



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>















May 7 145 39

THE  
LA WYERS REPORTS  
ANNOTATED

NEW SERIES  
BOOK 37

BURDETT A. RICH, HENRY P. FARNHAM,  
EDITORS

---

1912

---

ROCHESTER, N. Y.  
THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY

1912



Copyright 1912

by

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY.

**SEP 5 1912**

# TABLE

## OF

# CASES REPORTED

<b>A.</b>		Blanton, Heckscher v. .... (Va.)	923
Addington, Stonega Coke & Coal		Bliss, Steele v. .... (Mich.)	859
Co. v. .... (Va.)	969	Board of Comrs. v. Hart .... (Okla.)	388
Adoue, United States Fidelity		Board of Education, Fogg v.	
& G. Co. v. .... (Tex.)	409	(N. H.)	1110
Allen, Gooch v. .... (W. Va.)	930	Board of Equalization, Harding	
Allison v. Chester .... (W. Va.)	1042	v. .... (Neb.)	455
American Express Co. v. Des		Borello, People v. .... (Cal.)	434
Moines Nat. Bank. (Iowa)	37	Borgnis v. Falk Co. .... (Wis.)	489
American Mach. Co., Naville v. (Ky.)	153	Boston Elevated R. Co., Smith v.	
American Sales Book Co. v.		(C. C. A.)	429
Whitaker .... (Ark.)	91	Botheras, Fitchpatrick v. .... (Iowa)	558
Anson v. New York L. Ins. Co. (Ill.)	555	Britt, Hopper v. .... (N. Y.)	825
Astoria, Giaconi v. .... (Or.)	1150	Broadway Automobile Co., Win-	
Atwood v. Atwood .... (Conn.)	591	ton Motor Carriage	
Auld v. Southern R. Co. .... (Ga.)	518	Co. v. .... (Wash.)	71
Ayers v. Macoughtry .... (Okla.)	865	Brown, Heckscher v. .... (Va.)	923
<b>B.</b>		v. State .... (Miss.)	345
Bailey, McDonald v. .... (Okla.)	267	v. Webster .... (Neb.)	1196
Baker v. Libbie .... (Mass.)	944	Buchanan v. Kennard .... (Mo.)	993
Ball v. Ball .... (N. J. Err. & App.)	539	Burroughs Adding Mach. Co.,	
v. Milliken .... (R. I.)	623	Comptograph Co. v. ....	
Bank, Des Moines Nat., Ameri-		(C. C. A.)	821
can Express Co. v. .... (Iowa)	37	Burrows, Humptulips Driving	
First Nat., v. Kittle. (W. Va.)	699	Co. v. .... (Wash.)	226
of San Luis Obispo, Peo-		Byles, Ex parte .... (Ark.)	774
ple v. .... (Cal.)	934	State ex rel. Norwood v.	
Barham, Tippet & Wood v.		(Ark.)	774
(C. C. A.)	119	<b>C.</b>	
Barnes, State ex rel. Temple v.		Caldwell, Lindsley v. .... (Mo.)	161
(N. D.)	114	Cale, Gregory Co. v. .... (Minn.)	156
Barrette v. Whitney .... (Utah)	368	Campbell, Korn v. .... (N. Y.)	1
Batchelder v. Walworth .... (Vt.)	849	Carroll, Dickinson v. .... (N. D.)	286
Beach, People use of Tamplin v.		Casualty Co., Primrose v. .... (Pa.)	618
(Colo.)	873	Cawker v. Meyer .... (Wis.)	510
Belknap Springs Land Co., Doug-		Central of Georgia R. Co. v.	
lass v. .... (N. H.)	953	Jones .... (Ala.)	588
Bell v. Bell .... (Ala.)	1203	Champion Steel Range Co., Rath-	
Bemis, J. L. Owens Co. v. .... (N. D.)	232	bone, Sard, & Co. v.	
Bennett, Re .... (Minn.)	521	(C. C. A.)	258
v. Harrison .... (Minn.)	521	Chester, Allison v. .... (W. Va.)	1042
Berryman v. Hotel Savoy Co. (Cal.)	5	Kyle v. .... (Mont.)	230
Blackett v. Ziegler .... (Iowa)	291	Clark, Metropolitan Casualty	
Blanchard v. Blanchard .... (N. Y.)	783	Ins. Co. v. .... (Wis.)	717
v. Eureka Planing Mill		Clausen, State ex rel. Davis-	
Co. .... (Or.)	133	Smith Co. v. .... (Wash.)	466

Clemmer, Hollenbaek v. .... (Wash.)	698	Fidelity & Casualty Co. v. Fresno	
Cleveland-Cliffs Iron Co. v. Hull		Flume & Irrig. Co. (Cal.)	322
(Mich.)	889	Field, Guthrie v. .... (Kan.)	326
Clinton County v. Smith ..... (Mo.)	272	First Nat. Bank v. Kittle .. (W. Va.)	699
Com. v. Phelps ..... (Mass.)	567	Fitchpatrick v. Botheras .... (Iowa)	558
Com. ex rel. Layman v. Sheeran		Fitzsimmons v. Harmon ..... (Me.)	400
(Ky.)	289	Floyd v. Smith ..... (Fla.)	651
Comptograph Co. v. Burroughs		Fogg v. Board of Education.. (N. H.)	1110
Adding Mach. Co. ..		Follrath, McFadden v. .... (Minn.)	201
(C. C. A.)	821	Fortmeyer v. National Biscuit	
Comstock v. Waterford .... (Conn.)	1166	Co. .... (Minn.)	569
County Court, Daniels v. .. (W. Va.)	1158	Fresno Flume & Irrig. Co., Fidelity	
Cramer v. McCann ..... (Kan.)	108	& Casualty Co. v. .. (Cal.)	322
Crary Canning Co., Leonard Seed		Frisby v. United States (D. C. App.)	96
Co. v. .... (Wis.)	79	Fuhrman v. Interior Warehouse	
Crescent Coal Co., Glenn v. .... (Ky.)	197	Co. .... (Wash.)	89
Cummings v. Pennsylvania F.		Fulton, Light, H. & P. Co. v. .	
Ins. Co. .... (Iowa)	1169	State .... (Wash.)	307
Cunningham v. Saling ..... (Or.)	1051	Fults v. Munro ..... (N. Y.)	600
D.		G.	
Daily News Co., Mooney v. .. (Minn.)	183	George H. Paul Co. v. Shaw (Kan.)	1123
Daniels v. County Court .. (W. Va.)	1158	Ghio, Re ..... (Cal.)	549
Davis-Smith Co., State ex rel.		Giaconi v. Astoria ..... (Or.)	1150
v. Clausen ..... (Wash.)	466	Glenn v. Crescent Coal Co. .... (Ky.)	197
Dayton Coal & I. Co. v. Dodd		Goff v. Supreme Lodge Royal	
(C. C. A.)	456	Achates ..... (Neb.)	1191
Des Moines Nat. Bank, American		Gooch v. Allen ..... (W. Va.)	930
Express Co. v. .... (Iowa)	37	Greene, Moline v. .... (Ill.)	104
Dickinson v. Carroll ..... (N. D.)	286	Gregory Co. v. Cale ..... (Minn.)	156
v. Erie R. Co. ....		Grigsby v. Wopschall ..... (S. D.)	206
(N. J. Err. & App.)	150	Grisham v. Western U. Teleg.	
District of Columbia, Mark v.		Co. .... (Mo.)	861
(D. C. App.)	440	Grubb, O'Hanlon v. .... (D. C. App.)	1213
Dixie Cotton Mills, Ferrell v. (N. C.)	64	Gussner, McKenzie v. .... (N. D.)	918
Dodd, Dayton Coal & I. Co. v.		Guthrie v. Field ..... (Kan.)	326
(C. C. A.)	456	Guye v. Guye ..... (Wash.)	186
Dolley, Schaake v. .... (Kan.)	877	H.	
Douglass v. Belknap Springs		Hagan v. Commissioners' Court (Ala.)	1027
Land Co. .... (N. H.)	953	Halton, Robertson v. .... (N. C.)	298
E.		Hamilton, San Pedro, L. A. & S.	
Edwardsville v. Madison County (Ill.)	101	L. R. Co. v. .... (Cal.)	686
Elliott v. Mason ..... (N. H.)	357	Harding, Re ..... (U. S. Sup. Ct.)	392
Epperton, Ex parte (Tex. Crim. App.)	303	v. Board of Equalization (Neb.)	455
Epsom School Dist., Pembroke		Harmon, Fitzsimmons v. .... (Me.)	400
Academy v. .... (N. H.)	646	Harris, McLawhorn v. .... (N. C.)	831
Erickson v. Robertson .... (Minn.)	1133	O. J. Lewis Mercantile Co.	
Erie R. Co., Dickinson v. ....		v. .... (Ark.)	544
(N. J. Err. & App.)	150	Harrison, Bennett v. .... (Minn.)	521
Jimerson v. .... (N. Y.)	1181	Hart, Board of Comrs. v. .... (Okla.)	388
Eureka Planing Mill Co., Blanch-		Hartford L. Ins. Co., People v. (Ill.)	778
ard v. .... (Or.)	133	Hawker, Lowery v. .... (N. D.)	1143
Ex parte Byles ..... (Ark.)	774	Haynie v. North Carolina Elec-	
Epperson .... (Tex. Crim. App.)	303	tric Power Co. .... (N. C.)	580
Newport ..... (Ky.)	1034	Hayton v. Seattle Brewing & M.	
F.		Co. .... (Wash.)	432
Falk Co., Borgnis v. .... (Wis.)	489	Heckscher v. Blanton ..... (Va.)	923
Ferrell v. Dixie Cotton Mills.. (N. C.)	64	v. Brown ..... (Va.)	923
37 L.R.A. (N.S.)		Hogan, Johnson v. .... (Mich.)	880
		Hollenbaek v. Clemmer .... (Wash.)	698
		Hopper v. Britt ..... (N. Y.)	825



# CASES REPORTED.

v

Hotel Savoy Co., Berryman v. (Cal.)	5	Layman, Com. ex rel., v. Sheeran (Ky.)	289
Houston, Stanwood, & Gamble Co., Thomas v. .... (Ky.)	950	Lee v. Independent School Dist. (Iowa)	383
H. S. Emerson Co. v. Reunis (Wash.)	222	v. Vaughan Seed Store (Ark.)	352
Hubbard, Redman v. .... (Ky.)	728	Lemay v. Springfield Street R. Co. .... (Mass.)	43
Hughey v. Worner .... (Tenn.)	582	Leonard Seed Co. v. Crary Cann. Co. .... (Wis.)	79
Hull, Cleveland-Cliffs Iron Co. v. (Mich.)	880	Lewis, O. L., Mercantile Co. v. Harris .... (Ark.)	544
Humtulpis Driving Co. v. Burrows .... (Wash.)	226	Libbie, Baker v. .... (Mass.)	944
I.		Lindsley v. Caldwell .... (Mo.)	161
Illinois C. R. Co., Pennington v. (Ill.)	983	Livingston County, Trask v. (Mo.)	1045
Independent School Dist., Lee v. .... (Iowa)	383	Logansport v. Jordan .... (Ind.)	1036
Insurance Co., Hartford L., People v. .... (Ill.)	778	Lowery v. Hawker .... (N. D.)	1143
Metropolitan Casualty, v. Clark .... (Wis.)	717	Ludy v. Larsen .. (N. J. Err. & App.)	957
Pennsylvania F., Cummings v. .... (Iowa)	1169	Lynch, Neubeck v. .... (D. C. App.)	813
Interior Warehouse Co., Fuhrman v. .... (Wash.)	89	M.	
J.		McCann, Cramer v. .... (Kan.)	108
Jackson v. Pacific Coast Condensed Milk Co. .... (Or.)	757	McDonald v. Bailey .... (Okla.)	267
v. Stearns .... (Or.)	639	McFadden v. Follrath .... (Minn.)	201
Jenkins, Re .... (N. C.)	842	McKenzie v. Gussner .... (N. D.)	918
Jimerson v. Erie R. Co. .... (N. Y.)	1181	McLawhorn v. Harris .... (N. C.)	831
J. L. Owens Co. v. Bemis .. (N. D.)	232	McNamara, Michigan Trust Co. v. .... (Mich.)	986
Johnson, Re .... (Iowa)	875	Macoughtry, Ayers v. .... (Okla.)	865
v. Hogan .... (Mich.)	889	Madison County, Edwardsville v. (Ill.)	101
Vaughn v. .... (Idaho)	816	Maiden Lane Safe Deposit Co., Mosler Safe Co. v. (N. Y.)	363
Jones, Central of Georgia R. Co. v. .... (Ala.)	588	Marcum v. Terry .... (Ky.)	885
New York Continental Jewell Filtration Co. v. .... (D. C. App.)	193	Mark v. District of Columbia.. (D. C. App.)	440
St. Louis, I. M. & S. R. Co. v. .... (Ark.)	418	Mason, Elliott v. .... (N. H.)	357
Jordan, Logansport v. .... (Ind.)	1036	May v. Western U. Teleg. Co. (N. C.)	912
Judge & Dolph Drug Co., Lampert v. .... (Mo.)	533	Metropolitan Casualty Ins. Co. v. Clark .... (Wis.)	717
K.		Meyer, Cawker v. .... (Wis.)	510
Kendall v. Taylor .... (Ill.)	164	Michigan Trust Co., v. McNamara (Mich.)	986
Kennard, Buchanan v. .... (Mo.)	993	Milliken, Ball v. .... (R. I.)	623
Ketterer v. Nelson .... (Ky.)	754	Milwaukee Electric R. & L. Co., Sure v. .... (Wis.)	724
Kiernan v. Portland .... (Or.)	332	Minasian v. Osborne .... (Mass.)	179
Kittle, First Nat. Bank v. (W. Va.)	699	Missouri P. R. Co., Wallenburg v. .... (Neb.)	135
Korn v. Campbell .... (N. Y.)	1	Mitchell, St. Louis S. W. R. Co. v. .... (Ark.)	546
Kyle v. Chester .... (Mont.)	230	State v. .... (N. C.)	302
L.		Moline v. Greene .... (Ill.)	104
Lambert, Natchez, C. & M. R. Co. v. .... (Miss.)	264	Mooney v. Daily News Co. .. (Minn.)	183
Lampert v. Judge & Dolph Drug Co. .... (Mo.)	533	Morin v. Morin .... (Wash.)	585
Larsen, Ludy v. .. (N. J. Err. & App.)	957	Mosler Safe Co. v. Maiden Lane Safe Deposit Co. (N. Y.)	363
37 L.R.A. (N.S.)		Munro, Fults v. .... (N. Y.)	600
		N.	
		Natchez, C. & M. R. Co. v. Lambert .... (Miss.)	264
		National Biscuit Co., Fortmeyer v. .... (Minn.)	569

Naville v. American Mach. Co. (Ky.)	153	Railroad Co., San Pedro, L. A. & S. L. v. Hamilton .. (Cal.)	686
Nelson, Ketterer v. .... (Ky.)	754	Railway Co., Boston Elevated, Smith v. .... (C. C. A.)	429
Neubeck v. Lynch ..... (D. C. App.)	813	Central of Georgia v. Jones ..... (Ala.)	588
Newark, United States Fidelity & G. Co. v. .... (N. J. Err. & App.)	575	Missouri P., Wallenburg v. .... (Neb.)	135
Newport, Ex parte ..... (Ky.)	1034	St. Louis, I. M. & S., v. Jones ..... (Ark.)	418
New York, Re ..... (N. Y.)	281	St. Louis S. W., v. Mitchell ..... (Ark.)	546
New York C. & H. R. R. Co., Walsh v. .... (N. Y.)	1137	Springfield Street, Lemay v. .... (Mass.)	43
New York Continental Jewell Filtration Co. v. Jones ..... (D. C. App.)	193	Springfield Street, Ratelle v. .... (Mass.)	43
New York L. Ins. Co., Anson v. (Ill.)	555	Ratelle v. Springfield Street R. Co. .... (Mass.)	43
North Carolina Electric Power Co., Haynie v. .... (N. C.)	580	Rathbone, Sard, & Co. v. Champion Steel Range Co. (C. C. A.)	258
Norwood, State ex rel., v. Byles (Ark.)	774	Re Bennett ..... (Minn.)	521
Novelty Theater Co. v. Whitcomb (Colo.)	514	Ghio ..... (Cal.)	549
O.		Harding ..... (U. S. Sup. Ct.)	392
O'Hanlon v. Grubb ..... (D. C. App.)	1213	Jenkins ..... (N. C.)	842
O. J. Lewis Mercantile Co. v. Harris ..... (Ark.)	544	Johnson ..... (Iowa)	875
Olds Motor Works v. Shaffer ..... (Ky.)	560	New York ..... (N. Y.)	281
Olson, Russell v. .... (N. D.)	1217	Robinson ..... (N. Y.)	1023
Osborne, Minasian v. .... (Mass.)	179	Schriber ..... (Idaho)	693
P.		Walker ..... (N. Y.)	281
Pacific Coast Condensed Milk Co. Jackson v. .... (Or.)	757	Redman v. Hubbard ..... (Ky.)	723
Parshley, State v. .... (Me.)	444	Reunis, H. S. Emerson Co. v. (Wash.)	222
Pembroke Academy v. Epsom School Dist ..... (N. H.)	646	Riley v. Roach ..... (Mich.)	834
Pennington v. Illinois-C. R. Co. (Ill.)	983	Roach, Riley v. .... (Mich.)	834
Pennsylvania F. Ins. Co., Cummings v. .... (Iowa)	1169	Robbins Lumber Co., Solberg v. (Wis.)	790
People v. Bank of San Luis Obispo ..... (Cal.)	934	Robertson, Erickson v. .... (Minn.)	1133
v. Borello ..... (Cal.)	434	v. Halton ..... (N. C.)	298
v. Hartford L. Ins. Co. (Ill.)	778	Robinson, Re ..... (N. Y.)	1023
Salas v. .... (Colo.)	252	v. Pikeville ..... (Ky.)	1186
People, use of Tamplin v. Beach (Colo.)	873	Rocca v. Thompson ..... (Cal.)	549
Phelps, Com. v. .... (Mass.)	567	Russell v. Olson ..... (N. D.)	1217
Pikeville, Robinson v. .... (Ky.)	1186	Rutherford v. Wilson ..... (Ark.)	763
Pipkin, Stacey Cheese Co. v. .... (N. C.)	606	S.	
Portland, Kiernan v. .... (Or.)	332	St. Louis, I. M. & S. R. Co. v. Jones ..... (Ark.)	418
Primrose v. Casualty Co. .... (Pa.)	618	St. Louis S. W. R. Co. v. Mitchell ..... (Ark.)	546
Pritchard, Stewart v. .... (Ark.)	807	Salas v. People ..... (Colo.)	252
R.		Saling, Cunningham v. .... (Or.)	1051
Rackich, State v. .... (Wash.)	760	Salt Lake City, Webber v. .... (Utah)	1115
Railroad Co., Erie, Dickinson v. (N. J. Err. & App.)	150	San Pedro, L. A. & S. L. R. Co. v. Hamilton ..... (Cal.)	686
Erie, Jimerson v. .... (N. Y.)	1181	Hamilton v. .... (Cal.)	686
Illinois C., Pennington v. (Ill.)	983	Schaaake v. Dolley ..... (Kan.)	877
Natchez, C. & M., v. Lambert ..... (Miss.)	264	School Dist. No. 63, Superior Mfg. Co. v. .... (Okla.)	1054
New York, C. & H. R., Walsh v. .... (N. Y.)	1137	Schriber, Re ..... (Idaho)	693
87 L.R.A. (N.S.)		Seattle Brewing & M. Co., Hay-ton v. .... (Wash.)	432
		Shaffer, Olds Motor Works v. .... (Ky.)	560
		Shaw, George H. Paul Co. v. .... (Kan.)	1123

CASES REPORTED.

vii

Sheeran, Com. ex rel. Layman v. (Ky.)	289	Thompson, Rocca v. .... (Cal.)	549
Sisam, United States Smelting Co. v. .... (C. C. A.)	976	Tippett & Wood v. Barham (C. C. A.)	119
Smith v. Boston Elevated R. Co. (C. C. A.)	429	Tracy, State ex rel. Terminal R. Asso. v. .... (Mo.)	448
Clinton County v. .... (Mo.)	272	Trask v. Livingston County .... (Mo.)	1045
Floyd v. .... (Fla.)	651		
Snow, State v. .... (Wash.)	305	U.	
Solberg v. Robbins Lumber Co. (Wis.)	790	United States, Frisby v. .... (D. C. App.)	96
Southern P. Co., Walther v. .... (Cal.)	235	United States Bkg. Co. v. Veale (Kan.)	540
Southern R. Co., Auld v. .... (Ga.)	518	United States Express Co., State v. (Minn.)	1127
Springfield Street R. Co., Lemay v. .... (Mass.)	43	United States Fidelity & G. Co. v. Adoue .... (Tex.)	409
Street R. Co., Ratelle v. (Mass.)	43	v. Newark .. (N. J. Err. & App.)	575
Stacey Cheese Co. v. Pipkin .. (N. C.)	606	United States Smelting Co. v. Sisam (C. C. A.)	976
Staples, State v. .... (N. C.)	696		
State, Brown v. .... (Miss.)	345	V.	
Fulton, Light, H. & P. Co. v. .... (Wash.)	307	Vaughan Seed Store, Lee v. .... (Ark.)	352
v. Mitchell .... (N. C.)	302	Vaughan v. Johnson .... (Idaho)	816
v. Parshley .... (Me.)	444	Veale, United States Bkg. Co. v. (Kan.)	540
v. Rackich .... (Wash.)	760	Volli v. Wirth .... (Mich.)	297
v. Snow .... (Wash.)	305		
v. Staples .... (N. C.)	696	W.	
v. Thomas .... (La.)	172	Waldstein v. Williams .... (Ark.)	1162
v. United States Express Co. .... (Minn.)	1127	Walker, Re .... (N. Y.)	281
v. White .... (Mo.)	1177	Wallenburg v. Missouri P. R. Co. (Neb.)	135
State ex rel. Temple v. Barnes (N. D.)	114	Walsh v. New York, C. & H. R. R. Co. .... (N. Y.)	1137
Norwood v. Byles .... (Ark.)	774	Walther v. Southern P. Co. .... (Cal.)	235
Davis-Smith Co. v. Clausen (Wash.)	466	Walworth, Batchelder v. .... (Vt.)	849
Terminal R. Asso. v. Tracy (Mo.)	448	Waterford Comstock v. .... (Conn.)	1166
Stearns, Jackson v. .... (Or.)	639	Webber v. Salt Lake City .... (Utah)	1115
Steele v. Bliss .... (Mich.)	859	Webster, Brown v. .... (Neb.)	1196
Steffey, Stover v. .... (Md.)	856	Western U. Teleg. Co., Grisham v. (Mo.)	861
Stewart v. Pritchard .... (Ark.)	807	May v. .... (N. C.)	912
Stonega-Coke & Coal Co. v. Adding-ton .... (Va.)	969	Whitaker, American Sales Book Co. v. .... (Ark.)	91
Stover v. Steffey .... (Md.)	856	Whitcomb, Novelty Theater Co. v. (Colo.)	514
Superior Mfg. Co. v. School Dist. No. 63 .... (Okla.)	1054	White, State v. .... (Mo.)	1177
Supreme Lodge Royal Achatas, Goff v. .... (Neb.)	1191	Whitney, Barrette v. .... (Utah)	368
Sure v. Milwaukee Electric R. & L. Co. .... (Wis.)	724	Williams, Waldstein v. .... (Ark.)	1162
		Wilson, Rutherford v. .... (Ark.)	763
T.		Winton Motor Carriage Co. v. Broadway Automobile Co. (Wash.)	71
Tamplin, People use of, v. Beach (Colo.)	873	Wirth, Volli v. .... (Mich.)	297
Taylor, Kendall v. .... (Ill.)	164	Wopschall, Grigsby v. .... (S. D.)	206
Temple, State ex rel. v. Barnes (N. D.)	114	Worner, Hughey v. .... (Tenn.)	582
Terminal R. Asso., State ex rel., v. Tracy .... (Mo.)	448		
Terry, Marcum v. .... (Ky.)	885	Z.	
Thomas v. Houston, Stanwood, & Gamble Co. .... (Ky.)	950	Ziegler, Blackett v. .... (Iowa)	291
State v. .... (La.)	172		
37 L.R.A. (N.S.)			





# LAWYERS REPORTS

## ANNOTATED

NEW SERIES.

### NEW YORK COURT OF APPEALS.

DAVID KORN, Appt.,

v.

GEORGINE CAMPBELL, Respt.

(192 N. Y. 490, 85 N. E. 687.)

#### Covenant — restriction — enforcement — remote grantees.

A remote grantee of a portion of a tract of land cannot enforce against a remote grantee of another portion a restrictive covenant in a grant of the entire tract before its subdivision, as to the character of buildings to be placed on the property, although the original grantor parted with his entire interest in all property in the neighborhood, where deeds and mortgages were given by a subsequent grantee in subdividing the tract, and foreclosure sales made on the various subdivisions, without any reference to such covenant.

(September 29, 1908.)

**A**PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term, Part IV., for New York County, in his favor in an action brought to enforce a covenant as to the use of real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Louis Marshall, Albert T. Scharps, and James Frank, for appellant:

A court of chancery will enforce a restrictive covenant imposed by the grantor of land upon property conveyed by him, which inures to the benefit of, and is obligatory upon all subsequent grantees having notice, whether the covenant runs with the land, or is cognizable at law, or not, as, once created, it is indestructible otherwise than by the act of all parties, directly or indirectly interested in its enforcement.

Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep. 355; Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; McPherson v. Rollins, 107 N. Y. 322, 1 Am. St. Rep. 826, 14 N. E. 411; Simmons v. Crisfield, 123 App. Div. 201, 108 N. Y. Supp. 234; Hartley v. Harrison, 24 N. Y. 170; Freeman v. Auld, 44 N. Y. 50; Horton v. Davis, 26 N. Y. 495; Hopkins v. Wolley, 81 N. Y. 77; McConihe v. Fales, 107 N. Y. 404, 14 N. E. 285; Raynor v. Lyon, 46 Hun, 231; Dusenbury v. Hurlbert, 59 N. Y. 541; Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328; Ross v. Glenwood Cemetery Asso. 81 App. Div. 361, 81 N. Y. Supp. 779; Code Civ. Proc. § 1632; Christ Protestant Episcopal Church v. Mack, 93 N. Y. 488, 45 Am. Rep. 260; National Bank v. Levy, 127 N. Y. 553, 28 N. E. 592; Bernstein v. Nealis, 144 N. Y. 347, 39 N. E. 328; 1 Jones, Mortg. 5th ed. §§ 472, 473; Jackson ex dem. Beebe v. Austin, 15 Johns. 477; Haywood v. Nooney, 3 Barb. 643; Equitable Life Assur. Soc. v. Brennan, 148 N. Y. 672, 43 N. E. 173; Tulk v. Moxhay, 2 Phill. Ch. 774, 1 Hall & Tw. 105, 18 L. J. Ch. N. S. 83, 13 Jur. 89, 15 Eng. Rul. Cas. 254; Whitney v. Union R. Co. 11 Gray, 363, 71 Am. Dec. 715; Parker v. Nightingale, 6 Allen, 344, 83 Am. Dec. 632; Hano v. Bigelow, 155 Mass. 341, 29 N. E. 628; De Gray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388; Nottingham Patent Brick & Tile Co. v. Butler, L. R. 15 Q. B. Div. 261; Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Barrow v. Richard, 8 Paige, 351, 35 Am. Dec. 713; Brouwer v. Jones, 23 Barb. 153; Tallmadge v. East River Bank, 26 N. Y. 105; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Norcross v. James, 140 Mass. 188, 2 N. E. 946; Lewis v. Gollner, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; Silberman v. Uhrlaub, 116 App. Div. 869, 102 N.

Y. Supp. 299; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; *Round Lake Asso. v. Kellogg*, 141 N. Y. 348, 36 N. E. 326; *American Strawboard Co. v. Haldeman Paper Co.* 27 C. C. A. 634, 54 U. S. App. 416, 83 Fed. 619.

The restriction, as defined in the Lenox deed, was not extinguished by any merger of the so-called dominant and servient estate.

*Parker v. Nightingale*, 6 Allen, 344, 83 Am. Dec. 632; *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Fritz v. Tompkins*, 168 N. Y. 532, 61 N. E. 893; *Wetlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449, 94 N. W. 950; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Kieffer v. Imhoff*, 26 Pa. 438; *Smith v. Smith*, 120 App. Div. 278, 104 N. Y. Supp. 1106; *Starr v. Ellis*, 6 Johns. Ch. 395.

On petition for rehearing.

The deed to Coburn, and the purchase money mortgages executed by him, constituted an indivisible act.

*Dusenbury v. Hurlbert*, 59 N. Y. 541; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328; *Ross v. Glenwood Cemetery Asso.* 81 App. Div. 361, 81 N. Y. Supp. 779.

When the mortgages were subsequently foreclosed, the several purchasers acquired the right, title, and interest which had been conveyed to Coburn by Lalor and Coleman, subject to the restrictions against nuisances and buildings contained in the Lenox deed.

*Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260; *National Bank v. Levy*, 127 N. Y. 553, 28 N. E. 592; *Bernstein v. Nealis*, 144 N. Y. 347, 39 N. E. 328.

Mr. David B. Ogden, with Messrs. Huntington, Rhinelander, & Seymour, for respondent:

The title of the defendant is free from any restriction enforceable by the plaintiff.

*Belmont v. Coman*, 22 N. Y. 440, 78 Am. Dec. 213; *Dingeldein v. Third Ave. R. Co.* 37 N. Y. 577; *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661, 43 N. E. 173; *Barney v. Everard*, 32 Misc. 648, 67 N. Y. Supp. 535; *Lewis v. Ely*, 100 App. Div. 252, 92 N. Y. Supp. 705.

Werner, J., delivered the opinion of the court:

The plaintiff and the defendant are the respective owners of lands which adjoin each other, the titles to which were derived from a common source. The defendant's lot is on the northwest corner of Madison avenue and Seventy-Third street, in the borough of Manhattan, city of New York, having a frontage of 18 feet on the street, and a length of 80 feet on the avenue. The plaintiff's lot is on the avenue immediately

north of the defendant's, and has a frontage of 22 feet and 2 inches, with a depth of 92 feet. Each of these lots has upon it the typical dwelling house characteristic of that section of the city. This action is brought to restrain the defendant from making alterations in the building upon his lot, which are designed to render it convenient and suitable for certain business purposes, and the plaintiff predicates his right to this relief upon a restrictive covenant, which, among other things, recites that the premises out of which the respective lots of the plaintiff and the defendant have been carved shall "be used for the erection of first-class private residences only." The question is whether that covenant can be enforced by the plaintiff against the defendant. At special term it was held that it could. At the appellate division a contrary decision was reached, although by a divided court, and the case is now before this court upon plaintiff's appeal.

Since everything depends upon the history of the titles and the covenant referred to, a short statement of the salient facts is necessary to a proper understanding of the precise question involved. On the 10th day of August, 1870, James Lenox conveyed to William Lalor a plot of land which had a frontage of 102 feet and 2 inches on the west side of Madison avenue, and a frontage of 195 feet on the north side of Seventy-Third street. The deed by which this conveyance was made contained the covenant above referred to. This covenant, after prohibiting upon these premises many noxious and objectionable trades, occupations, and structures, provided that the grantee "will use or suffer the said premises to be used for the erection of first-class private residences only." So far as the record discloses, Lenox owned no other lands in that immediate neighborhood, and the lots now owned by the parties to this action are embraced in the tract thus conveyed. On the 12th day of August, 1870, Lalor and wife conveyed to James H. Coleman an undivided one-third interest in the tract of land above described, but the deed contained no reference to the covenant set forth in the deed from Lenox to Lalor. On July 1, 1871, Lalor and Coleman, with their respective wives, conveyed the whole tract to James E. Coburn by a full-covenant warranty deed, which referred to the covenant in the deed from Lenox to Lalor as follows: "Subject to the conditions, covenants, and restrictions against nuisances and buildings contained in deed of James Lenox of the above-described premises." Coincident with the delivery of this deed to Coburn, he executed to the North American Life In-

insurance Company eleven separate mortgages, one upon each of eleven lots into which he had divided the whole tract thus derived from Lalor and Coleman. Neither of these mortgages contained any reference to the restrictive covenant in the deed from Lenox. Upon these eleven lots Coburn erected private dwelling houses, which were disposed of to various persons by deeds in which there was no mention of that covenant. In 1879 the mortgages given by Coburn to the insurance company were foreclosed. The premises now owned by the plaintiff then belonged to Mary H. Moore, and title to the lot now owned by the defendant was then in Artemas H. Holmes; both of these grantees holding under deeds subsequent in date to the mortgage above referred to, and both having derived their titles through Coburn by deeds which did not refer to the restrictive covenant in the original deed from Lenox. Thus stood the titles to the premises now owned by the plaintiff and the defendant, respectively, when the mortgages to the insurance company were foreclosed, in 1879, and the premises were sold under referee's deeds which embodied no part of the restrictive covenant and made no reference thereto. The plaintiff's lot was bid in by Gustav Gottheil, and the defendant's lot by Artemas H. Holmes, who was then the owner of the equity of redemption. From that time down to the conveyance by the plaintiff, the title to his lot passed by mesne conveyances in the form of full-covenant warranty deeds, none of which referred to the restrictive covenant in the deed from Lenox; and the title to the defendant's lot passed by similar conveyances, with a single exception in 1887, when Jacob B. Tallman became the owner thereof under a deed "subject to the covenant against nuisances and as to buildings, contained in a certain deed made by James Lenox to William Lalor, dated the 10th day of August, 1870, and recorded in the office of the register aforesaid, in Liber 1154 of conveyances, page 253, August 10, 1870."

There has been much judicial writing upon the subject of restrictive covenants, and, as may be anticipated from the very nature of the topic, the cases abound in fine and subtle distinctions, which have been invented either to overcome the rigor of the common law in courts of equitable cognizance, or to adapt the settled forms of relief to fit special cases. There are many decisions upon this branch of the law which appear to be in hopeless conflict with each other, but which are easily reconcilable when their peculiar circumstances are understood. We shall make no attempt to analyze the decisions, for we think the case is plainly out

side of any rule under which restrictive covenants can be enforced. For the particular purposes of this case, such covenants may be broadly divided into three classes. In the first class may be placed those which are entered into with the design to carry out a general scheme for the improvement or development of real property. This class embraces all the various plans, generally denominated in the English cases as "building schemes," under which an owner of a large plot or tract of land divides it into building lots to be sold to different purchasers for separate occupancy, by deeds which contain uniform covenants restricting the use which the several grantees may make of their premises. In such cases the covenant is enforceable by any grantee as against any other, upon the theory that there is a mutuality of covenant and consideration, which binds each, and gives to each the appropriate remedy. Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract. Illustrations of this class may be found in *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 340, 24 Atl. 388; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 15 Q. B. Div. 261, and *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713. The second class embraces those cases in which the grantor exacts the covenant from his grantee, presumptively or actually for the benefit and protection of contiguous or neighboring lands which the former retains. In such cases the grantees, if there are more than one, cannot enforce the covenant as against each other, although the grantor and his assigns of the property benefited may enforce it against either or all of the grantees of the property burdened with the covenant. In this class are the leading cases of *Tulk v. Moxhay*, 2 Phill. Ch. 774, 1 Hall & Tw. 105, 18 L. J. Ch. N. S. 83, 13 Jur. 89, 15 Eng. Rul. Cas. 254; and *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, *Seymour v. McDonald*, 4 Sandf. Ch. 502, and *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661, 43 N. E. 173. Then there is a third class, where there are mutual covenants between owners of adjoining lands, in which the restrictions placed upon each produce a corresponding benefit to the other, and in such a case, of course, either party or his assigns may invoke equitable aid to restrain a violation

of the covenant. *Columbia College v. Lynch*, 70 N. Y. 440, 28 Am. Rep. 615.

We think the case at bar does not fall within either of the three classes referred to. Obviously, it is not in the first class, relating to a division of land into lots conveyed by separate deeds containing covenants entered into by each of the grantees. Lenox conveyed the whole plot to Lalor. That conveyance, it is true, was made subject to the restrictive covenant; but there is no evidence that the land was to be divided, and Lalor was under no obligation to divide it. The covenant was purely for the benefit of Lenox, or his remaining lands, if he had any. In no aspect of the case could the covenant be said to have benefited any part of the land burdened by it. That land all belonged to Lalor. It was all in one piece, and it was all covered by the same restrictions. The same conditions prevailed when Lalor conveyed an undivided one-third interest in the land to Coleman. The latter took with notice of the covenant in the deed from Lenox to Lalor, and, assuming that it was not merely a dry personal covenant, Lenox could have enforced it against Coleman as well as against Lalor. When Lalor and Coleman conveyed to Coburn, subject to the covenant in the deed from Lenox to Lalor, the land was still in a single piece, and Coburn, the absolute owner of it, was free to do with it as he pleased, except as against Lenox, the original covenantee, or those who stood in his shoes. At this juncture in the history of the title there was for the first time a division of the property. Eleven separate lots were mortgaged by Coburn to the insurance company, but none of the mortgages embodied any part of the restrictive covenant or contained any reference thereto. When the separate lots were thereafter conveyed to different grantees, there was no mention of the covenant, and when the mortgages were subsequently foreclosed the referee's deeds were qualified by no restrictions. Upon these facts we cannot assent to the contention of the learned counsel for the plaintiff that Lenox was the common grantor of the parties to this action, that the covenant was exacted by Lenox because the property was to be divided into lots, and that it was taken not for his own benefit, but to protect those who might later become the separate owners of parts of the tract. By the inevitable logic of the transaction, Coburn became the common grantor of the parties. Having the title to the whole of the land, he had the right to do with it as he pleased, except as against Lenox and his assigns. Coburn decided to divide the property and to sell it without restrictions, and he carried his resolution into effect. Neither the plaintiff nor

the defendant have any different title than that which they derived through the unrestricted deeds from Coburn. The original covenant, which may be good in favor of Lenox or his assigns as against any grantee of Coburn in this tract, is not enforceable as between such grantees.

It is equally clear that the plaintiff has not brought his case within the second class mentioned. It might be within that class if the plaintiff were in court representing Lenox. In that event the question would arise whether the covenant was one purely personal to Lenox, and, if so, whether it would be enforceable at all, or whether it was made for the benefit of land retained by Lenox when he sold to Lalor, but afterwards conveyed to the plaintiff. But that is not the situation. The plaintiff represents Coburn, the covenantor. He stands for the land burdened, and not for any land benefited, by the covenant; and in that regard the plaintiff and the defendant are upon precisely the same footing with reference to the original covenant. Neither is under any covenant obligation to the other, although both may possibly be bound to the original covenantee. In other words, the case can only be brought into the second class by a plaintiff who acquired the title of Lenox to lands for the benefit of which the covenant was made.

It is plain, also, that the case is not within the third class referred to. That class includes only those cases in which the owners of adjoining or contiguous lands enter into mutual covenants containing restrictions by which each is burdened for the benefit of the other. It is not even claimed that the plaintiff comes within this rule, and we have referred to it solely for the purpose of demonstrating that the plaintiff is not within either of the three general rules under which such covenants may be enforced. We do not mean to intimate that special circumstances may not exist in which a case not within the three classes above referred to may present considerations which would justify the enforcement of such a covenant in a court of equity. It is enough to say that no such circumstances appear in the case at bar. We have used the foregoing classification as a brief and convenient method of showing that all the authorities relied upon by the plaintiff fall within one or the other of these divisions, and that he is not within either of them. We might have stopped, indeed, with the discussion of the first class; for the plaintiff's whole position rests upon the assertion that when Lenox took the covenant from Lalor, it was contemplated that the property should be divided into lots, and, as it does not appear that Lenox re-

tained any lands to be benefited by the covenant, it must have been made for the mutual benefit of subsequent owners.

We have shown why this position is not tenable upon the facts presented by the record, and we think the order of the Appellate Division should be affirmed, with costs.

Cullen, Ch. J., and Haight, Vann, Willard Bartlett, Hiscock, and Chase, JJ., concur.

Petition for rehearing denied.

**CALIFORNIA SUPREME COURT.**  
(Department No. 2.)

JOHN H. BERRYMAN, Appt.,  
v.  
HOTEL SAVOY COMPANY, Respt.

(160 Cal. 559, 117 Pac. 677.)

**Covenant — restriction on use of lot — enforcement by adjoining owner.**

1. A covenant in a deed of a parcel of a tract being divided into city lots, which is stated to run with the land, and requires the covenantor to construct a specified building on the property which shall be a certain distance from street and side lines, cannot be enforced by a purchaser of an adjoining lot, whose deed forbids the placing of a building on the lot within the same distance from the street specified in the former deed, on the theory that the obligations are reciprocal.

**Same — benefit of entire tract — enforcement.**

2. A finding that covenants in a deed of a parcel of a tract of city property, requiring the erection of a building of a certain character placed in a certain way upon the property, were for the benefit of the entire tract, does not require its enforcement at the suit of an adjoining owner, where it is also found that there was no intention to create an easement in favor of any land whatever.

**Same — personal — running with land.**

3. A covenant imposing a burden on real estate for the benefit of the grantor personally does not follow the land into the possession of an assignee.

**Same — location of building.**

4. A covenant in a deed of a parcel of a tract of city property, that the grantee shall place a certain described building on the property, having certain relations to the side lines of the lot, is personal to the grantor, and does not run with the remainder of the tract, although the deed states that the covenant runs with the land "herein conveyed."

(August 23, 1911.)

Note. — See note post, 12.  
37 L.R.A. (N.S.)

**APPEAL** by plaintiff from a judgment of the Superior Court for Los Angeles County and from an order denying his motion for a new trial in an action brought to enjoin defendant from violating a certain building restriction contained in a deed of a parcel of a tract of city property. Affirmed.

The facts are stated in the opinion.

Messrs. Cryer & Tuttle, for appellant:

The owner of any part of the land intended to be benefited by a restrictive covenant may enforce the covenant in so far as may be necessary to protect his property.

Hills v. Miller, 3 Paige, 254, 24 Am. Dec. 218; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291; Hyman v. Tash, — N. J. Eq. —, 71 Atl. 732; Ivanson v. Mulvey, 179 Mass. 141, 60 N. E. 477.

The evidence does not justify the finding that the covenant in the Ross deed was not intended for the benefit of the plaintiff's lot.

5 Am. & Eng. Enc. Law, 13; Peck v. Conway, 119 Mass. 546; Clark v. Martin, 49 Pa. 289; Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291.

The equitable doctrine according to which courts of equity will enforce building restrictions, though they be not true covenants running with the land, obtains in this state.

Bryan v. Grosse, 155 Cal. 132, 99 Pac. 499; Hunt v. Jones, 149 Cal. 297, 86 Pac. 686; Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 383, 107 Pac. 625; Stewart v. Smith, 6 Cal. App. 160, 91 Pac. 667.

Mr. Frank G. Finlayson, for respondent:

Covenants in the nature of building restrictions are strictly construed in favor of the covenantor and owner of the land.

Clark v. Jammes, 87 Hun, 215, 33 N. Y. Supp. 1020; Hubbell v. Warren, 8 Allen, 173.

A covenant which is not for the direct benefit of the property granted is not, in this state, a covenant running with the land.

Lyford v. North Pacific Coast R. Co. 92 Cal. 95, 28 Pac. 103; Los Angeles Terminal Land Co. v. Muir, 136 Cal. 41, 68 Pac. 308; Fresno Canal & Irrig. Co. v. Rowell, 80 Cal. 114, 13 Am. St. Rep. 112, 22 Pac. 53; Fresno Canal & Irrig. Co. v. Dunbar, 80 Cal. 534, 22 Pac. 275; Pomona Land & Water Co. v. San Antonio Water Co. 152 Cal. 627, 93 Pac. 881.

A covenant relating to something not *in esse* does not run with the land, unless the assigns are mentioned; and then only as to such assigns as are mentioned.

Spencer's Case, 5 Coke, 16, 15 Eng. Rul.

Cas. 233; *Hartung v. Witte*, 59 Wis. 295, 18 N. W. 175.

It does not appear by the words of the deed to Ross, that it was the intention of the parties to create a right in the nature of a servitude or easement in the property granted, for the benefit of plaintiff's property, or for the benefit of any particular lot or parcel of land.

*Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Beals v. Case*, 138 Mass. 138; *Peck v. Conway*, 119 Mass. 546; *Clapp v. Wilder*, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692; *Badger v. Boardman*, 16 Gray, 559; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp v. Ropes*, 110 Mass. 381; *Skinner v. Shepard*, 130 Mass. 180; *Lowell Inst. for Sav. v. Lowell*, 153 Mass. 530, 27 N. E. 518; *Krekeler v. Aulbach*, 51 App. Div. 591, 64 N. Y. Supp. 908; *Safe Deposit & T. Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009; *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018; *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768; *Clark v. Jammes*, 87 Hun, 215, 33 N. Y. Supp. 1020; *Re Welsh*, 175 Mass. 68, 55 N. E. 1043; *James v. Irvine*, 141 Mich. 376, 104 N. W. 631.

Melvin, J., delivered the opinion of the court:

Plaintiff sought an injunction to restrain the defendant corporation from violating a certain building restriction contained in a deed from the common grantors of the predecessors in interest of both parties. Judgment was given in favor of defendant, and we are called upon to consider appeals from said judgment and from an order denying plaintiff's motion for a new trial.

There is very little, if any, material difference between the parties respecting the facts of the case; the only serious subject of controversy being the proper interpretation of the building restriction contained in the original deed, and the effect of a subsequent quitclaim deed, whereby the original grantors sought to release the present defendant from any binding force of such restriction. In July, 1901, Abbott Kinney and Matilda Dudley were the owners of the Bay View tract in Santa Monica. Three lots and part of a fourth (all adjoining and forming one parcel) were sold to Abner L. Ross, defendant's predecessor in title. The deed of conveyance from Kinney and Dudley, parties of the first part, to Ross, contained, in addition to the usual covenants in a deed of grant, bargain, and sale, the following: "It is provided and covenanted with a covenant running with the land herein conveyed, that a building and improvements shall be erected upon these premises to be maintained as a first-class hotel, to cost not

less than five thousand (\$5,000) dollars, and the main part thereof shall be located not less than seven (7) feet from the front line, and eight (8) feet from the N. E. side line, and twelve (12) feet from the S. W. side line of said lot, which spaces between buildings and side lines are to be maintained as flower gardens; and all front porches shall be kept open and unobstructed on the front and ends thereof; said hotel to be erected and opened within sixty (60) days from date hereof. . . . And it is hereby covenanted that if the hotel should be removed from said grounds, or should be destroyed by fire or other elements, that parties of the second part shall rebuild said hotel, or make other improvements on said lots to the full value as heretofore agreed upon; and on failure so to do within one year, the said party of the second part, his heirs or assigns, shall reconvey the said premises to the parties of the first part, their heirs or assigns, on payment of \$1,250."

The hotel was constructed in accordance with the covenant above quoted. In September, 1902, one Junipher purchased from Kinney and Dudley's grantees of her interest in Bay View tract property adjoining that previously conveyed to Ross. The deed to Junipher contained a restriction against placing any building nearer than 7 feet to the front line of the property conveyed. By mesne conveyances the title to this property was vested in Mary A. Berryman, in 1903. She erected a three-story building, one wall of which was on the line between her land and that of defendant. There are many windows for the admission of light and air to this building, overlooking the 12-foot space on defendant's property. Mary A. Berryman, on May 15, 1906, conveyed this last-mentioned property to her husband, the plaintiff, who owned it at the time when it is alleged defendant threatened to build on the 12-foot strip above mentioned in such a manner as to shut off light and air from the windows on that side of the building adjacent to defendant's land. In May, 1908, Kinney and Dudley quitclaimed to the Hotel Savoy Company all of the property previously conveyed by them to Ross; such conveyance being "given especially for the purpose of quitclaiming and releasing the covenants and restrictions contained in and provided by" their deed to Ross.

After a trial of the issues, the court found that the covenant providing for the maintenance of an open space next to the land afterwards acquired by plaintiff was not inserted in the deed for the benefit of "any particular property whatsoever;" that it was not the intention of any of the parties to the deed to create an easement for

the benefit of the land now owned by plaintiff; and that it "was the intention of the parties that said covenant should be for the benefit of the entire tract of land, of which the land in controversy was a part." The court also found that the title did not pass to defendant subject to the covenants contained in the deed to Ross; that such covenants created a mere personal right in favor of Kinney and Dudley; that this right was surrendered by the quitclaim deed; and that the covenants in the deed to Ross did not run with the land. It was also found that the wall of plaintiff's building encroached slightly on defendant's land.

Appellant contends that the deed to Ross and that to Junipher, each containing a restriction against building nearer the front line of the property than 7 feet, creates reciprocal obligations enforceable in equity, either as covenants that run with the land, or as personal covenants with which a court of chancery will compel compliance by persons taking the respective parcels with due notice of the mutual agreements. We cannot accept this view of the law.

As was said in *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 42, 68 Pac. 310: "That there are personal covenants enforceable in equity against the grantee of the covenantor is conceded; but that proposition is far from being applicable in all cases, for, if it were, it would result that all purely personal covenants in any manner relating to land would have the same effect as those which do run with the land." The covenant in the deed to Ross is affirmative. By it the covenantor agrees, in the future, to erect a building at a certain cost and in a certain manner. On the other hand, the deed to Junipher contains a negative covenant, a typical building restriction whereby the covenantor agrees to place no building nearer the front line of his property than 7 feet. There is no mention of adjoining property in the deed to Ross. Indeed, there is nothing in that deed to show that Kinney and Dudley, the grantors of Ross, had any interest in any property other than that described in the said deed. In other words, no dominant tenement is described to which the restriction in the deed to Ross might make his land a servient tenement.

Appellant insists that judgment should have been entered upon the findings, because the court found that the parties intended the covenant in question to be "for the benefit of the entire tract of land of which the land in controversy was a part." Since the whole includes a part, we are asked to interpret this finding as giving to the plaintiff the right to enforce the covenant made for the benefit of his land which was included in the original Bay View tract. The finding

upon this matter, however, must be read in its entirety. That part of it which declares that Ross and his grantors intended the covenant to operate for the benefit of the whole tract of land immediately follows a finding that the parties did not intend to create an easement for the benefit of the land subsequently acquired by Berryman, "or of any land whatever." Read as a whole, the finding is neither ambiguous nor in opposition to respondent's theory of the case.

A covenant not running with the land may be for the benefit of property owned by the persons who may enforce it, but that fact does not take it out of the category of personal covenants and make it an easement. Examining the words of the covenant itself, we cannot see that it creates an easement running with plaintiff's land.

It purports to be a covenant running with the "land conveyed," and there is nothing in the deed itself to show that the grantors owned another foot of land in that vicinity. Defendant, therefore, as a subsequent purchaser of the land, could not be charged with knowledge, derived from the record, that Kinney and Dudley owned other property to be benefited, and the evidence adduced at the trial showed no such knowledge. He had the right to read the covenant in the deed to Ross, imposing as it did a burden on his property, as one creating no servitude that would pass with the land. To that covenant the language of this court in *Los Angeles Terminal Land Co. v. Muir*, supra, is entirely applicable: "It was not made for the benefit of the lot conveyed, but purported to impose a burden thereon by restricting its use; and while a benefit will pass with the land to which it is incident, a burden will adhere exclusively to the original covenantor, unless a privity of estate or tenure subsist or be created between the covenantor and covenantee at the time when the covenant is made. *Webb v. Russell*, 3 T. R. 393, 402, 1 Revised Rep. 725; *Hurd v. Curtis*, 19 Pick. 459; *Bally v. Wells*, 3 Wils. 25, 29.

"Here there was no privity of estate between the parties, for by the same instrument which contained the covenant, the fee was conveyed to the covenantor. Under the feudal system the transfer of every estate created privity of tenure between the parties, and hence both the burden and the benefit of all covenants made by either bound and profited the assignee of either as an incident to the land. But when the statute of *quia emptores* abolished subinfeudation, this privity no longer existed in cases where a fee was transferred, and no reversion was left in the donor, and it became a rule that



covenants which imposed any charge, burden, or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee.

But on the other hand, if the covenant were one intended to benefit the land, it was considered to be incident to and run with the land, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant.' Rawle, *Covenants for Title*, p. 314. So our Civil Code (§ 1402) provides: 'Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land;' and § 1461 of the Civil Code provides that 'the only covenants which run with the land are those specified in this title, and those which are incidental thereto.'

Appellant says that the judgment enables Kinney and Dudley to profit by their own wrong; that, after selling their property at high prices because of the improvements on the lots now owned by respondent, they quitclaim for a consideration to the hotel company that restriction upon which appellant had depended as insuring the free admission of light and air to one side of his building. But they are not parties to this action, nor are they seeking equitable relief. Respondent, in purchasing the land in question, had a right to depend upon the title as conveyed to his predecessors and to him. In the deed to Ross he found a provision which possessed all of the characteristics of a personal covenant. The deed provided that, in the event of the destruction of the hotel by fire, it must be rebuilt, or improvements on the land must be made "to the full value as heretofore agreed upon," or otherwise the vendors or their assigns might repurchase at a stipulated price. There was no provision that the building restriction should apply to such new structure or improvements. True, as appellant says, this contingency never arose, but nevertheless the provision with reference to rebuilding in case of fire is very illuminating. It indicates that the parties did not intend the building restriction theretofore expressed in the deed to be perpetual and to pass as an easement, for, if such had been their intention, there would have been some effort to require the reconstruction of the building, in case of fire, upon the same lines and for the same uses as the original structure.

The intention of the parties should be "determined by a fair interpretation of the grant or reserve creating the easement." *Peck v. Conway*, 119 Mass. 549. As was said in *Clapp v. Wilder*, 176 Mass. 341, 50 L.R.A. 120, 57 N. E. 695: "It seems to us that in all these cases it is better to get

at the intention of the grantor from the language of the deed, interpreted in the light of the attending circumstances, than to conjecture the intent from the circumstances, and then to make the language of the deed bend to that."

Authority is not lacking to support the interpretation given by the trial court to the deed which was the basis of this action. In *Badger v. Boardman*, 16 Gray, 559, the facts were as follows: One Downing, the owner of a tract of land, conveyed to the defendant a certain lot, "subject to the following restriction: that no outbuildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon." Downing subsequently conveyed the adjoining lot to another person, and plaintiff, through various mesne conveyances, acquired title to it. The bill whereby the plaintiff sought to enforce the restriction in the deed was dismissed, and, in upholding this course, the supreme court of Massachusetts said: "The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to, and be deemed an appurtenance of, the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to inure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title, which refers specifically to this restriction, or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All

parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of *Whitney v. Union R. Co.* above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity, by accepting the grant, the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit."

*Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744, has many features resembling the case at bar. One Bates, who was the owner of land lying on both sides of Orient street, Swampscott, conveyed a portion on the southerly side, bordering upon the ocean, "upon condition that the granted premises shall be used for no other purpose or purposes than those for which they are now used, namely, for bathing and boating upon the beach, excepting only that low bathing houses may be built thereon; it being understood and agreed that the grantee, his heirs or assigns, may ornament the granted premises in such manner as shall not be inconsistent with the foregoing condition." Subsequently, Stephen Wardwell released his interest to Eben, and the latter conveyed the westerly part thereof to plaintiff, subject to the condition expressed in the deed from Bates. In the following year Wardwell conveyed to Gray the lot adjoining plaintiff's property on the east, subject also to the aforementioned condition, and Gray quitclaimed to defendant. The property on the north side of Orient street was also conveyed by Bates to the Wardwells, and through mesne conveyances Jewell and Lee obtained title to lots immediately opposite

their respective holdings on the south side of the street. Defendant, with full knowledge of the restrictions in the deed from Bates to Wardwell, prepared, in violation thereof, to move a house onto his lot. Plaintiff sued to enjoin him from so doing. After the suit was instituted, defendant procured, and caused to be recorded, instruments releasing all the owners of land on the south side of the street from the condition in the deed to the Wardwells. Plaintiff's bill was dismissed, the court saying, among other things: "So far as we are able to see, there is nothing to indicate that the original grantor of the premises, in annexing the condition, had any intent to regulate or control the possession or enjoyment of the premises for the benefit of subsequent owners or grantees of the estate, or any part of it; but that it was imposed by him solely for his own private and personal benefit, as the owner of other lots in the vicinity, in which the present plaintiff has no interest whatever."

*Sharp v. Ropes*, 110 Mass. 381, was a case in which the owner of a tract of land subdivided it into lots for sale. Two adjoining parcels were sold subject, for the term of fifteen years, to certain restrictions, one of which was that no building should be erected within 20 feet of the street. Plaintiff and defendant were subsequent grantees, and the former sought to enjoin the latter from building within 20 feet of the street. In discussing the bill the court used the following language: "It is not claimed that in regard to any of the lots there was any written covenant by the grantor, and it does not appear that there was any express stipulation or direct assurance on his part that any person who should purchase a lot on the north side of that street should have the benefit of a restriction binding all the other purchasers to leave an open space between their dwelling houses and the street. The only ground upon which the plaintiff can rest her claim that the restriction in question was intended to operate for the benefit of all the purchasers, and to establish a general plan of building by which each one would acquire a right in the nature of an easement in the land purchased by the others, is to be found in the fact that in his transactions with two separate and independent purchasers, the grantor conveyed a portion of the land in each case, subject to the terms and conditions set forth in the bill of complaint. . . . It is undoubtedly true, and has often been decided, that where a tract of land is subdivided into lots, and those lots are conveyed to separate purchasers subject to conditions that are of a nature to operate as inducements to the purchase, and to give to each purchaser

the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee, which he may enforce against any other grantee. *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Linzee v. Mixer*, 101 Mass. 512; *Tulk v. Moxhay*, 2 Phill. Ch. 774, 1 Hall & Tw. 105, 18 L. J. Ch. N. S. 83, 13 Jur. 89, 15 Eng. Rul. Cas. 254. But in the case at bar there is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed points out the mode in which he, his heirs, or devisees may enforce it. Neither of the deeds under which these parties respectively claim purports to give the grantee any such right against any other grantee. For aught that appears, the condition may have been intended for the benefit of the grantor or his family, as long as they continued to own the dwelling house. The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained."

Of a similar restriction the same court said in *Skinner v. Shepard*, 130 Mass. 181: "Undoubtedly Willis Bucknam might have enforced the first restriction while he lived; but there is nothing in the deed which shows that the parties intended that the restriction as to building within 25 feet of Green street should create a servitude or easement in the granted land, which should attach to, and be an appurtenance to, any neighboring land. The mere fact which the plaintiffs offered to prove, that Willis Bucknam, at the time when he conveyed to Munroe and others, was the owner of land separated from the estate granted by the Woburn Branch Railroad, is not sufficient to show that the object of the restriction was to benefit this land. In the absence of any words in the deed to this effect, or any reference to a plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate. For anything that appears, it may have been intended only for the benefit of the grantor and for his personal convenience. *Jeffries v. Jeffries*, 117 Mass. 184; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Badger v.* 37 L.R.A.(N.S.)

*Boardman*, 16 Gray, 559. We are therefore of opinion that the restriction as to building must be construed, not as a condition which the heirs of the grantor can enforce, but as a personal covenant merely with the grantor; and that, after his death, it created no encumbrance or servitude upon the estate for which the plaintiffs can maintain this action." See also *Lowell Inst. for Sav. v. Lowell*, 153 Mass. 530, 27 N. E. 518, which holds that the burden of proof is on the plaintiff to show from the terms of the grant, or from the situation and circumstances, that the grantor intended to create a servitude inuring to the land itself. *Beals v. Case*, 138 Mass. 138; *Clapp v. Wilder*, 176 Mass. 341, 50 L.R.A. 120, 57 N. E. 692; *Krekeler v. Aulbach*, 51 App. Div. 591, 64 N. Y. Supp. 908.

The case of *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018, was one in which an owner of property in Colorado Springs sought to enforce a condition against the sale of intoxicating liquors, contained in an original deed to defendant's grantor. Plaintiff had secured his title by mesne conveyances from the same original source. The deed provided that no intoxicating liquor should ever be sold or disposed of at a place of public resort on the premises thereby granted, and the supreme court held that the condition was valid and enforceable as between the grantor and its grantees (citing *Cowell v. Colorado Springs Co.* 3 Colo. 82, and *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547), but that it by no means followed that any owner of a lot in Colorado Springs might enforce the clause against any other lot owner. In pointing out the distinction between a personal covenant and one inuring to the benefit of the neighboring land, the court said: "*De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, is one of the numerous authorities relied upon by appellants to sustain their right to maintain this action. The covenant in the deed in this action was: 'And the said party of the second part, for himself, his heirs and assigns, doth hereby covenant to and with the said Daniel Dodd and Francis Mackin, their heirs, executors, and administrators, that he, the said party of the second part, his heirs or assigns, will not at any time hereafter erect or permit upon any part of the said lot any hotel, drinking saloon, gaming house, slaughterhouse, furnace, manufactory, brewery, distillery, or building for the curing of fish, or for any other uses or purposes that shall depreciate the value of the neighboring property for dwelling houses.' The opinion reviews the English and American authorities upon the subject here

under discussion, and sums up the conclusion of the court as follows, at page 340: 'The law deducible from these principles and the authorities applicable to this case is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser, and it appears by writings, or by the circumstances that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.' It affirmatively appears from the amended complaint that appellants were not parties to the original covenant contained in the deed under which appellee Robinson derives title to her property. In such cases it is held that an action is not maintainable (1), in which it does not appear that the covenant was entered into for the benefit of the land of which plaintiff has become the owner, and (2), in which it appears that the covenant has not entered into the consideration of plaintiff's purchase. From the very nature of the case, a covenant restricting the use of land will not be enforced against a subsequent purchaser without notice, actual or constructive, of the covenant. . . . By its terms the covenant is limited to the land 'hereby granted.' In this respect it differs widely from covenants which in express terms, or by reasonable or necessary implication, give notice that they are intended for the development or improvement of premises within a designated area, or for adjacent lots or neighboring property, as was the case in the New Jersey case, above cited, as indicated by that portion of the covenant which we have italicized."

Without further citation we may say that we think the great weight of authority is in favor of the conclusion reached by the trial court that the covenant in question was a personal one, not running with the land, and not capable of enforcement by the owner of adjoining property, who was a subsequent grantee deriving title from the grantors in the deed to Ross.

We have examined the authorities cited by appellant, and find that they are all readily distinguishable in their facts from 37 L.R.A.(N.S.)

the case at bar. We have already shown how one of these (*De Gray v. Monmouth Beach Club House Co.*) has been analyzed by the supreme court of Colorado, and found not applicable to a case like this. *Peck v. Conway*, 119 Mass. 546, and *Clark v. Martin*, 49 Pa. 289, were cases in each of which the covenant was made in favor of the owner of adjoining property occupied as a homestead at the time the covenant was made. In each case the immediately adjacent property was the only land possessed by the grantor, while in the case at bar the original grantors owned many lots in Bay View tract and elsewhere in Santa Monica, any one of which might have been benefited in some degree by the restriction set forth in the deed. In each of the cases last cited the grantor, who was the covenantee, owned but one lot of land in the vicinity of that taken by the grantee, who was the covenantor, and in each case the covenantee's land not only adjoined that of the covenantor, but was occupied by him at the time of the execution of the deed as a homestead. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190, is not in point, as the deed itself by its terms provided that the covenant should be for the benefit of the land retained by the grantor. The court said: "The covenant, it will be remembered, expressly declares that it shall be lawful for any person who shall become the owner of any of the land described in the ten deeds recited in the conveyance to the complainant, to maintain an action for a violation of the covenant against such person as may be the owner of complainant's land when the violation is committed. The language of the covenant makes it certain, beyond all doubt, that the parties mutually intended that the restrictions put upon the land conveyed should have the effect to confer an important benefit on the grantor's adjacent land." In *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218, the covenant was one by the grantor for the direct benefit of the land, and the plaintiff bought directly from the covenantee, the covenant itself operating as an inducement for him to make the purchase. *Muzzarelli v. Hulshizer*, 163 Pa. 643, 30 Atl. 291, was a case in which, from the language of the grant itself, it was evident that the common grantor intended the restrictions to apply to all of the lots granted. In *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, and in *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, the very language of the instruments creating the covenants showed that they were for the benefit of all of the grantor's lots, and that the restrictions might be enforced by subsequent owners. *Hemsley v. Marlborough House Co.* 68 N. J. Eq. 596, 61

Atl. 455, was like *Clark v. Martin* and *Peck v. Conway*, supra, a case in which the owner of a homestead granted certain property with a building restriction obviously for the benefit of her property, reserving to herself and heirs the right to consent to a different plan of building.

Owing to the conclusion which we have reached with reference to the covenant which we have been discussing, it will be unnecessary to examine respondent's point

that appellant is a trespasser upon its property, having built slightly over its line, as found by the court, and that as such trespasser appellant has no standing in a court of equity without first doing equity himself.

There are no other points that require special notice.

The judgment and order are affirmed.

We concur: **Lorigan, J.; Henshaw, J.**

**Note.**—*Who may enforce restrictive covenant or agreement as to use of property.*

- I. Introduction, 12.
- II. Restrictions for benefit of land retained, 15.
- III. Restrictions for benefit of land conveyed, 23.
- IV. Restrictions for benefit of whole tract.
  - a. Where whole tract is sold, 24.
  - b. Mutual covenants, 25.
  - c. Building scheme, 27.
- V. Effect of priority of purchase, 34.
- VI. Restrictive covenants as easements, 36.

### **I. Introduction.**

This note is limited to a discussion of the question of who may enforce restrictive covenants or agreements, besides the parties thereto. It is assumed that parties to such contracts, or their heirs or assigns, may enforce them.<sup>1</sup> It is not intended to cover the question of the right to enforce pure

easements, such as reservations of rights of way;<sup>2</sup> nor are cases on positive covenants,<sup>3</sup> such as covenants to fence,<sup>4</sup> included. Other cases excluded are those relating to the enforcement of covenants against subsequent grantees of the covenantor;<sup>5</sup> the enforcement of restrictive covenants, as between lessees;<sup>6</sup> the effect of acquiescence of the complainant on the right to enforce such covenants;<sup>7</sup> statutory rights to enforce covenants;<sup>8</sup> and the right of purchasers of lots according to a plat on which a public square or public streets are designated, to have them kept open.<sup>9</sup>

Whether a person not a party to a restrictive covenant has the right to enforce it depends upon the intention of the parties in imposing it.<sup>10</sup> If the language of the covenant, or the instrument in which it appears, is the only guide to this intention, it would seem that the ordinary rules for the interpretation of written contracts would be applicable.<sup>11</sup> And the intention is to be ascertained as in any other case, not by learn-

<sup>1</sup> *Norman v. Wells*, 17 Wend. 136.

The original obligation not to build a warehouse on property conveyed is a covenant running with the land, and the right to enforce it passes to the personal representatives, heirs, and assigns of the covenantee. *Robbins v. Webb*, 68 Ala. 393.

<sup>2</sup> *Stearns v. Mullen*, 4 Gray, 151; *Dennis v. Wilson*, 107 Mass. 591.

<sup>3</sup> *Waterbury v. Head*, 12 N. Y. S. R. 361.

<sup>4</sup> *Toledo, St. L. & K. C. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251; *Bronson v. Coffin*, 118 Mass. 156.

<sup>5</sup> *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662.

<sup>6</sup> *Master v. Hansard*, L. R. 4 Ch. Div. 718, 46 L. J. Ch. N. S. 505, 36 L. T. N. S. 535, 25 Week. Rep. 570; *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115.

<sup>7</sup> *Knight v. Simmonds* [1896] 2 Ch. 294, 65 L. J. Ch. N. S. 583, 74 L. T. N. S. 563, 44 Week. Rep. 580; *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 104, 50 Atl. 14.

<sup>8</sup> *Linzee v. Mixer*, 101 Mass. 512.

<sup>9</sup> *Fisher v. Beard*, 32 Iowa, 346; *Watertown v. Cowen*, 4 Paige, 510.

<sup>10</sup> Where the complainant seeks to enforce a restrictive covenant on the theory that it was made for the benefit of his land, he must show that this was the intention 37 L.R.A.(N.S.)

of the original grantor. *Hay v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

It is always a question of the intention of the parties. In order to make this rule applicable, it must appear from the terms of the grant, or from the situation of the surrounding circumstances, that it was the intention of the grantor in inserting a restriction, to create a servitude or right which should inure to the benefit of the plaintiff's land and should be annexed to it as an appurtenance. *Beals v. Case*, 138 Mass. 138.

In cases of this kind it is important to ascertain the purposes of the grantor in imposing the restrictions, whether they are intended for his personal benefit, or for the benefit of the lot owners generally. His intention is to be gathered from his acts and the circumstances. *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628.

<sup>11</sup> "A covenant is simply a contract of a special nature, and the primary rule for the interpretation thereof is to gather the intention of the parties from their words, by reading not simply a single clause of the agreement, but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met." *Clark v. Devoe*, 124 N. Y. 120,

ing some secret or unexpressed intention in the mind of the grantor, but through the language of the deed itself, construed in connection with the circumstances existing at the time it was executed, as the defendant is bound by what he had notice of, not by the secret intention of the grantor.<sup>12</sup> The vendor's object in imposing the restrictions must in general be gathered from all the circumstances of the case, including the nature of the restrictions. If the general observance of the restriction is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restriction to be for the benefit of all the lots, even though he might have retained other land, the value of which might be similarly enhanced, for the vendor might naturally be expected to aim at obtaining the highest price for his

land.<sup>13</sup> Where the manifest intention of the parties to a deed is to grant a negative easement for the benefit of land retained by the grantor, it is not necessary that this purpose should be expressed in the deed, but the omission from the deed of such an expression is an evidentiary circumstance to be taken into consideration.<sup>14</sup>

The action to enforce agreements imposing restrictions on the use of property, by persons not parties thereto, is equitable, and governed by the rules applicable to that kind of actions.<sup>15</sup> If an action at law cannot be maintained, that is an additional reason for entertaining jurisdiction in equity and preventing injustice.<sup>16</sup> If the action is based upon a covenant, it is not necessary that it be a covenant running with the land,<sup>17</sup> or that there be any privity be-

21 Am. St. Rep. 652, 26 N. E. 275, affirming 48 Hun, 512, 1 N. Y. Supp. 132.

The purpose of the grantor with whom the restrictive covenant is made can be evidenced by the language of the covenant itself, or by other language in the deed which contains the covenant. *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

"Generally," said the court in *Badger v. Boardman*, 16 Gray, 559, "when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance, or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor."

<sup>12</sup> *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

Where there was nothing in a deed containing a dwelling house restriction indicating that the covenant was for the benefit of anyone but the grantor, and there was no provision for the insertion of similar covenants in other deeds to be made by the grantor, and there was no other feature of the transaction which would disclose an intention that the covenant should attach to and be for the benefit of other land of the grantor, it was held that the complainant could not enforce it. *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

<sup>13</sup> *Elliston v. Reacher* [1908] 2 Ch. 374, 77 L. J. Ch. N. S. 617, 99 L. T. N. S. 346, affirmed in [1908] 2 Ch. 665.

<sup>14</sup> *Coughlin v. Barker*, 46 Mo. App. 54. The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, is generally determined by the fair interpretation of the terms of grant or reservation creating the easement, aided, if necessary, by reference to the situation of the property and the surrounding circumstances.

Where the common grantor sold to the defendant's predecessor in title a lot containing a building restriction, and imposed no such restriction on the lots he retained, 37 L.R.A. (N.S.)

and did not impose such restrictions on the majority of the lots he subsequently granted to others, this has been said to be a strong evidentiary circumstance tending to show that the purpose of the restriction was personal. *Ibid.*

<sup>15</sup> Agreements and stipulations may be enforced at law between the original parties only; but in equity those claiming title under them may resort to the whole instrument, including the covenants and agreements in gross, for the purpose of ascertaining the nature of the right intended to be conveyed, and when ascertained, the court will enforce in favor of such persons that use or mode of enjoyment which the grantor has seen fit to impress upon it. The effect of the grant will thus be given to that which is in the form of an agreement binding only between the original parties. *Schworer v. Boylston Market Asso.* 99 Mass. 285.

The jurisdiction of courts of equity in these cases is not confined by the limitations, nor is it founded upon the principles, of the action of covenant in courts of law. *Brouwer v. Jones*, 23 Barb. 153.

A restrictive building covenant may be enforced by the owner of land for the benefit of which it was imposed, and by the grantor who imposed the restriction, although no longer the owner, who may appear in aid of the enforcement of the restriction for the benefit of the grantees. *Riverbank Improv. Co. v. Bancroft*, 209 Mass. 217, 34 L.R.A. (N.S.) 730, 95 N. E. 216.

<sup>16</sup> *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

<sup>17</sup> It is not necessary, to have such a restriction enforced in equity, that it should be a covenant running with the land. *Coughlin v. Barker*, 46 Mo. App. 54. The court said: "The question whether the covenant runs with the land seems to be material in equity only on the question of notice; if the covenant runs with the land, then it binds the owner of the land, whether he had knowledge of it or not; for he takes

tween the parties.<sup>18</sup> It has been said that it is a principle upon which all the courts unite, that the right to equitable relief in these cases depends upon the following considerations; First. A precedent agreement in some form by which a restriction is imposed upon the lot owned or held by defendant, for the benefit of the lot owned or held

by the plaintiff. Second. In case the agreement is made by the defendant's predecessor in title, notice in some form to the defendant of the fact and nature of the agreement, either from the language of the title deed under which he holds, or otherwise.<sup>19</sup> The important requirement in all cases is that the agreement be not personal,<sup>20</sup> but

no greater title than his predecessors had to convey. But if the covenant does not run with the land, but the land is subject to what is sometimes called an 'equity,' and at other times a 'negative easement,' in favor of the adjoining land, then, in order to enforce this easement against the land, it is essential that the owner should have taken the land with notice of it."

In *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615, where the action was by the covenantee against an assign of the covenantor, it was urged that the action would not lie because the covenant did not run with the land, but the court said this was of no importance. "Whether it was a covenant running with the land, or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, is not material as affecting the jurisdiction of a court of equity, or the right of the owners of the dominant tenement to relief upon a disturbance of the easements."

Any grantee of the land to which such a right is appurtenant acquires by his grant a right to have the servitude or easement, or right of amenity, protected in equity, notwithstanding that his right may not rest on the covenant which simply runs with the title to his land, and notwithstanding that it may also be true that he may not be able to maintain an action at law for the vindication of his right. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190.

<sup>18</sup> It is not necessary, in order to sustain the action, that there should be privity either of estate or contract; nor is it essential that an action at law should be maintainable on the covenant; but there must be found somewhere the clear intent to establish the restriction for the benefit of the party suing or his grantor, of which right the defendant must have either actual or constructive notice. *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661, 43 N. E. 173, reversing 74 Hun, 576, 26 N. Y. Supp. 600.

"Easements of all kinds may be created and exist in favor of any third person, irrespective of any privity of estate or community of interest between the parties; and, in this respect, there is no distinction between negative easements and those rights that are more generally known as easements, as a way, etc." *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

In the absence of any privity between the complainant and the defendant, the right of the former rests upon a basis purely equitable. *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.  
37 L.R.A. (N.S.)

<sup>19</sup> *Coughlin v. Barker*, 36 Mo. App. 54.

The questions primarily involved are: "Does the complainant stand in the attitude of a subsequent purchaser from the vendor with whom the defendant's predecessor in title made his or her covenant?" And secondly, "Was such covenant made for the benefit of the land subsequently sold to complainant's predecessor in title?" *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

Where the person seeking to enforce the covenant was not a party to it, an action is not maintainable, (1) where it does not appear that the covenant was entered into for the benefit of the land of which the plaintiff has become the owner, and (2) where it appears that the covenant has not entered into the consideration of the plaintiff's purchase. *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018.

In *Elliston v. Reacher* [1908] 2 Ch. 374, 77 L. J. Ch. N. S. 617, 99 L. T. N. S. 346, affirmed in [1908] 2 Ch. 665, it is said that, in order to enforce such covenants as between purchasers, it must be proved (1) that both the plaintiffs and defendants derived title under a common vendor; (2) that previously to the selling of the lands to which the plaintiffs and defendants are respectively entitled, the vendor laid out his estate, or a definite portion thereof (including the land purchased by the plaintiffs and defendants respectively), for sale, in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent, and consistent only with some general scheme of development; (3) that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor; (4) and that both the plaintiffs and defendants, or their predecessors in title purchased other lots from the common vendor upon a footing that the restrictions subject to which the purchases were made were to inure for the benefit of the other lots included in the general scheme, whether or not they were also to inure for the benefit of other lands retained by the vendors.

<sup>20</sup> The action is not maintainable between purchasers not parties, if it appears that the covenant was not entered into for the benefit of subsequent purchasers, but for the benefit only of the original covenantee and his next of kin. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

one for the benefit of the particular piece of ground in favor of which the restriction is sought to be enforced. In making a conveyance the grantor has the legal right to impose a condition from any motive, and it is immaterial what that motive is; and it has even been said that he can impose it in favor of property he does not own, if he sees fit to do so.<sup>21</sup> If restrictions on lots of a tract of land are for the benefit of purchasers and their grantees, they cannot be released to a purchaser or his grantee without the assent of other purchasers or their grantees for whose benefit they were imposed.<sup>22</sup>

Naturally, in this class of cases as in others, the complainant carries the burden. If he seeks to enforce a restriction in favor of the land he owns, not having been a party thereto, he must show that it was the intention of the original parties that the restriction should inure to the benefit of

his land;<sup>23</sup> and the burden is on the plaintiff if he insists upon giving the condition any wider application than it purports to have on its face.<sup>24</sup>

Restrictive covenants may be divided into three classes, with reference to the benefit intended. First, those imposed for the benefit of the land retained; second, those imposed for the benefit of the land conveyed; and third, those imposed for the benefit of the whole tract, usually evidenced by some general plan or scheme for the development and improvement of the property. These will be considered in their order.

## II. Restrictions for benefit of land retained.

A very common purpose of restrictions as to the use of property conveyed is to benefit land retained by the grantor,<sup>25</sup> the

<sup>21</sup> Hays v. St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

An owner may subject his lands to any servitude, and transmit them to others charged with the same; and one taking title to lands, with notice of any equity attached thereto, or any outstanding right or claim affecting the title or the use and enjoyment of the lands, takes subject to such equities and such right or claim, and stands in the place of his grantor, bound to do, or forbear to do, whatever he would have been bound to do or forbear to do. *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

<sup>22</sup> *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122. See *infra*, II, note 38.

<sup>23</sup> The burden is necessarily on the plaintiff to establish that the covenant was imposed for the benefit of the land retained by the grantor. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938.

The burden is upon the complainant to prove that the covenant was made for the benefit of his property, and not merely for the benefit of the grantor. *Hemsley v. Marlborough House Co.* 62 N. J. Eq. 164, 50 Atl. 14.

The burden of proof is on the plaintiff to show from the terms of the grant, or from the situation and circumstances, that it was the intention of the grantor in inserting the condition, to create a servitude or right which should inure to the benefit of the lot of land owned by the plaintiff, and which should be annexed to it as an appurtenance. *Lowell Inst. for Savings v. Lowell*, 153 Mass. 530, 27 N. E. 518.

Where a deed to a city of a lot on one side of a street, opposite to which the city intended to build a school, contained a restriction that it should not be built, and the deed contained no mention that the condition was imposed for the benefit of adjacent land, and no earlier deed had mentioned any scheme or plan, and the lot owned by the party seeking to enforce the

restriction was then vacant land, it was held that he could not enforce the restriction, especially where plaintiff's deed executed several years afterward, contained no mention that such right or easement existed for his benefit. *Ibid.*

<sup>24</sup> *Sharp v. Ropes*, 110 Mass. 381.

<sup>25</sup> Another class of cases is where the owner sells a part of his premises, and imposes a restriction on the purchaser, by which the lands retained will be benefited. Such a transaction is sufficient to show an intention that the restriction is for the benefit of the lands retained, and the grantor or his subsequent grantee can enforce it. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

Where the grantor restricts the use of the land which he conveys, for the benefit of land which he retains, his subsequent conveyance of the land will pass such benefit to his grantee. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190.

In *Nottingham Patent Brick & Tile Co. v. Butler*, L. R. 16 Q. B. Div. 778. Lord Esher, M. R., said: "There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale; you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost, if not quite,



difficulty in this class of cases being to distinguish between agreements for the grantor's own benefit, and agreements for the benefit of the land itself. If it sufficiently appears that it is the land retained that is to reap the advantage, then any person into whose hands the property passes may enforce the restrictions as well as if he were the original party to it. It is well settled that the owner, upon selling a portion of his land, may by appropriate covenant or agreement lawfully restrict the use of the part conveyed for the benefit of the unsold portion, providing that the nature of the restricted use is not contrary to public policy. In such case a subsequent purchaser of a part of the remaining land, for the benefit of which the stipulation was made, may in equity enforce the observance of the stipulation against a prior grantee, upon the principle that the rights created by such a stipulation are transferable, and part of the land to which they are attached, and such subsequent purchasers may in equity enforce the stipulation against a person who holds title under a prior pur-

chaser who has acquired title with notice of the restriction, upon the principle which prevents a party having knowledge of the just rights of another, from contracting such rights.<sup>26</sup>

The principle upon which a person not a party to a restrictive covenant is permitted to enforce it is based upon the idea that the subsequent purchaser of lands to be benefited by the enforcement has made his purchase, and paid his consideration, in the expectation of the benefit to accrue to the land bought, from the observance of the restriction imposed by his grantor upon the use of the lots previously conveyed to the covenantor; and no injustice is worked upon the covenantor, or his assigns with notice of the covenant, by restraining them from using the land in a manner inconsistent with the contract under which they obtained title, and which fixed the price they paid with relation to the restrictions imposed.<sup>27</sup> The action being in equity, objections which would be fatal at law are here immaterial.<sup>28</sup>

It is not necessary specifically to men-

conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others." It is an inference of fact in each case whether the purchasers are bound *inter se* by such covenants.

A prior purchaser from the common grantor, by reason of the restrictions imposed, paid less price for his land; the party who subsequently purchased from the common grantor a part or the whole of the land to be benefited by the restrictions bought in consideration of the benefits coming to his lot because of the restrictions. This relation is such a privity as supports an equity in the subsequent purchaser of the lot benefited by the covenant to enforce it. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.

<sup>26</sup> *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938.

As no privity exists between a subsequent purchaser from the common grantor, and the original grantee or the persons holding under him, a right of action is necessarily dependent upon the existence of the fact that the stipulation was originally made for the benefit of the remaining land of the common grantor. *Ibid*.

But the fact that the grantor of a parcel of land with a restriction that no tavern or public house be built upon the same holds, at the time, a mortgage on the adjoining piece of land, is not sufficient to fasten a restrictive easement on the mortgaged land, so that a subsequent purchaser thereof can enforce the restriction against a subsequent purchaser of the restricted land. *Tibbetts v. Tibbetts*, 66 N. H. 360, 20 Atl. 979.

<sup>27</sup> *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.  
37 L.R.A. (N.S.)

A building line restriction entered into between the first owner of the land and the first grantee thereof, the grantor retaining the adjoining land, and each covenanting to maintain a certain building line, the parties agreeing to insert in every future conveyance by them of any of the said land a similar covenant on the part of the grantee, was held enforceable as between subsequent grantees claiming under the person who derived title from the covenantee alone, the deeds to both being made subject to such covenants, although their common source of title parted with the land conveyed to the plaintiff, and he conveyed to the defendant. The doctrine of the enforceability of restrictive covenants, by persons not parties thereto is established upon the principle that otherwise grantees of the covenantee would have no remedy at law by an action for damages, and the covenantee would be entitled only to nominal damages, after he had parted with his interest in the land to be benefited. *Perkins v. Coddington*, 4 Robt. 647.

<sup>28</sup> The fact that the covenants were made with mortgagors of the land only, and not with the mortgagees, so that in contemplation of the law they were made with strangers to the land, will not affect the right of such purchasers to enforce the covenants in equity. *Rogers v. Hosegood* [1900] 2 Ch. 388. The court said: "When the covenant was clearly made for the benefit of certain lands, with the person who, in the contemplation of such a court, was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty."

tion the restrictive covenant in a deed to land for the benefit of which it is made, in order that the purchaser of such land may enforce it;<sup>29</sup> nor is it necessary to establish a general building scheme;<sup>30</sup> or, by the better opinion, to show that the person seeking to enforce the restriction had notice of it at the time he obtained title to his land, so that it could be said to have entered into the consideration for the purchase;<sup>31</sup> or to prove that the grantor, at the time of imposing the restriction, found the land retained by a reciprocal obligation.<sup>32</sup>

It would seem that, under the circumstances here considered, where no purpose in imposing the restriction is stated, the presumption that the covenant was inserted in the deed to the premises conveyed for the benefit of the land retained is a very easy and natural one; but, no doubt, this is dependent largely upon the nature of the covenant itself.<sup>33</sup> Such a presumption does not invariably follow from the fact that the grantor retains property adjoining or in the vicinity of that conveyed to the covenantor.<sup>34</sup>

<sup>29</sup> *Child v. Douglas*, 2 Jur. N. S. 950, 5 De G. M. & G. 739, 1 Kay, 575, 2 Week. Rep. 461, 701.

<sup>30</sup> The right of a subsequent purchaser to enforce a restrictive covenant against a prior purchaser, the restriction having been imposed for the benefit of the remaining land of the common grantor, does not depend upon the question whether the lots were sold in pursuance of a general scheme or plan of improvement. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675.

The fact that there is no evidence that a particular restriction was part of a general plan does not necessarily negative the conclusion that it was intended for the benefit of a particular adjacent estate. The situation of the two parcels of land in respect of each other may be such as to render such a conclusion unavoidable, as, for instance, where a vendor sells one adjoining parcel, with an agreement not to build upon the other, in which case the conclusion is unavoidable that he annexes to the parcel sold an easement of light, air, and view in respect to the parcel retained. *Coughlin v. Barker*, 46 Mo. App. 54.

<sup>31</sup> Where by the express declaration on the face of the conveyance containing restrictive building covenants, the benefits of the covenants were intended for all or any of the vendor's lots near to or adjoining the plot sold, it was held that the representatives of the vendee of a part of the land retained by the vendor could enforce the covenant, although at the time he took his deed, he had no notice of the restrictions in favor of his land. *Rogers v. Hosegood* [1900] 2 Ch. 388.

And upon this point Farwell, J., upon the trial, said: "The plaintiff's right in such an action does not depend upon what he believes himself to have bought, but upon what he has in fact bought, and he has bought the land with the covenants annexed. The defendant is not injured, for he bought the land with knowledge of the covenant, and he can claim no more than the land with that burden upon it." *Ibid*.

But it has been said that the action is not maintainable between purchasers not parties, if it appears that the covenant has not entered into the consideration of the complainant's purchase. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

37 L.R.A. (N.S.)

<sup>32</sup> Nor is it necessary that the purpose be expressed in the deed or that the deed contain a reciprocal covenant on the part of the grantor to observe a like restriction in respect of the land retained by him. "To illustrate this," said the court, "let us suppose the case of the owner of two adjoining lots, desiring to build upon the one, and willing to sell the other. He sells the other with a restriction for a certain building line, but he imposes upon himself no restriction to observe the same building line in respect of the lot which he retains. He builds upon his own lot to the line of the street, and he enforces the restriction against his grantee, by which he is obliged to build back to the building line. It can be well seen that the grantor may intend this restriction for the mere purpose of retaining for himself a greater easement of light and view, without imposing upon himself a similar restriction." *Coughlin v. Barker*, 46 Mo. App. 54.

<sup>33</sup> In every case where the owner of a piece of property divides it and sells a part of it, imposing upon his vendee a restriction as to its use, there is a presumption that he imposes the restriction for the benefit of the land he retains, but this presumption is rebuttable. *Ibid*.

Where the original grantor owned adjoining parcels of land, and occupied one of them as a homestead, and sold the other with the express reservation that no building be erected by the grantee, his heirs or assigns, upon the land conveyed, it was held that the fair inference was that the parties intended to create an easement for the benefit of the estate retained by the grantor, and that a subsequent grantee of the original vendee could be prevented from building upon it. *Peck v. Conway*, 119 Mass. 546.

<sup>34</sup> The cases do not appear to have recognized that a restrictive covenant may be presumed to have been made for the benefit of the remaining land of the grantor, in the absence of some evidence of the fact. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938.

Where the vendor sells part of his land, and takes from the vendee restrictive covenants as to buildings, the law does not invariably regard such stipulations as having been made for the benefit of the land retained, so as to attach them to the reserved property and to pass them to vendees

The rule adopted in this class of cases has been well stated to be that where the common grantor of two adjoining lots sells one and retains the other, and puts in the deed of the one which he sells a covenant against building in a certain way, which covenant is manifestly intended for the benefit of the lot which is retained, and he afterwards sells this lot to another, the covenant passes to the assign of such lot as an appurtenance to it, or as an easement for the benefit of it, and such assign may enforce it against the owner of the other lot, whether he acquired the other lot immediately from the original vendor, or

through mesne conveyances, or by devise, descent, or otherwise, from him, provided he took with notice of it, actual or constructive.<sup>35</sup> So where the vendor, owning land on both sides of the river, sold land on one side, and, for the purpose of protecting a ferry, provided in the deed that neither the vendee nor his heirs and assigns should establish a common ferryboat landing on the property conveyed, it was held that this was enforceable by the devisees of the vendor.<sup>36</sup> And where the owner of three adjoining lots, upon the sale of the eastern and western lots, covenanted for himself, his heirs and assigns, with the grantee, his heirs and as-

on a subsequent sale of such property; and the vendor under such circumstances cannot be presumed to have intended to fetter himself in the exercise of the power which he possesses of dealing with the whole of his estate as he sees fit. *Keates v. Lyon*, L. R. 4 Ch. 218, 38 L. J. Ch. N. S. 357, 20 L. T. N. S. 255, 17 Week. Rep. 338.

An easement or servitude in the nature of a building restriction ought not to be held to be imposed for the benefit of an adjacent lot of land in the absence of any words in the grant itself implying it, unless circumstances and situation at the time of the grant were such as to make it manifest that the condition or restriction or reservation was intended to be for the benefit of such adjacent lot, and to be annexed to it as an appurtenance. *Lowell Inst. for Savings v. Lowell*, 153 Mass. 530, 27 N. E. 518.

<sup>35</sup> *Coughlin v. Barker*, 46 Mo. App. 54. The court said: "In every case there is a very strong argument in favor of the view that such restrictions ought to be construed as imposing what is termed a negative easement upon the land conveyed, for the benefit of the land retained, or what is sometimes termed an equity in the land retained as against the land conveyed. To the argument that the grantor intended the restriction for his own personal benefit, and that it was a mere personal covenant, and not a covenant running with the land, it may generally be answered that the grantor could not intend it for his own personal benefit, except for his benefit as owner of the land retained, and that he should be benefited by it from no other circumstance than from the circumstance that it benefited the land which he retained. In dealing with this subject, equity does not concern itself with the form of the language in which the restriction is couched, but deals only with its substance. It disregards the inquiry whether it is a condition or a covenant, and enforces it when it was plainly intended by the parties that it should be for the benefit of the land held by the plaintiff."

Where it appears by the true construction of the terms of the grant, that it was the well-understood purpose of the parties to create or reserve a right in the nature of a servitude or easement in the property 37 L.R.A.(N.S.)

granted, for the benefit of other land owned by the grantor, no matter in what form such purpose may be expressed, whether in the form of a condition or covenant or reservation or exception, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee; and the right and burden thus created and imposed will pass with the land to all subsequent grantees. *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190.

Where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation, or exception, which restricts the enjoyment of the portion of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land and is binding at law or not, it will be enforced in equity against the grantee and anyone subsequently acquiring title to the land with notice of it, at the instance of the grantor or any subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land, which the complainant in the suit holds. *Hayes v. Waverly & P. R. Co.* 51 N. J. Eq. 345, 27 Atl. 648.

When a restrictive covenant is included in a deed to the grantee, and such covenant is made for the benefit of the remaining land of the vendor, the right to enforce the covenant passes to the subsequent grantee of the vendor. *Hemsey v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14, affirmed in 63 N. J. Eq. 804, 52 Atl. 1132.

<sup>36</sup> *Frye v. Partridge*, 82 Ill. 267.

That the bill is brought by the grantee of the original owner will not affect the property involved, as the grantee succeeds to all the rights of the original grantor in equity, even if he does not do so at law. *Ibid.*

A restriction as to the sale of intoxicating liquors, made for the benefit of land retained by the grantor, is enforceable by and against the assignees of the parties thereto. *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104.

signs, that the center lot then owned by the grantor should be further restricted from having any building attached to a building already erected thereon, of a greater height than 10 feet from the surface of the lot, it was held that this was a covenant running with the land for the benefit of the eastern and western lots.<sup>37</sup>

It was also held that the owner of neither the eastern nor western lots could, by his independent act or deed, relinquish the subserviency of the center lot so as to affect the other.<sup>38</sup>

But the mere fact that the grantor of land with a building restriction was, at the

time of the conveyance, the owner of other land separated by a railroad from the land granted, was held not sufficient to show that the object of the restriction was to benefit this land, and it was also held that, in the absence of words in the deed to this effect, or any reference to the plan showing a general scheme of improvement, the grantees took their estate without any notice, express or constructive, that the restriction was intended for the benefit of the adjoining estate, and that the restriction is not enforceable thereafter by the heirs of the grantor.<sup>39</sup>

And where the provision in the defend-

When the owner of two adjoining lots conveys one, and incorporates into the deed of the lot conveyed a covenant restricting the right of the grantee to build in a certain specified manner, which covenant is intended for the benefit of the other land held by the grantor, a subsequent conveyance will pass or transfer the covenant to the grantee or grantees of such lot, as an easement for the benefit of the lot, and the grantee may enforce the covenant against the owner of the other lot in an appropriate action. *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965.

In *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400, there was a building restriction in the grantee's deed against building on the strip of land adjoining the southerly line of the remaining land of the grantor. The question in the case was whether the defendant could build on the strip, by the payment to the plaintiff, the successor in title of the grantor's remaining land, of a certain sum of money specified in the deed as liquidated damages in case of the violation of the covenant, and in holding that the penalty could not be offered in lieu of performance of the covenant, the court said that there could be no doubt that the right to enforce the covenant passed to the plaintiff, as grantee of the dominant premises.

*Harrison v. Good*, L. R. 11 Eq. 338, a vendee of a piece of land from the owners of an estate covenanted not to do, or suffer to be done, on such property, anything which should be a nuisance to the vendor or any of his tenants, "or the occupiers or owners of the adjoining property." The vendee then put up the land for sale at auction in thirty-four lots, subject to the same restriction. It was held that the word "adjoining" meant the property adjoining each lot, and that the covenant was enforceable by purchasers between themselves.

In *Clark v. Martin*, 49 Pa. 289, the grantor conveyed a lot adjoining the one he retained, stipulating in the deed that the grantee, his heirs and assigns, should not erect any building on the back part of the lot higher than 10 feet. It was held that this restriction was enforceable against a subsequent grantee of the lot sold, by the sub-

sequent grantee of the property retained by the vendor, the restriction having evidently been intended for the benefit of the latter lot.

<sup>37</sup> *Landell v. Hamilton*, 175 Pa. 327, 34 L.R.A. 227, 34 Atl. 663.

<sup>38</sup> *Ibid.*

A building restriction covenant by the purchaser of a part of the vendor's land, entered into for the benefit of the land retained, is enforceable by a subsequent purchaser of a part of the land retained, although the vendor after the sale attempts to release the land from the benefit of the covenant. *Western v. Macdermot*, L. R. 1 Eq. 499 on Appeal L. R. 2 Ch. 72, 36 L. J. Ch. N. S. 76, 12 Jur. N. S. 366, 15 L. T. N. S. 641, 15 Week. Rep. 265.

In *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218, the vendor, upon conveying land upon one side of a street, agreed not to build on a triangular strip of ground owned by him opposite the land sold, and gave a bond for the performance of the condition by himself, his heirs, executors, and administrators. Both pieces of the property passed into other hands. It was held that the burdened land could not be released without the consent of the owner of the first parcel sold, and that the complainant, the present owner, could enforce the covenant. The court said: "If the privilege was of no value to that part of the property, the mention of the fact of the bond would have been no commendation; and if it was calculated to enhance the value of the property in the opinion of the purchaser, it would be inequitable to permit the seller to release the right he had secured by the bond, after he had by that means induced the complainant to become the buyer. If such a privilege did increase the value of the property, or render its possession more desirable, either in reference to its present or future use for village lots, the legal presumption is that the purchaser took that privilege into the account in deciding upon the expediency of taking the property at the price he concluded to give."

See also on this point *supra*, I. note 22.

<sup>39</sup> *Skinner v. Shepard*, 130 Mass. 180.

There is disagreement as to the rights of one holding land under a subsequent conveyance from a common vendor to en-

ant's deed was that no structure should be erected on the lot "further east or nearer Ashland avenue than is the house or building immediately south of said property," it was held that the mere reference to the complainant's house as a monument was not sufficient to show that the grantor designed to protect the light, air, or view, or to give an interest in the property.<sup>40</sup>

If the vendor owns more than one piece of property, or if, having sold part of his land subject to a restrictive covenant, he afterwards transfers a portion of the remainder, the question arises whether the covenant or agreement was intended for the benefit of the particular parcel which passes into the hands of such grantees. Where the vendor put up a tract for sale at auction, sub-

ject to certain building restrictions sufficient to be an inducement to the purchase of the lots, and only part of the lots were sold, it was held that the purchaser of one of such lots had the right to insist that the vendor insert similar restrictions in the deeds to the remainder of the lots, although the vendor had other land besides, which it was urged on his behalf was the property intended to be benefited by the restrictive covenant.<sup>41</sup>

In general it may be said that in order that the plaintiff may enforce a building restriction in a deed under which the defendant claims, where neither the plaintiff nor defendant was a party thereto, it must appear that the restriction was inserted in the deed for the purpose of creating a restrictive

covenant owned an adjoining estate, the restriction must be taken to have been entered into for the protection of such estate, and that the purchaser of a portion of the latter estate was entitled to the benefit of this restriction, irrespective of whether or not any representation that such a covenant had been entered into by the purchaser from the vendor was made to the purchaser of the other property; and that any contract by the vendor with such purchaser should have the benefit of such covenant; but it was held that, in order to enable the purchaser as an assign—such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenant, and the conveyance not showing that the benefit of the covenant was intended to inure, for the time being, to each portion of the estate so retained, or of the portion of the estate of which the plaintiff is assign—to claim the benefit of the restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant; that is, it must appear that the benefit of the covenant was a part of the subject-matter of the purchase.

force a restrictive covenant in an earlier conveyance, when there is no proof that the covenant was intended for the benefit of the later grantee, except that it was contained in the prior deed. In some cases like that the covenant has been regarded as not appurtenant to the land retained by the vendor, but as personal to him, and the right of a subsequent vendee to enforce it has been denied. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547.

The mere fact that a grantor at the time of a conveyance with a restrictive covenant was the owner of land separate from the land conveyed is not sufficient to enable the grantee of the latter to enforce a covenant, in the absence of any words in the deed to that effect, or any reference to a plan showing a general scheme for improvement, and evidence that the grantee took the land notice, express or implied, that the restriction was for the benefit of the remaining land. *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

Where the owner of a tract of land sold part of it subject to certain restrictive covenants as to buildings, but did not himself enter into any covenants in respect thereto, and afterwards sold other parts of the land retained to other persons, nothing appearing as to restrictions, and then repurchased the part of the land which he first sold, it was held that he could then reconvey the land purchased free from the restrictions, since such restrictions could not be taken to have been entered into for the benefit of the purchasers of the land retained. *Keates v. Lyons*, L. R. 4 Ch. 218, 38 L. J. Ch. N. S. 357, 20 L. T. N. S. 255, 17 Week. Rep. 338.

<sup>40</sup> *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

<sup>41</sup> *Re Birmingham & District Land Co.* [1893] 1 Ch. 342, 62 L. J. Ch. N. S. 90, 3 Reports. 84, 67 L. T. N. S. 850, 41 Week. Rep. 189, 15 Eng. Rul. Cas. 285.

In *Renals v. Cowlishaw*, L. R. 9 Ch. Div. 125, affirmed in L. R. 11 Ch. Div. 866, 48 L. J. Ch. N. S. 830, 41 L. T. N. S. 116, 28 Week. Rep. 9, it was held that, as the vendor of land burdened with a restrictive

Where a church sold a tract of land for cemetery purposes, reserving a certain portion "for a church site," and the land was conveyed to trustees, who executed a declaration of trust for the benefit of the purchasers, and to reconvey the portion reserved, to the church for the church site, and the trustees afterwards conveyed the land for cemetery purpose to a cemetery association, and the portion selected for the church site to the church, under a deed reciting that it was "reserved as a site for a church," it was held that, in the absence of any statement in the bill to enjoin the church from selling the land for other purposes, under a release of the condition from the trustees, that the trustees were at the time of the transfer to the church individually interested in other land in the neighborhood which would be affected by the enforcement of the restriction, the restriction would inure to the benefit of the land owned by the cemetery association, and that

ease in favor of the ground which includes plaintiff's particular lot, and that the circumstances were such as to impart to the defendant notice, from the terms of the deed, that such was its purpose.<sup>42</sup> And in determining whether a building restriction was intended for the benefit of particular adjacent lots or parcels of ground, an important evidentiary circumstance is that similar restrictions were inserted in other deeds conveying such other lots or parcels, or that the deeds conveying such other lots or parcels contain reference to the restrictive clause in the particular deed.<sup>43</sup> But the coincidence that all the deeds conveying any portion of the property contained the same covenants would not be sufficient of itself to show that the covenant in the deed to de-

fendant's predecessor in title was intended to be for the benefit of complainant's lot, which had been sold by the common grantor six years before.<sup>44</sup>

In determining the question whether the restriction was intended for the benefit of the land retained, or for the benefit of plaintiff's lot, the nature of the restriction may have some bearing. In a Massachusetts case it is said that, assuming that the covenant is valid as a contract between the parties, in order to be enforceable by others, it must be of a kind which the law permits to be attached to the land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce

the church, at the suit of such association, would be enjoined from selling the land for other purposes. *Fairmount Cemetery Asso. v. First Presby. Church*, 60 N. J. Eq. 142, 46 Atl. 213.

<sup>42</sup> *Coughlin v. Barker*, 46 Mo. App. 54.

Where the restriction is no part of a general plan, and there is nothing in the language of the deed, when interpreted by surrounding circumstances, from which it can be fairly inferred that the restriction was intended for the benefit of any particular piece of land retained by the vendor, the covenant cannot be enforced by one who subsequently acquires from the vendor the particular piece of land, or by the vendor for the exclusive benefit of such subsequent purchaser. *Ibid.*

An action is held not maintainable between purchasers not parties, if it does not appear that the covenant was entered into for the benefit of the land of which the complainant has become the owner. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

A subsequent purchaser cannot enforce, as against a prior purchaser, a restrictive covenant, in the absence of proof that the covenant was made for the benefit of the land retained by the common grantor, or of proof of a building scheme. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938.

The right of the owner of a lot of land to enforce a covenant restrictive to the use of another tract, which covenant has been entered into by the owner of such other tract with the former owner of both, but has not been expressly assigned, depends primarily on the covenant having been made for the benefit of the land embracing such lot. It has been so made, the benefit of the covenant inures to the subsequent purchasers of the land. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 340, 24 Atl. 388.

<sup>43</sup> *Coughlin v. Barker*, *supra*.

<sup>44</sup> *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.

Where the common grantor conveyed the lot to which the defendant subsequently obtained title, with certain building restric-

tions, and after he had conveyed complainant's lot with similar restrictions, and there was no proof that when the deed for the complainant's land was made there was either a grant of any right in the residue of the land retained by the grantor, or a stipulation that the restrictions put upon the first lot should also be imposed on the remaining property when sales were made to subsequent purchasers, it was held that the complainant could not enforce the covenant in the subsequent deed, because not made for the benefit of complainant's lot. *Ibid.*

In *Badger v. Boardman*, 16 Gray, 559, a grantor conveyed a parcel of land designated on a plan, "subject to the following restriction: that no out buildings or shed should ever be erected westerly of the main building of a greater height than those now standing thereon," and afterwards conveyed another parcel on the same plan to the grantee under which the plaintiff claimed. It was held that the plaintiff could not enforce the covenant, there being nothing in the deeds to show that the restriction in the first deed was inserted for the benefit of the estate owned by the plaintiff, and there being no language in the deeds under which the plaintiff claimed title, which referred specifically to this restriction.

Where two lots of a parcel of land designated on a plan were conveyed to different grantees, the grantor having previously built a house on a different lot in the same tract, and the deeds contained a provision that for fifteen years no building should be placed on the granted premises within 20 feet of the street, and no trade offensive to dwelling houses in that neighborhood should be carried on, and that a violation of the restriction should not work a forfeiture, and that the grantor and his heirs might enter upon the land and remove anything violating the restrictions, it was held that the restriction was not enforceable against one grantee by another, there being nothing in the deed to show that the restriction was intended for the benefit of the estate owned by the plaintiff. *Sharp v. Ropes*, 110 Mass.

every restriction that can be devised, than the common law will recognize, as creating an easement, every grant purporting to limit the use of land in favor of other land. The principle or policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of, the thing" conveyed. They must be "for the benefit of the estate." Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden.<sup>45</sup>

Ordinarily, where the owner of a tract of land sells part of it subject to restrictions, it is a purchaser of part of the land retained who seeks to enforce the restrictions; but where the land sold burdened

with the restriction is afterwards divided up, and passes into the hands of different purchasers, the question has been raised whether such purchasers from the original vendee can enforce, as between themselves, the restrictions imposed upon their grantor's land. The courts are not in harmony on this question, but in this class of cases it would seem that the rights of portions of the servient estate to enforce the restriction would be exceedingly doubtful, since the restriction was imposed for the benefit of a different tract of land, that is, the land retained by the grantor,—the dominant estate. So it has been held that, in the absence of any fact or circumstance to show that a building restriction was annexed to a grant for the purpose of improving or

381. The court said no such purpose can be gathered from the plan, or from the situation of the property with reference to other land of the grantor. It purports to be a condition imposed by the grantor, and the deed pointed out the mode in which he, his heirs or devisees, may enforce it. Neither of the deeds under which the respective parties claim purports to give to the grantee any such right against any other grantee. For ought that appears, the condition may have been intended for the benefit of the grantor or his family as long as they continued to own the dwelling house.

Where plaintiffs' father, the equitable owner of a tract of land, caused a map to be made representing the property to be laid out in blocks, around a central block laid down on the map as a park, and caused the lots to be conveyed to different owners, and it was covenanted that the land designated as a park should be used for no other purpose, it was held that, the title to the park and the contiguous lots having passed from the plaintiffs' father in his lifetime, they inherited no right to either, and that, as they had no title, either to the park or to any land for the benefit of which the park was created, they could not enforce the covenant. *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655.

<sup>45</sup> *Norcross v. James*, 140 Mass. 188, 2 N. E. 946.

A covenant not to work a quarry is personal. "In what way," said the court, "does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in *Brooks v. Reynolds*, 106 Mass. 31, and an easement to have a quarry left unopened, the answer is that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct

physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land." *Ibid*.

And it was held that a covenant providing, among other things, that the premises conveyed shall not be used for any business or store purposes other than for hotel or lodging house or club purposes, purports upon its face to be a personal covenant not binding upon the assigns of the covenantor, nor inuring to the successors or assigns of the covenantee. *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 310.

When the covenant is limited to the land "hereby granted," and where the covenantors stipulated, "for themselves, their heirs, successors, and legal representatives," not to manufacture or sell intoxicating liquors on the premises, the covenant is thereby expressly limited to the particular persons named, the intention being further manifested by the condition of the forfeiture clause in the covenant, to the effect that upon condition broken the premises "shall revert to the party of the first part, its heirs, successors, and assigns." *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 A. & E. Ann. Cas. 1018.

In *Krekeler v. Aulbach*, 51 App. Div. 591, 64 N. Y. Supp. 908, where a grantor conveyed land adjoining a lot retained by him, to a grantee, "subject, nevertheless, to the express condition that no building or edifice of any description whatsoever exceeding 8 feet in height shall at any time hereafter be erected within 32 feet of the rear line of the said two lots," and the question was whether it constituted an encumbrance upon the servient estate, it was held that the agreement was a mere personal covenant, there being no reservation in this deed of this condition to the heirs or assigns of the grantor, and its burden not being charged upon the heirs or assigns of the grantee, and, all the property having been subsequently conveyed, none of the deeds of conveyance, either by

rendering more beneficial or advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of the restriction on the use of an estate was for the benefit of another tract joining to, or in the vicinity of, the land on which the restriction is imposed, the condition annexed to the grant can have no effect or operation, either at law or in equity, beyond that which attaches to it by the rules of the common law. The benefit of the condition would, in such case, inure to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it, or any part of it, subject to the condition.<sup>46</sup> And that, if a building restriction is assumed to be in the nature of an easement imposed for the benefit of land retained by the grantor, and the land conveyed is afterwards subdivided and sold to different persons, one of the subsequent grantees cannot enforce the covenant against another.<sup>47</sup> But in a New Jersey case, it was held that a restrictive covenant could be enforced as between grantees of the covenantor, where the covenant was entered into for the benefit of the land retained by the covenantor. The court said that both parties were bound to the grantor in the original deed, in respect to the restrictive covenant. Each was subject to an easement on the other's

lot in favor of those subsequently deriving title from the covenantor, and each was equitably entitled to the advantage which the observance of this stipulation by his neighbor might be to him. If all were relieved from the encumbrance, none perhaps could complain. But to be restrained from extending his own building to the street, and to let his neighbor on each side project in front of him, would be a greater grievance to any of these lot owners than was contained in the stipulation in the deed through which he derived title.<sup>48</sup>

It has been held that a tenant in common with the grantor cannot enforce an equitable restriction in a deed by his cotenant to which he was not a party, and therefore property so conveyed is not subject to an encumbrance by way of equitable restriction.<sup>49</sup>

### III. Restrictions for benefit of land conveyed.

Another, but much rarer, class of cases in which restrictive covenants may be enforced by persons not parties thereto is that in which a vendor, instead of imposing the burden on the property sold for the benefit of that retained, reverses the servitude, laying the restriction on the land retained for the benefit of the land sold. It would seem that the same reasoning ought to apply as well in the one case as the other, and that

the parties themselves or the representatives of their estates, containing any mention or reference to the condition; and there being nothing in the history of the land itself, and the purpose to which it had been devoted, which in anywise showed that for its proper enjoyment there was any necessity that the condition should be kept alive.

<sup>46</sup> *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744.

Where the grantor, owning land on both sides of a street, conveyed land bordering on the ocean on one side of the street subject to the restriction that it should be used for boating and bathing only, and that only low bathing houses should be built, and it did not appear that he had in contemplation the division of the lot into separate parcels which would be held by different owners, or that the condition was inserted in the grant for the purpose of creating a restriction on the use of the ground as between subsequent grantees of different lots or parcels thereof, it was held that, after the lot had been so subdivided, one grantee could not enforce the restriction against another. *Ibid*.

Where the original vendee bought a number of lots in a tract of land, to be held subject to the restrictions mentioned in a plan of the estate contained in an earlier indenture, which plan was subject to such alterations as should be made and approved

by the vendor, his heirs, etc., but the vendee never intended to bind the vendor to the observance of the restrictions which he, the vendee, had entered into, and the vendee afterwards sold two of the lots subject to the restrictions entered into between the original vendor and the original vendee, and then reconveyed the balance of the land to the original vendor without any stipulations, it was held that the purchaser of two of the lots from the original vendee could not enforce the restrictions as against the purchaser of other lots in the parcel conveyed to the original vendee. *Schreiber v. Creed*, 10 Sim. 9, 3 Jur. 625, 8 L. J. Ch. N. S. 346.

<sup>47</sup> *Graham v. Hite*, 93 Ky. 474, 20 S. W. 506.

Where the restriction in a deed was, among other things, that the buildings should be set back the same distance from the street as a certain house mentioned, and the grantee afterwards sold a portion of the land to different vendees, it was held that one of these vendees could not enforce the restriction against the other, since the original vendor did not intend to subject any one of the lots into which the parcel conveyed to the original vendee was divided, to a restriction in its use for the benefit of another or others of such lots. *Ibid*.

<sup>48</sup> *Winfield v. Henning*, 21 N. J. Eq. 188.

<sup>49</sup> *Hazen v. Mathews*, 184 Mass. 388, 68 N. E. 838.



the rule should here be that such restrictions may be enforced by the grantees of the covenant against the covenantor or his grantees, but that an action may not be maintained to enforce the restriction between grantees of the servient estate. It has been held that, an owner having sold a portion of his land, covenanting that he would not permit the land retained to be used for the purpose of a tavern, public house, or beer shop, a grantee of the covenant may enforce the same against a grantee of the covenantor taking with notice;<sup>50</sup> and that a covenant in a conveyance to a vendee not to erect or suffer to be erected any structure on the street, highway, or common owned by the grantor, in front of the premises conveyed, is a covenant running with the land, and the grant is a grant of a privilege or easement, which passes to a purchaser of the land conveyed without the assignment of the covenant, and the grantee of such an easement is entitled to an injunction to restrain the owner of the servient tenement from erecting buildings thereon in violation of his covenant.<sup>51</sup>

#### IV. Restrictions for benefit of whole tract.

##### a. Where whole tract is sold.

If the vendor, upon conveying property burdened with restrictions, does not retain

any land himself, the reasons given for the rules discussed in the last subdivision of the note do not, of course, apply. What are the rights of purchasers under such circumstances, as between themselves? It has been held in England that when an estate is put up for sale in lots, subject to the condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of these restrictive covenants, to each of the other purchasers, is a question of fact to be determined by the intention of the vendor and of the purchasers, and that question must be determined by the same rules of evidence as every other question of intention. If it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter. It is not necessary that there should be any covenant by the vendor in writing or otherwise, in express terms, that each purchaser would consider himself bound to the other purchasers.<sup>52</sup> The rule as to the enforceability of restrictive covenants by purchasers

<sup>50</sup> Nicoll v. Fenning, 51 L. J. Ch. N. S. 166, L. R. 19 Ch. Div. 258, 45 L. T. N. S. 738, 30 Week. Rep. 95.

In Mann v. Stephens, 15 Sim. 377, 10 Jur. 650, a vendor, upon the sale of part of his property, bound the remainder by a restrictive building covenant. It was held that a subsequent alienee of the vendee could enforce the covenant against a subsequent alienee of the vendor.

<sup>51</sup> Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.

Evidence of a parol agreement by the common grantor of plaintiff's and defendant's lots, to the effect that no hotel should ever be built on the defendant's lot, is not competent to show a restrictive easement in the defendant's lot in favor of the plaintiff's lot, since such an easement cannot be created except by deed or by prescription, which presupposes a grant. Tibbetts v. Tibbetts, 66 N. H. 360, 20 Atl. 979.

Where, upon the conveyance of a parcel of land to the grantor's daughter, there was no agreement with her upon which she could base any right to enforce a building restriction subsequently placed upon his remaining land adjoining that conveyed to the daughter, it was held that she could not invoke the aid of equity to enforce such a restriction. Hays v. St. Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

<sup>52</sup> Nottingham Patent Brick & Tile Co. v. Butler, L. R. 16 Q. B. Div. 778, 55 L. J. Q. 37 L.R.A. (N.S.)

B. N. S. 280, 54 L. T. N. S. 444, 34 Week. Rep. 405.

That the whole of the property was not sold at once will not defeat the rights of purchasers to enforce the covenant between themselves. Lapse of time is a matter to be taken into consideration, but it is not a bar. *Ibid*.

Restrictive covenants may be enforced between purchasers, although the original vendor sold the whole of the tract. *Re Birmingham & District Land Co.* [1893] 1 Ch. 342. Stirling, J., said: "It is a question of fact [to be decided from all the circumstances of the case] whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection; or are meant by him and understood by the buyers, to be for the common advantage of the several purchasers." The contention was that, the vendor having retained adjacent lands, restrictive provisions in the deeds to vendees of the smaller tract of land must be taken to have been introduced for the protection of the property held by them, instead of the remaining lands of the tract put up for sale. This was a case under the vendor and purchaser act of 1874, raising the question of the right of the purchaser of a part of a tract of land to have restrictive covenants similar to those in his deed inserted in the deeds of the lots of the remainder of the tract.

between themselves is applicable to a case where the vendor is really desirous of selling the whole of the property, though not of selling the whole at one and the same time.<sup>53</sup> And the facts that the restrictive conditions are different as regards different lots, and that there is more than one property put up for sale, and that some of the lots are free from conditions, that some of the lots were first put up for sale subject to conditions, and were afterwards sold free from conditions, will not prevent one purchaser, even though he has bought part of his land free from restrictions, from enforcing covenants as against another purchaser.<sup>54</sup>

#### *b. Mutual covenants.*

If the grantor and grantee mutually bind themselves to observe the restrictions, then the covenants or agreements are enforceable by the grantees of each,<sup>55</sup> whether they be prior or subsequent purchasers. So, it has been held that where the grantor cove-

nants with the purchaser of one of several lots in a tract, that he will include certain building restrictions in deeds of the other lots, subsequent purchasers of such lots may enforce such restrictions against one of such grantees who violates them.<sup>56</sup> And where the vendors agreed that the vendee should secure to him, for the benefit of his lot, a certain right or easement of light in, and prospect over, a strip of land bordering on the street, the vendee at the same time stipulating with them to leave a strip of a lot purchased by him of the same width free from obstruction for the benefit of others who might build on the street, and the vendors afterwards sold a parcel of the tract of land to another, and inserted such a covenant in the deed, the subsequent vendee having notice of the agreement with the first vendee, it was held that the agreement was one enforceable in equity in favor of the vendee of the first parcel, against the vendee of the other. The court said it was one of the cases in which equity would charge the conscience of the grantee of the

<sup>53</sup> *Collins v. Castle*, L. R. 30 Ch. Div. 243, Kekewich, J., said: "It seems to me that to narrow the doctrine to a case where all the property is put up for sale at once, by one auction, according to one scheme, once and for all determined, never to be departed from, would be to narrow the doctrine far too much, and to give it a restricted application which can never, I think, have been intended."

<sup>54</sup> *Collins v. Castle*, supra. The vendors in this case put up for sale at auction part of a tract of land, one of the conditions of the sale as to some of the lots being that the purchasers were to enter into certain restrictive covenants with the vendors similar to restrictions imposed upon a part of the estate previously sold. Other lands were to be burdened with different restrictions, and some of the lots were to be sold free from restrictions. Afterwards, the unsold lots and another piece of land composing the rest of the estate were sold, some with building restrictions, and some without any restrictions as to building. It was held that the restrictions imposed were for the common benefit of the purchasers and enforceable between themselves.

<sup>55</sup> Where the covenants are mutual, there is no difficulty in dealing with the question. "Thus," said the court in *Coughlin v. Barker*, 46 Mo. App. 54, "where the owner of a particular piece of land on which a row of houses is intended to be built executes a deed reciting that it has been laid out, and is intended to be dealt with in a particular manner, and declares that it shall be a general and indispensable condition of the sale of all or of any part of the land, that the several proprietors, for the time being, shall observe and abide by the several restrictions and stipulations therein contained, and that he, himself, will at all times ob-

serve the like restrictions and stipulations; and these restrictions and stipulations are also enforced by mutual covenants; although the question may afterwards arise between subsequent purchasers of different portions of the land, one of the subsequent lot owners will be bound, and another will be entitled to enforce the covenant."

A court of equity will restrain the violation of a covenant entered into by a grantee, restrictive of the lands conveyed, not only against the grantee covenantor, but against all subsequent purchasers with notice of the covenant, whether it runs with the land or not. There is, however, this distinction: The original grantor, in imposing the covenant upon the grantee, either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee to whom he may subsequently convey the whole or part of the remaining lands. *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111.

In *Coles v. Sims*, 5 DeG. M. & G. 1, 2 Eq. Rep. 951, 23 L. J. Ch. N. S. 258, 18 Jur. 683, 2 Week. Rep. 151, the rule was recognized that where the vendor and vendee bound themselves by mutual restrictive covenants, the grantee of the vendor may enforce the same against the grantee of the vendee having notice of the same.

It seems that an agreement between the vendor and vendee, to leave a plot of land open for the common advantage of both parties, would be enforceable by subsequent holders of the title of either party as between themselves. *McLean v. McKay*, L. R. 5 P. C. 327, 29 L. T. N. S. 352, 21 Week. Rep. 798.

<sup>56</sup> *Hutchinson v. Ulrich*, 145 Ill. 336, 21 L.R.A. 391, 34 N. E. 556.

land with an agreement relating to the land, although the agreement neither creates an easement nor runs with the land.<sup>57</sup> In a much-cited New York case, there were mutual building restriction covenants entered into between adjoining owners by which they bound themselves, their heirs and successors, and all persons who might thereafter become interested in the lands, to the observance thereof. The question in the case was whether a vendee of one of the original owners was bound by the restriction, and it was held that the restriction was enforceable against such vendee, the court recognizing the doctrine that the vendees of the other party would have been likewise bound by the reciprocal obligation. The court said that upon the breach of such a covenant it would be enforceable by the owner of the dominant tenement at the time of the violation of the covenant.<sup>58</sup>

And where the plaintiff and defendants each entered into restrictive building covenants with their common vendors, but in

neither the conveyance to the plaintiff nor in that to the defendant did the vendors enter into any covenant that if they themselves built, they would observe these covenants, or that if they sold the land for building purposes, they would cause the purchasers to enter into similar covenants, the plaintiff's right to enforce the covenant was regarded as so doubtful that his bill was dismissed.<sup>59</sup>

Mutual restrictive covenants may be entered into by grantors and grantees, or by owners of different tracts or lots of land for their mutual benefit; and in the latter case it would seem that the same rule as to their enforceability by the subsequent owners of the property not parties thereto should prevail as in the former. It has been held that where the owners of different lots enter into a covenant for a building restriction, and it appears that the intention of the parties was that their respective promises should be for the benefit of the promisees as owners of the neighbor-

<sup>57</sup> *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206. The jurisdiction of courts of equity over contracts and covenants is not confined to cases where the action at law can be maintained, but extends to cases where the action at law is not maintainable. Covenants controlling the enjoyment of land, though not binding at law, will be enforced in equity, provided that the person into whose hands the land passes has taken with notice of the covenants.

A land company, having opened up a tract of land, sold a lot, the deed containing the following provision: "It is mutually agreed by and between the parties hereto, as and for a part of the consideration heretofore mentioned, that the premises hereinbefore described are conveyed subject to the following covenants, conditions, and restrictions, which shall be binding upon the parties hereto, their heirs, successors, and assigns," etc. Among the covenants was one that the premises should be used for residential purposes only, and another that similar covenants and conditions and restrictions should be contained in all the conveyances of property in the tract. The lot was afterwards conveyed to the defendant by a deed without restrictions, the defendant having notice of the restrictions in plaintiff's deed, and the defendant began the erection of a church. An injunction was upheld. *Hisey v. Eastminster Presby. Church*, 130 Mo. App. 566, 109 S. W. 60.

<sup>58</sup> *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615. It was said that had the covenantees parted with their title, it might be questionable whether they could maintain the action. The right, it was said, exists for the benefit of the owners of the lands for the time being, and it may be waived or released by them; and the court thought that they would be the proper parties to bring the action.

<sup>59</sup> *L.R.A. (N.S.)*

In *Raynor v. Lyon*, 46 Hun, 227, the owner of a block of land cut it up into lots, and sold each lot subject to a covenant against the use of the same for the carrying on of any offensive trade. The question in the case was whether the subsequent owner of two of the lots could convey title free from the restriction, and it was held that he could not, notwithstanding that these lots had been conveyed back to the original owner without reserving such restrictions. It was held that the stipulations in the original deeds, while made with the original grantor, were manifestly for the benefit of whoever should become owners of the other portion of the block, and that it was not in the power of the original grantor to release the lots from the burden of this restriction.

The express language of a covenant to the original owners being "as well for their own use as for the use of each and all persons who may purchase or derive title through or from them to any part of the tracts of land laid down on the aforesaid map," being the map described in said deeds, and the further language of the covenants being that it shall "inure to the benefit of parties of the first part, and each of them, and of their grantees, who may at any time own any of the land laid down on said map, and may be enforced by any of them by action, injunction, or otherwise," it is enforceable by any of the owners of land thereon, upon the theory that there is a mutuality of covenant and construction which binds each, and gives to each the appropriate remedy. *Coates v. Cullingford*, 131 N. Y. Supp. 700.

<sup>59</sup> *Child v. Douglas*, 2 Jur. N. S. 950, 1 Kay, 575, 5 De G. M. & G. 739, 2 Week. Rep. 701.

ing land, and of the subsequent owners of such land, they are enforceable in equity by such subsequent owners, and it is not necessary that the owner himself should have been the promisee.<sup>60</sup>

Agreements relating to uniform building schemes really belong to this class of covenants or agreements. This, however, has been doubted in an English case, on the ground that mutuality cannot exist under certain circumstances, between prior and subsequent purchasers.<sup>61</sup> But the mutuality referred to is not the mutuality between prior and subsequent purchasers, but mutuality between the seller and his purchasers, which the purchasers may take advantage of through the reciprocal obligation of their vendor.

<sup>60</sup> *Codman v. Bradley*, 201 Mass. 361, 87 N. E. 591.

In *Kountze v. Helmuth*, 67 Hun, 343, 22 N. Y. Supp. 204, the question was whether restrictive agreements were an encumbrance upon land, so that the vendor could not give a clear title. In this case tenants in common owning a block of land entered into a building restriction agreement, and afterwards the owners of the block entered into another agreement as to a uniform building line, it being agreed that the covenant should run with the land and be binding on all future owners, and that all deeds executed by the parties of any of the lots should be made subject to the conditions of the agreement. The court said that the covenants in each of the agreements constituted reciprocal easements, to which subsequent grantees became entitled, and by which they were bound.

<sup>61</sup> *Elliston v. Reacher* [1908] 2 Ch. 374. Parker, Judge, said that in his opinion the implication of mutual contract is not always a particularly satisfactory explanation of the equity arising out of purchasers under a building scheme as to an enforcement of restrictive covenants. That this may be satisfactory where all the lots are sold at auction at the same time, but that where the sales are private and at various intervals, the circumstances may, at the date of one or more of the sales, be such as to preclude the possibility of any actual contract. "For example," said he, "a prior purchaser may be dead or incapable of contracting at the time of a subsequent purchase, and in any event it is unlikely that the prior and subsequent purchasers are ever brought into personal relationship, and yet the equity may exist between them." He said that it was enough that a community of interests imports in equity a reciprocity of obligation, which is in fact contemplated by each at the time of his own purchase.

<sup>62</sup> A class of cases in which equity has given relief embraces those involving restrictive covenants entered into with the original owner or owners of the tract, in pursuance of a general plan for the development and improvement of the property by lay-

### c. Building scheme.

The most familiar cases in which courts of equity have upheld the right of owners of land to enforce covenants to which they were not parties are those in which it has appeared that a general building scheme or plan for the development of a tract of property has been adopted, designed to make it more attractive for residential purposes by reason of certain restrictions to be imposed on each of the separate lots sold.<sup>63</sup> This forms an inducement to each purchaser to buy. It may be assumed that he pays an enhanced price for the property purchased. The agreement therefore enters into and becomes a part of the consideration. The buyer submits to a burden upon his own land,

ing it out in streets, avenues, and lots, adopting some uniform settled building scheme regulating the number, location, size, or style of house, or the use to which the buildings or property may be put. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

Restrictive covenants in deeds to grantees of a residential section of a city inure to the benefit of all the owners. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820.

If no uniform scheme of improvement is adopted when a tract is divided into lots and sold to various persons, the restrictions in the several deeds are not enforceable by the grantees as between themselves. *Schubert v. Eastman Realty Co.* 25 Ohio C. C. 336.

Where the defendant's grantor acquired title from the common grantor of all the property, in a certain lot subject to a building line restriction of which he had notice, it was held that the covenant was enforceable by an opposite owner acquiring title from the common grantor. *Francis v. Ziering*, 128 App. Div. 253, 112 N. Y. Supp. 647.

When an owner of a tract of land lays it out into streets and lots, and adopts a restrictive covenant with reference to the location and use of buildings to be erected on the lots, with a view to secure the defined conditions named in the covenant for the benefit of the entire tract which he seeks to develop, and inserts the covenant in all deeds as a part of the defined scheme, and as an exaction from all purchasers for the benefit of each purchaser, the equitable right to enforcement of the covenant inures to each purchaser irrespective of the time of his purchase. *Bowen v. Simth*, 76 N. J. Eq. 456, 74 Atl. 675.

If building restriction covenants were intended solely for the benefit of the grantor, subsequent grantees of the original grantee cannot take advantage of them; but if they were intended for the common advantage of all persons purchasing lots from the original grantee, such purchasers and their assigns may enforce them *inter sese* for their own benefit. *Peabody Heights Co. v. Willson*, 82 Md. 186, 36 L.R.A. 393, 32 Atl. 386, 1077.

because of the fact that a like burden imposed on his neighbor's lot will be beneficial to both lots. The covenant or agreement between the original owner and each purchaser is therefore mutual.<sup>63</sup> Under such circumstances the question of priority of purchase does not affect the right, as between the different owners of the separate portions of the tract sold, to enforce the agreement as between themselves. Cases in this country and England therefore uphold the doctrine that,

A building association having adopted a plan to maintain a uniform system of building and improvement, and inserted restrictive building covenants in its deeds, for the purpose of carrying out such plan, it was held that one lot owner could enforce such covenant against an adjoining lot owner. *Newbery v. Barkalow*, 75 N. J. Eq. 128, 71 Atl. 752.

Where a tract of land is subdivided into lots, and these lots are conveyed to separate purchasers subject to conditions that are to operate as inducements to the purchase, and to give to each purchaser the benefit of a general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee which he may enforce against any other grantee. *Sharp v. Ropes*, 110 Mass. 381.

The initial inquiry in every such case is whether the building restriction sought to be enforced was imposed upon the lot owned by the defendant for the benefit of the lot owned by the plaintiff. If this inquiry is answered in the negative, all other questions must be laid out in view. *Coughlin v. Barker*, 46 Mo. App. 54.

The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan by which all property is to be subjected to the restricted use being carried out, and that, while he is bound by and observes the covenant, it would be inequitable of him to allow any other owner of lands subject to the same restrictions to violate it. *De Gray v. Monmouth Beach Club House Co.* *supra*.

<sup>63</sup> In *Tallmadge v. East River Bank*, 26 N. Y. 105, a case much cited on this point, the question was whether a building line restriction in a plan under which property was sold was binding on a subsequent purchaser with notice, of one of the lots sold subject to the plan, and in holding that it was, the court said: "It is probable that the equity arising from the circumstances and assurances under which the lots were sold and conveyed . . . was mutual, as between . . . [the grantor] and his grantees respectively; and hence, that it would be easy to show that the equity was mutual as between his grantees, without regard to priority of conveyances, so that the equity would or might exist in favor of a 37 L.R.A. (N.S.)

although the legal title be absolute and unrestricted, yet the owner may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice.<sup>64</sup>

As pointed out in the *Monmouth Beach*

subsequent grantee against a prior grantee, as well as in favor of a prior grantee against a subsequent grantee; but it is unnecessary in this case to examine or decide that question."

<sup>64</sup> *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661, 43 N. E. 173.

Where there has been an actual execution of a plan and common understanding with reference to the establishment of a building line for the improvement of a street, and it has been exactly conformed to and observed in good faith for many years, large investments having been made by the lot owners in reference thereto, the rights of all of the owners should be regarded as being as clear and certain as their legal rights would have been, if all had covenanted with each other before any building was erected, that such plan should be conformed to in building. *Maxwell v. East River Bank*, 3 Bosw. 124.

In *Spicer v. Martin*, L. R. 14 App. Cas. 12, Lord Macnaghten said, *obiter*: "If the site of the houses now known as Cromwell Gardens had been put up for sale by auction, in building lots according to a plan, . . . and if the conditions of sale had prescribed that houses should be built such as those which have actually been erected, and that every purchaser should bind himself by a covenant in the terms of the restrictive covenant now in question, no one, I think, could have doubted that each purchaser would, as against the vendor, and as against every copurchaser, have had a right to the benefit of the covenant, although there might have been no direct stipulation to that effect, and no express provision for mutual covenants by the purchasers *inter se*."

In *McDougall v. Schneider*, 134 App. Div. 208, 118 N. Y. Supp. 861, the owner of a large tract of land divided into blocks and lots, and caused a map of it to be recorded, printed copies of the map containing these words: "This property when sold is restricted, that making it a first-class residential locality." He thereafter sold the entire tract in separate parcels to various persons, each of the deeds, except those on a certain avenue, containing uniform restrictions, and providing that the covenants should run with the land until a certain date. It was held that the covenants were entered into with a design to carry out a general scheme for the improvements or development of the property, because of the statement contained in the printed copies of the maps, and because of express pro-

Club House Co. Case,<sup>65</sup> which is the leading authority on the question in this country, the equity in this particular class of actions is dependent as much on the existence of the general scheme of improvement or development, as on the covenant,—a very important consideration in a case in which the question arises whether certain acts are in violation of the covenant, if any ambiguity exists as to its scope and meaning. And, as before stated, courts of equity, in relation to restrictions which contemplate a general building plan for the common benefit of purchasers of lots, recognize and enforce them at the instance of the original grantor or subsequent purchaser of lots, on grounds independent of legal liability.<sup>66</sup>

The rule laid down for such cases in the leading case just referred to <sup>67</sup> is that where there is a general scheme or plan adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and which contemplates a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction, to be inserted in each deed to a purchaser; and it appears by writings or by the circum-

visions in each deed making the covenants applicable to all of the property shown on the map, whether they were included in the particular conveyance or not, and because of the declaration with reference to the continuance of the covenant. It was also held that the covenant could be enforced by any of the owners of the land shown on the map, upon the theory that there was a mutuality of covenants and consideration which bound each and gave to each the appropriate remedy.

Where the grantor conveyed land bounded on a strip of land intended for street purposes, and covenanted among other things that the grantee should have the benefit of the grantor's interest on condemnation, it was held that the covenant ran with the land, and that the grantee's heirs were entitled to the entire condemnation money when the strip was appropriated by a city for street purposes. *Cincinnati v. Springer*, 23 Ohio L. J. 250.

<sup>65</sup> 50 N. J. Eq. 329, 24 Atl. 388.

<sup>66</sup> *Trout v. Lucas*, 54 N. J. Eq. 361, 35 Atl. 153.

<sup>67</sup> *DeGray v. Monmouth Beach Club House Co.* *supra*.

<sup>68</sup> Where the owner divides a tract of land into building lots, and as a part of a general scheme for its improvement inserts in the deeds of sale of all the several lots uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees, who may enforce them in equity, each for himself against the others. *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628.  
37 L.R.A. (N.S.)

stances that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof; and the covenants are actually inserted in all the deeds for lots sold in pursuance of the plan,—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant was part of the subject-matter of his purchase.<sup>69</sup> But in order that one purchaser may enforce a restrictive covenant against another, on the theory that the parcel granted was sold according to a scheme or plan, there must have been a definite scheme adopted by the vendors, that each lot should be subjected to the covenants sought to be enforced.<sup>70</sup>

In considering the effect of the existence of a building plan or general scheme of development upon the rights of the parties, it must be borne in mind that the problem presented is: What was the intention of the parties? This is ascertained by the evidence presented. The plan or scheme furnishes evidence of this intention. As was said by Collins, L. J., in an English case:<sup>70</sup> "Where a vendor sells land and retains other land, and imposes on the purchaser a covenant, it becomes a question of fact what

When restrictions inserted in a deed of a particular lot are part of a general scheme for the benefit and improvement of all the lands included in the larger tract, a grantee of any part of the land may, under proper circumstances, enforce them against his neighbor. *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691.

<sup>69</sup> *Tucker v. Vowles* [1893] 1 Ch. 195, 62 L. J. Ch. N. S. 172, 3 Reports, 107, 67 L. T. N. S. 763, 41 Week. Rep. 156. It is not enough that the vendor contemplated selling an estate in building lots, and that the lots should be sold substantially according to a plan deposited with a sanitary authority, and that he contemplated that houses should be erected of a residential character of not less than a certain value, and that as to many of the lots there should be more or less restrictive covenants, probably in many cases like the covenant sought to be enforced.

<sup>70</sup> *Nalder & C. Brewery Co. v. Harman*, 83 L. T. N. S. 257.

In *Mackenzie v. Childers*, L. R. 43 Ch. Div. 265, the matter was stated like this: "The question in this case is simply whether the vendors of land laid out upon a building scheme have covenanted or agreed, expressly or by implication, with the plaintiffs, who are purchasers of part of the land under that scheme, not to authorize other purchasers to use the rest of the land in violation of the building scheme. If they have so contracted, either by negative words or by affirmative words which imply a negative, there is no doubt the court would restrain them from breaking such contract."

the effect of that covenant is. That being a question of fact, it must be decided in the light of evidence, as are all other questions of fact. But if you find that a building scheme exists, proof of that building scheme may be given. It is only a matter of evidence, and it is perfectly competent to prove by other evidence, if you can find it, whether or not the building scheme applies. So, it has been held that it is not necessary that there should have been a general plan in order to make such agreements enforceable between subsequent grantees.<sup>71</sup> The court said that it is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in the plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which the sales were made; but the fact of the alleged terms is as effective when proved by a single deed, as when proved by a plan.

The plan furnishes a very strong inference that it was the intention to make the restrictions specified mutually binding on each purchaser of a lot in the plot included therein,<sup>72</sup> but it is not necessarily conclusive. If, from all the evidence,—the map, the advertisements, the covenants in the deeds themselves,—the uniform scheme of development or improvement is proved to

have been the intention of the parties, equity will carry it out at the suit of any of the lot holders, provided, of course, he has not by his own conduct shut the doors of the court. So, where the owner of a tract of land sold a part of it to one person, the vendor binding the land retained by certain restrictions, and thereafter sold a part of the remaining land to another, imposing certain restrictions as to the sale of liquors and to the carrying on of manufacturing, and there were no corresponding covenants by the vendor as to the remainder of the estate, nor any reference to any building scheme, and the vendor afterwards conveyed two other parts of the estate to others, and then put up the remainder at auction by sale plan, the plan referring to the part of the estate previously sold, the stipulations of the sale providing among other things that no building which might be erected on any lot should be used for the sale of beer, wine, or spirits, it was held that the assignees of purchasers at the auction could enforce the restriction as to the sale of liquors in a deed to a second purchaser, on the theory that the latter bought under a building scheme affecting the whole estate, all the sales, both those before and at the auction, being part of one transaction.<sup>73</sup> And in a case in which a vendor desiring to build a row of houses in the

More frequently a purpose to make the restriction reciprocal and binding upon all persons who should buy lots in the vicinity, from the vendor, is inferred from the circumstance that a building plan had been devised and declared by him on a recorded plat of a tract, or publicly announced when lots in the tract were sold at auction, or made known to a private buyer. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547.

<sup>71</sup> *Clark v. Martin*, 49 Pa. 289.

<sup>72</sup> Where the grantors of a tract of land, by uniting in a scheme or joint enterprise for the division of the estate into lots or parcels on a street or court laid out by them, and by annexing to the conveyance of each lot a restriction on its use, by the observance of which each parcel would be occupied for a similar purpose with every other, the legal inference is, in the absence of any evidence to the contrary, that the intention was to secure the specific mode in which the adjoining premises were to be improved and occupied, and the effect of such a restriction is to confer on each owner a right or interest, in the nature of a servitude, in all lots situated on the same street which were conveyed subject to the restriction. *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632.

Questions as to the right of persons not parties to covenants and agreements of this character, to enforce them, have arisen under various conditions. In some cases there has been the general plan or scheme, where 37 L.R.A. (N.S.)

each party has bought with reference to the general plan, and the agreement entered into the purchase of each piece of property, and in such cases the agreement has been enforced between grantees. Where land is sold in lots or parcels, and agreements are made with each purchaser creating a building line, the inference is that the agreement was intended for the common benefit of all the purchasers. That intention is manifested by the character of the transaction, and each may enforce the restrictive agreement against the others. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 32 N. E. 1040.

<sup>73</sup> *Nalder & C. Brewery Co. v. Harman*, 83 L. T. N. S. 257.

A building and trade restriction in the original deed, put in all subsequent deeds to purchasers of lots in a tract of land, which deeds were made subject to such restriction, is sufficient evidence of the general scheme for the improvement and benefit of all of the lands included in the tract, and this gives the grantee of any part of the land the right to enforce the restriction against his neighbor. *Tobey v. Moore*, 130 Mass. 451.

Where a corporation owning a tract of land caused the same to be divided into lots, streets, avenues, and parks, and agreed to a plan to be placed on the market for sale, in the form of a deed prepared by the company and used by it in the conveyance of each of such lots, each lot being restricted to use for residential purposes, it was

shape of a crescent, and wishing to secure uniformity in the buildings, expressly declared "that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row, that the several proprietors of such land, respectively, for the time being, should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars;" and then mutually covenanted with intending purchasers with reference to certain building restrictions for the purpose of effectuating, establishing, and rendering perpetual the plan designed; and the purpose aforesaid, the restriction as to the use of the property, was enforced in favor of the purchaser of one of the lots against another.<sup>74</sup> And where the owner of a tract of land opens a street and avenue, as well as lots on each side of the street, inserting

a building restriction in each of the deeds for the benefit of the property, it was said that such restrictive covenant will be enforced in equity, not only against the original grantee, but also against all subsequent purchasers with notice, in favor of the original grantor with whom it was made, and all subsequent purchasers of the lots to be benefited by it.<sup>75</sup>

But it was held that a general plan for the development of a tract of land was not shown where there was no map of the lots showing the restriction sought to be enforced, and no proof of any action of the common grantor indicating a decision on his part to develop the land on a uniform plan, of which the covenant in the deed by the common grantor to the defendant's predecessor in title formed a part,<sup>76</sup> and that a general scheme or understanding that all lands platted in a tract should be sold for residential purposes is not shown where

held that the restrictions were inserted for the benefit of purchasers who took deeds subject to these conditions and restrictions, and for the benefit of all the grantees of such purchasers, and that therefore the restrictions could be enforced in equity by and against such grantees. *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122.

<sup>74</sup> *Whatman v. Gibson*, 9 Sim. 106.

Where a city divided a tract of land which it owned into a number of building lots, according to a recorded plan, and sold two of the lots to grantors of the plaintiff and defendant, each of the deeds containing, among other restrictions, certain restrictions with reference to buildings, and the city at other times conveyed away all of the remaining lots shown on the plan for the general improvement of the neighborhood and for the benefit of all purchasers of the lots, it was held that the restriction was enforceable in equity by one of the purchasers against the other. *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. 684.

<sup>75</sup> *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.

Building line covenants made for the benefit of land laying on both sides of the street are enforceable by the owners of any of the lots for the benefit of which the covenants were made. *Bradley v. Walker*, 27 Jones & S. 334, 14 N. Y. Supp. 315.

Where the defendant's predecessor in title bound himself to the observance of a building restriction, as part of a building scheme, for the benefit of each estate affected by it, the agreement is enforceable by the grantee of a part of the land entitled to the benefit. *Payson v. Burnham*, 141 Mass. 556, 6 N. E. 708.

In *St. Andrews's Lutheran Church's Appeal*, 67 Pa. 512, a covenant between the grantor and grantee upon a sale of contiguous lots, that such lots should be subject to the restriction that none of them should be used for purposes other than a 37 L.R.A. (N.S.)

dwelling house, etc., was enforced in favor of the owner of one of the lots against the owner of another attempting to build a church thereon.

<sup>76</sup> *Roberts v. Scull*, supra.

The fact that the same restrictions were imposed upon a number of lots is not sufficient in itself to show that there was any general plan of improvement. *Haines v. Einwachter*, — N. J. Eq. —, 55 Atl. 38.

In the absence of proof of a general plan or scheme for the improvement of property, a restrictive covenant made by the former owner cannot be enforced by the subsequent grantee of the covenantee. *Ibid*.

Where a proprietor laid out a tract of land into a number of building lots, it was held that a general scheme or plan to convey the lots subject to certain restrictions was not shown where several of the deeds contained no restrictions, and where no two of the deeds contained the same restrictions. *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965.

*Sheppard v. Gilmore*, 57 L. J. Ch. N. S. 6, 57 L. T. N. S. 614. A restrictive covenant not to alter the front of a house was said not to be enforceable by the purchaser of another house in the same row, on the theory that the houses were erected in accordance with a certain plan. It was urged that the plaintiff and each purchaser of a house in the block signed the same plan, and the court said that if that had been proved, it would indeed have gone a long way, even if it would not have been entirely conclusive as to the question whether the restrictive covenants were intended to be for the benefit of the purchasers, or simply for the benefit of the vendor. But the plan was not offered in evidence, and there was no plan referred to in any of the deeds put in evidence, and the court could not infer that it was the same plan to which each purchaser referred in the covenant into which he entered.

The facts that a plan of a tract of land was prepared by the vendors chiefly for the



the plat itself attached to the dedication deed indicates nothing but a division of the land into lots, upon which land is a dedicated street and park, the dedication deed itself containing no allusion to such restriction, and the method of selling the land not showing uniformity in the matter of restriction.<sup>77</sup> Likewise, in a Missouri case, where the plaintiff was endeavoring to enforce a building restriction against the owner of another lot on the same tract, and the deed by which the plaintiff held contained such a restriction, but it did not appear that it made any reference to any similar building restriction in any other deed from the common grantor, or that the deed under which the defendant claimed, or any other deed of the common grantor

containing similar restrictions, referred to the fact that similar restrictions had been imposed upon the grantees of other parcels, it was held that the deed failed to afford intrinsic evidence of the general scheme of improvement, and the fact that grants were made of intervening parcels, by deeds containing no such restrictions, was held to negative the conclusion that there was, at the time when the deed under which the defendant claimed was made by the common grantor, such an established or matured scheme.<sup>78</sup>

Uniformity in the restrictions imposed on the lots sold is one of the strongest proofs of the existence of a building scheme. Consequently, any deviation as to restrictions imposed on any of the grantees is at once

purpose of being submitted to a sanitary authority, in order to obtain its consent to the laying out of an estate, and that the solicitor of the grantors had, for his own purposes, a smaller portion of the plan hanging up in his office, indicating generally that houses were to be erected on each plot except one, and that he had a printed form of conditions for his own convenience, are not sufficient to show a general building scheme, within the rule that such a scheme affords purchasers, as between themselves, the right to enforce restrictive covenants, where the sales were not at public auction, or where the plots were not put up together as a whole, or offered simultaneously to the public, and there were no printed conditions, and no conditions of any kind were circulated amongst the public or amongst the subsequent purchasers of different lots, which were held out or treated as applicable to the whole estate, and there were no representations of any kind on the part of the vendors to any purchaser, that the estate or the buildings marked out on the plan was, or were, to be bound by any conditions. *Tucker v. Vowles* [1893] 1 Ch. 195, 62 N. J. Ch. N. S. 172, 3 Reports, 107, 67 L. T. N. S. 763, 41 Week. Rep. 156.

<sup>77</sup> *Hemsley v. Marlborough Hotel Co.* 62 N. J. Eq. 164, 50 Atl. 14.

Where an improvement company sold several parcels of land, the deed containing a restriction as to building and the use of the property, and the purchaser afterwards sold one parcel to another person with the same restriction, and the purchaser objected to the title on the ground that the premises would be subject to the restriction, it was held that the title was free from the encumbrance, the improvement company having conveyed other lots on the same tract to other purchasers without restriction, the lots not having sold pursuant to a general scheme for the improvement of the land, and there being nothing to show that the land retained was to be subject to any easement, so as to make the restriction enforceable by subsequent purchasers between themselves, and it appearing from other facts that none of the grantors through

whom the title ran could enforce the restriction. *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298.

Where the commonwealth was the owner of a large tract of land, and divided it up into lots, and prepared a plan of the tract, and adopted a general form of deeds to be given to all purchasers, but there was no uniformity in the deeds actually given, and it assumed the right of changing the conditions and restriction in the deeds to different purchasers, and in many of its deeds it had inserted a form of restriction which permitted the purchaser to erect private stables, it was held that a restriction in one of the lot owner's deeds, that no building erected on the premises should be used as a stable, could not be enforced by another lot owner having such a restriction in his deed, it appearing that most of the lots on a certain street, including those of the parties to the suit, were sold by the commonwealth at public auction at different times, and that prior to such sale a catalogue describing the lots were published containing a note stating that it was understood that the commonwealth would not enforce the stipulation and agreement of the deed that buildings erected should not in any event be used as a stable. *Beals v. Case*, 138 Mass. 138.

<sup>78</sup> *Coughlin v. Barker*, 46 Mo. App. 54.

Where the common grantor was at the time the owner of all the land on either side of a street between certain limits, and at the date of the plaintiff's deed had sold nearly all of it, it was held that no general building scheme was shown where four of the conveyances contained no restrictions whatever. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938.

A general plan or scheme for the benefit of all purchasers of lots on the same street, as shown by a recorded plat, does not appear from the fact that most of the lots are sold subject to the same restrictions as to the building line, where no restrictions are shown by the plat, and none are imposed on some of the lots first sold, while purchasers of some of the other lots have violated the restrictions upon them, and such vio-

seized upon as a defense to an action to enforce the covenants or agreements, on the theory that a general plan of improvement is not shown. There may, however, be departures from the usual restrictions in individual cases, without destroying the integrity of the scheme of development as a whole. So it has been held that the fact that a portion of the conveyance does not contain the restrictions contemplated in the general plan will not defeat the same. Although some of the lots may have written restrictions imposed upon them, and others not, if the general plan has been maintained from its inception, if it has been understood and relied on and acted upon by all in interest, it is binding and enforceable on all *inter se*.<sup>79</sup>

And it has been held that a general building scheme does not necessarily fail where it was the original plan to exclude everything from the lots sold except residences, because the owner has sold some of the lots without restrictions, the lots having passed into the hands of persons who have continued to observe the original provisions.<sup>80</sup> The fact,

however, that a particular lot or portion of the tract sold may be unfit for the particular use to which it is restricted, has been held to be no reason why the restriction should not be enforced at the suit of another lot holder.<sup>81</sup>

It is no doubt possible that a general building scheme may be negated by particular words or clauses in the agreements or covenants, or by special reservations indicating a contrary intention; but it would seem that the intention to negative should be clear. Where the intention of the owners of a plot of land was otherwise clear, that, so far as the various lots of the tract were sold subject to common restrictions, such restrictions should inure to the benefit of all the lots so sold, it was held that this intention was not negated by the fact that the vendors reserved the power of sanctioning a hotel, tavern, public house, or manufactory on any lot, provided that, as to any portion of the estate not disposed of by the vendors, they reserve the power to deal with the same without reference to and independently of the restrictions.<sup>82</sup>

lations have not been resisted by other purchasers. *Summers v. Beeler*, 90 Md. 474, 48 L.R.A. 54, 78 Am. St. Rep. 446, 45 Atl. 10.

Where a parcel of land is conveyed subject to a building restriction, and there is nothing to show that the restriction was part of a general plan for the benefit of land thereby granted, or other property on the same street, or was inserted for the benefit of the grantee or his assignees, or was repeated in any grant or covenant executed by subsequent grantees of subdivisions of the same lot, or either of them, the subsequent purchasers have no more right in equity than in law to enforce restrictions between themselves. *Dana v. Wentworth*, 111 Mass. 291.

<sup>79</sup> *Allen v. Detroit*, — Mich. —, 36 L.R.A. (N.S.) 890, 133 N. W. 317.

In *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369, the complainant and defendant held title under conveyance from a land company, each to a lot forming part of a large tract laid out in streets and avenues for the purpose of sale and improvement, which imposed certain building restrictions. It was held that the complainant could enforce restrictions against the defendant, although the building line restriction on the street on which complainant's and defendant's property was located was varied in the case of one lot, made necessary by its situation with reference to property not owned by the company, and although different building lines were adopted on different avenues.

Where the building line established by the covenant was 20 feet from the street, the fact that the corner lot was conveyed with the restriction to only 10 feet does not militate against the view that the restrictions raised

in the deeds were in pursuance of a general scheme or improvement of the property. *Coates v. Cullingford*, 131 N. Y. Supp. 700.

That the restrictions as to the corner lots of a tract of land differ somewhat from the restrictions as to the other lots on the tract will not prevent their enforcement by lot owners as between themselves, on the theory that the restrictions are not uniform. *Isham v. Matchett*, 18 Ohio C. C. 338, 10 Ohio C. D. 267.

<sup>80</sup> *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601.

<sup>81</sup> In *Hall v. Wesster*, 7 Mo. App. 56, where a land association divided a tract of land into lots, and sold them with a common restriction clause containing, among other things, a provision that the premises should not be used for a milk dairy, one of the purchasers was allowed to enforce the restriction against another establishing a cow stable quarter of a mile away from the premises of the plaintiff. The fact that the land on which the cow stable was erected was unfit for residential purposes was held to be immaterial, as the grantor and all the purchasers of the land were bound to observe the stipulations in their deeds in favor of the other grantees of the land in the same tract.

<sup>82</sup> *Elliston v. Reacher* [1908] 2 Ch. 374, 77 L. J. Ch. N. S. 617, 99 L. T. N. S. 346, affirmed in [1908] 2 Ch. 665.

In *Mackenzie v. Childers*, L. R. 43 Ch. Div. 265, a building scheme had been carefully elaborated and embodied in an estate plan, the deeds to the purchasers reciting that some purchasers had already bought lots according to this scheme, and that "it is intended" not only that the actual purchasers should execute it, but that it should "be a part of all future contracts for sale

An action to enforce the restrictions is not, of course, maintainable between purchasers not parties, if it appears that the original plan has been abandoned without dissent, or the character of the neighborhood has so changed as to defeat the purpose of the covenant, and thus render its enforcement unreasonable;<sup>83</sup> but the effect of such circumstances on the right to enforce the restrictions is not considered in this note.

When it is considered that for years the common method of developing a tract of land is by the adoption of a general plan or scheme of improvement, and the imposition of uniform restrictions on the lots purchased, to render it effective, the fact that so few cases comparatively have been before the courts shows how beneficial they have been considered, what little friction they have caused, and how well disposed most property holders are to observe their solemn undertakings.

of the said plots or parcels of land respectively, that the several purchasers should execute this deed, and should thereby be severally, and respectively bound by all the stipulations hereinafter contained." It was held that the use of the words "it is intended" did not indicate that this was the intention of the vendors at the time, and that they were at liberty to change when they chose, but that they were bound to observe the restrictions agreed upon.

Where the only land of the grantor, for the benefit of which a restrictive building clause was inserted in the deed, was property subsequently conveyed to the complainant, it was held that the provision that the restriction should not be violated without the consent of the grantor "or her heirs" did not show that the covenant was a personal one, but that it was one that passed with the land, and was enforceable by the subsequent grantee. *Hemsley v. Marlborough House Co.* 68 N. J. Eq. 596, 61 Atl. 455.

Where the general plan of the owner of a tract of land which he divided up into lots was to restrict it to use for residential purposes, it was held that the fact that before the plan was drawn up he had sold two of the lots without restrictions, and that as to two of the other lots the restrictions were modified, because they were not well adapted for residential purposes, would not destroy the inference that the restrictions were imposed on each lot for the benefit of all the others, and that they were part of the general scheme for the improvement of the whole property, and the agreement is therefore enforceable by the several grantees. *Hano v. Bigelow*, 155 Mass. 341, 20 N. E. 628.

<sup>83</sup> *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

<sup>84</sup> The rule, while operative to enable the subsequent purchaser of land to be benefited by the restrictive covenant to enforce

#### V. Effect of priority of purchase.

Where one lot owner, not a party to a restrictive covenant or agreement, seeks to enforce it against another, the fact of the relative time at which each acquired his title becomes important under some circumstances. The rules applicable to that class of cases in which the vendor parts with a portion of his property subject to restrictions in favor of the land retained by him have been discussed, but the doctrine that a purchaser who buys a part of the dominant estate may enforce the restriction necessarily applies to subsequent purchasers. Where one buys land subject to restrictions, and afterwards another purchases land from the same grantor, subject to the same restrictions, the first vendee, if he seeks to enforce the restrictions against the second vendee, must proceed on a different theory, because it cannot be said that the restrictions in a later deed were an inducement to the prior purchase.<sup>84</sup> Nor could there have been granted to him any interest in

fit by the restrictive covenant to enforce it against the prior purchaser who made it, and against the assignees with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner, to enforce the restriction imposed by the latter upon the lot subsequently conveyed, and in which he had no interest. *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583.

While a subsequent purchaser or his assignees may enforce a restriction of the common covenant against a prior purchaser or his assigns, if made for the benefit of land embracing his lot, this rule gives no right of action to a prior against a subsequent purchaser. "Some other reason must exist," said the court in *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, "for that class of cases which hold that purchasers and their assigns are entitled to enforce between themselves a restrictive covenant entered into by first purchasers with a common vendor, without reference to priorities of title."

The right of the owner of a lot to enforce a covenant to which he was not a party or assign, restrictive of the use of other lands, is dependent on the covenant having been made for the benefit of such lands. "Obviously," said the court in *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, "while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant. The right of grantees from the common grantor to enforce, *inter se*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the

the covenant in the later deed.<sup>85</sup> In order to entitle the prior purchaser to enforce the restriction, he must show some agreement on the part of the vendor to hold the rest of the land, including the defendant's, subject to the same restrictions.<sup>86</sup> So it was held that where the owner of a block of land and the vendees of various lots entered into mutual covenants against the carrying on of any business on the property sold, of-

fensive to the neighboring inhabitants, the covenants were for the mutual benefit of all the purchasers of the lots in the block, and a prior purchaser of one of the lots could enforce a covenant in equity against a subsequent purchaser of another. The fact that the plaintiffs did not stand in the position of assignees of the covenant, and could not sue at law for its breach, was held immaterial.<sup>87</sup> That the same restrictive covenant is

improvement of the property and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase."

The same reasoning does not obtain as widely in favor of permitting a senior grantee of one lot to insist on a restrictive covenant inserted in a later conveyance of another lot, inasmuch as the covenant to be enforced was not in existence when the senior grantee bought, and the presumption that he bought in reliance on its protection does not arise naturally. In such an instance it must appear in some manner from the deed to the senior grantee, or *dehors* said deed, that the vendor intended the covenants to bind himself and those who thereafter should derive title from him to property in proximity to the complainant's. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547.

"A difference in principle can be discerned between the case of a grantee holding premises under a subsequent conveyance from the common source of title, and seeking to enforce a covenant restricting the use of near-by premises, contained in a deed of prior date, from the case of a man who, holding title under a prior grant, seeks to enforce a covenant contained in a deed later than the one under which he claims. The junior grant is supposed to have been made for a consideration enhanced by the circumstance that the use in obnoxious ways of property adjacent to, or in the neighborhood of, that conveyed, had been restrained in previous conveyances. . . . And, as no injustice to the former purchaser will be occasioned by holding him to the observance of the restriction in his deed, it is reasonable to allow any property owner who bought later from the same vendor, and who will be damaged by a breach of the restriction, to restrain a breach." *Ibid*.

A building restriction in a deed will not inure to the benefit of a prior grantee of another lot in the same tract, which is conveyed subject to the same restriction, when the grantor did not impose any servitude on the land he retained, and the restrictions were not part of the general plan or scheme for the benefit of all purchasers. *Summers v. Beeler*, 90 Md. 474, 48 L.R.A. 54, 78 Am. St. Rep. 446, 45 Atl. 19.

<sup>85</sup> Where the plaintiff, seeking to enforce 37 L.R.A. (N.S.)

a restrictive covenant in defendant's deed, acquires title from the common source of title prior to the defendant, the covenant will be treated as inuring for the benefit of the grantor only, unless it appear either from the covenant in the deed by which the grantor parted with title to the defendant's lot, or other extraneous facts, that the restriction was imposed on the defendant's property for the benefit of persons holding lots under prior conveyances. *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547. The principle, said the court, is this, that, as the common source of title conveyed plaintiff's property prior to that conveyed to the defendant, there could not have been assigned also with the lot of the plaintiff any interest in the restrictive covenant inserted in the subsequent conveyance of defendant's lot.

<sup>86</sup> Where the complainant's deed is prior to that of the defendant, and there is no covenant to the complainant from the grantor that the latter holds the remainder of the property subject to the same restriction, or that he will exact similar covenants from the purchasers of the remaining property, and the complainant is not the express assign of the defendant's covenant, and there is no covenant between the complainant and defendant, the complainant cannot enforce the covenant, in the absence of anything to show that the covenant was entered into for the benefit of the complainant's property. *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543.

Where similar restrictions are not inserted in all of the deeds of a tract of land divided up and sold in separate parcels, the owners of one of the lots may enforce the restrictions in his neighbor's deed, where the plaintiff is a subsequent purchaser. *Isham v. Matchett*, 18 Ohio C. C. 338, 10 Ohio C. D. 267.

<sup>87</sup> *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713.

The owner of a block divided into a number of lots, having inserted in each of the deeds a covenant against the carrying on of any offensive trade, the object being to protect the whole tract and every lot belonging to it, whether in the hands of the original owners or of subsequent grantees, it was held that the fact that the plaintiff's conveyance was prior to that of the defendant would not deprive him of the right to enforce the covenant. *Brouwer v. Jones*, 23 Barb. 153. The court said that every such covenant in every deed given by the grantors was intended not only for their benefit, but also for that of every other prior, as well as

incorporated in each deed the common grantor made conveying any portion of the property is not, however, sufficient evidence of the covenant having been entered into for the benefit of the lands conveyed to a prior purchaser, so as to enable him to enforce the covenant against a subsequent purchaser.<sup>88</sup>

The most common form of covenants or agreements which may be taken advantage of by prior purchasers are those entered into in pursuance of a uniform building plan or scheme of development of a tract of land.<sup>89</sup> If the owner adopts such a plan, and promulgates it, all purchasers may take advantage of the restrictions, but although the former owners of a tract of land may have had in mind a scheme of improvement, if they did not make it public, and, in conveying a portion of the land, imposed no restrictions upon themselves, the question whether the grantees of different lots containing similar restrictions can enforce them as between themselves depends upon the relative dates of their titles. If the complainant's title is subsequent to that of the defendant, he may enforce the restriction, since it would evidently be intended for the benefit of remaining land.<sup>90</sup>

#### VI. Restrictive covenants as easements.

In some jurisdictions the rights created by covenants restrictive of the use of land

are considered to be in the nature of easements. It has been held in Illinois that where a tract of land is subdivided into lots, and these lots are conveyed to separate purchasers subject to conditions that are of a nature to operate as inducements to the purchasers, and to give each purchaser the benefit of the general plan of building or occupation, so that each shall have attached to his own lot a right in the nature of an easement or incorporeal hereditament in the lots of the others, a right is thereby acquired by each grantee, which he may enforce against any other grantee.<sup>91</sup> And it has been held in Massachusetts that a reservation that no building be constructed on the parcel of land conveyed creates an easement, or servitude in the nature of an easement, upon the land conveyed, and if this easement was created for the benefit of the land reserved by the grantor, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it will be held appurtenant thereto, and will pass to a grantee of the original owner.<sup>92</sup> In Michigan it has been said that restrictions limiting the use of land to residential purposes, for the benefit of the entire tract, are in the nature of reciprocal negative easements, and may be created on the division and conveyance in severalty to different grantees of an entire tract.<sup>93</sup> The New York cases proceed on the theory of easement.<sup>94</sup> In a Pennsylvania case, a common grantor conveyed three adjoining lots,

every subsequent, grantee, and created an easement in behalf of the whole property.

<sup>88</sup> Mulligan v. Jordan, 50 N. J. Eq. 363, 24 Atl. 543.

One who holds a title derived from an earlier deed cannot maintain a suit to restrain the violation of a covenant in a later deed conveying land in the vicinity of that first conveyed, simply because there is a restrictive covenant in the later deed and its violation will affect the enjoyment of the former's property. Doerr v. Cobbs, 146 Mo. App. 342, 123 S. W. 547.

<sup>89</sup> See supra, IV. c.

<sup>90</sup> Hyman v. Tash, — N. J. Eq. —, 71 Atl. 742.

A building restriction covenant running to the common grantor only is not enforceable by a prior purchaser of lots, against a subsequent purchaser of lots in the same block, the deeds being wholly silent as to any uniform plan of improvement, there being no mutual covenant to bind the grantor, and the circumstances showing that no uniform plan of restriction was established. Equitable Life Assurance Soc. v. Brennan, 148 N. Y. 661, 43 N. E. 173, reversing 74 Hun, 576, 26 N. Y. Supp. 600.

<sup>91</sup> Clark v. McGee, 159 Ill. 518, 42 N. E. 965.

<sup>92</sup> Peck v. Conway, 119 Mass. 546.

The question whether such an easement is 37 L.R.A. (N.S.)

a personal right, or is to be construed to be appurtenant to some other estate, must be determined by a fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances. Ibid.

<sup>93</sup> Allen v. Detroit, — Mich. —, 36 L.R.A. (N.S.) —, 133 N. W. 317.

<sup>94</sup> In Gibert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785, affirming 38 Barb. 488, it is said that no principle is better established now, than that, even under a mere covenant in a deed providing against certain constructions which may be obnoxious or offensive to neighboring inhabitants, on the breach of the covenant; those who have suffered from it, though not parties to the deed, would be afforded relief in equity. Of course, they could not sue at common law on the covenant; yet, as the covenant was intended for their benefit, it will be deemed to have given them an easement in the land, and a court of equity will interpose to give them relief, by injunction, against its infraction.

In Columbia College v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615, where mutual covenants by owners of lands forbidding their use for business purposes, etc., were entered into, it was said: "The right sought to be enforced here is an easement, or, as it is sometimes called, an amenity, and consists

the deed to the center one containing a building restriction, the covenant being that the grantee, his heirs and assigns, shall not, nor will at any time thereafter, erect, etc. The deeds to the other land made no reference in express terms to this restriction, but the lots conveyed were described in part as bounded by the center lot conveyed to the said grantee. The three deeds were made on the same day. It was held that the restriction was in the nature of a covenant running with the land, and created an easement of light and air in favor of the adjoining land.<sup>95</sup> And in Rhode Island tenants in common having conveyed to the city a strip of the land for a street and covenanted for themselves, their heirs and assigns, that the building line should be a certain number of feet from the street, it was held that this was a mutual covenant, and a grant to each of a negative easement in the lots of the others, so as to constitute as to a subsequent purchaser of one of the lots a breach of the covenant against encumbrances.<sup>96</sup> But in New Jersey it has been said that while cases involving light, air, or view might in some respects be based on the doctrine of easements, it is not satisfactory when it comes to be applied to covenants as to the use to which buildings are to be put; nor could the covenant, if it created an easement, be suspended because a subsequent purchaser did not buy with the restrictions of the covenant in view.<sup>97</sup>

in restraining the owner from doing that with and upon his property which, but for the grant or covenant, he might lawfully have done, and hence is called a negative easement, as distinguished from that class of easements which compels the owner to suffer something to be done upon his property by another."

Where the original grantor conveyed complainant's and defendant's lots, and many others in the neighborhood, all with covenants against nuisances and the erection of steam engines on the premises, it was held that such covenants created easements on the lands for the benefit of the other owners, and that the plaintiff was entitled to enforce the restrictions against the defendant and subsequent grantee, although the defendant's deed did not contain the covenant. *Birdsall v. Tiemann*, 12 How. Pr. 551.

<sup>95</sup> *Muzzarelli v. Hulshizer*, 163 Pa. 643, 30 Atl. 291.

<sup>96</sup> *Greene v. Creighton*, 7 R. I. 1.

<sup>97</sup> *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388.

H. C. S.

## IOWA SUPREME COURT.

### AMERICAN EXPRESS COMPANY.

v.

DES MOINES NATIONAL BANK, Appt.

(146 Iowa, 448, 123 N. W. 342.)

#### Judgment — for principal — right of agent.

That a bank which undertook to deliver to a carrier a package of money to be carried and delivered to another bank was the agent of the latter for that purpose does not entitle it to the benefit of a judgment in favor of the principal against the carrier for failure to perform the service, which includes a finding that the carrier received the money, in an action by the carrier to hold the agent liable for fraud in placing waste paper instead of money in the package, and obtaining a receipt from the carrier for money.

(November 23, 1909.)

*Note. — Judgment between principal and a third person as res judicata in an action between the latter and an agent.*

The converse of the question stated in the title to this note forms the subject of a note to *Doremus v. Root*, 54 L.R.A. 649, entitled "Judgment in favor of employee as bar to recovery against employer for employee's act or default."

Although it is well settled that a judgment in favor of an agent, rendered upon a ground equally applicable to both, is available as an estoppel to the principal, it does not invariably follow that a judgment against the agent is *res judicata* as to the principal. So, also, the cases on the specific question under discussion disclose the fact that a judgment in favor of the principal may or may not be *res judicata* in an action brought against the agent.

This situation is obviously inconsistent with the principle that estoppels to be binding must be mutual; and calls for an explanation. One such, which is put forth in *Portland Gold Min. Co. v. Stratton's Independence*, 16 L.R.A. (N.S.) 677, 85 C. C. A. 393, 158 Fed. 63, is that the general rule that one may not have the benefit of a judgment as an estoppel, unless he would have been bound by it if it had been the other way, is subject to recognized and rational exceptions. Another is that the relation of principal and agent is not such as, of itself, to make a judgment concerning one *res judicata* as to the other; in other words, that a principal or agent is not necessarily a "party" to an action against the other, within the rule that a judgment is conclusive upon parties or privies. But since a judgment in an action against one may in some cases be conclusive upon the

**A**PPEAL by defendant from an order of the District Court for Polk County striking an amendment to the answer in an action brought to recover damages for fraudulently stating the contents of a package delivered to plaintiff for transportation to be money, and obtaining a receipt therefor as such. Affirmed.

The facts are stated in the opinion.

Messrs. Hager & Powell, for appellant:

A judgment in a suit in which an agent or a servant is a party is conclusive for or against the principal or master.

24 Am. & Eng. Enc. Law, 751; Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154; Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337; Glaze v. Citizens' Nat. Bank, 116 Ind. 492, 18 N. E. 450; Emma Silver Min.

Co. v. Emma Silver Min. Co. 7 Fed. 401; Green v. Clarke, 12 N. Y. 343; Castle v. Noyes, 14 N. Y. 329; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; Atkinson v. White, 60 Me. 396; Bates v. Stanton, 1 Duer, 79; Chicago, M. & St. P. R. Co. v. United States, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26; Beh v. Bay, 127 Iowa, 246, 109 Am. St. Rep. 385, 103 N. W. 119; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Krolik v. Curry, 148 Mich. 214, 111 N. W. 761; Richardson v. Southwestern Cotton Seed Oil Co. 15 Okla. 263, 81 Pac. 781.

Liability to the plaintiff cannot be grounded upon the charge that that judgment is erroneous.

Keithley v. Stevens, 238 Ill. 199, 128

other, wherein lies the basis for the estoppel? An answer to this query may be found in the suggestion made in Castle v. Noyes, 14 N. Y. 329, that the implied obligation growing out of the relation of master and servant, or principal and agent, to save the agent harmless in the commission of an act in his representative capacity, is the ground of the estoppel. Assuming this to be true, it follows that there is an estoppel by judgment, irrespective of the outcome of the action, where such implied obligation exists. The difficulty with this answer, however, is that it does not quite cover the situation, *e. g.*, it does not furnish a reason why a judgment in favor of an agent is available to the principal in a subsequent action for the same tort.

While the logical basis for the difference in the decisions is thus involved in obscurity, a practical test as to when a judgment is, and when it is not, available as an estoppel to a principal or agent, is whether the party against whom the judgment is sought to be used has had his day in court,—his opportunity to establish the existence of the facts upon which he relies.

In Rookard v. Atlantic & C. Air Line R. Co. 84 S. C. 190, 27 L.R.A. (N.S.) 435, 137 Am. St. Rep. 839, 65 S. E. 1047, it is stated as a general principle that while a judgment on the merits in favor of an agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent, a judgment against the agent is not conclusive in an action against the principal; and a judgment against the principal will not conclude the agent, unless the agent has been vouched, or given notice and an opportunity to defend.

In Stanton v. Hennessey, 78 Hun, 287, 28 N. Y. Supp. 855, affirmed without opinion in 150 N. Y. 564, 44 N. E. 1128, it was held that a judgment roll in an unsuccessful action against the father of the defendant for commissions upon the sale of a farm was improperly admitted in evidence in an action based upon the fraud of the defendant in procuring the services of the plaintiff by representing himself as clothed with author-

ity from his father to employ the plaintiff for that purpose, the defendant not having been a party to the former suit.

In Fogg v. Plumer, 17 N. H. 112, it was held that a verdict and judgment in an action of trespass relative to land brought by a person between whom and the plaintiff there was no privity of title is not rendered admissible in favor of the plaintiff by the fact that he acted as agent for such person, where whatever he did in that respect was in no way connected with the title.

In Swett v. Black, 1 Sprague, 574, Fed. Cas. No. 13,690, it was held that a decree in a suit by the owners of a vessel against the shipper for freight, in which the defense was that the cargo was never delivered, would be no evidence for or against the master of the vessel in a future suit against him for not delivering the cargo.

But in Bailey v. Sundberg, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 583, it was held that while the master of a vessel is not in privity with the owner, within the rule that binds privies as well as parties to the estoppel of a judgment, yet that where he participated in the defense of a libel *in rem* for a collision, the decree dismissing the libel on the merits was *res judicata* in a libel *in personam* against him for the same loss.

In Anderson v. West Chicago Street R. Co. 200 Ill. 329, 65 N. E. 717, affirming 102 Ill. App. 310, a judgment in favor of the lessor of a street railway in an action for an injury caused by the negligence of the lessee was held to be a bar to a subsequent suit for the injury against the lessee, the court saying: "In the case of a leasing of a railroad by one company to another company, the negligence or tort of the lessee company in operating its road is, by the law of this state, imputed to the lessor company, because it cannot absolve itself from the responsibility imposed by law upon it to operate its road so as to do no unnecessary damage to the person or property of others. Ellett's Case, 132 Ill. 654, 24 N. E. 559. The relation between them, so far as it has reference to such damage, is not that of landlord and tenant, but that of principal

Am. St. Rep. 120, 87 N. E. 375; Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Lyford v. Demeritt, 32 N. H. 234.

As against the plaintiff the doctrine of *res judicata* is applicable.

24 Am. & Eng. Enc. Law, 710; Hart v. Jewett, 11 Iowa, 276; Chicago, M. & St. P. R. Co. v. United States, 159 U. S. 372, 40 L. ed. 185, 16 Sup. Ct. Rep. 26; Anderson v. Fleming, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443; State use of Hempstead v. Coste, 36 Mo. 437, 88 Am. Dec. 148; Greenl. Ev. 523; Carver v. Jackson, 4 Pet. 85, 7 L. ed. 791; Castle v. Noyes, 14 N. Y. 329; Doremus v. Root, 54 L.R.A. 649, and note, 23 Wash. 710, 63 Pac. 572; Bates v. Stanton, 1 Duer, 79; Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec.

759; Bank of Kentucky v. Stone, 88 Fed. 383; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; Hill v. Bain, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; Atkinson v. White, 60 Me. 396; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; 24 Am. & Eng. Enc. Law, 752; Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337; Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401; Green v. Clarke, 12 N. Y. 343; Glaze v. Citizens' Nat. Bank, 116 Ind. 492, 18 N. E. 450; St. Louis v. Johnson, 5 Dill. 241, Fed. Cas. No. 12,235; 2 Morse, Banks & Bkg. § 567-C; 2 Black, Judgm. 588; Lower Alloways Creek v. Moore, 15 N. J. L. 146; Brown v. Bradford, 30 Ga. 927; Loomis v. Pulver, 9 Johns. 244.

and agent, or master and servant. Both being liable to the party injured, such party could sue them both in the same action or sue each one separately, but if one was not guilty of the tort, the other one could not be. It is not a case where the allegation is that two different parties have committed a tort to the person or property of the plaintiff, and thus each one of them would be individually liable, and where it might turn out on the trial that one of the parties was innocent of any actionable wrong. Such could never be the case where the negligence complained of is the negligence of the company operating the road. Its negligence is conclusively presumed to be the negligence of the owner. There is no question of fact to be tried whether the owner company is liable for the negligence of the lessee,—it is so liable under the law. It must follow then, that if, in a suit brought against the lessor in which the tort complained of is in fact the tort of the lessee, a verdict of not guilty is rendered,—that is, that there was no actionable wrong committed against the plaintiff by the lessor,—no actionable wrong could have been committed against him by the lessee in the premises, for it is the lessee's wrong that in these cases constitutes the basis of the action against the lessor."

In McCubbin v. Graham, 4 Kan. 397, a recovery against the principal in an action for damages for breach of contract to convey land, which included the value of a bond delivered to the agent making the sale as a part payment, was held to be a bar to a suit against the agent to recover the value of the bond.

In Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627, it was held that a judgment in an action of trespass against a principal for the act of his servant, rendered upon the merits, was a bar to a suit against the servant for the same act, the court saying: "This case requires that a single point only should be considered; whether one who acts as the servant of another, in doing an act alleged to have been a trespass, is to be considered as so connected with his principal, who commanded the act to be done, that what will operate as a bar

to the further prosecution of the principal will operate as such for his servant. If the action were brought against the servant, he could be permitted to prove that he acted as the servant of another who commanded the act, and was justified in the commission of it, or who, if the act were unlawful, had made compensation for it, either before or after judgment; and his defense would be complete. It is not perceived why he may not, upon the same principles, be permitted to prove that the plaintiff had commenced a suit against his principal for the same cause of action, and proved the acts of his servant as material to the issue tried between them, and that a judgment upon the merits had been rendered against him. In such case the principal and servant would be one in interest, and would be known to the plaintiff to be so. To permit a person to commence an action against the principal, and to prove the acts alleged to be trespasses to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant, and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided, and judgment rendered between parties responsible for the acts of others."

In Krolik v. Curry, 148 Mich. 214, 111 N. W. 761, a judgment on the merits in favor of a corporation, in an action instituted against it for fraud by means of misrepresentation in the sale of land, was held to be a bar against a subsequent suit against the officers of the corporation for the same fraud.

In Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337, it was held that a judgment in a suit against a city establishing its right to extend street improvements onto the plaintiff's property was conclusive of such right in an action brought by the same



The former judgment imports a verity, and plaintiff cannot be heard to urge that it was improperly obtained.

Dunlap v. Glidden, 31 Me. 435, 52 Am. Dec. 625; Lyford v. Demeritt, 32 N. H. 234; Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; M'Rae v. Mattoon, 13 Pick. 53; Hillsborough v. Nichols, 46 N. H. 379; Smith v. Abbott, 40 Me. 442; Freeman, Judgm. 289; Hahn v. Miller, 68 Iowa, 745, 22 N. W. 51; Beh v. Bay, 127 Iowa, 246, 109 Am. St. Rep. 385, 103 N. W. 119; New London Bank v. Ketchum, 66 Wis. 428, 29 N. W. 216; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 A. & E. Ann. Cas. 773; Southern P. R. Co. v. United States, 168 U. S. 60, 42 L. ed. 380, 18 Sup. Ct. Rep. 18; Hayes v. Chicago Teleph. Co. 218 Ill. 414, 2 L.R.A.(N.S.) 764, 75 N. E. 1003; Anderson v. Fleming, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443.

While a judgment or decree may sometimes be impeached for fraud, it can be only for a fraud extrinsic to the cause.

Haddock v. Haddock, 201 U. S. 627, 50 L. ed. 894, 26 Sup. Ct. Rep. 525, 5 A. & E. Ann. Cas. 1; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; United States v. Throckmorton, 98 U. S. 61, 25 L. ed. 93; Simms v. Slacum, 3 Cranch, 300, 2 L. ed. 446; Ammidon v. Smith, 1 Wheat. 447, 4 L. ed. 132; Smith v. Lewis, 3 Johns. 157, 3 Am. Dec. 469; Marriott v. Hampton, 7 T. R.

269, 2 Esp. 546, 4 Revised Rep. 439; Demerit v. Lyford, 27 N. H. 541; Peck v. Woodbridge, 3 Day, 30; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; Homer v. Fish, 1 Pick. 435, 11 Am. Dec. 218; Lewis v. Rogers, 16 Pa. 18; Sidsensparker v. Sidsensparker, 52 Me. 481, 83 Am. Dec. 527; Boston & W. R. Corp. v. Sparhawk, 1 Allen, 448, 79 Am. Dec. 750; Dampont v. Sympson, Cro. Eliz. 520; Eyres v. Sedgewicke, Cro. Jac. 601; Mason v. Messenger, 17 Iowa, 261; White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527; Lyford v. Demeritt, 32 N. H. 234.

Messrs. Lyon & Lyon and N. T. Guernsey, for appellee:

The withholding by defendant of the fact that an employee had appropriated the money supposed by plaintiff to have been placed in the package, from the plaintiff, was not an actual damaging fraud.

Bigelow, Fr. pp. 3-19; 1 Addison, Torts, pp. 35-37.

The former judgment is not *res judicata*.

Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Davis v. Brown, 94 U. S. 428, 24 L. ed. 207; Russell v. Place, 94 U. S. 608, 24 L. ed. 215; Johnson Steel Street Rail Co. v. Wharton, 152 U. S. 258, 38 L. ed. 433, 14 Sup. Ct. Rep. 608; New Orleans v. Warner, 175 U. S. 132, 44 L. ed. 103, 20 Sup. Ct. Rep. 44; Whitaker v. Johnson County, 12 Iowa, 595; Myers v.

plaintiff against the servants and agents of the city, acting under its authority and direction in the making of the improvement, the city being the real party in interest.

And in Bank of Kentucky v. Stone, 88 Fed. 383, affirmed in 174 U. S. 409, 43 L. ed. 1027, 19 Sup. Ct. Rep. 880, it was held that a judgment enjoining a county from enforcing an illegal tax was conclusive in a subsequent suit to restrain the board of assessors from certifying such a tax for collection, the real party in interest in both cases being the same.

In Warren Featherbone Co. v. De Camp, 154 Fed. 198, it was held that a decree in the principal's favor in an action for the alleged infringement of a patent, declaring the patent void, was *res judicata* as to the validity of such patent, in a similar action brought against one who became an agent during the pendency of the former suit.

For a substantially identical decision rendered in an action to restrain the infringement of an alleged trademark, see Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154, which is sufficiently set forth in the opinion in AMERICAN EXP. CO. v. DES MOINES NAT. BANK.

And in W. A. Gaines & Co. v. Rock Spring Distilling Co. 179 Fed. 544, it was held that the judgment in an action against a principal for the infringement of an alleged trademark was *res judicata* as to per-

sons using such trademark only as agents or employees.

A case which, although not falling within the scope of this note, may be of collateral interest, is Phillips v. Jamieson, 51 Mich. 153, 16 N. W. 318, in which it was held that a judgment in an action brought by a third party against defendant's principal was inadmissible, as bearing upon the question of exemplary damages, in an action for assault and battery committed upon one who was resisting an attempt on the part of the agent to move a boundary fence, for the purpose of showing that the defendant knew the real dividing line was where the fence stood, the court saying: "Judgments are admissible in evidence when the same subject-matter again comes in controversy between the same parties; but here was neither identity of parties nor identity of subject-matter. All that could be claimed was that the same question of fact had arisen in another case in which defendant's principal was a party, and had been passed upon by jury. If it were a sound principle that such a decision ought to be accepted as conclusive in other controversies, it would have been ruled so long before this, for the occasions for the ruling have been abundant. But it has never been so decided, and we know of no good reason why it should be."

E. S. O.

Johnson County, 14 Iowa, 47; McDonald v. Gregory, 41 Iowa, 513; 1 Greenl. Ev. § 535; Bigelow, Estoppel, 75; Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 750; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Linton v. National L. Ins. Co. 44 C. C. A. 54, 104 Fed. 584.

Evans, Ch. J., delivered the opinion of the court:

This case was before us on a former appeal from an interlocutory order. American Exp. Co. v. Des Moines Nat. Bank, 136 Iowa, 597, 111 N. W. 31. In the case of Bank of Irwin v. American Exp. Co. 127 Iowa, 1, 102 N. W. 107, the defendant therein (plaintiff herein) was held liable to the Irwin bank for the sum of \$2,000, being the supposed contents of a package delivered to the express company by Des Moines National Bank as consignor for the Irwin bank as consignee. Afterwards this action was brought by the express company against the consignor for damages, on the general ground that fraud and deceit was practised upon it by one of the employees of said National Bank in fraudulently reporting the contents of such package, and obtaining a receipt therefor, as containing \$2,000, whereas, in fact, it contained no money. As a third division of its answer, the defendant pleaded that it had been adjudicated in the former case that the Des Moines National Bank was the agent of the Bank of Irwin, and that the package delivered by it did contain the sum of \$2,000, and that the Des Moines National Bank, as such agent, is now entitled to plead the judgment in the former action as an adjudication, and such adjudication was therein pleaded as a complete defense. The plaintiff demurred to this defense. The demurrer was sustained by the lower court. The defendant refused to amend, and stood upon its pleading and appealed to this court, where the ruling of the trial court was affirmed. 136 Iowa, 597. The case being remanded, the defendant amended such third division of its answer, and withdrew the allegation that its agency was adjudicated, and, in lieu thereof, alleged that it was in fact such agent, and with such amendment it still pleaded the former adjudication. Upon motion of plaintiff the amendment was stricken. The grounds of the motion were based upon the history of the pleading as above stated. From this order, the defendant has again appealed.

The case is argued here by appellant on the theory that his amendment to the third defense was sufficient to make the same a good and valid defense. This position is contested by the appellee. The theory of the 37 L.R.A. (N.S.)

defendant is that the former opinion of this court only held that there was no adjudication of its agency. Having now alleged such agency, it contends that it now presents a good defense. We think, however, that the opinion on the former case is broader than is assumed by counsel, and that it holds, in effect, that the adjudication pleaded is not available to the defendant in this case. The questions now presented by the appellant were in fact presented by it on the former appeal, and were duly considered by this court. We have given the question further consideration, and are satisfied with the former conclusion. The argument of the defendant is that it was agent for the Irwin bank for the remittance of the money by express; that it was adjudicated in the Bank of Irwin Case that the express company had received the money; and that the defendant as agent of the Irwin bank is entitled to the benefit of such adjudication. The rule invoked by appellant is not so broad and general in its application as is assumed. There are abundant cases wherein agents have been permitted to plead adjudications in favor of their principal as bar to actions against themselves. But the ground upon which such plea is permitted is essentially different from that which exists in this case. The cases cited by appellant's counsel in their brief are illustrative.

Lea v. Deakin, 11 Biss. 23, Fed. Cas. No. 8,154, was a case wherein the plaintiff brought suit to restrain the defendant from infringing an alleged trademark. It was shown in defense that the defendant was agent for a principal in the use of the alleged trademark, and that the plaintiff had previously sued such principal, and that it had been adjudicated in such suit in a trial on the merits that such principal had a right to the use of the name which he applied to his goods. It was held that this adjudication protected the agent as well as the principal, on the theory that what the principal had a right to do by himself he had the same right to do by his agent. Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337, was an injunction suit against a city and its officers to restrain them from committing certain acts. It was held that a former adjudication in an action brought by the plaintiff against the city alone, to enjoin the same acts, wherein decree was rendered in favor of the city, was a bar to a second action against the officers of the city; the city being the real party in interest in each case.

Castle v. Noyes, 14 N. Y. 329, was a case where the plaintiff sued a master for a trespass committed by a servant. The plaintiff had previously sued the servant, who

was defended by the master. After trial on the merits, judgment was rendered in that case for the servant. It was held that this judgment was a bar to a second action for the same trespass against the master.

*Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, was also a trespass case. The plaintiff first sued the master for the trespass of his servant, and was defeated after a trial on the merits. He then sued the servant for the same trespass. It was held that the second suit was barred by the adverse judgment in the first. *Atkinson v. White*, 60 Me. 396, was a controversy between the plaintiff and the defendant over the title to certain logs. The plaintiff held the same by bill of sale, and the defendant by a prior mortgage from a common grantor. Defendant sold some of the logs and warranted the title. Plaintiff sued the defendant's purchaser, and the question of the priority of defendant's right was litigated on the merits of such suit, and the plaintiff was defeated therein. He thereupon brought a second action against the defendant, and it was held that the prior adjudication was a bar.

*Bates v. Stanton*, 1 Duer, 79-88, was a case where a bailee was permitted to deny the title of the bailor by reason of a prior adjudication in a suit between the bailor and another, wherein it was adjudicated that such other person was the true owner of the goods. It was held that the bailee was bound to respect this adjudication, and that he was protected thereby. *Beth v. Bay*, 127 Iowa, 246, 109 Am. St. Rep. 385, 103 N. W. 119, is a case wherein it was held that an adjudication of the liability of the principal was binding upon the surety.

This brief review of some of the cited cases indicates the general scope of the rule which is invoked by appellant in its own behalf. The rule is not applicable to a state of facts such as are alleged in this case. The defendant was agent of the Irwin bank, only in the sense that it was consignor of the package, and delivered it to the common carrier, which became also the agent of the consignee. Under no circumstances could there be a joint liability of the defendant and the Irwin bank to the express company. Under the allegations of the answer, defendant was not a general agent of the Irwin bank, but a special agent directed to do a specific thing, namely, to ship \$2,000 in currency by express. Notwithstanding such agency, it sustained also the relation of consignor to the express company as a public carrier. If its employee practised fraud or deceit upon the plaintiff as charged in the petition, this was quite beyond the scope of its authori-

ty as agent for the Irwin bank. If it failed to deliver the currency to the express company, it did not perform its agency. If, in lieu of delivering the currency, its employee practised fraud and deception upon the express company, and thereby obtained a receipt for alleged currency, this was not the act of the Irwin bank as principal, nor could it be made affirmatively liable therefor. True, such fact was important and decisive in the *Bank of Irwin Case*, but there was no such privity between the two banks as to make the same adjudication cover both. If the fraud charged in the petition was perpetrated upon the plaintiff, it did not of itself give rise to a cause of action.

The plaintiff's cause of action accrued when it was made liable to the Irwin bank by reason of the receipt which it gave for the supposed currency, and which receipt was obtained from it by the alleged fraud. In that sense the cause of action in favor of the plaintiff arose after the adjudication which is now attempted to be pleaded as a bar. It is true that it was necessarily found in the *Bank of Irwin Case* that the express company had received the money from the Des Moines bank. If it should now be found upon a trial of this case that it had not received the money, the findings in the two trials would be inconsistent. But this consideration is not controlling. It is often true that a litigant may be able to prove a fact as against one party, and fail to prove it as against another. Such inconsistencies arise out of the exigencies of proof and trial. Evidence is sometimes available as against one party to a litigation which is not available as against another. An illustration of that fact is furnished here. It appears from our former opinion in the *Bank of Irwin Case* that on the trial below the express company offered in evidence certain admissions of the president of the Des Moines bank, and of certain acts of its employees, and this evidence was rejected on the ground that such admissions and such acts were not binding upon the Irwin bank. Such objection would not be available against the express company in a suit between it and the present defendant. It is manifest that that case was tried on the theory that the Des Moines bank, defendant herein, was not in privity with the plaintiff therein. Our conclusion, therefore, is that, the alleged agency pleaded did not create such privity between the two banks as to entitle the defendant herein to plead the adjudication in the former case as a bar against this action.

In considering the legal sufficiency of this affirmative defense, we have necessarily taken into consideration the allegations of

the petition against which it is interposed as a defense.

The order of the trial court is affirmed.

Petition for rehearing denied.

**MASSACHUSETTS SUPREME JUDICIAL COURT.**

**MARY LEMAY**

v.

**SPRINGFIELD STREET RAILWAY COMPANY.**

**TWILLA LEMAY**

v.

**SAME.**

**PHILLINESE RATELLE**

v.

**SAME.**

(210 Mass. 63, 96 N. E. 79.)

**Negligence — sudden emergency — measure of care.**

1. One is not excused from all error of judgment by the fact that he is compelled to act immediately upon a sudden emer-

gency, but he is required to use due care in view of all the circumstances.

**Pleading — declaration for negligence — variance.**

2. Under a declaration seeking to hold a carrier liable for injuries because of careless, negligent, and reckless operation of its car in approaching and rounding a curve, a recovery cannot be allowed for defect in the car, or failure to inspect.

**Appeal — amending pleadings to meet issues.**

3. If issues not presented by the pleadings were fully tried, the appellate court may remand the cause with permission to amend the pleadings to meet the issues without awarding a new trial.

(October 16, 1911.)

**E**XCEPTIONS by defendant to rulings of the Superior Court for Hampden County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in plaintiffs' favor. Overruled on condition.

Messrs. Henry W. Ely and Joseph B. Ely, for defendant:

If there were several means at the mo-

**Note. — Care required of one in sudden emergency.**

I. Introductory, 43.

II. Conduct of person injured.

a. Emergency caused by negligence of defendant.

1. General rule, 44.

2. Explanations and limits of rule, 47.

3. Illustrations of rule, 51.

4. More than one tortfeasor, 54.

b. Emergency caused by negligence of person injured, 54.

c. Emergency caused by other agencies, 55.

d. Texas cases, 58.

III. Conduct of defendant, 60.

IV. Miscellaneous, 64.

**I. Introductory.**

This note is limited to emergencies involving physical human peril. In view of the great number of cases upon the subject, no attempt at an exhaustive collection of them has been here made. Questions of proximate cause and burden of proof are excluded; also cases which are complicated by some invitation or command of the defendant, and cases where the injury was suffered in rescuing others.

For cases on voluntarily incurring danger to save another's life as contributory negligence, see the note to *Norris v. Atlantic Coast Line R. Co.* 27 L.R.A. (N.S.) 1069.

For cases on the duty of driver of a horse

that is running away, see the note to *Kimble v. Stackpole*, 35 L.R.A. (N.S.) 148.

For cases on attempting to pass automobiles with frightened horse as constituting negligence, see the note to *Cumberland Teleph. & Teleg. Co. v. Yeiser*, 31 L.R.A. (N.S.) 1137.

It is not intended generally to cite master and servant cases, but a few of them have been included.

The general subject of emergency in admiralty is, of course, without the scope of this note.

"In circumstances of imminent danger, the ordinarily prudent man commonly acts without prudence, and . . . it is only the exceptional man who can be relied upon, under such circumstances, to retain his presence of mind." *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209.

The question of conduct in an emergency has usually been considered with respect to the conduct of the person injured, that is to say, with respect to the question of contributory negligence, although it will be seen there are cases in which the conduct of the defendant is tested with reference to the haste and excitement under which he acted; and in *LEMay v. Springfield Street R. Co.* it is conceded that the fact of emergency may have a bearing upon the defendant's conduct.

"According to the lexicographers, an emergency is a sudden or unexpected happening or occasion calling for immediate action." *Burger v. Omaha & C. B. Street R. Co.* 139 Iowa, 645, 130 Am. St. Rep. 343, 117 N. W. 35.

torman's command for the checking of the speed of the car, he could not be accountable for not having tried all of them, if he acted reasonably under the circumstances.

O'Brien v. Lexington & B. Street R. Co. 205 Mass. 184, 91 N. E. 204; Kane v. Worcester Consol. Street R. Co. 182 Mass. 201, 65 N. E. 54; Creavin v. Newton Street R. Co. 176 Mass. 529, 57 N. E. 994; Le Blanc v. Lowell, L. & H. Street R. Co. 170 Mass. 564, 49 N. E. 927; Kerr v. Boston Elev. R. Co. 188 Mass. 434, 74 N. E. 669.

Messrs. Daniel E. Leary, Edward W. Beattie, Jr., and George D. Cummings, for plaintiffs:

It was not proper for defendant to single out various possible culpable causes of the accident, and to request an instruction as

to each that there was no liability on the part of defendant. The jury may have been unable to fix with certainty the exact contributing cause, but, nevertheless, have been satisfied that there was negligence for which defendant was responsible.

Mooney v. Connecticut River Lumber Co. 154 Mass. 407, 28 N. E. 352; Pomeroy v. Boston & M. R. Co. 172 Mass. 92, 51 N. E. 523; James v. Boston Elev. R. Co. 204 Mass. 158, 90 N. E. 513; Tobin v. Pittsfield Electric Street R. Co. 206 Mass. 581, 92 N. E. 887.

Defendant, having accepted plaintiff as a passenger, was bound to exercise in the management of its car the highest degree of care required by the circumstances to protect her from injury.

## II. Conduct of person injured.

### a. Emergency caused by negligence of defendant.

#### 1. General rule.

The test of the conduct of one put in a sudden emergency by the negligence of the defendant is that of a person of ordinary prudence confronted with the same circumstances; therefore if his conduct bears this test, he is not guilty of contributory negligence for mistaking the way of escape from the emergency.

Fed.—Stevenson v. Chicago & A. R. Co. 5 McCrary, 634, 18 Fed. 493; Collins v. Davidson, 19 Fed. 83; Cowen v. Ray, 47 C. C. A. 352, 108 Fed. 320.

Ala.—Cook v. Central R. & Bkg. Co. 67 Ala. 533.

Ark.—St. Louis, I. M. & S. R. Co. v. Stamps, 84 Ark. 241, 104 S. W. 1114.

Cal.—Lawrence v. Green, 70 Cal. 417, 59 Am. Rep. 428, 11 Pac. 750 (passenger jumping from coach); Schneider v. Market Street R. Co. 134 Cal. 482, 66 Pac. 734; Dinnigan v. Peterson, 3 Cal. App. 764, 87 Pac. 218; Warren v. Southern California R. Co. — Cal. —, 67 Pac. 1 (crossing railroad track after discovering train).

Colo.—Colorado Midland R. Co. v. Robins, 30 Colo. 449, 71 Pac. 371.

D. C.—Jennings v. Philadelphia B. & W. R. Co. 29 App. D. C. 219, 10 A. & E. Ann. Cas. 761.

Ga.—Atlanta, K. & N. R. Co. v. Roberts, 116 Ga. 505, 42 S. E. 753; Self v. Adel Lumber Co. 5 Ga. App. 846, 64 S. E. 112.

Ill.—Frink v. Potter, 17 Ill. 404 (passenger); Wesley City Coal Co. v. Healer, 84 Ill. 126, 1 Mor. Min. Rep. 68 (servant); Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410 (passenger); Dunham Touring & Wrecking Co. v. Dandelin, 143 Ill. 409, 32 N. E. 258, affirming 41 Ill. App. 175; Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739; Paige v. Illinois Steel Co. 233 Ill. 313, 84 N. E. 239; Winn v. Cleveland, C. C. & St. L. R. Co. 239 Ill. 132, 87 N. E. 954; North Chicago Street R. 37 L.R.A. (N.S.)

Co. v. Louis, 35 Ill. App. 477, reversed on other grounds in 138 Ill. 9, 27 N. E. 451; Joliet Street R. Co. v. Duggan, 45 Ill. App. 450; Hagerstrom v. West Chicago Street R. Co. 67 Ill. App. 63; Cleveland, C. C. & St. L. R. Co. v. Baker, 106 Ill. App. 500; Galesburg Electric Motor & P. Co. v. Barlow, 108 Ill. App. 509; Junction Min. Co. v. Ench, 111 Ill. App. 346; Chicago & A. R. Co. v. O'Leary, 126 Ill. App. 311; Douglas v. Wabash R. Co. 149 Ill. App. 612; Swengel v. Illinois Third Vein Coal Co. 154 Ill. App. 409, decided against plaintiff on other grounds.

Ind.—Indianapolis, B. & W. R. Co. v. Carr, 35 Ind. 510; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143 (as stating the rule); Pennsylvania Co. v. Stegeneier, 118 Ind. 305, 10 Am. St. Rep. 136, 20 N. E. 843; Pennsylvania Co. v. McCaffrey, 139 Ind. 430, 29 L.R.A. 104, 38 N. E. 67; McIntyre v. Orner, 166 Ind. 57, 4 L.R.A. (N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 A. & E. Ann. Cas. 1087; Indianapolis Union R. Co. v. Waddington, 169 Ind. 448, 82 N. E. 1030; Dieckman v. Louisville & I. Traction Co. 46 Ind. App. 11, 89 N. E. 909; Louisville, E. & St. L. Consol. R. Co. v. Kelly, 6 Ind. App. 545, 33 N. E. 1103; Grand Rapids & I. R. Co. v. Cox, 8 Ind. App. 29, 35 N. E. 183; Lake Erie & W. R. Co. v. McHenry, 10 Ind. App. 525, 37 N. E. 186; Cleveland, C. C. & St. L. R. Co. v. Bossert, 44 Ind. App. 245, 87 N. E. 158; Chicago, I. & L. R. Co. v. Martin, 31 Ind. App. 308, 65 N. E. 591; Cincinnati, H. & D. R. Co. v. Acrea, 42 Ind. App. 127, 83 N. E. 1009.

Iowa.—Frandsen v. Chicago, R. I. & P. R. Co. 36 Iowa, 372; Moore v. Central R. Co. 47 Iowa, 688; Fox v. Chicago, St. P. & K. C. R. Co. 86 Iowa, 368, 17 L.R.A. 289, 53 N. W. 259 (servant); Haas v. Chicago, M. & St. P. R. Co. 90 Iowa, 259, 57 N. W. 894; Brantner v. Chicago, B. & Q. R. Co. 136 Iowa, 349, 112 N. W. 790 (servant); Burger v. Omaha & C. B. Street R. Co. 139 Iowa, 645, 130 Am. St. Rep. 343, 117 N. W. 35; Kern v. Des Moines City R. Co. 141 Iowa, 620, 118 N. W. 451; Brugge-

*Marshall v. Boston & W. Street R. Co.* 195 Mass. 284, 81 N. E. 195; *Carroll v. Boston Elev. R. Co.* 200 Mass. 527, 86 N. E. 793; *Partelow v. Newton & B. Street R. Co.* 198 Mass. 24, 81 N. E. 894; *Steverman v. Boston Elev. R. Co.* 205 Mass. 508, 91 N. E. 919; *Gardner v. Boston Elev. R. Co.* 204 Mass. 213, 90 N. E. 534.

Defendant's eighteenth, twenty-fifth, and twenty-sixth requests, which are mentioned in the opinion, are as follows:

"(18) If you should find that the air brake on this car of the defendant failed to work, without premonition or warning to the motorman, and at a time when he was closely approaching a sharp curve in the defendant's tracks, so that he was confronted with unexpected peril, then it is

immaterial whether the hand brake was used by him or not, if he used a reasonably proper method for checking the speed of the car."

"(25) The plaintiff cannot recover for any defect in the car causing the accident.

"(26) The plaintiff cannot recover for failure to inspect the car."

*Sheldon, J.*, delivered the opinion of the court:

The defendant's eighteenth request could not have been given as framed. It would have excluded from consideration by the jury the question of the motorman's negligence in approaching a sharp curve at an excessive and dangerous rate of speed, before he had discovered the failure of his

*man v. Illinois C. R. Co.* 147 Iowa, 187, 123 N. W. 1007.

*Kan.—St. Louis & S. F. R. Co. v. Brock*, 69 Kan. 448, 77 Pac. 86, judgment for plaintiff reversed on other grounds; *Kansas City-Leavenworth R. Co. v. Langley*, 70 Kan. 453, 78 Pac. 858; *Edgerton v. O'Neil*, 4 Kan. App. 73, 46 Pac. 206.

*Ky.—South Covington & C. Street R. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493 (passenger), reversed as verdict excessive; *Chesapeake & N. R. Co. v. Ogles*, 24 Ky. L. Rep. 2160, 73 S. W. 751; *Nisbet v. Wells*, 25 Ky. L. Rep. 511, 76 S. W. 120; *Maysville & B. S. R. Co. v. McCabe*, 30 Ky. L. Rep. 1009, 100 S. W. 219; *Louisville & N. R. Co. v. Taylor*, 31 Ky. L. Rep. 1142, 104 S. W. 776; *Louisville & N. R. Co. v. Molloy*, 32 Ky. L. Rep. 745, 107 S. W. 217; *Big Sandy & C. R. Co. v. Blankenship*, — Ky. —, 118 S. W. 315.

*La.—Holzab v. New Orleans & C. R. Co.* 38 La. Ann. 185, 58 Am. Rep. 177; *Taylor v. Vicksburg, S. & P. R. Co.* 123 La. 768, 49 So. 518.

*Me.—Moore v. Maine C. R. Co.* 106 Me. 297, 76 Atl. 871; *Shannon v. Boston & A. R. Co.* 78 Me. 52, 2 Atl. 678 (passenger).

*Md.—Western Maryland R. Co. v. Herold*, 74 Md. 510, 14 L.R.A. 75, 22 Atl. 323; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346 (passenger, obiter); *Lund v. Tyngsboro*, 11 Cush. 563, 59 Am. Dec. 159 (obiter).

*Mass.—Sears v. Dennis*, 105 Mass. 310; *Hanks v. Boston & A. R. Co.* 147 Mass. 495, 18 N. E. 218; *Cody v. New York & N. E. R. Co.* 151 Mass. 462, 7 L.R.A. 843, 24 N. E. 402 (passenger); *Green v. Haverhill & A. Street R. Co.* 193 Mass. 428, 79 N. E. 735; *O'Brien v. Lexington & B. Street R. Co.* 205 Mass. 182, 91 N. E. 204.

*Mich.—Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532, 9 N. W. 841; *Fehnrich v. Michigan C. R. Co.* 87 Mich. 606, 49 N. W. 890; *Barnes v. Brown*, 95 Mich. 576, 55 N. W. 439 (as implying the same result); *Howell v. Lansing City Electric R. Co.* 136 Mich. 432, 99 N. W. 406, reversed on other grounds (passenger); *Karrer v. Detroit*, 112 Mich. 331, 106 N. W. 64, reversed on other grounds; *Deneen v. Houghton County* 37 L.R.A. (N.S.)

*Street R. Co.* 150 Mich. 235, 113 N. W. 1126, 13 A. & E. Ann. Cas. 134, reversed on other grounds.

*Minn.—Wilson v. Northern P. R. Co.* 26 Minn. 278, 37 Am. Rep. 410, 3 N. W. 333 (passenger); *Mark v. St. Paul, M. & M. R. Co.* 30 Minn. 493, 16 N. W. 367; *Dolson v. Dunham*, 96 Minn. 227, 104 N. W. 964 (servant), reversed on other grounds.

*Miss.—Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. 693.

*Mo.—Kleiber v. People's R. Co.* 107 Mo. 240, 14 L.R.A. 613, 17 S. W. 946 (passenger jumping from car in fear of collision); *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972 (as recognizing the rule); *Williamson v. St. Louis Transit Co.* 202 Mo. 345, 100 S. W. 1072 (jumping from an electric car on account of a flame from the controller box, which immediately threatened plaintiff); *Lee v. St. Louis, M. & S. E. R. Co.* 112 Mo. App. 372, 87 S. W. 12 (servant); *Lang v. Missouri P. R. Co.* 115 Mo. App. 489, 91 S. W. 1012 (crossing); *McManus v. Metropolitan Street R. Co.* 116 Mo. App. 110, 92 S. W. 176 (passenger jumping off car); *Boyce v. Chicago & A. R. Co.* 120 Mo. App. 168, 96 S. W. 670; *Feddeck v. St. Louis Car Co.* 125 Mo. App. 24, 102 S. W. 675; *Hull v. Thompson Transfer Co.* 135 Mo. App. 119, 115 S. W. 1054; *Scott v. Metropolitan Street R. Co.* 138 Mo. App. 196, 120 S. W. 131; *Palmer v. Chicago & A. R. Co.* 142 Mo. App. 633, 121 S. W. 1087; *Wylar v. Ratican*, 150 Mo. App. 474, 131 S. W. 155; *Blyston-Spencer v. United R. Co.* 152 Mo. App. 118, 132 S. W. 1175; *Byars v. Wabash R. Co.* — Mo. App. —, 141 S. W. 926; *Neier v. Missouri P. R. Co.* — Mo. —, 6 S. W. 695.

*Neb.—Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, 20 L.R.A. 853, 55 N. W. 872 (horse frightened by locomotive in street); *Riley v. Missouri P. R. Co.* 69 Neb. 82, 95 N. W. 20 (judgment, however, was for the defendant); *Cudahy Packing Co. v. Wesolowski*, 75 Neb. 786, 106 N. W. 1007 (servant).

*N. J.—Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 33 L.R.A. 122, 55 Am. St. Rep. 620, 34 Atl. 1094.

air brake, and the question whether, if he was confronted with unexpected peril, he acted with proper diligence under the circumstances then existing and with the light that he then had. It is true that allowance must be made for one compelled to act immediately, without opportunity for deliberation, upon a sudden emergency. But this does not mean that he is necessarily excused for any error of judgment, but simply that his conduct is to be judged in view of the exigency and the need of immediate action. He is still bound to use the same degree of care to which he is ordinarily held; but due allowance must be made for the situation in which he is placed, and he is not to be held to a coolness of judgment for which there is not

time. *Linnehan v. Sampson*, 126 Mass. 506, 511, 512, 30 Am. Rep. 692; *Cody v. New York & N. E. R. Co.* 151 Mass. 462, 468, 7 L.R.A. 843, 24 N. E. 402; *Tozier v. Haverhill & A. Street R. Co.* 187 Mass. 179, 72 N. E. 953; *O'Brien v. Lexington & B. Street R. Co.* 205 Mass. 182, 184, 91 N. E. 204. This is the rule stated in *Brooks v. Petersham*, 16 Gray, 181, 184; and we know of nothing in our decisions to the contrary. While a choice, though mistaken, may yet be prudent (*Kane v. Worcester Consol. Street R. Co.* 182 Mass. 201, 65 N. E. 54), this must be determined by the jury, and not by the court. The instructions given to the jury upon this question were accurate and sufficient.

But the twenty-fifth and twenty-sixth

N. Y.—*Buel v. New York C. R. Co.* 31 N. Y. 314, 88 Am. Dec. 271 (passenger jumping from railroad car to avoid collision); *Twomley v. Central Park, N. & E. River R. Co.* 69 N. Y. 158, 25 Am. Rep. 162 (passenger rushing from street car to avoid collision); *Dyer v. Erie R. Co.* 71 N. Y. 228 (jumping from wagon at railway crossing) reversed on another ground; *Voak v. Northern C. R. Co.* 75 N. Y. 320; *Schimpf v. Sliter*, 64 Hun, 463, 19 N. Y. Supp. 644 (bicyclist injured by wagon); *Bond v. New York C. & H. R. R. Co.* 69 Hun, 476, 23 N. Y. Supp. 450; *Heath v. Glens Falls, S. H. & Ft. E. Street R. Co.* 90 Hun, 560, 36 N. Y. Supp. 22 (as stating the rule); *Canton v. Simpson*, 2 App. Div. 561, 38 N. Y. Supp. 13; *Poulsen v. Nassau Electric R. Co.* 30 App. Div. 246, 51 N. Y. Supp. 933 (passenger jumping from electric car owing to flashing or flaring). To the same effect, (*Paine v. Geneva, W. S. F. & C. L. Traction Co.* 115 App. Div. 729, 101 N. Y. Supp. 204; *Boyce v. Shawangunk*, 40 App. Div. 593, 58 N. Y. Supp. 26; *Halstead v. Warsaw*, 43 App. Div. 39, 59 N. Y. Supp. 518 (women jumping from wagon); *Wall v. New York C. & H. R. R. Co.* 56 App. Div. 599, 67 N. Y. Supp. 519; *Rush v. Joseph H. Bauland Co.* 82 App. Div. 506, 81 N. Y. Supp. 830; *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24; *Nicholsburg v. Second Ave. R. Co.* 11 Misc. 432, 32 N. Y. Supp. 130; *Leonard v. Joline*, 61 Misc. 336, 113 N. Y. Supp. 682; *Cowen v. Knickerbocker Ice Co.* 6 N. Y. S. R. 250; *Thies v. Thomas*, 77 N. Y. Supp. 276.

Ohio.—*Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597 (passenger); *Wheeling & L. E. R. Co. v. Suhrwiar*, 22 Ohio C. C. 560, 12 Ohio C. D. 809 (railroad crossing); *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559; *Lake Shore Electric R. Co. v. Majewski*, 25 Ohio C. C. 55.

Pa.—*Delaware, L. & W. R. Co. v. Smith*, 1 Walk. (Pa.) 88; *Kreider v. Lancaster, E. & M. Turnp. Co.* 162 Pa. 537, 29 Atl. 721; *Doyle v. Chester Traction Co.* 214 Pa. 382, 63 Atl. 604; *Shaffer v. Beaver Valley* 37 L.R.A. (N.S.)

*Traction Co.* 229 Pa. 533, 79 Atl. 122; *Pennsylvania Teleph. Co. v. Varnau*, 2 Monaghan (Pa.) 645, 15 Atl. 624; *Pittsburgh, B. & W. R. Co. v. Rohrman*, — Pa. —, 12 Am. & Eng. R. Cas. 176 (passenger jumping from derailed railway car); *Russell v. Westmoreland County*, 26 Pa. Super. Ct. 425.

S. D.—*Davis v. Holy Terror Min. Co.* 20 S. D. 399, 107 N. W. 374 (servant).

Tenn.—*East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea, 46 (servant); *McMillan Marble Co. v. Black*, 89 Tenn. 118, 14 S. W. 479 (servant); *Southern R. Co. v. Pugh*, 97 Tenn. 624, 37 S. W. 555.

Va.—*Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71 (servant); *South West Improv. Co. v. Smith*, 85 Va. 306, 17 Am. St. Rep. 59, 7 S. E. 365.

Wash.—*Sandquist v. Independent Teleph. Co.* 38 Wash. 313, 80 Pac. 539 (servant); *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400 (servant).

W. Va.—*Haney v. Pittsburgh, C. C. & St. L. R. Co.* 38 W. Va. 570, 18 S. E. 748 (employee jumping from railroad car to avoid collision); *Normile v. Wheeling Traction Co.* 57 W. Va. 132, 68 L.R.A. 901, 49 S. E. 1030.

Wis.—*Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638 (servant); *Duame v. Chicago & N. W. R. Co.* 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394; *Valin v. Milwaukee & N. R. Co.* 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084.

Eng.—*Chaplin v. Hawes*, 3 Car. & P. 554; *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. 12, 43 L. J. Q. B. N. S. 185, 30 L. T. N. S. 275, 22 Week. Rep. 561 (in effect).

Can.—*Rainnie v. St. John City R. Co.* 31 N. B. 582 (passenger).

For Texas cases, see *infra*, II. d.

#### Error of rescuer.

A similar rule applies where a third person makes an error of judgment in endeavoring to rescue the plaintiff. *Schoenfeld v. Metropolitan Street R. Co.* 40 Misc. 201, 81 N. Y. Supp. 644.

requests should have been given; for, although the defendant would have been liable upon a proper declaration, if the accident was caused by any defect in its car which might have been discovered and remedied by proper inspection, yet the declarations in these cases averred merely that the accident was caused by the fact that the defendant had "so carelessly, negligently, and recklessly operated" its car as to cause it to approach and go around the curve at a very high and dangerous rate of speed, causing the injuries complained of. This plainly charged only the negligent operation of the car, and not negligence in using a defective or poorly equipped car. The plaintiffs were allowed to recover, and the verdicts in their favor may have been

found upon an issue which was not open under the pleadings, and which the defendant seasonably requested to have withdrawn from the jury. *Lund v. Tyngsboro*, 11 Cush. 563, 567, 59 Am. Dec. 159 et seq.; *Hanlon v. South Boston Horse R. Co.* 129 Mass. 310; *James v. Boston Elev. R. Co.* 201 Mass. 263, 87 N. E. 474.

But the bill of exceptions seems to indicate that the defendant was fully heard upon this question, and it was fairly submitted to the jury. It follows that, if the plaintiff's declarations shall be amended so as to present this issue, justice does not demand a new trial. *Denham v. Bryant*, 139 Mass. 110, 112, 28 N. E. 691, and cases cited; *Peck v. Waters*, 104 Mass. 345, 351; *Fay v. Walsh*, 190 Mass. 374, 377, 77 N.

## 2. *Explanations and limits of rule.*

In *Bischoff v. People's R. Co.* 121 Mo. 216, 25 S. W. 908, the court quoted from *Kleiber v. People's R. Co.* 107 Mo. 240, 14 L.R.A. 613, 17 S. W. 946, saying: "In that case the following rules were deduced from the authorities: 'First, the peril or alarm must have been caused by the negligence of the one against whom indemnity is sought; second, the apprehension of peril, from the standpoint of the injured person, must have been reasonable; and, third, the appearance of the danger must have been imminent, leaving no time for deliberation. On the other hand, the danger must be judged by the circumstances as they appear, and not by the result.'"

In *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 16, which was reversed, however, on another ground, the court said: "The plaintiff jumped from the car and received his injuries in doing so. Other passengers who remained in the car were not hurt. If he contributed to his own injury by want of proper care, he would not be entitled to recover. The degree of care required of him is in proportion to the degree and imminence of the danger."

## Doctrine founded on common experience.

"Persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances." *Richmond R. & Electric Co. v. Hudgins*, 100 Va. 419, 41 S. E. 736.

"Persons under imminence of peril may not be required to exercise all the presence of mind and care 'of a prudent, careful man,' with impending danger. The law makes allowance, and leaves the circumstances to the jury to find, if the party acted rashly and under an undue apprehension of the danger." *Galena & C. Union R. Co. v. Yarwood*, 17 Ill. 509, 65 Am. Dec. 682.

"When anyone is in danger through the negligence of another, his action in the emergency suddenly thrown upon him cannot be weighed in scales to determine whether

he acted wisely or foolishly in the imminence of great danger." *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781.

Where the plaintiff was a servant of the defendant, the court said: "The misconduct of the company in threatening the plaintiff with a collision may be taken as established. The open question is whether the plaintiff, after discovering the danger, acted recklessly or rashly, and thus brought upon himself a calamity which he might have avoided by more discreet conduct. All the authorities concur in holding that the duty of a person for his own safety, in such an emergency, is not to be measured by the ordinary standard, but that allowance is to be made for the state of his emotions." *Smith v. Wrightsville & T. R. Co.* 83 Ga. 671, 10 S. E. 361.

"A person who, from an impulse of fear produced by the wrongful act of another, acts erroneously, and, in consequence of such erroneous act, receives an injury which he would not have received had he not so acted, will not be precluded from recovering damages on the ground of contributory negligence; for it does not lie in the mouth of the defendant to say to the plaintiff, 'You shall not have damages because you did not act with reasonable care,' if the misconduct of the defendant paralyzed the nerves or destroyed the volition of the plaintiff, so that he became incapable of acting with that care which persons under other circumstances employ." *Siegriest v. Arnot*, 10 Mo. App. 197.

In *Ransom v. Union Depot Co.* 142 Mo. App. 361, 126 S. W. 785, where the servant of one of the defendants was not considered by the court to have been negligent in getting a truck out of the way of a swiftly approaching train, the court said that he might have abandoned the truck and sought safety in flight, but he stuck to his post and labored to get the truck out of the way. "The expressman was suddenly confronted by a great peril which gave him no time to think. The law imposes no rules of conduct upon one who is suddenly confronted by impending danger, and is compelled to act, not by the dic-



E. 44; *Beers v. McGinnis*, 191 Mass. 279, 282, 77 N. E. 768.

The other exceptions have not been argued, and we treat them as waived.

If the plaintiffs shall be allowed by the superior court within sixty days from the

filing of the rescript, to amend their declarations as has been stated, the exceptions will be overruled; otherwise they must be sustained.

So ordered.

tates of care and reason, but by the instinct of self-preservation."

#### Peril need not be actual.

It is error for the court to instruct the jury in such a manner as to lead them to understand that before a person can have the benefit of not being guilty of negligence in acting hastily under sudden peril, the peril must be actual, and not simply apparent, imminent danger. *Hainlin v. Budge*, 56 Fla. 342, 47 So. 825.

Where a servant was killed the court approved the following instructions: "If the jury believe that, at the time the deceased jumped from the car, the appearances of danger to him were sufficient to justify a person of reasonable firmness and prudence in believing that his safety required him to jump from the car in order to escape the impending danger, then the fact that his death resulted from injuries received in making such jump will not defeat the plaintiff's right to recover in this action; and this is so notwithstanding that the jury may further believe that deceased might have escaped unhurt, had he made no effort to leave said car." *St. Louis, I. M. & S. R. Co. v. Touhey*, 67 Ark. 209, 77 Am. St. Rep. 109, 54 S. W. 577.

In the case of a servant suing his master for injury, the court said: "It is also contended that the court erred in instructing the jury that it is not negligence to commit an error under the influence of fear produced by the appearance of sudden danger, and also that there was error in instructing to the effect that if the defendant, through its negligence, put the plaintiff in a position of immediate danger, real or apparent, and that plaintiff, through a sudden impulse of fear, attempted to escape the danger, and in so doing actually received the injury he was attempting to escape, then he may recover. We cannot agree that these objections are well taken. On the contrary, we think the instructions substantially correct, under the evidence and circumstances of the case." *Silver Cord Combination Min. Co. v. McDonald*, 14 Colo. 191, 23 Pac. 346, 16 Mor. Min. Rep. 171.

In *Gannon v. New York, N. H. & H. R. Co.* 173 Mass. 40, 43 L.R.A. 833, 52 N. E. 1075, where a passenger was injured, the court said: "If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments, and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event." 37 L.R.A.(N.S.)

But in *Georgia R. & Electric Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944, where the trial court charged the jury: "If you believe that the plaintiff, at the time that he jumped from the car, was acting under a reasonable apprehension, that is to say, the apprehension of a prudent man, that he was under circumstances, that he might receive an injury, he would not be guilty of contributory negligence in jumping from the car,"—the appellate court said: "This is not an accurate statement of the doctrine of emergency raised by the carrier, and acted on by the passenger. The judge informed the jury that if the passenger was acting under a reasonable apprehension 'that he might receive an injury,' he would not be guilty of contributory negligence in jumping from the car. It is not every reasonable apprehension of a bare possibility of injury which will suffice. Making even the reasonable apprehension of a prudent man that he might receive an injury, as a matter of law, a test of whether it was negligent to jump from a car, was erroneous. Nor should the judge have stated to the jury that certain facts would or would not make the passenger guilty of contributory negligence. . . . Whether a passenger who was put in imminent peril acted rashly or recklessly in leaping from a car, or whether he should have remained upon it, or have sought to leave it in some other manner, are questions for the jury. In determining whether he acted rashly or recklessly, and thus brought upon himself an injury which he might have avoided by more discreet conduct, the jury may consider the excitement and state of the emotions of the passenger produced by the peril in which he has been placed by the carrier."

#### The choice of hazards.

In *Haff v. Minneapolis & St. L. R. Co.* 4 McCrary, 622, 14 Fed. 558, the court said in charging the jury: "I think the rule applicable, where contributory negligence is set up as a defense, is the one which is to be applied in this case, and this is it: If the plaintiff was placed, by want of care of the defendant, in such a position that at the moment, and in the face of a great and threatening peril, he was obliged to choose between two hazards, and he makes such choice as a person of ordinary prudence and care, placed in the same situation, might make, and is thereby injured, the fact that if he had chosen the other hazard, he would have escaped injury, does not relieve the defendant from liability for its own negligence."

In *Mitchell v. Southern P. R. Co.* 87 Cal.

62, 11 L.R.A. 130, 25 Pac. 245, where a passenger on a railroad was injured, the court said: "Where there has been an unsuccessful attempt to escape danger in an accident, was the attempt which was made an unreasonable or rash act? or was it one which a person of ordinary care and prudence might do under the circumstances? The answer to this inquiry cannot be made to depend upon the result of the attempt to escape, nor upon the result which would have occurred if the attempt had not been made. It would be unreasonable to require a passenger in case of accident to judge with absolute certainty the degree of danger attending him if he made no effort to escape, and the absolute consequences of an effort to escape. He must act upon the probabilities of an effort to escape as they appear to him, and choose that hazard which seems to him, as a person of prudence, to be the least. Of course, the facts that he was injured in the attempt to escape, and that those who remained in the car escaped without injury, are circumstances which the jury should consider in determining whether he acted as a man of ordinary prudence would under the circumstances; but where he has acted in the manner described, it cannot be said that his attempt to escape constituted contributory negligence."

Where the plaintiff's intestate, a passenger on a horse railroad, placed in great peril by the negligence of the driver of the car, made a mistake in judgment in jumping from the car and was killed, the court said: "He was not, however, bound to the exercise of any better judgment or greater degree of caution than would be required of a prudent man when placed in a similar condition of peril, and it was held to be a sound rule of law, applicable to such cases, that an instinctive effort to escape a sudden impending danger resulting from the negligence of another will not relieve the latter from liability, and that delay in an effort to escape, until the exact nature and measure of danger was ascertained, would not be required. *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585. This sound principle has been recognized and reiterated in many cases. . . . That the party makes a mistake, and would have escaped injury had he remained quiet, will not bar his action." *Cuyler v. Decker*, 20 Hun, 173.

In *Woodson v. Prescott & N. W. R. Co.* 91 Ark. 388, 121 S. W. 273, where the action was brought by the fireman of one of the defendant's locomotives, for injury received by him, the court held that it was error to instruct the jury as follows: "You are further told that if, after the plaintiff knew the engine was derailed, he knew he could have escaped in safety, but thought the engine would stop, and with full knowledge of the facts decided to remain on the engine and take the risk, instead of trying to escape, he cannot recover," as this,

in effect, was stating that as matter of law the plaintiff was guilty of negligence.

#### Test of conduct.

The measure of duty of a plaintiff put in peril by the defendant is that of an ordinarily prudent man under all the circumstances. *Gibbons v. Wilkes-Barre & Suburban Street R. Co.* 155 Pa. 279, 26 Atl. 417; *Alabama G. S. R. Co. v. Fulton*, 144 Ala. 332, 39 So. 282. Compare Texas cases, *infra* II. d.

A plaintiff may recover if he finds himself in a perilous situation by reason of the failure of the defendant, and while endeavoring to extricate himself from the perilous situation in which he finds himself, he acts as a reasonably prudent man would act under such circumstances. *Illinois Southern R. Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745.

Where there was nothing in the record from which it appeared that the plaintiff had unnecessarily or improperly exposed himself to peril in the first instance, the court approved the following instruction: "A man under sudden excitement or peril is only required to exercise such care for his own safety as an ordinary prudent man would have exercised under like circumstances, and if he exercised such degree of care, then, in that, he is not guilty of contributory negligence." *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. 86.

In *Stack v. East St. Louis & Suburban R. Co.* 245 Ill. 308, 137 Am. St. Rep. 318, 92 N. E. 241, the court said in affirming a judgment for the plaintiff: "There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise, it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances."

It is, of course, a question for the jury whether the act that was done was such an act as a man of ordinary prudence might have done under the circumstances of the case. *Woodward Iron Co. v. Andrews*, 114 Ala. 243, 21 So. 440; *Noyes v. Southern P. R. Co.* 92 Cal. 285, 28 Pac. 288.

In *St. Louis & S. F. R. Co. v. Murray*, 55 Ark. 248, 16 L.R.A. 787, 29 Am. St. Rep. 32, 18 S. W. 50, the duty of a passenger is laid down as follows: "On occasions where a passenger is suddenly confronted by imminent danger and peril, he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but must of necessity judge hastily of the danger of remaining where he is, as also of the danger of attempting to escape, by the circumstances as they, at the instant, appear to him, and not by the result." He acts upon the probabilities as they appear

to him, and if he acts as a man of ordinary prudence 'placed in the same circumstances, and under a like necessity of immediate action and decision,' would have acted, and in so doing makes an effort to escape and is injured, the railroad company is responsible to him for his damages."

In an action by an employee for injuries received, as he claimed, while jumping from a car to avoid imminent peril, the court said: "One exposed to sudden and unexpected danger is not responsible for acting without judgment or wildly, and whether he so acted depends materially upon the facts and circumstances of the case. The proper inquiry is, considering his surroundings at the time, Did he exercise such reasonable care and diligence as would be expected of a prudent and reasonable man under similar circumstances?" *Pierson Lumber Co. v. Hart*, 144 Ala. 239, 39 So. 566.

But see *contra*, *Cook v. Parham*, 24 Ala. 21, where the court said: "There was evidence conducing to show that the slave June leaped from the boat into the river, when there was no necessity for him to have done so; and upon the trial it was insisted that if his death was caused by his own rashness, and not by the act of the plaintiffs in error, they could not be held responsible. The charge given upon this point was 'that, if the death of the slave was the legitimate and natural consequence of the collision, though not the inevitable consequence, the defendants would be liable;' and the judge also added: 'That if a man of ordinary care and presence of mind could have saved himself, yet, if the slave was frightened out of his ordinary presence of mind, by the confusion and alarm occasioned by the collision of the boats, and that collision was the result of the negligent acts of the defendants, then they would be liable;' or, in other words, that the death in such a case would be the legitimate consequence of such negligence. In this charge there was no error."

#### Limits of the rule

In *Galena & C. Union R. Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323, the court approved the following instruction, and held it was error to have refused to give it: "If the jury shall believe, from the evidence, that the plaintiff leaped from the car of the defendants while it was moving slowly in a place where there was no danger of the car being upset or injured, under a rash and undue apprehension of danger, when in reality he was in no danger, and that the injury was caused by such leaping, they must find for the defendants, even though the plaintiff, at the time, really thought himself in danger, and leaped to the ground to save himself from harm."

In *Chicago & A. R. Co. Randolph*, 53 Ill. 510, 5 Am. Rep. 60, the court said it was error to refuse to instruct the jury, "if the jury believe, from the evidence, that, under all the circumstances existing at the time,

a man of ordinary prudence, situate as the plaintiff was, would not have jumped off, the jury should find for the defendant."

Where the jury found that the plaintiff could not recover as his intestate was guilty of contributory negligence in jumping from the caboose on which he was a passenger, when alarmed at lumber falling from the train, the court said in affirming the judgment: "If the intestate voluntarily leaped from a train while it was moving at a rate of speed which made death or great bodily harm inevitable, he was guilty of negligence arising to the degree of rashness, unless the falling lumber produced such a condition of things as reasonably to have induced in his mind the belief that to remain would result in great bodily harm." *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. 226.

Where there is a deliberate act with no necessity for it, and no claim of fright, the plaintiff cannot recover. *Sutherland v. Cleveland, C. C. & St. L. R. Co.* 148 Ind. 308, 47 N. E. 624.

In *Muldowney v. Illinois C. R. Co.* 36 Iowa, 462, where an employee of a railroad was injured in trying to couple cars, it was held that his belief that he could do so without injury could not be considered upon the question of his contributory negligence. His belief was not the question.

In *Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685, the court, in giving directions for a new trial, stated that the jury should be instructed that if a person injured, "while using such means, and acting as a person of ordinary prudence placed in such a position might reasonably act, was injured and killed, it was immaterial that if he had followed some other course he might have escaped injury." This part of the instruction was directed in place of the following: "If the decedent, while using such means as then appeared to him to be reasonably necessary to avoid such danger, was injured and killed, still he was not guilty of contributory negligence, and the jury will so find."

In *Chretien v. New Orleans R. Co.* 113 La. 767, 104 Am. St. Rep. 519, 37 So. 716, the court, in sustaining a judgment for the defendant on the ground that the plaintiff, who was a passenger, had not good cause for jumping from a car, quoted with approval the language of the court in *South Covington & C. Street R. Co. v. Ware*, 84 Ky. 267, 1 S. W. 493, as follows: "The character of the impending danger, or at least its apparent character, is to be considered. If one acts unreasonably, rashly, or becomes frightened at a trivial occurrence not calculated to alarm a reasonably prudent man, and thereby brings injury upon himself, there is no liability. It is urged that when one is frightened by something resulting from the neglect of the carrier, he cannot be charged with contributory negligence to any accident. He, however, must act upon reasonable apprehension of peril. His conduct must con-

form to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it."

In *Brooks v. Petersham*, 16 Gray, 181, which was an action against the town for injuries due to a defect in the road, the court held that it was error to instruct the jury that "the mere want of prudent management on the part of Mrs. Brooks or her companion after the horse began to run, or the mere fact that she imprudently seized the reins and turned the horse from the road, would not exonerate the defendants." The court said further: "The plaintiff was bound to use ordinary care as well after as before the horse began to run in consequence of the defect in the road. She could not abandon herself to needless alarm, or give up all proper control of the horse, in consequence of the peril to which she was exposed by the negligence of the defendants in omitting to keep their road in suitable repair. She was still bound to use such care as a person of ordinary prudence and discretion would exercise if placed in similar circumstances and exposed to a like danger, making due allowance for the alarm into which she and her companion were thrown by the occurrence of the accident."

In *Adamson v. Norfolk & P. Traction Co.* 111 Va. 556, 69 S. E. 1055, the court approved the following instruction, stating in effect that the word "danger" was shown to be intended for apparent danger by another part of the charge: "The court instructs the jury that the law requires of every man that he exercise a reasonable amount of care for his own safety. If you believe the plaintiff has failed to prove by legal evidence that Adamson ever saw the car approaching the car on which he was seated from the rear, and if you believe from the evidence that Adamson was not in danger of being injured if he had remained seated, but that he jumped directly in front of an approaching car simply because he heard some women holler 'Jump,' without stopping to think or to take any care at all for his safety, and that his death was caused by an absolutely unguarded and reckless act of his own, your verdict should be for the defendant."

### 3. Illustrations of rule.

In *Jones v. Boyce*, 1 Starkie, 493, 18 Revised Rep. 812, where a passenger jumped from a coach probably thinking it would be overturned, but it was not, Lord Ellenborough in charging the jury said: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

This case was followed in *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, where the court approved the following instruction: "If the jury find there was no want

of proper skill or care or caution on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife in rashly and improperly springing from it, then the defendant is not liable to this action; but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset, and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

In *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502, the general rule was applied to a case of jumping or dropping from a window when the building was burning by reason of the negligence of the defendant.

The rule was also applied where the defendant's driver, recklessly driving down the street, put a woman who was crossing in such sudden and unexpected peril that, in her fright and in her efforts to escape, she fell and was injured. *Sandy v. Swift & Co.* 159 Fed. 271, affirmed in 92 C. C. A. 56, 165 Fed. 622.

In *Holland v. Tennessee Coal, Iron & R. Co.* 91 Ala. 444, 12 L.R.A. 232, 8 So. 524, where the plaintiff's intestate was killed by molten iron while in the employ of the defendant, the court approved instructions to the effect "that it was the duty of plaintiff's intestate to have used due diligence in trying to get out of the way of the molten iron, when he saw it flowing towards him in the ditch (if you believe he saw it, or could have seen it by the exercise of due care), and if he failed to do so, and because of such failure he was burned and injured, you must find for the defendant," saying that these charges "are manifestly sound statements of the doctrine of contributory negligence. The fact, if it be one, that the intestate was panic-stricken, and his energies paralyzed by the awful nature of the impending catastrophe, might be proper to be considered by the jury in determining what effort would amount to due diligence, or what omission of effort would be negligence, under all the circumstances; but no such consideration can relieve from the duty of diligence on the one hand, or condone negligence on the other."

In *Karr v. Parks*, 40 Cal. 188, the plaintiff, a child eleven years old, was walking with her sister five years old in the street, and saw the defendant's cow coming toward her in a rapid, threatening manner, and, catching her little sister by the hand, attempted to get into a corral which was near by, but was hooked and severely injured by the cow. At the time she was

about 60 feet from her father's house. The negligence of the defendant having been shown, the court said upon the question of contributory negligence: "The evidence does not satisfy us that there was even bad judgment in the plaintiff's attempting to escape to the corral for protection, rather than to the house, but it would be absurd to hold that even an adult person, in time of imminent danger, is negligent unless he takes every precaution that a careful calculation afterward will show he might have taken. She had no time to measure and compare distances, or to calculate whether she would gain time by retreating in one direction rather than another, even though, as a mathematical problem, it was very easy of solution."

In *Bilton v. Southern P. Co.* 148 Cal. 443, 83 Pac. 440, where a man driving was shown to have employed due diligence until he was within about 8 feet of a railroad track, when he first was able to learn that a train was coming, it was held that it was not negligence for him as a matter of law to attempt to escape by driving across the track after having become aware of the approach of the train.

In *Ward v. District of Columbia*, 24 App. D. C. 524, where the plaintiff was riding his bicycle down the street when a man rushed out from near a tree on the sidewalk and warned him, and the plaintiff, being confused, turned his bicycle towards the tree, which was being cut down by the defendant, and it fell upon him, it was held that it was error to take the questions of negligence and contributory negligence from the jury.

Where the plaintiff, a baggage master in the employ of the defendant railroad, jumped from a train to avoid a collision, it was held that there was no error in refusing the following request to charge: "That if it appear that at the time of the injury the plaintiff was acting in disobedience of a proper order of the conductor or person in charge of the train, to secure his, plaintiff's, safety, and it also appear that the injury was caused by such disobedience, he cannot recover." The plaintiff, however, stated that he did not hear the order, but the court said that, as baggage master, he was not legally bound to obey the conductor in such a matter. *Georgia R. & Bkg. Co. v. Rhodes*, 56 Ga. 645.

In *Root v. Kansas City Southern R. Co.* 195 Mo. 348, 6 L.R.A. (N.S.) 212, 92 S. W. 621, where a brakeman, seeing a trestle ahead of him on fire, jumped from the train and was injured, when he would have escaped injury if he had remained on the train, it was held that this was not contributory negligence, and that the matter could not be viewed from the standpoint of after the accident.

Where the defendant, probably in jest, pushed a board part way through the transom of the room occupied by the plaintiff, and she, fearing that the board would fall upon her, strained her leg in endeavoring

to get out of the way, it was held that the question whether she had acted with reasonable prudence under the circumstances was for the jury, and they having found for the plaintiff, the decision was not disturbed. *Ellick v. Wilson*, 58 Neb. 584, 79 N. W. 152.

Where a woman on the sidewalk, seeing a derailed car coming in her direction, was injured in trying to escape, and would have been safe had she stood her ground, it was held that there was no error in refusing a nonsuit, the peril being caused by the negligence of the defendant. *Tuttle v. Atlantic City R. Co.* 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450.

Where the plaintiff on the sidewalk, hearing the horse and wagon of the defendant being rapidly driven behind her on the sidewalk, instinctively jumped to get out of the way, and injured her head against a building, the appellate court said that the trial court properly refused "to charge the jury that the plaintiff was under a duty to look back and ascertain the distance of the horse and wagon before jumping to get out of the way. In place of this, the judge charged that if it appeared the horse and wagon were so distant that she had time to look around, then she was bound to do so before jumping; but if the horse and wagon were right upon her, or so close to her that she had not time to look around, and instinctively jumped on one side to avoid immediate danger, then she was justified in jumping before she looked." The court said further: "There can be no rule of law which imposes it as a duty upon one, over whom danger impends by the negligence of another, to incur greater danger by delaying his efforts to avoid it, until its exact nature and measure are ascertained. The instinctive effort on the part of the plaintiff to avoid the danger did not relieve the defendant from responsibility." *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585, reversing 5 Lans. 67. The reversal was on another ground.

In *Schafer v. New York*, 154 N. Y. 466, 48 N. E. 749, where a city had left the curb of an intersecting street in the highway so that the traveled way was across this curb, and the plaintiff's intestate, driving a heavy load, was jounced from his seat upon the pole by this curb and was seen struggling to keep on the wagon, and 20 feet beyond the curb the wheels struck a manhole projecting a few inches above the level of the street, and he was thrown under them and killed, the court said: "After he had passed over he was unexpectedly thrown into a situation of danger that would naturally cause some mental confusion. The horses were still going rapidly up the incline and had but 20 feet farther to go before the forward wheel struck the manhole. During the mere instant of time required to go that short distance he was balancing on the pole and struggling to

keep on the wagon. If he had retained his seat so that he could have seen the manhole, it would have been his duty to make due effort to avoid it, but situated as he was the jury could have found that the peculiar circumstances surrounding him relieved him from the exercise of greater care."

Where the plaintiff's intestate was laying a gas main under a horse car track, and knew of the approach of a car from the south, and it was the custom of the driver to detach his horses and drive them around the trench, the car going over it by its own motion, and one of the horses fell into the trench, and thereupon the plaintiff's intestate, to get out of the way, jumped away from the horse and was hit by the car passing overhead and killed, it was held that the questions of negligence and contributory negligence were for the jury. *Burns v. Second Ave. R. Co.* 21 App. Div. 521, 48 N. Y. Supp. 523.

Where the defendant's driver, who was driving along the road at night, drunk, was met by the plaintiff's driver, who, in apprehension of a collision, turned out, and the plaintiff was thrown out and injured, it was held that if the plaintiff's driver acted as a reasonably prudent person under the circumstances, he was not negligent. *Crampton v. Ivie Bros.* 124 N. C. 591, 32 S. E. 968.

Where the plaintiff, in endeavoring to escape a trunk which fell on the sidewalk from the wagon of an express company in front of its premises, fell over another trunk upon the sidewalk, it was held that he was not guilty of contributory negligence, and that the express company was liable for his injuries. *Vallo v. United States Exp. Co.* 147 Pa. 404, 14 L.R.A. 743, 30 Am. St. Rep. 741, 23 Atl. 594.

Where the plaintiffs, who were husband and wife, were driving down the street when their horses were frightened by the escape through a stopcock of water from a water pipe, and it was claimed that when the horses took fright the woman grasped the lines, pulled the wrong line, and prevented her husband from properly managing the horses, it was held that the court properly charged the jury that "if she was suddenly placed in a position of peril, and under the influence of fright deprived of the calm judgment she would otherwise have had, and grasped the lines with the intention of stopping the horses, even though she made a mistake in her judgment as to what would be the effect of her act, the law does not hold her to the accountability that it would if she were in other circumstances. These are questions for you. If you find that she was guilty of negligence which contributed in any degree to the happening of the accident, then she could not recover." *Baker v. North East*, 151 Pa. 234, 24 Atl. 1079.

Where the injury to a servant was due to the negligent starting of the master's mill while the servant was in a dangerous position, and the danger was caused by the 37 L.R.A. (N.S.)

machinery moving backward, and the servant, in his sudden peril, called out "back up," when it was a forward movement that he desired, it was held that this was not contributory negligence. *Mathews v. Daly-West Min. Co.* 27 Utah, 193, 75 Pac. 722.

In *Woolley v. Scovell*, 3 Mann. & R. 105, 7 L. J. K. B. 41, where the defendant, finding it convenient to throw a bag of wool from an upper story of his warehouse, instructed his servants, before doing so, to call out to passers-by in the yard, and the plaintiff, on hearing the warning, lost his presence of mind and ran across the yard thinking that he could escape in time, but was struck by the wool, it was held that he was entitled to recover.

Where the plaintiff's child was killed by the escape of gas caused by the servants of the defendants in working in the cellar of the house of the child's parents, and it was claimed that the mother of the child was guilty of contributory negligence, in that, in endeavoring to save herself, she neglected to close the doors, it was held that there was no error in leaving the question to the jury. *Flaherty v. Scranton Gas & Water Co.* 30 Pa. Super. Ct. 446.

And in *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378, it was held that a mother was not guilty of contributory negligence in failing to rescue in time her child, who had fallen into the water, in view of the excitement she was under.

Cases are not infrequent where it is claimed that it was contributory negligence "not to jump."

In *Bush v. St. Joseph & B. H. Street R. Co.* 113 Mich. 513, 71 N. W. 851, where the plaintiff was the driver of a wagon, and was injured by a collision with a street car, and his companions had escaped by jumping, it was held that it was not contributory negligence on his part not to jump, as he had the responsibility of his team and had the duty to endeavor to avoid the collision if he reasonably could.

In *Sherwood v. New York C. & H. R. R. Co.* 120 App. Div. 639, 105 N. Y. Supp. 547, the court decided, though it seems not without some difficulty, that it was not necessarily contributory negligence for a boy of sixteen years of age, with confidence in his companion, who was driving the automobile in which they were riding, to omit to jump from the machine to escape a collision with a railway train.

In *Dickson v. Omaha & St. L. R. Co.* 124 Mo. 140, 25 L.R.A. 320, 46 Am. St. Rep. 429, 27 S. W. 476, it was held that it was not necessarily negligence for an engineer whose forward trucks were off the rails, to refrain from jumping from the locomotive.

So, in *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376, it was held that it was not negligence for the plaintiff's intestate, who was an engineer on the defendant's road, to refrain from jumping from his engine to avoid the results of a collision.

#### 4. *More than one tortfeasor.*

Where the emergency is caused by the negligence of one of two tortfeasors, and the injury is inflicted by the negligence of the other, the question would seem to be simply one of proximate cause.

And where the negligence of two defendants bring about the emergency, they are both responsible. Thus, in *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458, the court approved an instruction that if the jury believed from the evidence that Miller was placed in a position of sudden peril by the negligence of the defendants, without contributory negligence on his part, he could not be held responsible for error of judgment with respect to effecting his escape, occasioned by such sudden peril; which instruction also contained the converse of that proposition.

And "where the negligence of a third party and of the defendant are contributory causes leading to a position of sudden danger to the plaintiff, the latter's ill-advised action under the spur of necessity does not amount to negligence upon his part sufficient to defeat a recovery." *Akers v. New York*, 14 Misc. 524, 35 N. Y. Supp. 1099, where however, it does not seem clear that there was any negligence of a third party.

#### b. *Emergency caused by negligence of person injured.*

For cases upon the conduct of the defendant in an emergency caused by the negligence of the person injured, see *infra*, III.

When a man's own negligence has led him into the peril and emergency, then the rule does not apply. *McClary v. Chicago*, M. & St. P. R. Co. 46 Fed. 343; *Peck v. New York*, N. H. & H. R. Co. 50 Conn. 379; *Briscoe v. Southern R. Co.* 103 Ga. 224, 28 S. E. 638; *Rundgren v. Boston & N. Street R. Co.* 201 Mass. 156, 87 N. E. 189; *Richfield v. Michigan C. R. Co.* 110 Mich. 406, 68 N. E. 218; *Aiken v. Pennsylvania R. Co.* 130 Pa. 380, 17 Am. St. Rep. 775, 18 Atl. 619; *Chattanooga Electric R. Co. v. Cooper*, 109 Tenn. 308, 70 S. E. 72; *Smith v. Norfolk & W. R. Co.* 107 Va. 725, 60 S. E. 56; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007; *Liermann v. Chicago*, M. & St. P. R. Co. 82 Wis. 286, 33 Am. St. Rep. 37, 52 N. W. 91; *Haetsch v. Chicago & N. W. R. Co.* 87 Wis. 304, 58 N. W. 393; *Dummer v. Milwaukee Electric R. & Light Co.* 108 Wis. 589, 84 N. W. 853.

"Conduct which the law requires of those who wrongfully bring themselves into an emergency is not to be measured by that which the law excuses in those who are wrongfully brought into an emergency by others." *Lucas v. New Bedford & T. R. Co.* 6 Gray, 64, 66 Am. Dec. 406.

In *South Chicago City R. Co. v. Kinnare*, 216 Ill. 451, 75 N. E. 179, where a bicyclist was injured by a street car, the court, in affirming a judgment for the plaintiff, approved the following instruction: "If

you believe from the evidence that the plaintiff became frightened or alarmed or confused just before coming into collision with defendant's car, on account of getting suddenly into a position of peril, then such sudden peril will not excuse him for a failure, if there was any, to exercise ordinary care, if you believe from the evidence that he brought himself into such position of peril by reason of his own negligence, if he was negligent, or by reason of running the risk of an obvious and serious danger merely to avoid inconvenience."

Where the plaintiff, knowing that a train was expected, negligently went upon a trestle, and seeing the train coming, jumped from the trestle and was injured, it was held that if the train stopped, as was claimed by some of the witnesses, before it reached the trestle, then the plaintiff could not recover; but if, on the other hand, it did pass the place from which the plaintiff jumped, inasmuch as the engineer had seen the plaintiff, then, on the theory of last clear chance, the defendant was liable. *Weeks v. Wilmington & W. R. Co.* 131 N. C. 78, 42 S. E. 541.

But there have been some cases where the person injured was given the benefit of the emergency rule, although his own negligence brought him into the place of peril.

Thus, in *Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, 41 Am. Rep. 333, where it was admitted that the plaintiff's deceased husband was negligent in walking upon a railway trestle, but that the defendant's servants saw him in time to have stopped the train before it reached him, it appeared that the deceased sat down on the end of the ties, and after three or four cars had passed him in safety raised up and was struck and killed. The court said: "One in so perilous a position is not to be held to the exercise of the same care and prudence as if he were in a place of security. The terror, temporarily depriving the deceased of the proper use of his faculties, was produced by the recklessness of defendant's servants managing the train, if they saw him, and could have stopped the train after they discovered him on the trestle, before it reached him."

Where it was the custom of persons to walk along the railroad track where it passed through marshy grounds, and there was no way to get off the track except into a ditch of water or on platforms at intervals, and the plaintiff's intestate was killed by a train which he first saw some 900 feet behind him, having endeavored to gain one of the platforms instead of jumping into the ditch, the court said: "The deceased was placed in a sudden and perilous exigency, and the question is not whether he did the wisest thing possible under the circumstances, but whether he exercised ordinary care and prudence." It may be noted that the court said also as to the question of trespass: "Notwithstanding the trespass of the deceased upon the track, it was undoubtedly the duty of the engineer to exer-

cise ordinary diligence and care to avoid the loss of life." *Remer v. Long Island R. Co.* 48 Hun, 352, 1 N. Y. Supp. 124, affirmed in 113 N. Y. 669, 21 N. E. 1116.

And in *Harrington v. Los Angeles R. Co.* 140 Cal. 514, 63 L.R.A. 238, 98 Am. St. Rep. 85, 74 Pac. 15, the court approved the theory that where the defendant knows of the danger to the injured party which the latter has entered into or incurred by reason of his negligence in failing to discover it, and such defendant recklessly proceeds regardless thereof, he can find no refuge in the fact that the injured party, who does not know of it, would have known if he had used reasonable care to ascertain it, and held that in such a case he who knows of the danger and can avoid it, as against one who does not in fact know thereof, has the last clear opportunity to avoid the accident, and is liable, if the injured party, after discovering his own danger, exercises ordinary care to escape the injury, and that the conduct of the person killed after discovering the danger, who was then in great peril, was a question for the jury as to whether he acted with reasonable prudence under the circumstances, to avoid the danger.

#### *c. Emergency caused by other agencies.*

There are but comparatively few cases which discuss the question where the emergency has arisen from a cause other than that of the negligence of the parties.

For the rule where the emergency is caused by the negligence of the defendant and another tortfeasor, see *supra*, II. a, 2.

In *Chattanooga Electric R. Co. v. Cooper*, 109 Tenn. 308, 70 S. W. 72, where the plaintiff's intestate, in order to escape an automobile, ran upon the track of the defendant's car and was killed by the car, the court held that while the position of peril must have been reached without the fault of the plaintiff, it was "a mistake to assume, as is done by the plaintiff in error, that the application of this rule is restricted to cases where the peril producing the confusion of judgment, and the consequent false effort to escape, is the negligent act of the party creating the peril." The court said further: "To require that one in the midst of peril, or in the presence of impending danger, should act with the prudence of an ordinarily careful man under ordinary circumstances, would be to put a strain on human nature which all experience shows it would not be able to bear," but the case was reversed, as it was not made plain to the jury that the plaintiff must be without fault in putting himself in the place of peril.

In *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 375, 102 Pac. 347, it was held that the test was the conduct of a reasonable and prudent person under the circumstances, whether the apparent peril was produced by the defendant or an agent independent of it. In that case the plaintiff's 3; L.R.A. (N.S.)

child, with its grandmother, stepped upon the defendant's track to escape from a team of horses which were frightened by an exhaust from the defendant's engine, and the child was killed by cars backing without statutory warning. The court did not seem to consider that there was any negligence in the exhaust.

In *Alabama & V. R. Co. v. Lowe*, 73 Miss. 203, 19 So. 96, where a nurse carrying one child and leading the other started across a railway track, with plenty of time to cross in safety, but stopped on the track terrified at a cry that some performing bears were loose, and the child she was leading was killed by the train, the court approved the finding that the nurse was not guilty of contributory negligence. The negligence charged against the defendant was running through a city at a high rate of speed, approaching a populous crossing around a curve without ringing the bell or blowing the whistle, and without keeping a proper lookout. The question of imminent peril is not discussed, but the court in its opinion refers to it as follows: "When the nurse started to cross the track, she saw the smoke from the engine and knew that a train was approaching, but the train was several hundred feet away, and she had ample time in which to have prudently gone forward and to have safely crossed the track, even at the high rate of speed at which the train was being run. She failed to so cross, because, when she arrived just on the track, her course was arrested by the general alarm made that the 'bear was loose,' the flight of the crowd in every direction, and the outcries directed to her. Terrified, stunned, incapable of action, the unhappy old nurse stood motionless."

In *Cassida v. Oregon R. & Nav. Co.* 14 Or. 551, 13 Pac. 438, the court, in reversing a judgment for the defendant, said: "Here were three little girls who, being frightened by cattle, sought refuge upon the railroad track. They may have been so alarmed and terrified by their fears that they did not look for any train of cars, but, seized with a panic, ran down the trestle work in order to make their escape. It was not necessarily any act 'of commission or omission wrongful in itself.' Their apprehensions of danger from the cattle may not have been well founded, but could have been as potent as though they had been real. It seems to me that the offer to show the circumstances which led to the course they pursued in the case should have been admitted in proof, and submitted to the consideration of the jury."

In *Palmer v. Larchmont Horse R. Co.* 112 App. Div. 341, 98 N. Y. Supp. 567, where the plaintiff was driving at night along a road and, seeing red lights extending along some distance as a warning of danger because of repairs to the road, he turned to the left upon the defendant's electric car track without looking behind him, and was shortly after struck from the rear by one of the defendant's cars and injured, it was



held that he was not, as a matter of law, guilty of contributory negligence in the sudden emergency which confronted him.

In *Cannon v. Pittsburg & B. Traction Co.* 194 Pa. 159, 44 Atl. 1089, where the plaintiff, driving on a street which was only 20 feet wide and had two trolley tracks, hearing a car behind him, drove on the left-hand track to let it pass, and continued on the left-hand track, and while the car was beside him, another car came suddenly into view over a hill approaching in the opposite direction, and ran into his team, the court said: "The only ground on which the plaintiff could be adjudged guilty of contributory negligence is that, when he turned out to let the first car pass, he did not stop and wait until it had passed, and then return to the track which he had left, instead of approaching the crest of the hill on the track on which there was danger of meeting a car. Because of the narrowness and grade of the street, the situation was one calling for extreme caution, but the court could not have said that in going on the plaintiff was negligent. Being familiar with the locality, he had reason to suppose that he might meet a car on the track on which he was driving before he had an opportunity to turn out, but not that he would meet a car running at such speed over the narrow crest of the hill that it could not be stopped in time to avoid a collision after the motorman saw him. . . . He was, moreover, by the necessity of turning out of the track, suddenly placed, without fault on his part, in a position of danger; and, in his effort to extricate himself, he could not be held to the use of the best judgment."

In *Moore v. Central R. Co.* 47 Iowa, 688, where the plaintiff, to escape from a frightened team of horses which he and his fellow servants had been using, stepped on the track of his master's railway, and was run over by a hand car, a judgment against the master was affirmed. It should be noted that there was some evidence that those on the hand car saw the plaintiff's danger in time to have stopped the car, and there is an intimation in the report that the hand car may have frightened the horses.

In *Simeone v. Lindsay*, 6 Penn. (Del.) 224, 65 Atl. 778, the court seems to consider that the sudden peril might be caused otherwise than by the negligence of the defendant, as it charged the jury that "while a person will not be held guilty of contributory negligence, who, in the effort to avoid immediate danger, in the exigency of the moment, suddenly and without time or opportunity for reflection, puts himself in the way of other perils without fault on his part, and particularly so if the defendant has placed the person in such position, yet, if a person walks into a danger that the observance of due care would have enabled him to avoid, and is thereby injured, he would be guilty of contributory negligence."

In *Folsom v. Concord & M. R. Co.* 68 N. 37 L.R.A. (N.S.)

H. 454, 38 Atl. 209, where the plaintiff's intestate, on hearing a train, endeavored to force his horses over the crossing and was killed, it was held that the court properly instructed the jury that "if you find McMurphy was put in sudden peril in consequence of the negligence of the defendants, or for any reason for which he was not responsible, and adopted a course which in ordinary circumstances a prudent person would not have adopted, he is not necessarily chargeable with negligence; but the test is, Would an ordinarily prudent person under the same circumstances have done as he did." But it would seem that there probably was enough in the case to show that the peril was caused by the negligence of the defendant.

In *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209, the court, having stated that it must be assumed from the evidence and the verdict that the situation was the result of the negligence of the defendants, said also that they were not prepared to hold, "in the absence of negligence on the part of the plaintiff, that it is a material question whether the dangerous situation of plaintiff was the result of defendants' negligence or otherwise."

In *Hoff v. Los Angeles P. Co.* 158 Cal. 596, 112 Pac. 53, the court, in reversing a nonsuit, lays down the rule as to sudden peril without reference to the negligence of the other party, that is to say without making it a condition that the peril was caused by the negligence of the defendant; but it seems that that was probably the theory of the case.

In *Feeney v. Wabash R. Co.* 123 Mo. App. 420, 99 S. W. 477, where it does not appear entirely clear that the emergency was due to the negligence of the defendant, the court said of the plaintiff and her driver: "They were in a trap, were suddenly confronted with great danger and, even if it appeared, as it does not, that poor judgment was displayed, we would not hold them accountable in law for losing their heads in a moment of great and imminent peril."

In *Martin v. Third Ave. R. Co.* 27 App. Div. 52, 60 N. Y. Supp. 284, the court, in reversing a judgment for the plaintiff, nevertheless said: "If, in the exercise of reasonable prudence, he had placed himself in a position of danger, and, when there, was called upon to act in an emergency, the fact that he did not select the safest course, and was injured, would not as matter of law render him guilty of contributory negligence."

In *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700, 45 N. E. 559, the court, in stating the rule as to the person injured, says in the official headnote, "when a person, without his fault, is placed in a situation of danger," etc. In that case the peril or the emergency was created by the negligence of the defendant.

In *Lake Shore & M. S. R. Co. v. John-*

ston, 25 Ohio C. C. 41, the court quotes from the Snyder Case this official headnote, without stating that the emergency was created by the negligence of the defendant; but it seems probable that this was the theory on which the point was decided.

In *Mosten v. Lake Shore & M. S. R. Co.* 218 Pa. 392, 67 Atl. 740, the court invoked the rule without pointing out clearly any negligence on the part of the defendant in creating the emergency, though it seems probable that the court considered that there was such negligence.

The theory that the negligence creating the emergency must be that of the defendant was enforced in *Wilson v. Susquehanna Turnp. Road Co.* 21 Barb. 68, where a trace became unhitched in going down a hill, and the driver turned the horses to the left at the side of the road, whereupon the plaintiff, riding in the wagon, being afraid that the horse would go over the bank, jumped out upon a pile of stones and was injured. The road was not as wide as was required by the act incorporating the defendant, but it was held that the injury was not caused by any negligence of the defendant, and a judgment for the plaintiff was reversed. The court distinguishes *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115, on the ground that there the negligence causing the peril was that of the defendant.

In *Trowbridge v. Danville Street-Car Co.* 1 Va. Dec. 823, 19 S. E. 780, where it was claimed that the plaintiff's intestate, in order to escape a sudden threatened peril from drays and wagons, came suddenly in front of the defendant's car, the court, in sustaining a verdict for the defendant, said that there was no negligence on the part of the defendant, and that the sudden peril referred to in the (unspecified) "authorities cited" was such as the defendant has caused.

So, in the master and servant case of *Murphy v. Chicago G. W. R. Co.* 140 Iowa, 332, 118 N. W. 390, the court lays down the rule that the emergency or ground of apprehension must be due to the negligence of the defendant.

In this connection reference should be made to *Wesley City Coal Co. v. Healer*, 84 Ill. 126, 1 Mor. Min. Rep. 68, where the owner of a coal mine was negligent in omitting to maintain an extra exit required by the statute and, a fire breaking out in the mine, the men rushed to the shaft, and the plaintiff's husband fell down the shaft and was killed, and it was held that, admitting the fire was accidental, the panic would probably have been averted had there been the extra exit, as the knowledge of this fact would have reassured the workmen; and the jury may well have found that the alarm or fright resulted directly from the want of a second mode of escape. *Ibid.*

The rule that the conduct of one placed in a sudden emergency is to be tested by the conduct of an ordinarily prudent person

son placed in the same emergency is not in reality an exception to the general doctrine of contributory negligence, but a mere application thereof. The conduct of an ordinarily prudent person is the general test applied in determining whether or not one has been guilty of contributory negligence. That test, of course, is to be applied in the light of the surrounding circumstances, which in the cases now under consideration include, among others, the existence of a sudden emergency. Many, perhaps most, of the cases, in stating the rule as to a sudden emergency, use language literally implying that the emergency must have been created by the negligence of the defendant. In most of these cases, however, there was no question of negligence except on the part of the defendant or of the plaintiff, and the courts probably meant merely to negative the applicability of the rule where the emergency was created by the plaintiff's own negligence. Viewing the rule simply as an application of the general doctrine of contributory negligence, it is not apparent how the question whether the emergency was created by the negligence of the defendant or of a third person can be material, assuming that the defendant has been guilty of some act of negligence which may be deemed the proximate cause of the injury, and which, apart from the question of contributory negligence, would sustain a recovery. When negligence on the part of the defendant has been established as a proximate cause of the injury, the liability is established, unless plaintiff did not exercise the care of an ordinarily prudent person. In determining whether or not he did exercise such care, it is necessary to take into consideration the situation existing at the time with reference to which his conduct must be determined, and if at that time he was confronted with a sudden emergency, it would seem to be entirely immaterial, so far as the question of contributory negligence is concerned, whether that emergency was the creation of the defendant's negligence or of that of a third person. To apply the rule that the plaintiff was bound only to exercise the care of an ordinarily prudent person confronted by the same emergency, in a case where the emergency was created by the negligence of a third person, and not by the negligence of the defendant, is not, of course, to permit the plaintiff to recover against the defendant because of the negligence of a third person, since, as before stated, the negligence of the defendant as a proximate cause of the injury must in any event be established. It is merely to refuse to eliminate the sudden emergency created by the negligence of a third person, as a factor in determining whether or not plaintiff has been guilty of contributory negligence, which may be invoked to relieve the defendant of the consequences of its conceded or established negligence. If the emergency was created by the plain-

tiff's own negligence, though the defendant was thereafter guilty of negligence constituting a proximate cause of the injury, the plaintiff cannot ordinarily recover, even though his conduct after the emergency arose was that which might be expected from an ordinarily prudent person in the same emergency, for the reason that his conduct is not (as in the case of an emergency created solely by the negligence of the defendant or of a third person) to be considered solely with reference to the situation after the emergency arose, but his original negligence continues as a factor in the situation, and the question of his contributory negligence must be considered with reference to his whole course of conduct, including that which preceded as well as that which followed the emergency.

It is probably, however, logically essential to the Texas doctrine, hereinafter referred to, that the emergency shall have been created by the negligence of defendant.

#### No recovery without negligence.

There can, of course, be no recovery where there is no negligence.

Thus, where one who was passing along the street was warned of a blast about to be made, and took up a position of safety together with certain of the defendant's employees, and, the blast being very severe, he became terrified and rushed into a position of danger, where he was killed, it was held that the defendant was not liable. *Graetz v. McKenzie*, 9 Wash. 696, 35 Pac. 377.

Where a passenger jumped from a car after it was found to be off the track, the court said, in reversing a judgment for the plaintiff: "The third instruction places the right of recovery on the sole ground of there being an accident, and that plaintiff jumped from the car and was injured, regardless of the question as to whether the defendant was in any manner guilty of negligence, and regardless of the question as to whether the plaintiff was in the exercise of the same care when he jumped from the train as would have been exercised by a man of ordinary care and prudence under the same circumstances." *Mobile & O. R. Co. v. Klein*, 43 Ill. App. 63.

#### d. Texas cases.

In Texas, since the *Neff Case* *infra*, the test of the ordinarily prudent man under the circumstances is not considered a practical one.

In *International & G. N. R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283, the court criticized the qualification, "if the acts done were such as an ordinarily prudent person might have been expected to do under like circumstances," and says: "If the standard by which the conduct of the imperiled party is to be judged is to be that which a person of ordinary prudence might be ex-

pected to do under like circumstances, how can it be determined what a man of prudence would do under such conditions? A jury is presumed from their knowledge of men and their affairs in ordinary transactions, to know what a man of ordinary prudence would do under a given state of facts; but when prudence itself is destroyed, and judgment yields to sudden impulse, when there is neither time nor capacity to reflect, how can anyone say what a man prudent under ordinary circumstances would do if he should be so situated? The rule is sound and just, which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if, in an effort to save his life, he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." This last quotation is partly quoted in *Missouri, K. & T. R. Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956. The theory of the *Neff case* is approved in *International & G. N. R. Co. v. Sein*, 11 Tex. Civ. App. 386, 33 S. W. 558; *Houston & T. C. R. Co. v. Byrd*, — Tex. Civ. App. —, 61 S. W. 147; *Ft. Worth & R. G. R. Co. v. Eddleman*, 52 Tex. Civ. App. 181, 114 S. W. 425.

In *Gulf, C. & S. F. R. Co. v. Knott*, 14 Tex. Civ. App. 158, 36 S. W. 491, a case of master and servant, the court, referring to the *Neff Case*, said: "Under this rule it is not required that the act of the party which results in his own injury should be such as might have been expected from an ordinarily prudent person under like circumstances. Such qualification, by the opinion in the case referred to, is deemed to be useless, if not calculated to confuse the jury, when expressed in a charge; and it may now in this state be considered eliminated from the rule which before obtained in cases of this character."

The *Neff rule* is also approved in *Bryant v. International & G. N. R. Co.* 19 Tex. Civ. App. 88, 46 S. W. 82, where the court reversed a judgment for the defendant by reason of the following instruction: "Although there may have been apparent danger to plaintiff, yet, if there was in fact no danger, defendant would not be liable for plaintiff's imaginary danger."

In *San Antonio & A. P. R. Co. v. Peterson*, 20 Tex. Civ. App. 495, 49 S. W. 924, the court approved the following instruction: "If you believe from a preponderance of the evidence that the defendant was guilty of negligence in the issue submitted to you, in the manner charged, and that, as a proximate result of such negligence (if any), the plaintiff was placed in a dangerous situation, where he must adopt a perilous alternative; or where, in the

terror of an emergency for which he was not responsible (if you so find), and for which defendant was responsible (if you so find), he acted wildly or negligently, and suffered in consequence,—such negligent conduct, under such circumstances (if any), is not contributory negligence, for the reason that persons in great peril, when not caused by their acts, are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.”

In *Atchison, T. & S. F. R. Co. v. Van Belle*, 26 Tex. Civ. App. 511, 64 S. W. 397, where Van Belle caught his foot between the rails in the yards of his employer, and was run over, the court approved the following instruction: “In determining whether or not said Emil Van Belle used such means to extricate himself from his perilous position, if you believe he did get his foot fastened as alleged, and avoid the danger, as a reasonably prudent person would have used under like circumstances, you are authorized to take into consideration whether or not the said Emil Van Belle was excited to such an extent that the means to extricate himself was not thought of by him, and would not have been thought of by a reasonably prudent person under like circumstances, there being no allegation that the deceased, Emil Van Belle, was excited so as to render proper and prudent action on his part impossible, and the evidence showing that the time was ample for him to have extricated himself had he been so fastened and excited.”

In *Saunders v. Missouri, K. & T. R. Co.* 35 Tex. Civ. App. 383, 80 S. W. 387, where the defendant was charged with running an engine at high speed, and in unnecessarily blowing a whistle frightening the mules of the plaintiff, and it was claimed by the defendant that the plaintiff should have dismounted from his wagon, the court said: “The court charged the jury in effect that if, after the team became frightened, the plaintiff could have dismounted from the wagon with safety; and if, under the circumstances, a man of ordinary prudence would have dismounted,—the plaintiff was not entitled to recover. This charge is objected to on the ground that it ignored and eliminated the question of imminent peril. The objection is well taken. The rule is that when one person is placed in a perilous position by the wrongful act of another, the person so situated is not required to exercise the same degree of care that a person of ordinary prudence would have exercised.”

In *Texas Midland R. Co. v. Byrd*, 41 Tex. Civ. App. 164, 90 S. W. 185, the court said: “If the servants of appellant operating the train in question were guilty of negligence in not signaling its approach sooner than they did, and by reason of such negligence appellee was placed in a position of real or apparent danger,

and, impelled by sudden terror produced thereby, jumped from the trestle, or fell in his effort to escape such danger, and was not himself, under all the circumstances, guilty of contributory negligence in walking upon said trestle, then appellant would be liable, whether appellee acted prudently or imprudently to avoid the danger or apprehended danger;” but the judgment for the plaintiff was reversed upon another ground. (On an appeal after a subsequent trial, it was held that the plaintiff was guilty of contributory negligence in going upon the trestle. 102 Tex. 263, 20 L.R.A.(N.S.) 429, 115 S. W. 1163, 20 A. & E. Ann. Cas. 137.)

In *International & G. N. R. Co. v. Bryant*, — Tex. Civ. App. —, 54 S. W. 364, the court, referring to a former appeal in the same case, says: “It was then held that the issue of contributory negligence was not only not raised by the evidence, but that parties placed in a perilous position by the negligence of another were not held to any degree of care; that if it should afterwards appear that, had they remained still and done nothing, the injury would have been avoided, recovery would not be defeated thereby. 19 Tex. Civ. App. 88, 46 S. W. 82. The trial court, in submitting the case to the jury, followed that decision, and we are of opinion there was no error in so doing. *International & G. N. R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 285.”

Where the plaintiff's wife, who was being scalded by steam from a locomotive, in attempting to escape ran into a post and was injured, the court, following the *Neff Case*, said that the trial court properly instructed the jury in substance “that if plaintiff's wife was, by the negligent act of appellant, placed in a situation of danger, and, in order to save herself from the danger, acted wildly and negligently, such act on her part would not prevent a recovery by plaintiff.” *Gulf, C. & S. F. R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317.

But in *Texas Midland R. Co. v. Booth*, 35 Tex. Civ. App. 322, 80 S. W. 121, the court reversed the case on account of the following clause in an instruction: “‘And that in her efforts to save herself and her child from the danger of being thrown from said wagon, undertook to alight therefrom,’ because it assumes as a fact that . . . [the woman referred to] was in danger of being thrown from the wagon.” And the court, while citing the *Neff Case*, says, as to the question of apparent danger: “We understand, of course, that the rule in such cases is not what an ordinarily prudent person would do under the same circumstances. At the same time, we are of opinion that it is not every appearance of danger, however slight, which will relieve the injured party from the exercise of ordinary care. In our opinion, the rule is that there must be either a real danger or that the circumstances as they ap-

pear to the party at the time must be such as to create in the mind of such person a reasonable apprehension of danger. Otherwise the fright and consequent injuries could hardly be held to have been such a reasonable consequence of the negligence of defendant as to constitute such negligent act the proximate cause of the injury."

In *Missouri K. & T. R. Co. v. Oslin*, 26 Tex. Civ. App. 370, 63 S. W. 1039, the court seems to have instructed the jury as if the rule in Texas was similar to that in other states; but as the judgment was for the plaintiff, this point was not considered.

Where the plaintiff, an employee of a consignee of oils, was unscrewing the cap on an oil car, for the purpose of connecting the hose, and, by the negligence of the defendant, as was found by the jury, one of the valves was open so that the oil gushed over the face and eyes of the plaintiff, and he then endeavored to put the cap back to stop the oil, and it further gushed over his face and eyes, inflicting injuries, it was held that his action under the circumstances, in endeavoring to put back the cap, was not contributory negligence. *Gulf, W. T. & P. R. Co. v. Wittnebert*, — Tex. Civ. App. —, 104 S. W. 424.

### III. Conduct of defendant.

In *LEMAX v. SPRINGFIELD STREET R. Co.* the court concedes that the fact of the emergency is one of the circumstances in which the conduct of the defendant is to be viewed by the jury. This is in accord with *Tozier v. Haverhill & A. Street R. Co.* 187 Mass. 179, 72 N. E. 953, where the court, after holding that there was no error in refusing the following instruction: "If the jury find that the motorman did not exercise the best judgment which the case discloses could have been exercised, he being called upon to act in a sudden emergency, his error would not be such negligence as would make the defendant liable," said: "If the request contained nothing but a statement of the familiar principle that, in determining whether one acts with reasonable care in a sudden emergency, the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, and he is not to be deemed careless merely because he failed to do that which would have been best as shown by subsequent events, it properly might have been given. . . . But it went further, and included the proposition that the motorman's error in not exercising the best judgment in a sudden emergency, if the jury found such an error, would not be actionable negligence, whatever the error might be in other particulars," gross or otherwise.

But the doctrine of many of the cases is less guarded.

Where a motorman confronted with the emergency of a collision threw off the power and jumped from the car and attempted

to remove it from the track, and in his haste did not completely throw off the power, the court, in reversing a judgment for the plaintiff, whose injury in some degree was due to the fact that the power was not cut off, said: "Persons who have to act in a sudden emergency are not to be judged in the light of after events, but are to be judged, under all the circumstances of the case, by the standard of what a prudent person would have been likely to do under the same circumstances. Whether the failure of the motorman to turn the controller so as to completely shut off the power before he jumped from the car was negligence was a question of fact, to be determined from all the circumstances and in view of the evidence tending to prove that he was confronted with a sudden emergency and an unexpected danger, which required prompt and immediate action." *Barnes v. Danville Street R. Co.* 235 Ill. 566, 128 Am. St. Rep. 237, 85 N. E. 921.

Where the plaintiff's intestate was under a car the wheels of which rolled upon his leg, and no negligence was claimed against the defendant for this act, but it was charged with negligence in that its superintendent of the yard, in an endeavor to extricate the plaintiff's intestate, ordered that the train be backed, and it was backed and ran over his body and killed him, it was claimed on the part of the defendant that one acting in a sudden crisis was not required to exercise that deliberate judgment which time for reflection affords. The court, while agreeing with the doctrine in general, stated that the jury were warranted in finding that the superintendent was guilty of negligence in backing the train, when the result was obvious to the casual observer. *American Car & Foundry Co. v. Inzer*, — Ind. App. —, 86 N. E. 444, reversed on another ground in 172 Ind. 56, 87 N. E. 722.

In *Bittner v. Crosstown Street R. Co.* 153 N. Y. 76, 60 Am. St. Rep. 588, 46 N. E. 1044, the court, in reversing a judgment for the plaintiff, said that if the jury "could believe the evidence of the witness Toms, that the car had passed so far beyond the boy, and then, while he was still alive, was backed down upon him, and again was sent over him, they could, perhaps, say that the motorman was careless in the management of his car at the time, and that, through such carelessness, the boy was in fact killed. But if they believed that the motorman was endeavoring, in the exercise of his judgment, to prevent injury to the boy, then there was no carelessness on his part, but merely an error of judgment, for which the defendant could not be held responsible. Upon the evidence, it appears that the motorman was confronted with a sudden emergency, and it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible, even if it was an error which brought

about the lamentable results claimed. Even the failure to exercise the best judgment would not be evidence of negligence."

In *Stabenau v. Atlantic Ave. R. Co.* 155 N. Y. 511, 63 Am. St. Rep. 698, 50 N. E. 277, reversing 89 Hun, 609, it was held that there was no negligence in the motorman of the defendant choosing one of two methods of stopping his car. The court said: "Whether the one or the other means provided for stopping the car should have been adopted was a matter for the exercise of the motorman's judgment, and, though newly employed, he was not shown to be incompetent. For an error in its exercise, the defendant could not be held responsible. Even the failure to have exercised the best judgment would not have been evidence of negligence."

In *Wynn v. Central Park, N. & E. River R. Co.* 133 N. Y. 575, 30 N. E. 721, the court, in reversing a judgment for the plaintiff on the ground that there was not any evidence of want of skill on the part of the driver of a car which was running downhill with a broken brake, said that, while they did not see any evidence that there was any failure to exercise the best judgment which the case rendered possible, a failure to exercise the best judgment which the case rendered possible cannot clearly be claimed as evidence of a lack of care or skill.

In *Lewis v. Long Island R. Co.* 162 N. Y. 52, 56 N. E. 548, the following instruction was held to be error: "If you find that the engineer of the defendant's train, after seeing the horses attached to the trolley in which plaintiff was seated, omitted to do any act which might have prevented the collision, or might have lessened the danger to plaintiff, defendant was guilty of negligence." The court said: "Where an employee of a railroad company is confronted with a sudden emergency, the failure on his part to exercise the best judgment the case renders possible does not establish lack of care and skill upon his part, which renders the company liable.

The short period of time in which he was obliged to act, the impending danger to his train, to himself, to his passengers, and to others, with the consequent excitement attending such a situation, the various acts required to stop or lessen the speed of the train, and all the other circumstances surrounding him at the time, should have been presented to the jury and considered by it before it could properly find the defendant negligent by reason of the acts of its engineer. By the portion of the charge under consideration, the jury was permitted to find the defendant negligent without regard to these facts and circumstances, and to hold it liable for any mistaken exercise of judgment upon the part of the engineer."

Where a flagman at a crossing suddenly confronted the plaintiff's horses with his lantern, and stopped them from continuing on over the crossing, it was held that if

there was any negligence in the manner of action of the flagman, it was the act of a man in emergency saving human life which was apparently in peril; therefore, he was not negligent. *Floyd v. Philadelphia & R. R. Co.* 162 Pa. 29, 29 Atl. 396.

Where gasoline from a lamp on the defendant's premises had taken fire, and as one of the servants was carrying it to the door it burst into flames, severely burning him, and he threw it from him injuring the plaintiff, it was held that there was no negligence on the part of the defendant, as the servant was not negligent in acting as he did in the sudden peril which had overtaken him. *Donahue v. Kelly*, 181 Pa. 93, 59 Am. St. Rep. 632, 37 Atl. 186.

In *Phillips v. People's Pass. R. Co.* 190 Pa. 222, 42 Atl. 686, the court, in reversing a judgment for the plaintiff, while not satisfied that there was any lack of wisdom in the course pursued by the motorman, said: "It cannot be said that he was bound, upon being confronted by so sudden and immediate a danger, to do what after mature deliberation would have seemed to a prudent man to be the wisest thing under the circumstances. Where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there must be not only a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, but also a reasonable opportunity to perform it."

Where the motorman of an electric car saw a boy riding on the steps of a car of a steam railroad approaching him on a parallel track, and there being not sufficient space between the two tracks to enable the cars to pass without injuring the boy in his then position, the court, in affirming a nonsuit, said: "With a clear understanding that the boy would be injured unless he got out of the way of the electric car, the motorman called and motioned to him to jump off or climb on the bumper. Possibly under the circumstances it would have been better to stop the car, and thus lessen the injury, than attempt to avert it altogether; but since he was confronted by a sudden and unexpected danger, and had but a moment in which to act, the motorman cannot be held liable for failure to see and follow what might appear on reflection to have been the wiser course." *Ackerman v. Union Traction Co.* 205 Pa. 477, 55 Atl. 16.

Where a fire had broken out in a mine, and the plaintiff's intestate, who was killed, might have been saved if the fan of the mine had not been stopped, the court, in holding that the defendant was not liable for the stopping of the fan, said: "The evidence discloses that, at the time the fire was discovered by the men upon the outside of the mine, they were suddenly placed in a situation demanding immediate action, and that in the excitement and confusion occasioned by the discovery of the fire, and peril of the men below, and

not knowing the precise location of the fire, they decided to do, and did do, what seemed to them best at the time. If what was done was not the best thing that could have been done, it nevertheless cannot be deemed an act of negligence, but must be considered a mere error of judgment, for which the company cannot be held responsible." *Hughes v. Oregon Improv. Co.* 20 Wash. 294, 55 Pac. 119.

But in *Bessemer Land & Improv. Co. v. Campbell*, 121 Ala. 50, 77 Am. St. Rep. 17, 25 So. 793, the court held that in considering the actions of the superintendent of a mine for the rescue, etc., of miners, and with reference to his closing the mine or ordering it closed, there was no predicate for the application of the *in extremis* rule in any case, in the absence of personal peril to the party seeking to have his conduct measured by reference to it.

Where one of a hand car crew was killed, and the question was as to the negligence of the defendant's foreman when he saw a train approaching, the court said: "It may be that the section foreman had the option of a safer course than the one he adopted; but, even then, we should not impute negligence to such mere error of judgment. Such mere error of judgment does not have within it the elements of negligence. We conclude, therefore, that where there are two or more different lines of action, any one of which may be taken, and a person with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the result that his choice was not the best means of escape cannot be imputed to him as negligence." *Gumz v. Chicago, St. P. & M. R. Co.* 52 Wis. 672, 10 N. W. 11.

Where the plaintiff was injured by a horse that was running away, *Lindley, J.*, said in his opinion: "It is said that negligence is to be inferred from the fact that the driver did not call out or give warning. I cannot see that that *per se* affords any ground for inferring negligence. The coachman himself was in fear for his own life; and the probability is that in such circumstances even a cool man might abstain from calling out." *Manzoni v. Douglas, L. R.* 6 Q. B. Div. 145, 50 L. J. Q. B. N. S. 289, 29 Week. Rep. 425, 45 J. P. 391.

Where a passenger on a street car on runners was injured on account of the running away of the horses, and it was claimed that the driver could have directed them straight down the street, instead of permitting them to make a usual turn into a side street on the usual route, while the judgment was for the plaintiff, the jury expressly found that the driver was without fault. The court said: "The driver had to decide what to do in a very brief interval, and under unusual and trying circumstances; and clearly negligence is not predicable of his action, and so the jury have found." *Rainnie v. St. John City R. Co.* 31 N. B. 582. 37 L.R.A.(N.S.)

In *Pond v. Norfolk & W. R. Co.* 111 Va. 735, 69 S. E. 949, it was held that the defendant's servant could not be required to adopt the wisest possible action to avert an accident.

So, in *Bishop v. Belle City Street R. Co.* 92 Wis. 139, 65 N. W. 733, it was held that the defendant's motorman was not liable merely for failing to choose that course which, after the result was ascertained, might seem to have been the best.

In *New York, C. & St. L. R. Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130, the court said *obiter*: "While engineers of locomotives are expected from their training, experience, and the nature of their duties, to be equal to almost any emergency in the management of their trains, yet it must be remembered in their favor that they have mind and nerves the same as other people, and that, when they are suddenly and unexpectedly confronted with imminent peril or danger to themselves or to the persons and property in their charge, by obstructions on the track or about to go thereon, they cannot be held to a strict course of conduct to prevent injury to persons or property not connected with the train, so that the action taken is in good faith, and at the time believed to be the best."

In *Todd v. Daniels*, 153 Ill. App. 223, it was held that where, in a certain emergency caused by an unavoidable accident, the facts that an order given by one in charge of servants was not the best order under the circumstances, and in consequence of it one of the servants was injured, would not establish negligence in the giving of the order.

But in *Macdonald v. Thibaudeau, Rap. Jud. Quebec* 8 B. R. 449, where a fire broke out in the defendant's warehouse, and as the employees were coming down the stairs the defendant's foreman told them to go back to their work as there was no danger, and the daughter of the plaintiff, who was among several of the employees who went back, later opened a window to escape from the smoke or to get the air, and fell or jumped out of the window and was killed, it was held that the defendant could not defend on the ground that his foreman under the emergency had perhaps not taken the best course, as he was liable for not letting the employees proceed out of the building, or in advising against it.

#### Limitations of doctrine.

In certain relations and under some circumstances there is little place for the doctrine.

In *Lewark v. Parkinson*, 73 Kan. 553, 5 L.R.A.(N.S.) 1069, 85 Pac. 601, where the plaintiff was injured by the negligence of the defendants, who ran a line of hacks, the court held that it was proper to refuse the following instruction: "You are instructed that carriers are not liable for mistaken exercise of judgment on the part of their servants in an emergency, nor for

a failure upon the part of their servants to act with the utmost promptitude when the circumstances are such as to afford no time for deliberation." The court said: "This was properly refused; the negligence of the carrier in permitting the emergency to arise is lost sight of in the instruction. Moreover, it was not a correct statement of the law with respect to the liabilities of a common carrier for injuries caused to a passenger by the negligence of the carrier."

Where the defendant's elevator, carrying a number of passengers, stopped between two floors and could not be moved, and the president of the company, being notified, sent for the engineer, who after some time did an act which precipitated the elevator to the ground, it was held that this was not a case of one compelled to act in a certain emergency, as there was no apparent danger as long as the elevator remained untouched, and as a matter of law the defendant was required to exercise the highest degree of care for the safety of those in the elevator. *Savage v. Joseph H. Bauland Co.* 42 App. Div. 285, 58 N. Y. Supp. 1014.

In *Indianapolis Traction & Terminal Co. v. Smith*, 38 Ind. App. 160, 77 N. E. 1140, it was held that there was no error in instructing the jury under the circumstances of the case that it was the duty of a motorman to exercise the highest degree of care to avoid injury to a person after discovering his peril; but in this case it seems that there was no evidence that the motorman attempted to stop his car.

In *Valin v. Milwaukee & N. R. Co.* 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084, where an engineer justified his failure to blow the whistle when he saw a man on foot driving a team of horses close to the track, by stating that they were standing still and he was afraid he would frighten the horses onto the right of way, the court said the horses were already on the right of way, and the reason given was unworthy of any consideration whatever.

In *Blackwell v. O'Gorman Co.* 22 R. I. 638, 49 Atl. 28, it was held that where the peril is caused by the defendant, he cannot claim that in the emergency he should not be held to ordinary judgment.

#### The doctrine denied.

In *O'Rourke v. Lindell R. Co.* 142 Mo. 342, 44 S. W. 254, where the plaintiff was a passenger on another railway, and was injured by a collision with the Lindell railway, it was held that there was no error in refusing to instruct the jury that "in determining whether the motorman of the Lindell Railway Company exercised ordinary care, the jury must judge its condition in view of all the circumstances disclosed by the evidence as they existed at the time he had to act, and not by what may seem best to them when considering the facts after the accident." The court said: "The rule invoked relieves the in-

jured party of the duty of exercising the care required of a prudent person, but does not excuse from his legal duty the party by whom the injury is inflicted, though by the negligence of a third person he was drawn into a situation which made imminent the danger of inflicting the injury. Plaintiff had no control over the Suburban Railway Company, and its negligence, if it was negligent, cannot be imputed to her."

#### Emergency created by negligence of person injured.

Where by the misconduct of the person injured, the defendant is placed in a position where he has to act in a certain emergency, he is not liable for a mistake of judgment. *Robinson v. Manhattan R. Co.* 5 Misc. 209, 25 N. Y. Supp. 91.

In *Wise Terminal Co. v. McCormick*, 104 Va. 400, 51 S. E. 731, where one servant of the defendant claimed that another servant was negligent in not doing all that he could to stop his engine after the plaintiff was under it, the court said: "Here the party doing the injury, i. e., the watchman or acting engineer, Taylor, claims, and as we think properly, that, having been suddenly put into an emergency by the negligence of the plaintiff, the latter could not require of him the wisest possible action. In other words, if the view of the plaintiff in this case be correct, A, by his gross negligence, may require action on the part of B to save him from the consequences of his own fault, and if B does not automatically and instantly do that which will conduce to his safety, B is liable. Having no reason whatever to expect that the plaintiff or anyone else would on a dark night attempt to mount the engine in his charge from the middle of the track in front, or be on the track where the engine could inflict an injury upon him, Taylor was, by the negligence of the plaintiff, suddenly put into an emergency when and where the wisest possible action on his part could not be reasonably required of him."

Where a man's boat by his own negligence got in the wash of the vessel of a third person, and then under the rake of a boat towed by the defendant's steamer, and he was drowned, it was held that it could not be claimed that his death was due to the fact that the steamer's crew had not, on the spur of the moment, used the best judgment as to what to do to rescue him. *Brown v. French*, 104 Pa. 604.

This case was followed in *Skerak v. Jutte*, 153 Pa. 117, 25 Atl. 994, where a person drowned had by his own fault placed himself in front of a steamer which ran him down, and there was but a moment of time to enable those on the steamer to look out for his safety, the court, in holding that they did everything that could have been done, approved the doctrine that a mistake in judgment in a great and sud-



den emergency of that kind could not be considered as carelessness.

In this connection reference may be made to *Illinois Steel Co. v. Rolewicz*, 113 Ill. App. 312, where a servant was placed in a precarious position without any negligence of his master, and it was held that the master was not liable because other servants were not prompt in the emergency to rescue the plaintiff.

#### IV. Miscellaneous.

In *Atlantic Coast Line R. Co. v. Daniels*, 8 Ga. App. 775, 70 S. E. 203, it appeared that the plaintiff, driving his automobile, came upon the defendant's track, owing to its negligence in leaving the bars up. He was notified by the watchman that a train was coming on the first track, where he had stopped, and the plaintiff pushed the car from behind onto the middle track, when he was again notified that there was a train coming on that track, and he pushed the car over onto the third track. After the train had gone by, the gates were lifted, and he, then forgetting in his excitement that his car had the maximum power turned on, started it in that condition, when he was seriously injured, and it was held that the petition was not bad on demurrer, as the question was one for the jury.

In *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608, the defendant dropped ashes from its railroad into the street negligently, upon a driver and his horse. The horse ran away, and the driver endeavored to drive him against the post of the elevated railroad, and then into the curbstone, but was thrown out, and the horse ran over the plaintiff. It was held that there was no error in finding the defendant guilty of the injury. The court said: "The driver was passing along in pursuit of his customary business, driving his horse, when suddenly the falling of the fire upon himself and the horse placed him in a position of great danger, and he was justified in attempting to save his own life and protect himself from injury. If he made a mistake in his judgment, the company was not relieved from liability."

Where the plaintiff was injured by a coal cart being thrown against him by a collision of the cart with one of the defendant's trains, it was held that if the accident was due to a sudden and instinctive effort on the part of the coal cart driver to escape impending danger after receiving warning thereof, there not being sufficient time to form an intelligent and deliberate judgment as to the best means of escape, negligence was not imputable to him. *Quill v. New York C. & H. R. R. Co.* 16 Daly, 313, 11 N. Y. Supp. 80, affirmed in 126 N. Y. 629, 27 N. E. 410.

It may be noted that in *Filippone v. Reisenburger*, 135 App. Div. 707, 119 N. Y. Supp. 632, where the defendant, in order to get upon a runaway where the plain-

tiff stood, stepped upon a barrel, which turned over or fell over, and the defendant, in order to save himself from falling, caught hold of the plaintiff's feet and caused him to fall, injuring him, it was held that no actionable negligence was shown. The court said the case "must be disposed of as governed by the principle of pressing danger, as applied in *Laidlaw v. Sage*, 158 N. Y. 73, 44 L.R.A. 216, 52 N. E. 679, and in this way expressed in *Moak's Underhill on Torts*, p. 14: 'The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily.'"

B. B. B.

#### NORTH CAROLINA SUPREME COURT.

M. C. FERRELL, Admr., etc., of Samuel Ferrell, Deceased,

v.

DIXIE COTTON MILLS, Appt.

(157 N. C. 528, 73 S. E. 142.)

**Electricity — dangerous guy wire — injury to trespassing child.**

1. A corporation which permits a guy wire to get loose and hang against wires carrying a deadly current of electricity to its factory, at a place used, to its knowledge, actual or imputed, by children of the neighborhood as a playground, will be liable for the death of a child who comes in contact with the wire, although he is in fact a trespasser.

**Same — warning — effect.**

2. That small children had been driven away from a pole from which a guy wire hung in contact with wires carrying a deadly electrical current, about which they were trespassers, but were in the habit of playing, does not absolve the owner of the pole from liability in case one is injured by coming in contact with the wire.

**Same — location of pole — effect.**

3. Whether a pole carrying a deadly current of electricity from which a wire is allowed to hang in a dangerous condition is on or off from property rented by its owner to the parent of a child injured by coming in contact with the wire is immaterial on the question of liability for the injury, if the owner had sole control of it.

**Note.** — As to duty, in stringing electric wires, to guard against danger to children, see notes to *Temple v. McComb City Electric Light & P. Co.* 11 L.R.A.(N.S.) 449, and *Wetherby v. Twin State Gas & Electric Co.* 25 L.R.A.(N.S.) 1220. As to doctrine of attractive nuisance, see note to *Cahill v. Stone*, 19 L.R.A.(N.S.) 1094. And generally, as to duty of property owner toward trespassing children, see note to *Walsh v. Pittsburg R. Co.* 32 L.R.A.(N.S.) 559.

**Negligence — failure to watch child — dangerous playground.**

4. Parents, one of whom is away from home all day and the other is engaged in household duties, are not negligent as matter of law in permitting their six-year-old child to go out of doors to play without someone to watch him, although near the house is a pole from which hangs a dangerous guy wire.

(December 23, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for Iredell County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts sufficiently appear in the opinion.

Messrs. Z. V. Turlington and H. P. Grier, for appellant:

Plaintiff cannot recover, and should have been nonsuited.

Briscoe v. Henderson Lighting & P. Co. 148 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 600; Monroe v. Atlantic Coast Line R. Co. 151 N. C. 375, 27 L.R.A.(N.S.) 193, 66 S. E. 315; Salladay v. Old Dominion Copper Min. Co. 12 Ariz. 124, 100 Pac. 441; Davis v. Joslin Mfg. Co. 29 R. I. 101, 69 Atl. 65; Hall v. Missouri & K. Teleph. Co. 141 Mo. App. 183, 124 S. W. 557; Davis v. Seaboard Air Line R. Co. 138 N. C. 115, 48 S. E. 591, 1 A. & E. Ann. Cas. 214; Mitchell v. Seaboard Air Line R. Co. 153 N. C. 116, 68 S. E. 1059; Sutton v. West Jersey & S. R. Co. 78 N. J. L. 17, 73 Atl. 256; Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644.

Messrs. L. C. Caldwell, Burwell & Cansler, and R. H. Hutchinson, for appellee:

The authorities cited by the attorneys for appellee are fully set out in the opinion.

Walker, J., delivered the opinion of the court:

The negligence charged against the defendant is the maintaining by it of a highly dangerous and deadly condition and instrumentality on premises which were uninclosed, and which were in an attractive place to children, and on which premises defendant knew, or by the exercise of reasonable care ought to have known, that small children were accustomed to play. There was ample evidence to sustain this allegation. The contention of the appellant is that the child was a trespasser, to whom it owed no duty except to refrain

from wilfully injuring it. If the injury had been to a person of such mature age that he could appreciate the nature of his acts, and the dangers attached to the situation, we would agree with this contention. But when, as in this case, the injury is suffered by a six-year-old boy, under such circumstances and surrounding conditions as the evidence showed to exist, a different rule of law governs the conduct and liability of the defendant. What did this six-year-old boy know about the dangers of electricity? What could he possibly have known about the rules of property and the laws of trespass? Technically he may have been a trespasser on defendant's land; but all he knew about it was that it was an attractive place to play, and that it was where he and the other little children of the neighborhood were accustomed to play, and had been playing for months past. The defendant knew, or ought to have known, that this pole with the loose guy wire attached to it was an instrument of death, which might become effective to anyone who came in contact with it. The defendant also knew, or ought to have known, that the children were in the habit of playing about this pole, and that they were also in the habit of swinging on this loose guy wire. Under these circumstances, the law will not permit the defendant to allege a technical trespass and thereby shield itself from the consequences of its negligence, resulting in the death of the son of the plaintiff.

The doctrine of the "turntable cases" was first before this court in the case of *Kramer v. Southern R. Co.* 127 N. C. 328, 52 L.R.A. 350, 37 S. E. 468. There the nine-year-old son of plaintiff was killed by climbing upon a pile of cross-ties negligently stacked by defendant in an unused portion of one of the streets of the town of Marion. The court held that plaintiff's son was not a trespasser; but it further says: "If he was too young to be bound by any rule as to contributory negligence, and had a habit of playing, with other boys, on the cross-ties, with the knowledge of the defendant, and without the defendant's attempting to prevent such sport, or to take precautions against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the cross-ties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury."

In *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A.(N.S.) 1116,

62 S. E. 600, plaintiff was not permitted to recover, as the evidence failed to show that the premises of defendant were especially attractive to children, or that children were accustomed to play there; and also that this rule of law had never been held applicable in the case of a boy thirteen years of age. But, in the course of the opinion, Mr. Justice Connor states his approval of the rule of law which we think is applicable to the case in hand. On page 411 of 148 N. C., he says, quoting from 21 Am. & Eng. Enc. Law, 2d ed. 473: "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing thereon." Immediately following this language, the editor says: "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated is well applied in the rule of numerous cases that one who maintains dangerous implements or appliances on uninclosed premises, of a nature likely to attract children in play, or permits dangerous conditions to exist thereon, is liable to a child who is so injured, though a trespasser at the time when the injuries are received; and with stronger reason when the presence of a child trespasser is actually known to a party, or when such presence would have been known had reasonable care been exercised."

In the case of *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399, plaintiff was permitted to recover for the death of her son, a seventeen-year-old boy, who was killed by catching hold of a wire which was hanging low over a path used by people in going to a moving-picture show. The *Harrington Case*, *supra*; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Mitchell v. Raleigh Electric Co.* 129 N. C. 166, 55 L.R.A. 398, 95 Am. St. Rep. 735, 39 S. E. 801, as well as other cases in our reports, lay down the rule that persons and corporations dealing in electricity are held to the highest degree of care in maintenance and inspection of their wires, poles, etc. This rule is well stated in *Mitchell's Case*, *supra*: "In behalf of human life, and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." See *Hicks v. Western U. Teleg. Co.* — N. C. —, 73 S. E. 139.

*Henderson v. Continental Ref. Co.* 219 37 L.R.A. (N.S.)

*Pa. 384*, 123 Am. St. Rep. 668, 68 Atl. 968, presents a state of facts almost exactly similar to the facts in this case. There the eleven-year-old son of plaintiff was killed by getting into a gas engine erected on a vacant uninclosed lot by defendant. The lot lay between two dwelling houses owned by defendant, in one of which the parents of the boy had formerly lived. The lot had been used as a sort of common, and as a playground for the children. There was a path across it. The court says: "A fair inference is that heedlessly, or without appreciating the danger, the child ventured too near and was injured. Under these circumstances he cannot fairly be regarded as a mere trespasser. The lot was really an appurtenance to the two houses and was a part of the curtilage."

As in the above case, we think that from the evidence in this case it is reasonable to infer that this pole was within the curtilage of plaintiff's dwelling. He says that it was right at, or near to, the corner of his uninclosed garden patch, only a short distance from his home.

In sustaining a recovery by the plaintiff in *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 A. & E. Ann. Cas. 498, it is said: "It [the defendant] failed to take proper care of dynamite brought into this vicinity, and left it exposed upon premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves."

In *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, an eight-year-old boy was drowned in a gravel pit situated on an uninclosed vacant lot belonging to defendant. The court says: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." 2 *Shearm. & Redf. Neg.* 4th ed. § 705; 4 Am. & Eng. Enc. Law, 53, and cases in note. In such case the owner should reasonably anticipate the injury which has happened. 1 *Thomp. Neg.* 304."

*Tackett v. Henderson Bros. Co.* 12 Cal. App. 658, 108 Pac. 151, cites at length the cases of *Mitchell v. Raleigh Electric Co.* and *Haynes v. Raleigh Gas Co.* *supra*, and approves the doctrine there laid down. It is there held: "A person or company using wires charged with an electric current is bound, while the public is not, not only to know the extent of the danger arising

from them, but to use the very highest degree of care practical to avoid injury."

In *Olson v. Gill Home Invest. Co.* 58 Wash. 151, 27 L.R.A. (N.S.) 884, 108 Pac. 140, it is said: "Here the appellants, having no apparent use for the dynamite, and knowing of the trespassing proclivities of the boys, needlessly stored it, a most dangerous agency, where, in the exercise of ordinary prudence, they should have anticipated the trespassing boys would readily find, be attracted by, and take it. Under such circumstances, we cannot hold that the trespassing of the boys should, as a matter of law, excuse the appellants from liability." The boys above mentioned were thirteen and fourteen years of age, and the dynamite was stored in an unlocked building on a vacant, uninclosed lot.

In *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, it is held: "Defendant piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it. Held, that a recovery was justifiable."

In *Brown v. Salt Lake City*, 33 Utah, 222, 14 L.R.A. (N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 A. & E. Ann. Cas. 1004, an eight-year-old boy was drowned in a conduit situated near a schoolhouse. Entrance to the conduit was barred up; but one of the bars had been broken for a year or more, and children had played in and about it for several years, and its condition had been brought to the notice of the city authorities. The court says: "We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner."

In *Price v. Atchison Water Co.* 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, an eleven-year-old boy was drowned in defendant's reservoir. The reservoir was fenced; but there was a kind of stile over the fence, and defendant had knowledge that boys played about the reservoir, fishing and indulging in other sports. The court says: "To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument of place follows as justly as though the invita-

tion had been express. . . . It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life. Such is not the law."

In *Decker v. Itasca Paper Co.* 111 Minn. 439, 127 N. W. 183, a five-year-old boy was killed while playing on an elevator in defendant's mill. The evidence showed that defendant permitted children and others to go about the premises, and that it had knowledge that children were accustomed to play in this room and on this elevator, and with reference to these facts the court said: "The elevator, in the condition in which defendant maintained it, was extremely dangerous as a playground for young children, and the precise manner in which the accident happened is not of serious moment as respects defendant's liability, since it is clear that death resulted from playing about the elevator. . . . Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away; and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by plaintiff upon the same subject, presented a question for the jury."

In *Franks v. Southern Cotton Oil Co.* 78 S. C. 10, 12 L.R.A. (N.S.) 468, 58 S. E. 960, a ten-year-old boy was killed by drowning in a reservoir on defendant's premises. The reservoir was unfenced, and children were accustomed to play about it. The court says, quoting from *Thompson on Neg. vol. 1, § 1030*: "Although the dangerous thing may not be what is termed an attractive nuisance,—that is to say, may not have especial attraction for children by reason of their childish instincts,—yet where it is so left exposed that they are likely to come into contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them." Again, quoting from *Thompson, Neg. vol. 1, § 1026*: "One doctrine under this head is that if a child [technically] trespass upon the premises of the defend-

ant, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed, his inability to be a trespasser, in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any duty towards him which they would not owe, under the same circumstances, toward an adult." See also *Bridger v. Asheville & S. R. Co.* 25 S. C. 24; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Townsend v. Wathen*, 9 East, 277, 9 Revised Rep. 553; *Thomp. Neg.* §§ 1024-1030; 2 Wood, *Railway Law*, § 321; *Cooley, Torts*, p. 634; *Bishop, Non-Contract Law*, § 854; 7 Am. & Eng. Enc. Law, 403; 1 Street, *Foundation of Legal Liability*, p. 160; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; *Kopplekom v. Colorado Cement Co.* 16 Colo. App. 274, 54 L.R.A. 284, 64 Pac. 1047; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257.

In *Snare & T. Co. v. Friedman*, — L.R.A. (N.S.) —, 94 C. C. A. 369, 160 Fed. 1, it is said: "We think, in reason, and in consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years who, to its knowledge, were accustomed to play on the public streets in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith."

*Peirce v. Lyden*, 85 C. C. A. 312, 157 Fed. 552, holds: "Defendant maintained a shed in a railroad yard of about 2 acres near a schoolhouse in a city, in which he kept open barrels of oil. During the daytime the shed was left unlocked, and for

several months children living in the vicinity who played in the yard had been in the habit of stealing oil from the barrels . . . and making fires with it in the yard, which fact was known to defendant's watchman. On one such occasion, plaintiff, who was an infant, was burned and injured. Held, that defendant was chargeable with notice of such practice of the children from its long continuance and the knowledge of its watchman, and that the question of his negligence in keeping the place in such condition, in view of the danger of their injury therefrom, was for the jury."

In *Akin v. Bradley Engineering & Mach. Co.* 48 Wash. 97, 14 L.R.A. (N.S.) 586, 92 Pac. 903, defendant had thrown some dynamite caps on a vacant lot in rear of its place of business. A path ran through this vacant lot, and school children used the path. Plaintiff was a boy of eleven years of age. The court said: "We think that when the respondent left these dangerous explosives by the wayside, where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown herein did not constitute an intervening cause that should relieve respondent from liability."

In *Stollery v. Cicero & P. Street R. Co.* 243 Ill. 290, 90 N. E. 709, a boy of ten years was killed, and his body found beside a conveyer operated by defendant on a vacant lot in a city. Held: "Under the decisions of this state, unguarded premises supplied with dangerous attractions are regarded as holding out an implied invitation to children which will make the owner of the premises liable for injuries to them, even though the children be technical trespassers." This case also holds: "The rule of law is, as already stated, that the proof of ordinary care on the part of appellee's intestate, as well as all the other elements of the action charged in the declaration, may be established by circumstantial evidence."

The principles of the law of negligence laid down in the foregoing cases, as well as in others too numerous to cite, is both just and humane; and, under the authority of these cases, the court committed no error in submitting the facts in the case to the jury for their decision.

Appellant's fifth exception is to the court's refusal to charge that the defendant was not guilty of negligence in that its

watchman, the witness W. D. Plyler, had told the children to stay away from this pole. Considering the well-known propensity of children of the age of plaintiff's intestate and his playmates to desire to do what they are forbidden, the watchman's warning was hardly more than an invitation. The snip of a pair of wire cutters was all that was necessary to render this death trap perfectly harmless. The defendant, having negligently failed to perform this insignificant act, and thereby caused the death of this six-year-old boy, now asks the court to excuse its negligence by charging the jury that it is not liable because its watchman told those boys to stay away from this pole. This, we think, is hardly short of trifling with human life. In the excerpt already quoted from *Decker v. Itasca Paper Co.* 111 Minn. 439, 127 N. W. 183, the court, in speaking to this very question, says: "Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away; and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by plaintiff upon the same subject, presented a question for the jury." We think that this disposes of appellant's fifth exception.

Appellant's sixth exception is equally without merit. The defendant's liability in this case is in no wise dependent on the question as to whether the pole was on or off of the premises which it had rented to plaintiff, father of the dead boy. In either event, the pole was not rented to the plaintiff. Nor would it make any difference if it had been, except that it may have rendered the question of the negligence of defendant more positive and clear. *Turner v. Southern Power Co.* 154 N. C. 131, 32 L.R.A. (N.S.) 848, 69 S. E. 767; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344. There was no evidence tending to show that anyone except defendant had charge of this pole, or had any authority to remedy any defects in or about it. The defendant, therefore, was responsible for its dangerous and deadly condition.

Appellant's seventh exception is to the refusal of the court to charge the jury that plaintiff's cause of action was barred by his contributory negligence. Under the facts disclosed by the evidence in this case, the plaintiff and his wife were not guilty of contributory negligence in permitting their six-year-old boy to go out into the yard to play.

In *Day v. Consolidated Light, Power, & Ice Co.* 136 Mo. App. 274, 117 S. W. 81, 37 L.R.A. (N.S.)

plaintiff's six-year-old boy was killed by contact with a live wire which was strung near the end of a roof. Plaintiff lived on the third story of a building, and this roof was used as a kind of back yard. As to the mother's contributory negligence, the court says: "There is not sufficient ground in the facts before us for declaring the mother of the child guilty in law of negligence. Under the facts disclosed, the characterization of her conduct was an issue for the jury to solve. There is no merit in the suggestion that this child, only six years old, was guilty of contributory negligence." In *Henderson v. Continental Ref. Co.* 219 Pa. 384, 123 Am. St. Rep. 668, 68 Atl. 968, the court says: "As to the suggestion that the parents were guilty of contributory negligence, they could not be so held as a matter of law, merely because they allowed a seven-year-old boy to go around by himself upon the streets in the vicinity of his home, or to visit a neighbor's house. At most, the question would be for the jury. *Enright v. Pittsburg Junction R. Co.* 204 Pa. 543, 54 Atl. 317. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the machinery. It was not so clear a duty that the court could declare it as a matter of law." In *Enright v. Pittsburg Junction R. Co.* supra, holding a father not guilty of contributory negligence in permitting an eleven-year-old son to stroll along railway tracks 1½ blocks away from home, the court says: "The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." In *Colorado Springs Electric Co. v. Soper*, 38 Colo. 126, 88 Pac. 161, twins, five years of age, were permitted to play in the grounds of a near-by public institution for deaf and dumb. A passing teamster allowed them to ride with him some two blocks away. One of the children, after being put down, took hold of a piece of barb wire lying in the grass, the other end of which was attached to an electric light pole and in contact with electric wires. The child was injured. In speaking to the question of the contributory negligence on the part of the child's parents, the court says: "They were away from the traveled portion of the street, safe and secure from all dangerous things rightfully on the street. The barbed wire charged with electricity had no right to be there. If parents are negligent in permitting children to play out of doors, on public grounds, in the daytime, unattended

by the parents themselves or others, then, in the majority of cases, it will be necessary to go out of the business of rearing or attempting to rear children, because parents cannot be with children at all hours of the day; neither is it practical to employ others to be with them to guard them against unseen dangers." In *Compt v. C. H. Starke Dredge & Dock Co.* 129 Wis. 622, 9 L.R.A. (N.S.) 652, 109 N. W. 650, the court says: "Upon the issue of contributory negligence of plaintiff's mother, the evidence tends to show that she lived in a house something more than a block and a half from the place of injury, and around two street corners; that she was a woman who earned her own living as a nurse, and had the care of the housekeeping for her family, consisting of her mother, an adult brother, herself, and three children; that she had never known the plaintiff to go where the pile driver was at work; that on the day in question her brother was sick in bed, and she was engaged with her Saturday housecleaning; that she gave plaintiff his lunch in the kitchen, which had a door leading into the back yard, which was not locked; that after giving him his lunch she turned to her work in another room and was out of sight only fifteen or twenty minutes when she learned of his injury. . . . We think that the ordinary mother of a family, under these circumstances, would be very much surprised to learn that she had been guilty of negligence in the care of an approximately three-year-old child. Certainly the fact of such negligence is not clear enough to be declared as matter of law." In *Tecker v. Seattle, R. & Southern R. Co.* 60 Wash. 570, 11 Pac. 791, a boy six and one-half years of age went to the postoffice with his ten-year-old sister. She went in and got the mail, and when she came out, the boy had gone into the street and had been run over and killed by one of defendant's cars. The court says: "Nor can it be said as matter of law that the parents of a child are negligent in permitting him to go upon the street in the care of another child of sufficient age to appreciate and avoid danger, or other competent custodian. In such cases the question of negligence should be submitted to the jury." 29 Cyc. 558. The parent is only required to exercise ordinary care in watching and controlling the child. 29 Cyc. 556; *Cameron v. Duluth-Superior Traction Co.* 94 Minn. 104, 102 N. W. 208." In *Saxton v. Pittsburg R. Co.* 219 Pa. 492, 68 Atl. 1022, a boy six and one-half years of age was injured. The court says: "The father of the boy was not precluded from recovering because he permitted his

son to go on the street in a business part of the city, unattended." It appeared in *Gunn v. Ohio River R. Co.* 42 W. Va. 676, 36 L.R.A. 575, 26 S. E. 546, that two boys, five and six years of age, were run over and killed by a train of defendant. They lived 300 to 400 yards from the railroad. In speaking to the question of the contributory negligence of the mother, the court says: "The mother sent them that morning to turn the cows up the road, and come back by the corn lot and garden,—a different direction from the trestle, I understand. They could not pen or imprison their children from light and air and exercise and play. They could not always keep unfailing watch upon them."

The evidence in this case shows that the father was away from home from early in the morning until late at night, earning a living for himself and family; that the mother was at home taking care of her household duties, which the presence of several children must have rendered both numerous and exacting. Under such circumstances, surely it cannot be held as matter of law that these parents were negligent in permitting their six-year-old boy to go out in the yard to play without constantly watching him. If such a rule should be adopted, a large majority of the mothers would be forced to keep their little children in the house, or else be responsible for any injury suffered by them at the hands of others.

As to the eighth exception, upon the question of contributory negligence, there is no evidence that the plaintiff knew of the condition of the pole and loose guy wire till August. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the wire. It was not so clear a duty that the court could declare it as a matter of law.

The ninth exception is to the court's definition of "negligence." This exception is without merit, particularly as the court charged the jury as follows: "But if you find a reasonably prudent man ordinarily would have permitted that wire to remain as it was in the place as it was, detached from the ground, then it would not be negligent in the company in having it in that condition; or, if you should find that it was not the proximate cause of the plaintiff's intestate's death, why you should answer the first issue, 'No.'" *Hicks v. Western U. Teleg. Co.* — N. C. —, 73 S. E. 139.

What has been said in regard to the preceding assignments of error, together with the authorities set out and the principles stated, disposes of the other exceptions.

Those facts of this case which are uncontested present a clear of negligence; the jury having found against the defendant's contention, under the charge of the court, which gave to it the benefit of every principle of law to which it was fairly entitled. At very small expense, the defendant, with notice of the dangerous situation, could, by the exercise of the slightest care, have prevented this accident, and the wonder is that it did not, at once, take steps to do so. It may be that the courts, in view of so many injuries from this deadly agency, which, without proper care, is a constant menace to the public, will have to suggest that companies who make use of it in their business must either convey it by wires laid under ground, or so safeguard their wires as to remove this ever-increasing danger to those who, in their ordinary avocations, must come in close proximity to this subtle, dangerous, and oftentimes fatal current. It is no injustice or hardship to the defendant that we hold it liable under the conceded facts of this case.

No error

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

**WINTON MOTOR CARRIAGE COMPANY,**  
Appt.,  
v.  
**BROADWAY AUTOMOBILE COMPANY,**  
Resp't.

(65 Wash. 650, 118 Pac. 817.)

**Conditional sale — negotiating purchase-money note — effect.**

Under a conditional-sale contract by which the title remains in the seller until

performance of the conditions, the indorsement of the purchase-money note to a bank as collateral for a loan to the seller is an election to treat the note as an absolute debt, which vests title to the property in the purchaser.

(November 17, 1911.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to establish plaintiff's title and right of possession to an automobile levied upon and held by the sheriff as the property of J. R. Burch, under an attachment and execution issued in an action by defendant as plaintiff against said Burch. Affirmed.

The facts are stated in the opinion.

The contentions of counsel and authorities cited are set out in the opinion.

Messrs. Roberts, Battle, Hulbert, & Tennant and C. J. France for appellant.

Messrs. Hughes, McMicken, Dovell, & Ramsey and Frank P. Helsell for respondent.

Parker, J., delivered the opinion of the court:

This action was prosecuted by the plaintiff in the superior court for King county under §§ 573-577, Rem. & Bal. Code, to establish its title and right of possession to an automobile levied upon and held by the sheriff of King county as the property of J. R. Burch, under an attachment and execution issued out of that court in an action wherein the defendant was plaintiff and J. R. Burch was defendant. We think the facts upon which the respective rights of the parties rest are shown by this record beyond controversy to be in substance as follows: On August 24, 1908, the plaintiff

**Note. — Conditional sale: transfer of purchase-money obligation as affecting reservation of title.**

The general question of the effect upon a conditional sale of the taking of collateral security is treated in the notes to *Monitor Drill Co. v. Mercer*, 20 L.R.A.(N.S.) 1065, and *Thornton v. Findley*, 33 L.R.A.(N.S.) 491. As to whether acceptance of commercial paper for the purchase money in a conditional sale constitutes payment or satisfaction of the debt, see note to *A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co.* 35 L.R.A.(N.S.) 1, at page 90.

As to whether the bringing of an action for the purchase price constitutes a waiver of the right of the vendor in a conditional sale to recover the property *in specie*, see note to *Frisch v. Wells*, 23 L.R.A.(N.S.) 144.

For a discussion of the general question 37 L.R.A.(N.S.)

of reservation of title to property as affecting negotiability of note for purchase price, see note to *Choate v. Stevens*, 43 L.R.A. 277.

There is a decided conflict among the authorities as to the effect of a transfer of a purchase-money obligation upon the title reserved in a conditional contract of sale. In some instances it has been held that such a transfer constitutes an election to treat the obligation as a debt, and that such an election vests the title to the property in the purchaser; in other cases it is held that a transfer of the obligation transfers the security, and vests the title to the property in the transferee; while in still other cases it is held that such a transfer leaves the legal title in the vendor. In a few instances the contrary holdings are reconcilable, but in some cases the courts have evidently proceeded upon theories which differ fundamentally from those adopted by other courts. An examination of the cases, how-



delivered to Burch an automobile under a conditional-sale contract, which, in so far as we need to notice its terms, provides: "This agreement witnesseth: That the Winton Motor Carriage Company, a corporation, party of the first part, has, this 24th day of August, 1908, delivered to J. R. Burch, party of the second part, at 1305 Western Ave., Seattle, Washington, the following described personal property, to wit: One secondhand Winton automobile, Model M, No. 6723, for which the second party agrees to pay the sum of \$2,000, \$1,100 upon the delivery of said goods and chattels, receipt whereof is hereby acknowledged, and the further sum of \$900 in three months, at the rate of 8 per cent per annum from date until paid. It

is further agreed that said goods and chattels shall remain absolutely the property of said Winton Motor Carriage Company until said sum of \$900, with interest thereon, is paid in full. . . . It is agreed and understood that time is the essence of this contract, and if any said payment remain unpaid after the same shall become due, or if any of the above conditions be violated, said first party, its agents or assigns, may enter upon the premises where said property is stored and retake possession thereof, without previous demand, and retain all instalments paid, and terminate this contract." This contract was not filed under § 3670, Rem. & Bal. Code. At the same time Burch executed and delivered to the plaintiff his promissory note for \$900,

ever, will more accurately demonstrate the various rules and their applications than can be done in a general summary.

In addition to WINTON MOTOR CARRIAGE COMPANY v. BROADWAY AUTOMOBILE COMPANY, but one case seems to have passed upon the effect of an indorsement of a conditional-sale note to a bank as collateral for a loan to the seller, and that is Ensley Lumber Co. v. Lewis, 121 Ala. 94, 25 So. 729, in which a conclusion opposite to that reached in the former case was announced, although the court was not directly discussing the effect upon the rights of the vendee of such an indorsement. In the Ensley Lumber Company Case notes for the purchase money of certain machinery, the title to which was reserved by the vendor, were indorsed to a bank as collateral to secure a loan to the vendor, and held by the bank until the loan was repaid, when the notes were returned to him; and in an action for conversion, instituted by the vendor against the conditional vendee and the purchaser upon foreclosure of a mortgage upon the machinery, given by the conditional vendee, on the issue that the plaintiff did not have title, as it had passed to the bank by the indorsement of the notes, it was held that the legal title to the property for which the notes were given did not pass to the bank, and that when the loan for which they were hypothecated to the bank was paid and they were returned to the plaintiff, the legal title to both the property and the notes was in him. However, in connection with this case, it should be noted that the court did not consider the real ground of the decision in the WINTON MOTOR CARRIAGE COMPANY CASE, which was that the indorsement of the note was an election to treat it as an absolute debt, and therefore an election which vested title to the property in the purchaser.

A somewhat similar case, however, is that of Hyatt v. Bell, 83 Ark. 360, 103 S. W. 748, wherein a purchase-money note, containing an express reservation of title pending payment, was deposited with one to whom the vendee mortgaged the prop-

erty, with the vendor's consent, as additional security for the mortgage loan, and the note and mortgage were subsequently sold to a bank. Later the note was returned by the bank to the original payee and by him sold, after maturity, to one who brought replevin against the purchaser at a sale under the mortgage, and it was held that the plaintiff's vendor, by depositing the note as security for the loan, waived, as against the purchaser at the mortgage sale, any right to assert the title reserved by him in the note.

A case which applies directly the doctrine of election between the right to treat the purchase-money obligation as an absolute debt and the right to retake under the contract of sale is *Truax v. Parvis*, 7 Houst. (Del.) 330, 32 Atl. 227, wherein it was held that an assignment of purchase-money notes which recited the reservation of title constituted an election to rely upon the notes for the purchase money, if, by such an assignment, the vendor intended to make an election between his two remedies, the court saying that the jury must take into consideration what he really intended. This decision seems to be more consonant with reason and well-settled principles of law than that of *WINTON MOTOR CARRIAGE COMPANY v. BROADWAY AUTOMOBILE COMPANY*.

Other cases which apply the rule of election are *Merchants' & P. Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565, which is set out in *WINTON MOTOR CARRIAGE COMPANY v. BROADWAY AUTOMOBILE COMPANY*, and *Parlin & O. Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084, which follows the *Thomas Case*. In Georgia, where there is an admitted conflict in the authorities, the following cases held that when a promissory note for the purchase money of personal property, which contains a reservation of title to the property in the payee until the note is paid, is, by the payee, transferred for value to a third person "without recourse," the title reserved for securing the payment of the debt is divested; and if, at the time of such transfer, the title so held was not likewise

payable three months after date, with interest at 8 per cent per annum. This note, it is conceded, represented the balance of the purchase price, and it will be noticed was for the same amount, the same time, and the same rate of interest, as stated in the contract. It was an entirely separate instrument from the contract of sale, and there was nothing in that contract indicating any purpose by the parties thereto of having this balance of the purchase price further evidenced in this manner. Soon thereafter the plaintiff indorsed this note, and placed it in the hands of the First National Bank of Seattle as collateral security for a loan which that bank made to the plaintiff. Thereafter, on November 21, 1908, this note being then about to ma-

ture, an extension of time of payment was granted, both Burch and the bank consenting thereto, and, in pursuance thereof, a new note was executed by Burch, payable direct to, and left with, the bank, as collateral in lieu of the first note. This second note was indorsed by the plaintiff, and made payable February 21, 1909. A short time after the execution of this note, Burch absconded, leaving many unpaid obligations. At the time of and prior to the time Burch absconded the automobile was kept by him at plaintiff's garage, but his possession thereof under the contract was in no manner interfered with or questioned prior to that time. Soon thereafter the plaintiff took up the second note from the bank, and also took possession of the auto-

transferred to the purchaser of the note as a security in his hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker. *Burch v. Pedigo*, 113 Ga. 1157, 54 L.R.A. 808, 39 S. E. 493; *Bradley v. Cassels*, 117 Ga. 517, 43 S. E. 857; *McCullough v. Pritchett*, 120 Ga. 585, 48 S. E. 148; *Swann Davis Co. v. Stanton*, 7 Ga. App. 668, 67 S. E. 888. In connection with these cases, see the Georgia cases set out infra. And see *Heinbockle v. Zugbaum*, 5 Mont. 344, 51 Am. Rep. 59, 5 Pac. 897, wherein, in discussing the question whether a conditional sale was made absolute by the taking of purchase-money notes, it was said that "if the notes were negotiable, and had been transferred for value by the plaintiff [vendor] he could not recover the goods or the price for which he sold them."

In a number of jurisdictions, it is held that the assignment of a purchase-money promissory note, which contains a reservation of title pending payment, does not constitute a waiver of the right to reclaim the property, complete the sale, and vest the title in the vendee, but that, on the other hand, the transfer carries the legal title with it, and subrogates the assignee to all the original rights and remedies of his assignor. The following cases are to this effect: *Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623; *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 108; *Esty v. Graham*, 46 N. H. 169; *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Standard Steam Laundry v. Dole*, 22 Utah, 311, 61 Pac. 1103; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100. In *Barton v. Groseclose*, supra, the court said: "It must be conceded that when the vendor of property parts with possession, and at the same time reserves to himself the legal title to the property, and thereupon sells, assigns, and transfers to a third party all of his rights and interests in and to the contract [here a promissory note, containing reservation of title], that he is thereafter left without any interest either in the title or possession of the property or the contract. While this is

true, the title to the property must necessarily rest somewhere,—either, we take it, in the original vendee of the property, or the assignee of the contract. To say that the title passed to the vendee of the property would be to deprive the owner of the legal title, to whom the purchase price had not yet been paid, of a valuable property right. It would amount to depriving him of the right of disposition of his property, and cutting off the security which he had retained for the payment of the debt. We think the assignment of a contract like the one under consideration carries with it the legal title to the property, and gives to the assignee of the contract all the rights and remedies enjoyed by his assignor, and that in such case an attachment will not lie until the property has first been exhausted." And in *Bank of Little Rock v. Collins*, 66 Ark. 240, 50 S. W. 694, it was held that a note given for the purchase money of personal property, the title to which was thereby reserved, could be assigned under a statute allowing the assignment of all notes, written agreements, etc., and that the assignment passed the title to the vendor's assignee, together with the right to sue for and recover the property in his own name, upon default in payment of the purchase money at maturity of the note. According to brief of counsel it was here contended that the assignment of the note waived reservation of title until payment, and was an election to enforce payment; citing, among others, the case of *Merchants & P. Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565, which is set out and commented upon in *WINTON MOTOR CARRIAGE COMPANY v. BROADWAY AUTOMOBILE COMPANY*, but the court in its opinion did not consider such contention.

And this rule has been applied where the contract and notes are separated and distinct instruments and both are assigned. *Heyns v. Meyer*, 46 Ind. App. 45, 91 N. E. 973; *Bean v. Edge*, 84 N. Y. 510. And see *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.* 72 Miss. 608, 18 So. 364,—a case where both the note and the contract were assigned, wherein it was held,

mobile, continuing in possession thereof until it was levied upon and taken from his possession by the sheriff on January 4, 1909, under a writ of attachment issued out of the superior court in an action commenced therein by the defendant against Burch to recover a debt existing prior to the date of the conditional-sale contract. Judgment being rendered in that case in favor of the defendant, against Burch, and execution having issued thereon to the sheriff for the sale of the automobile, on February 26, 1909, the plaintiff commenced this action by filing an affidavit with the sheriff under § 573, Rem. & Bal. Code,

claiming ownership of the automobile. This claim is based upon the plaintiff's rights under the conditional-sale contract. Upon issues raised by the defendant's answer to the plaintiff's affidavit, a trial was had, resulting in findings and judgment in favor of the defendant, from which the plaintiff has appealed.

Did the acts of appellant in taking from Burch the \$900 note representing the balance of the purchase price of the automobile, and thereafter indorsing that note over to the bank as collateral security for the loan, constitute in law an election by appellant to make the sale absolute, and

it being contended that the vendor had waived any stipulated securities (and in Mississippi a reservation of title is considered as security for the purchase price), that an assignee could maintain an action to subject the property to the debt, but that, as the contract contained stipulations obligatory on the vendor, he should be made a party defendant in order that a complete settlement of all matters involved might be made. But that the vendor need not be joined, see *Blackley v. Dooley*, 18 Ont. Rep. 381.

And the same has been held true where the reserved title was expressly assigned with the notes, although the agreement was merely a part of the note itself. *English v. Hill*, 116 Ga. 415, 42 S. E. 717; *Blackley v. Dooley*, supra.

In *Cade v. Jenkins*, 88 Ga. 791, 15 S. E. 292, where the right to collect notes given for the purchase money out of personal property sold conditionally, the seller retaining title, was held extended by statute to the holder of such notes, to whom they had been transferred without recourse on the payee, the court held that such transfer did not operate to divest the notes of their character as a debt for the purchase money. In the later conflicting decisions of the Georgia supreme court, which are set out herein, no reference was made to the statutes applied in this case. The Georgia courts in some instances, however, do recognize the existence of a conflict, but seem reluctant to do more than recognize it, as they have failed even when good opportunity was presented, to settle the law, contenting themselves by merely following either one line of decisions or the other.

And in the following Georgia cases it was held that the "unconditional assignment" of a purchase-money note containing a reservation of title does not extinguish the security, but carries it along, and the reserved title becomes vested in the assignee until the purchase price is paid: *Townsend v. Southern Product Co.* 127 Ga. 342, 119 Am. St. Rep. 340, 56 S. E. 436; *Turnell v. Carter*, 5 Ga. App. 847, 64 S. E. 114, citing and following *Cade v. Jenkins*, supra; *Laurens Bkg. Co. v. Bales*, 4 Ga. App. 142, 60 S. E. 1014. And see 37 L.R.A. (N.S.)

*West Yellow Pine Co. v. Kendrick*, 9 Ga. App. 350, 71 S. E. 504, wherein the indorsement of purchase-money notes which contained reservations of title until the notes should be paid, "We hereby transfer the within property . . . without recourse," was held to transfer both the indebtedness and the reserved title to the transferee.

But the rule that the indorsement or transfer of a promissory note which stipulates that the property for the purchase price of which it was given shall remain the property of the vendor until paid vests the title in the indorsee is not universally applied, as will be seen by an examination of the following cases, which hold that such an indorsement, standing alone, does not vest the title in the indorsee, but leaves it in the indorsers, it being said that a mere indorsement does not constitute a sale and assignment of their property in the property conditionally sold. *Domestic Sewing Mach. Co. v. Arthurs*, 63 Ind. 322; *Hyde v. Courtwright*, 14 Ind. App. 106, 42 N. E. 647. In *Spoon v. Frambach*, 83 Minn. 301, 86 N. W. 106, supra, the contention was made that by the terms of the note the payee, and not his assigns, was alone authorized to retake the property, but the court, as above stated, held that the title passed to the assignee.

In Mississippi, where the vendor may institute replevin for the recovery of property, and at the same time sue in assumption on the notes, it was held, in *McPherson v. Acme Lumber Co.* 70 Miss. 649, 12 So. 857, that the vendor may, after default, replevy the property, although he has assigned the notes, and suits thereon are pending against the vendee, it being said that in such case the vendor will hold the property or proceeds as trustee for the assignees; and as to the rights of the vendee, it was said that the court had ample power to protect him from being compelled to pay twice. It will be noted that the court must have proceeded upon the assumption that the debt did not follow the assignment of the note. Also that in Mississippi the rule is different where the debt is assigned. See *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.* as set out supra.

G. J. C.

thereby vest the title to the automobile in Burch? The correct answer to this question we regard as by far the most important factor to be considered in determining this controversy. It is apparently conceded by counsel for both parties that under a conditional-sale contract and a temporary promissory note representing the unpaid purchase price, such as are here involved, the seller has a choice of two remedies, to wit: He may disaffirm the sale and retake the property upon failure of the conditions which it is agreed will vest title in the purchaser, or he may, by some act clearly manifesting his intention so to do, elect to treat and rely upon the unpaid purchase price as an absolute debt due from the purchaser. It is a general rule that the seller cannot have both remedies, and that, when he has elected to avail himself of one, he has thereby divested himself of all right to the other. Whatever exceptions there be to this rule, a reference to the authorities will show that such exceptions occur for the most part in jurisdictions where the law regards such contracts of sale only as security for the payment of the debt, in the nature of a lien, or where the contract by its terms evidences an intention to create a lien upon the property as security for the debt. The title which is by this contract reserved in the seller is the absolute title, under which he may retake the property, if at all, and retain it without any obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller. The nature of this title is clearly stated by the supreme court of Connecticut in *Crompton v. Beach*, 62 Conn. 25, 38, 18 L.R.A. 187, 36 Am. St. Rep. 323, 25 Atl. 446, 448, as follows: "A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell, and receive back a pledge. He retains the title until he elects to part with it, and, when he does so elect, the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or encumbrance upon the property, inuring to his benefit." The supreme court of Minnesota in *Alden v. W. J. Dyer & Bro.* 92 Minn. 134, 90 N. W. 784, expressed

substantially the same view as follows: "It must now be regarded as the settled law of this state, as well as of most others, that, where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be held a mortgage; and it is equally as well settled that, upon the vendee's failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the price; but the assertion of either right is an abandonment of waiver of the other." Not only is this the undoubted law of this state, but it is the very theory upon which appellant is now resting its claim of absolute title to this automobile. The application and importance of this principle to our inquiry will be rendered more apparent as we proceed.

An examination of the authorities will show that there are several ways in which the seller under conditional-sale contracts may so act that the law will impute therefrom to him an election to waive the conditions of the sale resulting in title passing to the purchaser. While the decisions so holding will be found to relate to varying acts of the seller, they all rest upon the same underlying principle; to wit, that an election to hold the purchaser personally bound as a debtor owing the purchase price results in such election vesting title in the purchaser. The bringing of a simple suit to recover the purchase price, unaided by any claim of lien upon or attachment of the property conditionally sold, constitutes an election to vest title in the purchaser, and look to him only as a debtor owing the purchase price under the holdings in the following cases: *Mathews Piano Co. v. Markle*, 86 Neb. 123, 124 N. W. 1129; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558; *American Process Co. v. Florida White Pressed Brick Co.* 56 Fla. 116, 47 So. 942, 16 A. & E. Ann. Cas. 1054; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, 42 Pac. 435; *Avery v. Chapman* (Supp.) 127 N. Y. Supp. 721; *Crompton v. Beach*, 62 Conn. 25, 18 L.R.A. 187, 36 Am. St. Rep. 323, 25 Atl. 446; *Richards v. Schreiber, C. & W. Co.* 98 Iowa, 422, 67 N. W. 569; *Alden v. W. J. Dyer & Bro.* 92 Minn. 134, 90 N. W. 784. The following decisions deal with suits seeking recovery of the purchase price, accompanied by attachment or claim of lien against the conditionally-sold property: *Butler v. Dodson*, 78 Ark. 569, 94 S. W. 703; *Smith v. Barber*, 153 Ind. 322, 53 N. E. 1014. It might be argued that an attempt by suit

to fasten a lien upon the very property sold furnishes a stronger reason for holding such suit to be an election by the seller to pass the title to the purchaser. But, after all, such suits are only efforts to recover the purchase price as a debt against the purchaser, and that fact is just as inconsistent with the seller retaining the title as his claim of lien upon the property. It seems inconceivable that the absolute title remain in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser. This court has expressed views in harmony with the decisions above noticed in *Jones v. Reynolds*, 45 Wash. 371, 373, 88 Pac. 577, and *Ramey v. Smith*, 56 Wash. 604, 608, 106 Pac. 160. The latter involved a suit and judgment rendered thereon against the purchaser, without any effort to fasten a specific lien upon the conditionally-sold property. The following decisions are of particular interest, in that they involve suits by the seller against the purchaser, which were unsuccessful or voluntarily abandoned, yet they were held to constitute elections: *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008; *Hickman v. Richburg*, 122 Ala. 638, 26 So. 136; *Frisch v. Wells*, 200 Mass. 429, 23 L.R.A. (N.S.) 144, 86 N. E. 775. In this last-cited case the court observed: "It must be presumed from the record that with knowledge of his legal rights, and being in possession of the facts, the plaintiff chose to bring suit for the balance due, and to arrest and hold the body of the debtor until he was discharged upon taking the oath prescribed by Rev. Laws, chap. 168, § 40. The plaintiff failed to enter the writ. It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding. *Butler v. Hildreth*, 5 Met. 49; *Connihan v. Thompson*, 111 Mass. 272; *Bailey v. Hervey*, 135 Mass. 172. The answer was a general denial, which put in issue, not only the plaintiff's right to possession, but his title to the property. *D'Arcy v. Steuer*, 179 Mass. 40, 41, 60 N. E. 405. And the plaintiff having once made an irrevocable election, the title was relinquished or waived, and the present action is absolutely barred. *Bailey v. Hervey*, 135 Mass. 172; *Whitney v. Abbott*, 191 Mass. 59, 77 N. E. 524."

No decision has come to our notice involving an election resting alone upon the indorsing and transferring to a third party of a conditional-sale note of the nature here involved, as collateral security for a

loan made to the payee and seller. We are, however, cited to two Texas decisions seemingly directly in point in so far as the principle here involved is concerned. They are *Merchants' & P. Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565, and *Parlin & O. Co. v. Harrell*, 8 Tex. Civ. App. 368, 27 S. W. 1084. These cases apparently involve indorsement and sale of the notes. In the latter case the former is commented upon and followed; the court observing: "They are not in an attitude to maintain the suit. They indorsed at least one of the notes given by *Burns & Munn* for the goods to a bank in Illinois, thus making their election to rely on their right to enforce the contract of sale. Upon failure of *Burns & Munn* to pay the purchase price of the goods, they could elect to sue on the notes for the debt due, or to abandon the sale and recover the goods. They could not, after electing to abide by the sale, by transfer of the notes or one of them, sue to recover the goods sold. In the case of *Merchants' & P. Bank v. Thomas*, supra, it was decided by the supreme court of this state that when the owner of personal property transfers its possession to one who executes his notes for the purchase price, and, by a contract executed at the time the title to the goods is to remain in the vendor until the price is paid, and, on default of payment, the vendor may regain possession of the goods, the vendor may elect to enforce payment of the notes or recover possession; but that he could not do both, and that the assertion of one right is the abandonment of the other; that the transfer of the notes was an election to enforce payment thereof, and an abandonment of the title, vesting it in the vendee. 'The contract, once abandoned,' says the court, 'could not be restored by any action on the part of the vendors and the indorsees without the consent of the vendee.' And it was held that, if the vendors repossessed the notes, they thereby obtained only such rights against the makers as were held by the parties (the indorsees) from whom they received them,—the right to enforce their payment by suit against the makers. 'Had the notes been indorsed simply for collection, the case might have been different, as no suit had been brought upon them; but as to this there was no proof, and the presumption is that the sale of the notes was absolute, and for a valuable consideration.' The transfer of one of the notes, as shown in the case before us, had the same effect as to election of rights under the contract as the transfer of all of them. Upon the ground, then, that plaintiff could not recover the property after having elected to enforce payment of the purchase price, we

conclude that the judgment of the lower court must be affirmed."

Counsel for appellant seek to lessen the force of the doctrine of the decisions above noticed, as applicable to the facts of this case, by citation of decisions which hold that acts of the nature therein involved, as well as certain other acts indicating an intention on the part of the seller to look to the purchaser only as a debtor, do not necessarily constitute an affirmation of the sale. Let us notice some of them. In *Goodkind v. Gilliam*, 19 Mont. 385, 48 Pac. 548, after entering into the conditional-sale contract, the seller took from the purchaser a mortgage upon the property which he foreclosed, and thereby became the owner of the property. Thereafter, by agreement between them, the property was again placed in the possession of the purchaser, under the terms of the original contract of conditional sale. The taking of the chattel mortgage and foreclosing of it was held not to be a waiver affecting subsequently acquired rights of the seller, evidently because it could not influence the subsequent agreement which simply adopted the original contract, and was in effect a new conditional sale. In *Sargent v. Metcalf*, 5 Gray, 306, 66 Am. Dec. 368, it was merely held that the vendor did not waive the conditions of the sale and pass title to the vendee merely by asking and being promised additional security which was never given. This was not an unqualified election to look to the vendee as a debtor only. In *Warner Elevator Mfg. Co. v. Capital Invest. Bldg. & L. Asso.* 127 Mich. 323, 89 Am. St. Rep. 473, 86 N. W. 828, an unsuccessful attempt to enforce a mechanics' lien was held not to be a waiver, evidently upon the theory that the contract created nothing but a lien to secure the purchase price, and that two such liens could exist at the same time. In *American Box Mach. Co. v. Zentgraf*, 45 App. Div. 522, 61 N. Y. Supp. 417, the contract by its very terms prevented a waiver of one remedy by an attempt to exercise the other, so in that case there was no question of an election. In the case of *Monitor Drill Co. v. Mercer*, 20 L.R.A.(N.S.) 1065, 90 C. C. A. 303, 163 Fed. 943, 16 A. & E. Ann. Cas. 214, there was held to be no election by the taking of collateral security for the purchase price. But in that contract it was provided that, upon retaking the property by the seller, he was to apply the proceeds to the payment of the indebtedness, and deliver the surplus, if any, to the purchaser. It is apparent that an unconditional title was not reserved in that contract as in this. In *Ward v. Yarnelle*, 173 Ind. 535, 91 N. E. 7, it was simply held that the waiver of a right to a mechanics' 37 L.R.A.(N.S.)

lien upon the building into the construction of which the conditionally sold property went was not an election, and did not affect the reserved title. This was not only not inconsistent with the seller's title, but was directly in harmony therewith. Had the seller insisted on his right of lien, there might have been some room for argument as to whether or not that constituted an election. The following cases cited by appellant's counsel may not be so readily distinguishable, and possibly lend some support to appellant's contentions: *Standard Steam Laundry v. Dole*, 22 Utah, 311, 61 Pac. 1103; *First Nat. Bank v. Reid*, 122 Iowa, 280, 93 N. W. 107; *William W. Bierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. These decisions, however, are not of such controlling force as to lead us to adopt appellant's contentions and depart from the doctrine of the authorities we have noticed, supporting the contrary view, with which our own decisions are in harmony, especially in so far as they hold that the suing for the purchase price constitutes an election, where the title reserved by the seller is absolute and unconditional, as in this case.

Did the title pass with the transfer of the note to the bank as collateral security? Counsel for appellant do not seriously contend that it did, but call our attention to the following decisions holding that under certain circumstances the title to the property passes with the transfer of the note evidencing the balance of the purchase price. *Cutting v. Whittemore*, 72 N. H. 107, 54 Atl. 1098; *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.* 72 Miss. 608, 18 So. 364. These decisions and others in harmony therewith it will be found upon examination hold that the property passes with the assignment of the purchase-money note because of the law of the jurisdiction which regards such contracts only as security in the nature of liens, or because of the terms of the contract creating only a lien securing the debt. This is nothing but an application of the well-known doctrine of equity that an assignment of the secured debt carries the right to the security. Of course, counsel for appellant could not safely rest upon this theory, because it would at once destroy the absolute unconditional title which it is claiming. Thus is emphasized the importance of keeping in mind the fact that the sale contract did not create a lien, but that it reserved an absolute title in the seller which was as absolutely to pass to the purchaser upon certain conditions. There is not the slightest question of security for a debt here involved.

Now, let us view the situation as it ex-

isted at the time of the indorsement and transfer of the note to the bank by appellant, as collateral security, ignoring for the present all subsequent events. That note upon its face had no connection whatever with the conditional-sale contract. It was in the manner stated transferred to the bank before maturity, as collateral security. There is nothing in the record indicating any intention to transfer to the bank with the note, appellant's title in the conditionally sold property. At that time no conditions of the contract were broken entitling appellant to retake the property, nor had appellant at that time assumed to retake the property. In view of these facts, what intention will the law impute to appellant by thus transferring this note? Now, of course, the purpose of the transfer to the bank was to render the note available to the bank as collateral security for its loan to appellant. The only value that this note could possibly have in the hands of the bank was that of any other piece of negotiable paper acquired by the bank before maturity; that is, it became a debt payable unconditionally at a stated time from Burch to the bank or its assignees. Appellant must have then elected to have that note assume this function, for in no other way could it be of any value to the bank as security. By that transfer the note was freed from all connection with the conditional-sale contract. The bank acquired no right in or lien upon the property, for the title thereto either remained absolutely in appellant, or, by the transfer of the note, passed absolutely from appellant to Burch by virtue of that act, as an election on his part. Some effort is made to distinguish between the effect of the assignment of this note as collateral security and an assignment of a note upon a sale thereof, as in the Texas cases above cited. It will not do to make any such distinction; for to do so would be to take away from the note in the hands of the bank the very quality which it was intended to possess by the transfer to the bank; to wit, the quality of an absolute debt obligation against Burch as any negotiable note executed by him would have. We are of the opinion that, when appellant assigned the note to the bank, that act constituted in law an election on its part to waive the conditions of the sale, and resulted in vesting absolute title in Burch. It was an election to place Burch in such a position that he became an unconditional debtor for the purchase price of the property.

Counsel for appellant rely upon the events which occurred thereafter as in some way preventing or undoing this result.

That such events did not prevent this result seems to us to be fully answered by what has already been said. How, then, was the title to the automobile restored to appellant? We are unable to see how the taking possession of the automobile by appellant at the time it did would have any effect towards restoring the title to it. At that time none of the conditions of the sale were broken by Burch, and there is nothing in this record to indicate that appellant had any right whatever to take possession of the automobile at that time, even had not the absolute title previously passed to Burch. The mere fact that Burch absconded did not give to appellant any such right of possession, and it cannot be seriously claimed that Burch consented to the retaking of the property by appellant. Neither are we able to see that the taking up of the note by appellant from the bank had the slightest effect upon the title of the automobile. We have seen that the title had already passed to Burch by the act of appellant in assigning the note to the bank. The title to the automobile did not pass with the note back to appellant any more than it passed with the note from appellant to the bank. The very fact, as we have seen, that we are not dealing with the property as security for a debt, renders all speculation touching the effect of the events subsequent to the original transfer of the note by appellant to the bank, as wholly foreign to the question of the title to the automobile.

Considerable is said in the briefs about the moral and equitable rights of the respective parties. To enter upon the consideration of the rights of the parties from such a standpoint would probably show that they are fairly evenly balanced. But such considerations have no place in this case. The controlling facts are beyond dispute; and from them by well-settled rules of law the rights of the parties can be clearly ascertained. Our conclusions render it unnecessary to express an opinion on the effect of the failure to file the sale contract with the county auditor under § 3670, Rem. & Bal. Code, involving the question of whether or not respondent, as an attaching creditor suing for a debt existing before the date of the sale contract, is such an encumbrancer that the conditional sale is void as to it without such filing.

We conclude that the judgment of the learned trial court is in accord with the law as applicable to the undisputed facts.

The judgment is affirmed.

Gose, Fullerton, and Mount, JJ., concur.

## WISCONSIN SUPREME COURT.

LEONARD SEED COMPANY, Resp.,

v.

CRARY CANNING COMPANY, Appt.

(147 Wis. 166, 132 N. W. 902.)

## Sale — seed — mixed variety — liability.

No liability in damages exists because seed does not prove to be of the variety specified in the sale, where the contract provides that neither the seller nor his employees shall give any warranty, express or implied, as to description, utility, productiveness, or any other matter, of any seeds.

(October 24, 1911.)

*Note. — Liability of vender of seeds.*

- I. General rule, 79.
- II. Warranty that seed is true to name, 80.
- III. Warranty of germinating power, 81.
- IV. Freedom from noxious weed seeds, etc., 82.
- V. Effect of nonwarranty or disclaimer of warranty clause, 82.
- VI. Effect of ignorance on part of seller, 84.
- VII. Negligence of purchaser, 84.
- VIII. Remedies of purchaser.
  - a. Rescission, 85.
  - b. Damages.
    1. In general, 85.
    2. Where seed is not sowed or planted, 86.
    3. Where seed is mixed with other seed, 86.
    4. Where seed is not true to name, 86.
    5. Where seed does not possess germinating power, 87.
    6. Where seed contains noxious seed, etc., 88.
    7. Interest, 88.

*I. General rule.*

It is a general rule, denied in but few jurisdictions, that the sale of seed as and for a certain kind, that is a sale by description, constitutes a warranty of the seed. In some jurisdictions it is treated as an express warranty, and in some as an implied warranty, while in others it is not regarded as a warranty, but as a condition the breach of which gives rise to an action in the nature of a breach of warranty.

As to most of the questions arising in this note, it is immaterial whether a sale of seeds in effect by description constitutes an express warranty of the seeds, or whether it raises an implied warranty, or a condition. The question is of importance, however, when considering the effect of a non-warranty or disclaimer of warranty clause. 37 L.R.A. (N.S.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Door County in plaintiff's favor in an action brought to recover the purchase price of a quantity of seed peas grown for defendant by plaintiff under a written contract. Affirmed.

Statement by Barnes, J.:

On February 14, 1908, plaintiff and defendant entered into a contract whereby the plaintiff agreed to sell to the defendant certain varieties of seed peas. Among other things, the plaintiff agreed to furnish 1,000 bushels of "Advancer" peas, and guaranteed 75 per cent delivery. Such peas were to be grown during the season of 1908, to be delivered after harvest, but in season for the planting trade for the year 1909. A quantity of peas was de-

On this subject see *infra*, V., "Effect of nonwarranty or disclaimer of warranty clause." On the more general question of whether a sale by description constitutes an express or implied warranty, or a condition, and the distinction with reference thereto, see note in 35 L.R.A. (N.S.) 258.

As already stated the weight of authority holds the seller of seeds liable as upon a warranty, when he sells seeds as being of a particular kind. The cases so holding are hereinafter grouped with reference to the question of the nature and extent of the warranty.

In a few jurisdictions, however, the theory of a warranty or condition being created by a sale of seed as and for a certain kind is denied, and the right to recover damages if the seed delivered is not the kind that it was sold for is denied, although the purchaser by inspection could not have ascertained that fact. This is the doctrine in Pennsylvania. Thus, in *Lord v. Grow*, 39 Pa. 88, 80 Am. Dec. 504, the sale of wheat as spring seed wheat was held not to constitute a warranty that the wheat was true to name, the doctrine being that in a sale of this character the rule of *caveat emptor* applies, even though the true character of the seed could not be determined by inspection. The court said: "True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee." This is also the doctrine, as to a very similar state of facts, of *Kircher v. Conrad*, 9 Mont. 191, 7 L.R.A. 471, 18 Am. St. Rep. 731, 23 Pac. 74, the case being influenced by and following the preceding case. The doctrine was also applied in *Shisler v. Baxter*, 109 Pa. 443, 58 Am. Rep. 738, as to the sale of seed as and for Wakefield cabbage seed.

And see *Calhoun v. Brinker*, 5 Ohio N. P. N. S. 122, 17 Ohio S. & C. P. Dec. 705, holding that a dealer furnishing seed upon the request of a buyer of seed, for seed



livered under this contract to the defendant, it giving its promissory notes in payment therefor according to the terms of the contract. The peas so sold were in turn sold by the defendant to various farmers for the purpose of planting, and under contracts by virtue of which the farmers agreed to sell the peas raised from such seed to the defendant. The plaintiff brought action upon the notes. The defendant, among other things, interposed a counterclaim setting forth that the peas furnished were not "Advancer" peas, that they were received by the defendant without knowledge of that fact, that there was no means of discovering that they were not "Advancer" peas until after they had been sowed and the seed had germinated, and

that as soon as the defendant discovered that the peas were not of the variety purchased, it notified plaintiff. The counterclaim further set forth that the peas were mixed with other different varieties, making it impossible to harvest them without a mixture of overripe peas of varieties other than "Advancer." Facts are pleaded tending to show damage, and judgment is asked for the amount thereof. On the trial the court allowed the defendant to amend its answer by setting up a new counterclaim for the purchase price of the peas. The trial court held that the peas were sold without warranty as to quality or description, and directed a verdict for the plaintiff for the amount claimed less \$343.75. The peas were shipped from Chi-

of a certain kind, does not thereby impliedly warrant the seed to be true to name. In this respect a distinction is made between a dealer and a grower.

## II. Warranty that seed is true to name.

It has been held that in a sale of seed for planting or sowing, where the sale is by description, the doctrine of implied warranty does not apply, but the doctrine of express warranty does, and it is said that "no particular form of expression or words is necessary to make an express contract of warranty. The word 'warranty' is not necessary to it. An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most unequivocal language on the subject." *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916, 81 N. W. 491.

Considering the question as to what will constitute a warranty that seed, when sold for planting or sowing purposes, is true to name, in *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425, the court said: "The subject of warranty, in its application to the class of cases in which the present one is comprehended, has been involved in much confusion. The authorities are not consistent; . . . the tendency of recent adjudications has been . . . to put this subject on a reasonable footing. Starting from the admission that, in the absence of fraud and of a warranty, the rule of *caveat emptor* applies, the effort is, not to elevate particular expressions contained in a given contract into a general rule of law, but to regard each case in the light of its own circumstances, and with respect solely to the understanding of the parties. Whether the representation or affirmation accompanying a sale shall be regarded as a warranty or as *simplex commendatio* is a question to be solved by a search for the intention of the contracting parties."

57 L.R.A. (N.S.)

To raise an implied warranty that seed is true to name, the circumstances must be such as to amount to a representation of fact on the part of the seller that the article is of the particular kind or description. If the buyer in terms asks for seed of a particular kind, and the seller purports to comply with his request, he will be held to warrant the article as being of that kind, although he may not have made any declaration in words to that effect. *Rauth v. Southwest Warehouse Co.* 158 Cal. 54, 109 Pac. 839. An order for a particular kind and quality of seed raises an implied warranty that the seed furnished complies with the order. *Gubner v. Vick*, 25 N. Y. Week. Dig. 358, 6 N. Y. S. R. 4. So, where a purchaser calls for a certain kind of seed, supplying the article raises an implied warranty that the seed is of that variety. *Gardner v. Winter*, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143.

If barley is sold for seed purposes as being of a certain kind, and a partial failure of the crop from such seed results from the fact that it is of a different kind, the seller is liable for the damages as for a breach of warranty. *Rauth v. Southwest Warehouse Co.* supra.

A sale of seed as rape seed constitutes an express warranty that the seed is true to name where the purchaser is ignorant of the appearance of rape seed, and hence an inspection of it by him would not aid him to determine the true character of the seed. *Hoffman v. Dixon*, supra. The sale of turnip seed as "skirvings seed" constitutes a warranty that the seed is of that kind. *Allan v. Lake*, 18 Q. B. 560. A sale of turnip seed as and for "early strap-leaf red-top turnip seed" constitutes a warranty that the seed is of that kind. *Wolcott v. Mount*, supra. A sale of seed for seed purposes as and for "Arlington white spine cucumber seed" constitutes a warranty that the seed will produce that kind of cucumbers. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410. Selling seed for sowing or planting as being a particular kind of seed constitutes a warranty that it is true to name, which is breached by de-

cago and invoiced on the basis of 56 pounds to the bushel. The court held that the defendant was entitled to receive 60 pounds per bushel, and hence made the foregoing reduction. From a judgment in plaintiff's favor, defendant appeals.

**Mr. W. L. Evans, with Mr. W. E. Wagener, for appellant:**

In a contract of sale of personal property, in the absence of fraud or any express or implied warranty, an action for a breach of contract for failure to deliver the thing contracted for survives a delivery of something other than contracted for, the buyer not being able by inspection to ascertain the failure to deliver the thing contracted

for, and only a use of the property, which prevents its return, showing this fact.

Smith v. Love, 64 N. C. 439; 24 Am. & Eng. Enc. Law, 1111, 1157; 35 Cyc. 367; Biggers v. Pace, 5 Ga. 171; 30 Am. & Eng. Enc. Law, 129, 130; Josling v. Kingsford, 13 C. B. N. S. 447, 32 L. J. C. P. N. S. 94, 9 Jur. N. S. 947, 7 L. T. N. S. 790, 11 Week. Rep. 377; Benjamin, Sales 6th ed. §§ 600, 605; Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305; Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. Rep. 601; Columbian Iron Works & D. D. Co. v. Douglas, 84 Md. 44, 33 L.R.A. 103, 57 Am. St. Rep. 362, 34 Atl. 1118; Chanter v. Hopkins, 4 Mees. & W. 404, 1 Horn & H. 377, 8 L. J. Exch. N. S. 14, 3 Jur. 58; McConnell v. Jones, 19 Ind.

livering seed of a different kind, utterly unproductive. VanWyck v. Allen, 69 N. Y. 61, 25 Am. Rep. 136.

A sale of seed by description, without opportunity of inspection, raises an implied warranty that the seed is true to name. Wieler v. Schilizzi, 17 C. B. 619. A warranty that seed sold for sowing or planting purposes is true to name will be inferred where the seller asserts at the time of the sale that the seed is of a species which the buyer is in search of, the seller at the time being aware that the buyer has no opinion himself on the subject, the character of the seed not being ascertainable by sight or touch. Wolcott v. Mount, supra. A sale of seed for seed purposes raises an implied warranty surviving acceptance, that the seed is true to name and free from noxious weed seed, where the true character of the seed and the presence of noxious weed seed cannot be ascertained by any reasonable inspection. Depew v. Peck Hardware Co. 121 App. Div. 28, 105 N. Y. Supp. 390. affirmed without opinion in 197 N. Y. 528, 90 N. E. 1158. But there is no implied warranty that seeds sold for seedling purposes are up to the standard in quality. Ibid. A sale of onion sets by description raises an implied warranty that the sets shall not only answer the description, but that they are salable or merchantable. Frith v. Hollan, 133 Ala. 583, 91 Am. St. Rep. 54, 32 So. 494.

### III. Warranty of germinating power.

One who sells a farm product to a purchaser, the purchaser making known at the time of the purchase that he wants the article for seed with which to plant a crop, and who guarantees that the article which he sells is good for the purpose of seeding, is liable in damages in case of the entire worthlessness of the article for seed purposes, discovered after the land had been prepared and the seed sown. Reiger v. Worth, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217.

Where at the time a contract for the purchase of flaxseed for seeding purposes

is entered into, the seed is not present so that it can be inspected by the purchaser, and when it arrives and is delivered to him a defect in the seed is not apparent, and is not discoverable by ordinary means of inspection, and is in fact not discovered until after it is sowed, and it fails to germinate, these circumstances, together with the fact that by the terms of the sale the seller is to buy the crop resulting from such seed, raise a warranty that the seed is fit for the purpose for which it was bought. Shaw v. Smith, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886. Where flaxseed is sold with the understanding on the part of both parties that it is to be sowed or planted with the view of raising a crop which, when harvested, is to be sold to the seller of the seed, the circumstances raise an implied warranty that the seed is of a kind that will grow. Johnson v. Sproull, 50 Mo. App. 121.

A representation that rice is excellent or good seed rice, where made with the knowledge that the purchaser intends to use it for seed purposes, constitutes a warranty that it possesses germinating power. Reiger v. Worth, 130 N. C. 268, 89 Am. St. Rep. 865, 41 S. E. 377. Selling peas for seed in response to a request for seed peas raises an implied warranty that the seed is fit for that purpose. Landreth v. Wyckoff, 67 App. Div. 145, 73 N. Y. Supp. 388. A sale of seed for the purpose of planting raises an implied warranty of fitness for that purpose, which is breached by a want of germinating power. Moore v. Koger, 113 Mo. App. 423, 87 S. W. 602. The sale of seed with the intent upon the part of both buyer and seller that it is to be used in planting or sowing raises an implied warranty of fitness for that purpose; that is, that it is clean seed, possessing no defects in germinating power. Cline v. Mock, 150 Mo. App. 431, 131 S. W. 710. A warranty that onion seed for planting purposes is fresh and genuine, and the product of the preceding year, constitutes a warranty that the seed will germinate and grow, where the term "fresh seed" is understood in the vicinity of the contract as

328; Nicoll v. Modern Steel Structural Co. 143 Wis. 545, 128 N. W. 72; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280; McCaa v. Elam Drug Co. 114 Ala. 74, 62 Am. St. Rep. 88, 21 So. 479; Wolcott v. Mount, 36 N. J. L. 262, 13 Am. Rep. 438.

Mr. Henry Graass, for respondent:

The defendant waived its claim that the peas delivered failed to satisfy the contract, by not notifying the plaintiff of such claim as soon as, by reasonable diligence, the defendant could have discovered the defects.

Jacobson v. Tallard, 116 Wis. 665, 93 N. W. 841.

Neither defendant's first counterclaim nor third counterclaim states facts sufficient to constitute a defense or counterclaim.

Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246.

Barnes, J., delivered the opinion of the court:

The contract for the sale of the peas contained the following provision: "It is also understood and agreed that the party of the first part [plaintiff] does not give, and its agents and employees are forbidden to give, any warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds delivered or to be delivered by it, and that it is not, and will not be, in any way responsible for the crops."

Counsel for the appellant admit "that

meaning seed which will germinate and grow. Ferris v. Comstock, 33 Conn. 513.

It is not always necessary that the seller be expressly informed that it is the intention of the buyer to use the seed which he is purchasing for sowing or planting; the nature of the seed may be such that in the sale of it the seller will be charged with knowledge of the intention of using it for such purpose. Thus, as to clover seed, which has little, if any, commercial value except for the purpose of seeding, a seller of it to a farmer will be charged with knowledge of the intention of the purchaser to use it for seeding purposes. Fox v. Everson, 27 Hun, 355.

A sale of grain for seed described as "rust-proof oats," while constituting a warranty that the oats are of the described variety, does not, however, constitute a warranty that they are suitable for any particular use, if the purchaser in selecting the variety he intends to sow does not rely upon the judgment or skill of the seller, whose judgment and skill he trusts only to the extent of providing the designated species. Gachet v. Warren, 72 Ala. 288.

Where a purchaser calls for seed of a certain variety, supplying the article raises an implied warranty that the seed is of that variety, but it does not raise an implied warranty that it will germinate and produce good crops when sown, or that it is fit for the purpose intended. Gardner v. Winter, 117 Ky. 382, 63 L.R.A. 647, 78 S. W. 143.

The word "seed" used in a bill of sale does not amount to an express warranty that the seed will germinate or grow; neither does it raise an implied warranty to that effect. Moore v. McKinley, 5 Cal. 471.

#### **IV. Freedom from noxious weed seeds, etc.**

A contract by a grower to raise and furnish seed of a described kind, to be of good growing stock, constitutes a warranty that seed of good growing stock shall be sown, and that everything shall be done in regard to sowing and caring for the seed 37 L.R.A. (N.S.)

that can reasonably be required in the ordinary course of raising seed. There is, however, no implied warranty that the seed, when raised, shall be good. Pinder v. Button, 7 L. T. N. S. 269, 11 Week. Rep. 25.

A grower of wheat, by selling it for seeding purposes, impliedly warrants that it is suitable for seed, and free from latent defects arising from the manner of cultivation, harvesting, and storing, which would render it unsuitable for that purpose. Prentice v. Fargo, 53 App. Div. 608, 65 N. Y. Supp. 1114, affirmed without opinion in 173 N. Y. 593, 65 N. E. 1121. A sale of seed for seed purposes by the grower thereof raises an implied warranty that it is free from noxious weed seed. Bell v. Mills, 78 App. Div. 42, 80 N. Y. Supp. 34; and that there is no impurity in the seed from cross fertilization. Landreth v. Wyckoff, supra.

In Shatto v. Abernethy, 35 Minn. 538, 29 N. W. 325, a jury were held justified in finding on the facts that a warranty that wheat sold was pure Saskatchewan fife wheat was not breached by the presence of foreign seeds and different kinds of wheat.

#### **V. Effect of nonwarranty or disclaimer of warranty clause.**

The courts are not agreed as to the effect of a notice accompanying seed sold for planting or sowing, containing a clause in effect that the seller does not warrant the seed in any respect, and that if the purchaser is not willing to take it without warranty he must return it.

In some jurisdictions a distinction is made between a warranty and a condition, and it is held that a sale by description constitutes a condition rather than a warranty, and that a nonwarranty or disclaimer of warranty clause does not cover the rights of the parties claiming a violation of the condition.

Thus, in Wallis v. Pratt [1911] A. C. 394, a clause that "sellers give no warranty, expressed or implied, as to growth, description, or any other matters," was held not to relieve a seller of seed sold by de-

plaintiff is freed by the terms of this contract from all liability as to the seed in question being good or bad, large or small, wrinkled or smooth, black or white, wormy or sound, vital or dead." But counsel argue that the peas furnished under the contract must be of the Advancer variety, and that plaintiff was not relieved by its contract from liability for damage resulting from furnishing peas other than Advancer peas. It was practically conceded on the argument that the clause quoted was intended to exempt the plaintiff from such liability as was sought to be enforced against it under the counterclaim in this action. The concession was advisedly made. The peas to be delivered under the contract were described therein as Advancer peas. But the

contract provided that no warranty, express or implied, was given that the peas furnished should be of the description named therein. If a dealer in seed peas can exempt itself from liability for selling bad, wormy, or dead peas to a grower, no good reason is apparent why it cannot go further and say that it will not be responsible in the event of an intermixture of other peas with the variety agreed to be furnished. Neither of the parties here is under guardianship or incompetent to contract. There is no claim that the contract signed was not the one agreed upon, or that both parties did not fully understand what they were agreeing to. Plaintiff plainly undertook to relieve itself from liability in case of intermixture, and defendant

scription, for planting or sowing purposes, from damages if the seed delivered was not true to name. Lord Loreburn, L. C., remarked: "When you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller, if they see fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake onto the buyer, then he must use apt language.

. . . I do not think he has done so in the clause to which I have referred." On the same point, Lord Alverstone, Ch. J., remarked: "It is quite impossible to suggest, . . . when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods or for the consequences of a breach of the condition." The reasoning of Lord Alverstone is to the effect that the disclaimer or nonwarranty clause does not apply to the sale of seeds for seed purposes by description, since such a sale raises a condition rather than a warranty, and renders the seller liable for breach of the condition, and the clause referred to does not cover this liability. This distinction between a warranty and a condition is discussed in a note in 35 L.R.A. (N.S.) subdv. IV. and V. pages, 265, 273.

A very similar clause was also held in *Howcroft v. Laycock*, 14 Times L. R. 460, not to relieve the seller from damages for the sale of cabbage seed by name, where the seed he furnished was not true to name. The clause in question read, "Messrs. — give no warranty, express or implied, as to description, quality, productiveness, or any other matter connected with the seeds they send out, and they will not be in anyway responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned." Said Mr. Justice Day: "The clause in question 57 L.R.A. (N.S.)

could not be construed to mean that no action should be brought. When *Couve Tronchuda* was ordered the seed sellers were not entitled to deliver something quite different. The custom of a trade might qualify a contract, but it could not destroy it. A rational construction must be put on the words relied upon. The construction desired by the respondents to be established unreasonable." This construction was to quote counsel: "When, in ordinary cases, goods have been accepted, the purchaser could only recover for breach of warranty. Here, however, the purchaser had agreed not to raise any question of warranty, and therefore had no remedy. It was an important matter for seed sellers and seed growers all over the country. In this case the seed sellers had bought the seed from someone else, so there was no imputation on their bona fides. Seed would be very much dearer if the sellers had to guarantee it."

In other jurisdictions a sale by description is regarded as constituting a warranty, and it is held that the nonwarranty or disclaimer of warranty clause is binding upon the purchaser, if it comes to his notice, but is not unless it does.

Thus, in *Bell v. Mills*, 68 App. Div. 531, 74 N. Y. Supp. 224, a disclaimer reading, "I exercise the greatest care to have all my seeds, potatoes, bulbs, and plants, etc., fresh, pure, clean, and true to name, and if such should not be the case, I will refill the order, free of charge, providing sufficient proof is given me within a reasonable length of time. I cannot guarantee crops, and will not be held responsible for them. If these goods are not accepted on these terms, they must be returned at once." — was held to preclude a purchaser with knowledge of the disclaimer from recovering damages to his land caused by the presence of mustard seed in the seed which he had purchased and sowed. When subsequently before the court, this clause was held not to be binding unless known to the purchaser and assented to by him, he using the seed with knowledge of the notice. 78 App. Div. 42, 80 N. Y. Supp. 34.

agreed that it should be relieved. It is not claimed that the contract is void, because contrary to public law or to public policy, and, if not, effect should be given to it. The vendee might reject and refuse to receive the peas if they were not "Advancer" peas, or it might well be that, in the event of the shipment being made in bad faith, and with the purpose and intention of committing fraud upon the vendee, an action for damages for the fraud would lie; but we have no such case before us. If it be conceded that the contract is one-sided, it must also be conceded that the parties had a right to make a one-sided contract if they saw fit.

Counsel for appellant cite the following authorities to sustain the contention that,

notwithstanding the agreement of the parties, there was a warranty that the peas sold would answer the description contained in the contract, or in any event that there was a breach of a condition of the contract by the failure of the plaintiff to furnish the thing contracted for: *Josling v. Kingsford*, 13 C. B. N. S. 447, 32 L. J. C. P. N. S. 94, 9 Jur. N. S. 947, 7 L. T. N. S. 790, 11 Week. Rep. 377; *Columbian Iron Works & D. D. Co. v. Douglas*, 84 Md. 44, 33 L.R.A. 103, 57 Am. St. Rep. 362, 34 Atl. 1118; *Shepherd v. Kain*, 5 Barn. & Ald. 240, 24 Revised Rep. 344; *Allan v. Lake*, 18 Q. B. 560; *Wieler v. Schilizzi*, 17 C. B. 619. These cases do not hold that a party selling an article under a designated name may not relieve him-

A disclaimer of warranty printed in fine type in the corner of a bill rendered the purchaser of the seed, prior to his planting the same, does not affect an implied warranty raised by the sale, where the notice does not in fact come to his attention. *Landreth v. Wyckoff*, 67 App. Div. 145, 73 N. Y. Supp. 388.

It cannot be said as a matter of law that a purchaser of seed is bound to know or understand that a card containing in one corner in fine print such a disclaimer, which he found in a bag of the seed, is intended as a contract, and that he must read and inform himself of its contents; but it is a question for the jury whether, coming to him as it did, he was bound to read the card and inform himself of its contents. *Bell v. Mills*, 78 App. Div. 42, 80 N. Y. Supp. 34.

Whether there was a warranty that onion seed was true to name, in view of the circumstances of the sale, and the fact that on the package containing the seed there was printed a nonwarranty provision, was held in *Coates v. Harvey*, 17 N. Y. S. R. 389, 2 N. Y. Supp. 5, a question for the jury.

In other jurisdictions a nonwarranty or disclaimer of warranty clause is held to preclude an implied warranty, whether actually coming to the notice of the purchaser or not, if by custom and usage it is a part of the contract.

Thus, it has been held that where a general custom prevails in the seed trade that the seller of seeds sells the same for seed purposes with a disclaimer of warranty, and such disclaimer is printed upon the package containing the seed, a sale is presumed to have been negotiated with reference to the general custom of the trade, and no implied warranty arises that the seed is true to name. *Blizzard Bros. v. Growers' Canning Co.* — Iowa, —, 132 N. W. 66.

Although it did not appear that the buyer read a disclaimer of warranty notice printed upon a package containing the seed purchased, it is held in *Calhoun v. Brinker*, 5 Ohio N. P. N. S. 122, 17 Ohio S. & C. P. 37 L.R.A. (N.S.)

Dec. 705, that the notice nevertheless constitutes a contract between the parties, and the purchaser cannot recover damages suffered by him because seed furnished was not true to name.

Where a canning company contracts to purchase for canning purposes the crop grown from seed which it sells, an implied warranty is raised that the seed sold will produce a crop suitable for canning purposes, and this is true although the grower of the seed has attached to the package containing the seed furnished a disclaimer of warranty on its part, since this disclaimer under the circumstances does not inure to the benefit of the canning company. *Blizzard Bros. v. Growers' Canning Co.* supra.

#### VI. Effect of ignorance on part of seller.

In *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. Rep. 916, 81 N. W. 491, the court remarked: "There is no good reason why a dealer should be permitted to exhibit seed to his customers, asserting it to be rape seed when it is something else, and then protect himself from the consequences of his falsehood by a plea of ignorance. The injury by the deception is just as great whether it be wilful or innocent. The customer has the same right to rely upon the representation in the one case as in the other. Knowledge on the part of the vendor is not essential either to actionable fraud or a contract of warranty."

#### VII. Negligence of purchaser.

Opportunity on the part of a purchaser to inspect the seed which he purchases does not militate against his right to insist upon the condition of the contract as to the identity of the article delivered being made good, where he relies wholly on his contract, not knowing whether the article he receives answers such condition or not; and he is not chargeable with negligence because he did not inspect. *Hoffman v. Dixon*, supra.

A purchaser of seed can recover damages

self from liability in his contract of sale, in the event that the article delivered does not answer the description contained in the contract. Some very general language is used in the contracts of sale involved in the cases cited, and in some of them it might well be construed as being broad enough to extend to the description of the article; but in none of the cases has it been so construed. These cases were decided upon the theory that this general language was intended to refer to the quality of the article furnished, and not to the description of the article itself. In *Taylor v. Bullen*, 5 Exch. 779, 20 L. J. Exch. N. S. 21, where an article was sold and the party undertook to relieve himself from liability in his contract of sale by stating

where the seed in quality is inferior to the warranty, if it is a reasonable thing for him to plant the seed without examination. *Wagstaff v. Short-Horn Dairy Co.* Cab. & El. 324.

Contributory negligence on the part of the purchaser in failing to inspect the seed before sowing or planting the same may affect his right to recover damages for foul seed contained therein, discoverable upon inspection, even though the seller sold the seed as good clean seed, and stated that it was pure seed. The purchaser is not entitled to rely entirely upon representations as to the kind or quality of seed, but he should make an inspection of it before using, and if he fails to do so the question of his negligence in that regard is a question for the jury. *Fox v. Everson*, 27 Hun, 355.

After discovering that noxious seed is growing from seed purchased, it is the duty of the purchaser to use reasonable means to root it out and prevent its further growth if he can do so. He cannot lie idle and permit the noxious weed to seed and spread over his entire farm, and thus enhance his damages. *Ibid.*

### VIII. Remedies of purchaser.

#### a. Rescission.

The purchaser upon discovering a breach of implied warranty of seeds may rescind the sale within a reasonable time and return the property, or he may retain it and avail himself of the damages he has suffered either by bringing a cross action for breach of warranty, or proving the real value and abating the recovery *pro tanto*. *Frith v. Hollan*, 133 Ala. 583, 91 Am. St. Rep. 54, 32 So. 494. If seed is sold to be sowed or planted, and it proves wholly worthless for this purpose, and totally useless and valueless for any purpose whatever, no recovery can be had in an action for the purchase price. *Johnson v. Sproull*, 50 Mo. App. 121.

A purchaser may refuse to receive seed if not of the quality described in the contract.

that he would not be liable for "any defect or error whatsoever," it was held that the word "error" was broad enough to include an error in description, as well as an error in quality, and that there was no liability on the part of the vendor, even though the article furnished did not answer the description of the article contracted for. If the seller expressly refuses to warrant, there can be no excuse for raising an implied warranty. *Habersham v. Rodrigues*, 1 Speers, L. 314; *Farr v. Gist*, 1 Rich. L. 68; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5.

The case of *Blizzard Bros. v. Growers' Canning Co.* — Iowa, —, 132 N. W. 66, is directly in point. There a package was

tract. *Gloster Oil Works v. Buckeye Cotton Oil Co.* 87 Miss. 618, 40 So. 225. But a purchaser purchasing seed under a contract that the seed shall be clean and satisfactory, vital and fit for seed purposes, cannot arbitrarily reject seed that is clean, vital, and fit for such purposes, even though he claims the same is not satisfactory. *Ferry v. Ballinger*, 8 Kan. App. 756, 60 Pac. 824.

#### b. Damages.

##### 1. In general.

The purchaser of seeds under a warranty of kind, quality, or fitness for the purpose intended, is entitled to recover from the seller damages for the breach of the warranty, which, by the weight of authority, include any loss occasioned him by the breach, the amount of which is reasonably certain, or capable of being ascertained with a reasonable degree of certainty, providing the same can be said to have been fairly within the contemplation of the parties as a result of the breach. The amount recoverable frequently depends upon the nature of the warranty breached, and hence the cases have been classified according to the character of the warranty.

Consequential damages cannot be recovered where the purchaser has knowledge of the inferior character of the seed before sowing it. *Oliver v. Hawley*, 5 Neb. 439.

Where, in his petition for damages, the plaintiff seeks to apply a rule for admeasuring the same which will result in his obtaining less damages than he is really entitled to, he will be limited in his recovery to the damages claimed. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410; *Crutcher v. McManus*, 13 Ky. L. Rep. 592.

That the purchaser uses the seed on land he leases on shares does not affect the measure of damages which he is entitled to recover. He is entitled to recover full damages for the breach of warranty, the warranty inuring to the benefit of the landlord as well as the tenant. *Phillips v. Vermillion*, 91 Ill. App. 133.

marked "Large Cheese Pumpkin Seed," and sold as such, when in fact it contained "Connecticut Pie Pumpkin Seed" mixed with a few squash. On the package the following warranty was printed: "While we exercise great care to have all seeds pure and reliable and true to name, our seeds are sold without any warranty, ex-

press or implied, and without any responsibility in respect to the crop." There was no evidence to show that the purchaser read this warranty, but there was evidence showing that it was a general custom among seedmen to sell seeds without warranty as to quality and as to true name, and such custom was held to be binding

Or the landowner may join with the tenant in an action for the damages. *Fuhrman v. Interior Warehouse Co.* post, 89.

## **2. Where seed is not sowed or planted.**

Where seed is not as warranted, and the purchaser discovers this fact before using it, he may retain the seed and recover in damages the difference between the market price of the seed he received and the purchase price of the seed had it been as warranted. *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693.

Where no special damages have resulted from a breach of warranty as to the kind of seed, and the seed is retained by the purchaser, the measure of damages is the difference between the value of seed of the kind which it was warranted to be and the value of the seed actually delivered. *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657.

## **3. Where seed is mixed with other seed.**

Where the seller is not informed that the buyer intends to mix the seed with other seed before sowing or planting it, the purchaser is not entitled to recover the value of the seed thus mixed with the impure seed purchased. *Fox v. Everson*, supra.

## **4. Where seed is not true to name.**

It has been held that where seed is not true to name and no crop results from sowing it, the measure of damages for breach of the warranty of kind is the market value of the crop which would have been raised had the seed been as represented together with expenses actually incurred in producing the crop, not, however, including any cost of harvesting. *Fuhrman v. Interior Warehouse Co.* post, 89.

The damages recoverable for breach of an express or implied warranty that seed is true to name, where, before ascertaining the breach, the seed is planted or sown, and a crop results different in character than that which would have resulted had the seed been as warranted, is the difference between the value of the crop produced and the crop which would have been produced if the seed had been answerable to the warranty, embracing the profits. *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425.

For breach of an express warranty that seed is true to name, the measure of damages recoverable is the value of a crop 37 L.R.A. (N.S.)

had the seed been true to name, such as would ordinarily have been produced that year, deducting the expense of raising the crop, and also the product and value of the crop actually raised. *Crutcher v. Elliott*, 13 Ky. L. Rep. 592; *Passinger v. Thorburn*, 34 N. Y. 634, 90 Am. Dec. 753; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed without opinion, in 197 N. Y. 528, 90 N. E. 1158; *Gubner v. Vick*, 25 N. Y. Week. Dig. 356, 6 N. Y. S. R. 4; *Wagstaff v. Short-Horn Dairy Co.* Cab. & El. 324; *Page v. Pavey*, 8 Car. & P. 769; *Randall v. Raper*, El. Bl. & El. 84, 27 L. J. Q. B. N. S. 266, 4 Jur. N. S. 662, 6 Week. Rep. 445.

This measure of damages was applied in *Moody v. Peirano*, — Cal. App. —, 84 Pac. 783, as to the sale of wheat warranted to be white Australian, where the wheat was not true to name and produced a crop inferior in value to that which would have been produced had the seed been as warranted.

This rule of damages has been held to apply whether no crop at all or a crop of an inferior kind is grown. *Crutcher v. Elliott*, 13 Ky. L. Rep. 592.

Where seed is sold under a warranty, express or implied, as to kind, the natural consequence of the breach of the warranty in this respect is a crop different in kind and quality from that which would have resulted had the seed been as warranted. If the seed produces a crop not harmful to the land, but of a poor character or of an inferior quality, and less value than would have been produced had the warranty been fulfilled, the measure of damages is the value of the crop of the true product such as the seed was warranted to produce, and such as would have ordinarily been produced that year, less the expense of raising it, and less also the value of the crop actually raised from the seed sold, — in other words, the difference between the market value of the crop raised and the crop which might have been raised from the seed ordered. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410.

The measure of damages for breach of warranty that hop roots were female hop roots, and good runners, where breached because the roots were male roots and worthless for cultivation and production, is all the damages thereby occasioned the purchaser, including the difference between the value of the crop raised and what it

upon the purchaser. A contract deliberately entered into between two parties, exempting one of them from liability in case seeds sold are not true to name, should be as binding as a custom among dealers not to sell with a warranty that the seeds furnished are true to description.

As before stated, we do not hold that, if

would have been had the roots been as warranted. *Schutt v. Baker*, 9 Hun, 556.

Where bulbs are sold for the understood purpose of raising lilies for a certain market, the measure of damages for breach of warranty as to the kind of bulbs is the difference between the value of the crop which the plaintiff raised and a crop of the kind he would have raised had the bulbs been true to name. *Edgar v. Joseph Breck & Sons' Corp.* 172 Mass. 581, 52 N. E. 1083.

Where seed germinates and grows, but produces a crop different from what it would had the seed been as impliedly warranted, and the crop produced is worthless, the measure of damages for breach of the implied warranty is the value of the crop which might have been raised had the seed been as warranted, where such value is shown with reasonable certainty. *Cline v. Mock*. 150 Mo. App. 431, 131 S. W. 710.

Where seed, if true to name, would result in a perennial crop, that is one lasting from year to year, the measure of damages is the fair value of the crop lost, or the crop which would have been produced under ordinary circumstances if the seed had been as represented, together with the cost of reseeded, the cost of recultivation, and the cost of new seed sown. *Depew v. Peck Hardware Co.* 121 App. Div. 28, 105 N. Y. Supp. 390, affirmed without opinion in 197 N. Y. 528, 90 N. E. 1158.

Where the seed germinates and a crop results of a different character from that which would have resulted had the seed been true to name, loss of profits are properly included in the measure of damages, since, from a legal point of view, they are neither remote nor uncertain, and the parties must have perceived at the time of making the contract that its breach would probably result in the loss of definite profits. *Wolcott v. Mount*, supra.

Where a crop, though of inferior quality, is raised from the seed, the means are thus furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits, and prospective profits are allowed. *Vaughan's Seed Store v. Stringfellow*, supra.

In *Hurley v. Buchi*, 10 Lea, 346, the right to recover speculative profits for breach of warranty in a sale of seed by description, where it is breached by furnishing seed of a different kind, is denied, and the measure of damages is said to be the difference between the value of the seed delivered and the value of the seed had it

the plaintiff acted in bad faith and with the intention of deceiving and defrauding the defendant, or even if it failed to exercise due care and caution in selecting the seed, the latter would not have a cause of action for the resulting damage. No such cause of action has been stated in the counterclaim, and no claim was made on

been as represented or warranted. In this case the purchaser planted the seed he had purchased and it produced a crop, but a crop much less in value than would have been the crop, had the seed been true to name, the principal difference being the time of maturity of the crop.

In determining the value of a crop which would have been raised if the seed had been of the kind represented, the seasons, the character of the land, the manner in which it was prepared and cultivated, and the crops which were grown in the neighborhood from the seed of the kind represented, are all to be considered. *Crutcher v. Elliott*, supra.

##### 5. Where seed does not possess germinating power.

The damages recoverable for breach of warranty of seed warranted as to kind and quality, where, because of poor quality, it does not properly germinate and grow, but a partial crop results, is the difference in the price of the crop raised from the seed and the price of the crop which would have been raised from the seed had it been as warranted. *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693.

Where seed is not in quality as represented, the measure of damages is the difference between the crop as actually raised and what it would have been had the seed been of the quality represented. *Flick v. Wetherbee*, 20 Wis. 392.

For breach of warranty for failure of seed to germinate, the purchaser may recover damages from the seller for all the loss necessarily sustained by him by reason of this defect. *Shaw v. Smith*, 45 Kan. 334, 11 L.R.A. 681, 25 Pac. 886.

For breach of warranty in the sale of seed, breached by the failure of seed to germinate and grow, the damages recoverable by the purchaser is the value of his labor expended in preparing his ground for the reception of the seed, after deducting all general benefit to the land resulting from such labor, and also value of the labor expended in planting the seed, and the amount paid for the seed, with interest on the several amounts. *Ferris v. Comstock*, 33 Conn. 513.

Where seed fails to sprout and make a crop, the purchaser is entitled to recover only the actual expenses of planting the seed and the rental value of the land; he cannot recover the value of the crop had the seed been as warranted. *Vaughan's Seed Store v. Stringfellow*, supra.



the argument that any such cause of action was relied upon or existed.

The ruling of the trial court excluding testimony tending to show that the peas furnished were not Advancer peas was correct on the record presented. There was present but one of two elements that were

necessary to constitute a cause of action. The element of bad faith was not presented by the pleadings, and no claim was made by counsel that such bad faith existed. We find no error in the record.

Judgment affirmed.

The reason for denying the right to recover the value of the crop, where the seed wholly fails to germinate or grow after being planted, is that the evidence of the probable produce of the right seed in the land and the year in question are lacking, and the rule that the plaintiff must establish a quantum of his loss by evidence which will enable the jury to estimate the extent of his injury excludes such elements of the injury, the same being incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty. *Ibid.*

Where no fraud is alleged, nor any knowledge on the part of the seller that seed sold for planting purposes is bad, and the action is merely a suit on the warranty of the merchantable quality of the seed, which the law imposes, or on the express warranty of the fitness of the seed for planting, the breach being the failure of the seed to germinate and grow, the measure of recovery for breach of the warranty if the seed is worthless is the purchase money with interest and expense incurred in complying with the contract after the sale was entered into, such as the hauling of the seed, preparing the land for planting, etc. *Butler v. Moore*, 68 Ga. 780, 45 Am. Rep. 508.

Damages recoverable for a breach of warranty in the sale of seeds for seeding purposes, where breached by failure of the seed to germinate, is the amount which the purchaser paid for the seed, the amount which he expended in the preparation of the soil for the crop, and for the planting or sowing of the seed, and, where it is too late to plant another crop, the reasonable rent for the land, subject to be reduced, however, by such amount as the seller may be able to show that the purchaser could have rented the land for. *Reiger v. Worth*, 127 N. C. 230, 52 L.R.A. 362, 80 Am. St. Rep. 798, 37 S. E. 217.

It has, however, been held that where the seed fails to produce a crop, the measure of damages for breach of warranty is the fair value of the crop that might have been raised had the seed been as warranted. *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Crutcher v. Elliott*, 13 Ky. L. Rep. 592. And see *Fuhrman v. Interior Warehouse Co.* post, 89.

#### **6. Where seed contains noxious seed, etc.**

The measure of recovery for damages from the sale of seed as pure seed, which contains noxious seeds, is the amount of loss which the purchaser actually sustains, 37 L.R.A. (N.S.)

and which would necessarily be expected to follow from the sale of impure seed. *Fox v. Everson*, 27 Hun, 355. The difference in value between pure seed and that sold is the measure of recovery where the land is not injured by noxious seeds therefrom. If the land is injured, in addition to these damages, the purchaser is entitled to recover the difference between the value of the land before the sowing of the seed, and the value of it after sowing, and for the purpose of determining the damages to the land, it is competent to show the extent to which the noxious seed had grown upon the land from the seed sown, the expense and labor, together with the difficulty, of removing and killing it, and the extent to which it would interfere with the growing and production of crops. *Ibid.*

Where the purchaser of seed, after sowing the same, discovers that it contains noxious weed seed which will injure his land, it is his duty to do whatever he can to make the damages as little as possible, and whether he acts in good faith in what he does in that regard is a question for the jury. *Bell v. Mills*, 68 App. Div. 531, 74 N. Y. Supp. 224. Thus, if he could remedy the injury by plowing up the noxious weeds, it would be his duty to do so, and thereby save his crop, and he would not be justified in plowing up the entire crop, although he would be justified in doing the latter if he could not otherwise get rid of the noxious weeds. *Ibid.*

#### **7. Interest.**

The purchaser is not entitled to recover interest on the damages from the time the crop would have been harvested and sold, since the demand is unliquidated, and the amount cannot be determined by computation simply, or reference to market values. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13, same case subsequent appeal in 78 N. Y. 393, 34 Am. Rep. 544.

But it has been held that where a warranty is breached by failure of the seed to germinate and grow, the purchaser is entitled to recover interest on the value of his labor expended in preparing his ground for the reception of the seed, after deducting benefits to the land from such labor, also interest on the value of the labor expended in planting the seed, and interest on the amount paid for the seed. *Ferris v. Comstock*, 33 Conn. 513.

Generally, as to interest on unliquidated damages, see note in 28 L.R.A. (N.S.) 1.

A. G. S.

**WASHINGTON SUPREME COURT.**  
(Department 2.)

M. P. FUHRMAN et al., Resp'ts.,  
v.

INTERIOR WAREHOUSE COMPANY,  
Appt.

(64 Wash. 159, 116 Pac. 666.)

**Landlord and tenant — joint tenancy  
in crop — action for sale of unfit  
seed.**

1. One who, in renting land, reserves a share of the crop as rent, may join with the tenant in an action for damages against one from whom the tenant purchased seed which proves to be worthless, by reason of which the crop was lost.

**Seed — unfitness — liability of seller.**

2. One who sells unfit seed, knowing the purpose for which it is to be used, is liable for damages in case the crop is lost because of such unfitness.

**Damages — loss of crop — deduction of  
cost of production.**

3. To ascertain the damages for loss of a crop because of defective seed, the cost of production which has actually been incurred should not be deducted from the market value of the crop which should have been produced.

**Same — contract price of seed.**

4. The contract price of seed purchased for use on land, if not paid, should be deducted from the market value of the crop, in awarding damages for loss of the crop because of the defective character of the seed.

**Appeal — erroneous instruction on  
damages — remittitur.**

5. A judgment for damages should not be reversed for error in an instruction as to the measure of damages, if the amount which the verdict was increased by the error is easily ascertained, and a remittitur is filed for that amount.

(July 14, 1911.)

**APPEAL** by defendant from a judgment of the Superior Court for Klickitat County in plaintiffs' favor in an action brought to recover damages for loss of a crop of wheat because of defective seed sold by defendant to plaintiff Fuhrman. Modified and affirmed.

The facts are stated in the opinion.

Messrs. F. D. Chamberlain and E. C. Ward for appellant.

Mr. W. B. Presby, for respondents:

A contract of rental on shares renders the landlord and lessee tenants in common of the entire crop.

Abernethy v. Uhlman, 52 Or. 359, 93 Pac. 936, 97 Pac. 540; Rice v. Peters, 128

App. Div. 776, 113 N. Y. Supp. 40; Rector v. Anderson, 96 Minn. 123, 104 N. W. 884; Demott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443; Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 507; Fagan v. Vogt, 35 Tex. Civ. App. 528, 80 S. W. 664; Sowles v. Martin, 76 Vt. 180, 56 Atl. 979; Strangeway v. Eisenman, 68 Minn. 395, 71 N. W. 617; Black v. Scott, 104 Mo. App. 37, 78 S. W. 301; Smith v. Tankersley, 20 Ala. 212, 56 Am. Dec. 195; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478; Thompson v. Mawhinney, 17 Ala. 362, 52 Am. Dec. 176; Avery v. Stewart, 75 Minn. 106, 77 N. W. 560, 78 N. W. 244; McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 437, 81 N. W. 830; Cooper v. McCrew, 8 Or. 327; Aiken v. Smith, 21 Vt. 172.

Plaintiffs below were not only properly, but necessarily, joined as plaintiffs, since tenants in common of chattels must join in such action.

15 Enc. Pl. & Pr. 544; Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478.

Crow, J., delivered the opinion of the court:

Action for damages by M. P. Fuhrman and Frank L. Huston against the Interior Warehouse Company, a corporation. The complaint, in substance, alleges that the plaintiff Frank L. Huston, being the owner of tillable land in Klickitat county, granted its possession to his coplaintiff, M. P. Fuhrman, under a lease, by the terms of which Fuhrman agreed to pay Huston a rental of one third of any and all crops grown thereon during the year 1909; that Fuhrman, with the intention of growing a crop of wheat-hay, thoroughly plowed, cultivated, and prepared the land, and applied to defendant, Interior Warehouse Company, to purchase blue-stem wheat with which to seed the land, that he notified the defendant he wanted blue-stem wheat for seed; that defendant, so knowing his wants, needs, and purposes, sold him a variety of winter wheat known as "forty-fold," which Fuhrman used in seeding, believing it to be a blue-stem; that Fuhrman seeded the land in March and April, 1909; that forty-fold wheat is not adapted to, but is worthless for, spring sowing; that it will sprout, but will not mature or produce a crop, and that the plaintiffs, without fault on their part, lost their entire crop, to their damage in the sum of \$1,050. To this complaint a demurrer was overruled, and the defendant answered. On trial the jury, in compliance with instructions of the trial court, divided the damages in the proportion of two thirds and one third, and returned a verdict in favor of Fuhrman for \$420, and in favor

**Note.** — As to the liability of the vendor of seeds, see note to preceding case.  
37 L.R.A. (N.S.)

of Huston for \$210. The defendant has appealed from the final judgment entered thereon.

The demurrer was special and general; its grounds being (1) a defect of parties plaintiff, (2) improper joinder of several causes of action, and (3) insufficient facts pleaded to state a cause of action. Appellant first assigns error on the order overruling the demurrer, and in substance contends that, as respondent Huston was the landlord of respondent Fuhrman, the alleged sale of wheat, if made to either, was made to the latter only; that no privity of contract exists between Huston and appellant; that Huston has no separate cause of action against appellant; that he and Fuhrman have no joint or common cause of action against appellant; and that they are improperly joined as parties plaintiff. The allegations of the complaint show Fuhrman was tilling the land upon an agreement to yield to Huston a specified portion of the crop raised. This made the respondents tenants in common in the crop. The weight of authority is that every contract whereby use of land is given to a party to cultivate and return to the owner a specified portion of the crop produced creates a tenancy in common in the crop, and that this is true whether the agreement between the parties is a lease or a mere cropping contract. The tendency of the courts is to hold that, whenever there is a provision in any form of contract for a specific division of crops produced, a tenancy in common arises therein. *Freeman, Cotenancy & Partition*, 2d ed. § 100; *Foot v. Colvin*, 3 Johns. 216, 3 Am. Dec. 478; *Putnam v. Wise*, 1 Hill, 234, 37 Am. Dec. 309; *Aiken v. Smith*, 21 Vt. 172; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Dinehart v. Wilson*, 15 Barb. 595; *Abernethy v. Uhlman*, 52 Or. 359, 93 Pac. 936, 97 Pac. 540. In *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193, the court said: "In the case of *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176, it was decided by this court that a contract made with the owner of land, which the other party agreed to cultivate and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. In the contract under consideration, the mode of compensation adopted repels the conclusion that it could have been the intention of the parties that the land should not be cultivated, and thus assimilates its terms more closely to the contract in the case last cited. It is true the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be

37 L.R.A. (N.S.)

regarded, rather than the words. *Putnam v. Wise*, supra. And in contracts of this description the true test seems to be that, wherever provision is made for dividing the specific products of the land, a tenancy in common results. *Putnam v. Wise*, supra, and authorities there cited."

Although the appellant sold the seed wheat to Fuhrman only, the sale was for the benefit of Huston as well. He was interested in the prospective crop. A sale of seed wheat unfit for use damaged him as directly and positively as it did Fuhrman. It caused him to lose the one third which he was to receive for the use of his land as completely as it caused Fuhrman to lose his two thirds. In *Foot v. Colvin*, supra, it was held that the owner of land, and his lessee cultivating it on shares, have joint property in the crops, and may jointly maintain an action against a third person who wrongfully cuts and removes them. If Huston and Fuhrman were both injured as the direct result of appellant's act in selling the latter seed wheat unfit for use, they, as tenants in common in the crop, have a joint cause of action against appellant for their damages sustained. The demurrer was properly overruled.

Appellant contends its motion for a nonsuit should have been granted. We have carefully examined the evidence, and find that, although conflicting, it was sufficient to sustain the verdict of the jury on the issues of fact submitted, and that the nonsuit was properly denied. The evidence introduced was sufficient to show that, for the joint benefit of Huston and himself, the respondent Fuhrman properly plowed, cultivated, and prepared the land for seeding; that he purchased the wheat, which he understood and appellant represented to be blue-stem, suitable for spring sowing; that Fuhrman used it to seed the land; that the crop did not mature sufficiently to justify the expense of harvesting; that it was not harvested for that reason; and that it was a total loss. It also appeared that the respondent Fuhrman had not paid appellant for the seed wheat purchased and used by him. On the measure of damages the trial court instructed the jury as follows: "If you find from the evidence and a preponderance thereof that plaintiff is entitled to recover from defendant, you will allow him such sum, not exceeding \$1,050, as is equal to the market value of such crop as plaintiff would have raised upon his land if the wheat had been as represented by the defendant, less the cost of harvesting such crop, and less the value, if any, of such crop as was raised that season upon the land plant-

ed with the seed alleged to have been sold to plaintiff by defendant."

Appellant contends this instruction was erroneous, in that it stated an improper measure of damages. In *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, this court held the proper measure of damages for a lost crop to be its market value, less the cost of producing, harvesting, and marketing the same. Here the respondent Fuhrman had incurred and paid all expense of cultivating, seeding, and producing a crop, aside from the cost of the seed wheat used, but he incurred no expense of harvesting. Expense or cost of producing the crop, actually incurred by respondent Fuhrman, should not be deducted from its market value, but such expense of producing and harvesting as he had not incurred should be deducted. The value of a probable crop upon the land was shown, and no expense of marketing should be deducted. The instruction was erroneous, in that it failed to instruct the jury to deduct the cost of the seed wheat used which respondent Fuhrman had purchased from appellant, and for which he had not made payment. Appellant claimed the seed wheat was not sold to Fuhrman, but to his mother. The jury, however, found the sale was made to the respondent, and the evidence sustains this finding. Appellant, in a communication made to Mrs. Fuhrman, claimed sales of the wheat in dispute were made for a total price of \$87.84, the highest value mentioned in the evidence. It is apparent that the only possible prejudicial effect of the instructions given and above quoted was to increase the damages to that extent.

Other objections are predicated upon rulings of the court on the evidence, and on instructions given or refused. We, however, find the record free from prejudicial error, except as above stated, and consider that we have discussed all controlling questions of law or fact arising on this appeal. As the only possible effect of the erroneous instruction above mentioned, prejudicial to the appellant, would be to increase the damages awarded to the extent of \$87.84, a new trial should not be granted, except at respondents' election. It is ordered that if, within twenty days after remittitur, the respondents file with the clerk of the superior court notice of their election to remit \$87.84 of the damages awarded, the judgment as thus modified be affirmed; and that otherwise a new trial be granted. The appellant will recover its costs in this court.

Dunbar, Ch. J., and Morris and Chadwick, JJ., concur.  
37 L.R.A. (N.S.)

## ARKANSAS SUPREME COURT.

AMERICAN SALES BOOK COMPANY,  
Appt.,  
v.  
E. G. WHITAKER.

(— Ark. —, 140 S. W. 132.)

**Principal and agent — authority to accept rescission of sale.**

1. One employed to solicit orders for, or make sales of, goods, has no implied authority to take back goods sold and delivered, because of dissatisfaction on the part of the customer.

**Appeal — wrongful admission of evidence — withdrawal.**

2. The erroneous admission of evidence is not reversible error if it is withdrawn by the court from the consideration of the jury.

**Evidence — parol to show when written contract is to take effect.**

3. Parol evidence is admissible to show that a written contract of sale was not to take effect until the purchaser had an opportunity to inspect the goods and find them satisfactory.

(October 16, 1911.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Boone County affirming a judgment of a Justices' Court in defendant's favor in an action brought to recover the purchase money for certain goods alleged to have been sold and delivered to defendant under a written contract. Reversed.

The facts are stated in the opinion.

*Note.* — *Implied power of agent to assent to rescission of contract.*

In general.

It is a general rule that the law will not imply the power to abrogate from the mere power to fulfil or carry out a contract. *Ye Seng Co. v. Corbitt*, 7 Sawy. 368, 9 Fed. 423. Nor will mere authority to make a contract for another raise an implication of authority to cancel or surrender the contract, once it is made. *Stilwell v. Mutual L. Ins. Co.* 72 N. Y. 385.

**Authority to sell.**

It is very generally held that mere authority to sell, or solicit orders for the sale of, an article, raises no inference of authority to rescind a completed sale, even though the rescission is by the same agent who made the original contract of sale. *Stoddart v. Warren*, Fed. Cas. No. 13,471; *Bradford v. Bush*, 10 Ala. 386; *Lindow v. Cohn*, 5 Cal. App. 388, 90 Pac. 485; *Luke v. Griggs*, 4 Dak. 287, 30 N. W. 170; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 164; *Samuels v. Northrup Nat. Bank*, 234

Messrs. Pace & Pace for appellant.

Mr. J. W. Story, for appellee:

The evidence did not tend to contradict the alleged written order, or to vary its import. It only showed that the order had never in fact been delivered as a present binding obligation, and it was competent to show the circumstances and conditions under which the alleged order and the goods were delivered.

Graham v. Remmel, 76 Ark. 140, 88 S. W. 899, 6 A. & E. Ann. Cas. 167; Kelly v. Carter, 55 Ark. 112, 17 S. W. 706; St. Louis & N. A. R. Co. v. Crandell, 75 Ark. 89, 112 Am. St. Rep. 42, 86 S. W. 855; State v. Wallis, 57 Ark. 64, 20 S. W. 811; Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; Burke v.

Ill. 9, 84 N. E. 721; Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53; West-End Hotel & Land Co. v. Crawford, 120 N. C. 347, 27 S. E. 31; Brigham v. Hubbard, 28 Or. 386, 43 Pac. 383; Ludwig v. Gorsuch, 154 Pa. 413, 26 Atl. 434; Mange-Weiner Co. v. Patton Worsham Drug Co. 27 Pa. Super. Ct. 315; Adrain v. Lane, 13 S. C. 183; Kountz v. Gates, 78 Wis. 415, 47 N. W. 729.

Stating the rule in Bradford v. Bush, 10 Ala. 386, the court said: "It does not follow that if a person is authorized to sell property, his agency continues, so as to permit him to rescind the sale, or adjust the damages which the vendee may sustain by a breach of warranty. The transaction is complete by the sale, and the rights of the parties become vested, the one in the thing sold, and the other in the price."

Applying the general doctrine, it has been held that an agent for subscriptions, or a canvasser of books, has no implied authority to cancel subscriptions after taking them. Stoddart v. Warren, Fed. Cas. No. 13,471. And that a traveling agent or solicitor of orders has no implied authority to rescind or change a contract for the sale of goods after the receipt of the goods by the purchaser (Brigham v. Hibbard, 28 Or. 386, 43 Pac. 383; Diversay v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154), even though some were to be applied as a credit upon goods thereafter to be furnished (Lindow v. Cohn, 5 Cal. App. 388, 90 Pac. 485).

Employment to solicit and send in orders for goods and to collect outstanding accounts does not authorize an agent to release a purchaser from liability for the price of goods theretofore purchased, and accept another in his stead. Ludwig v. Gorsuch, 154 Pa. 413, 26 Atl. 434.

A mere agent to sell personalty does not possess implied authority to rescind an executed sale, thereby reinvesting his principal with title to property, the title to which had theretofore passed to another under a pre-existing contract of purchase. Fletcher Bros. v. Nelson, 6 N. D. 94, 69 N. W. 53.

That property is conveyed to an agent 37 L.R.A. (N.S.)

Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816.

Frauenthal, J., delivered the opinion of the court:

This was a suit to recover from appellee the purchase money of a recapitulator, and certain supplies connected therewith, which appellant alleged it had sold to him in pursuance of a written contract therefor. The suit originated in a justice of the peace court, from whose judgment an appeal was taken to the circuit court. In the circuit court a verdict was returned in favor of appellee, and from the judgment entered thereon this appeal is prosecuted.

The appellant was located at Elmyra,

with authority to sell or dispose of it in his discretion does not authorize him to rescind a contract of sale after having entered into it. Kountz v. Gates, 78 Wis. 415, 47 N. W. 729.

#### —land contracts.

Authority to sell land does not operate *per se* to confer upon the agent authority to cancel the contract of sale without the principal's knowledge or consent. West-End Hotel & Land Co. v. Crawford, 120 N. C. 347, 27 S. E. 31.

Acting as agent in a sale of land raises no inference of authority, after the execution of the contract, to rescind the sale or modify the terms thereof. Adrain v. Lane, 13 S. C. 183.

Upon execution by an agent of the contract to sell real estate for his principal, his authority ceases, and he has no authority thereafter to cancel or rescind the contract. Samuels v. Northrup Nat. Bank, 234 Ill. 9, 84 N. E. 721.

A power of attorney to sell real estate confers upon the agent no authority to cancel the contract once made. Luke v. Griggs, 4 Dak. 287, 30 N. W. 170.

Where authority not terminated by contract.

Where a contract of sale is incomplete, it has been held that an agent having general authority in reference to the sale and delivery of the property has implied power to consent to rescission of the contract. On this theory Denman v. Bloomer, 11 Ill. 177, same case, subsequent appeal, 12 Ill. 240, holds that authority to make a sale implies authority to rescind it, where the sale is not entirely complete, because all the purchase price has not been paid. This doctrine is also sustained in Palmer v. Roath, 86 Mich. 602, 49 N. W. 590, holding that an agent who obtained an order for a machine which was shipped direct to him in fulfillment of the order had authority to agree with the purchaser to take the machine back if he did not want it, the purchaser objecting to it on the

New York, and was engaged in the manufacture and sale of the goods for the purchase money of which this action was instituted. It claims to have sold the goods to appellee through a salesman under a written contract executed by appellee. The written contract is in the nature of an order, signed by appellee, by which he directed the appellant to ship to him by freight, f. o. b. Elmyra, New York, said goods on or about June 20, 1909, and agreed to pay therefor the sum of \$35; it being stated in said written order that \$5 of said purchase money was paid in cash, and the balance was to be paid in monthly installments.

The testimony on the part of the appellant tended to prove that it shipped the

goods in the manner set out in said written order, and that appellee had refused to pay therefor. The appellee testified that the appellant's salesman saw him at his place of business at Alpena, Arkansas, and endeavored to sell him the goods, and that he refused to buy, and finally the salesman said: "I have one more proposition to make to you, and that is this: I will send an outfit to you on trial for thirty days, and at the end of that time, if it is not satisfactory, you can ship it back;" and that appellee thereupon signed the order. Afterwards the goods were shipped, and upon trial they proved unsatisfactory to the appellee. Later the salesman came to appellee's place of business, and he told the salesman that the goods were not satis-

ground that it did not comply with the order.

So, where the authority of an agent is not exhausted by merely executing in behalf of his principal a contract, the power to rescind a previously executed contract is implied. Thus, an agent and blockman having authority to make contracts, settlements, collect balances, and such like, has power to relieve a purchaser of surplus goods previously sold him, and have them shipped to other points. *Herpolsheimer v. Acme Harvester Co.* 83 Neb. 53, 119 N. W. 30.

Apparently upon the same theory it has been held that a person having transacted business at different times with the traveling representative of another, who had approved of such transactions and delivered goods to him upon orders to such agent, and had accepted payments for the same through the agent, has the right to rely upon an agreement by the agent for his release as guarantor of notes held by the principal, substituting therefor a chattel security. *A. A. Cooper Wagon & Buggy Co. v. Torbert*, 86 Neb. 143, 124 N. W. 1134.

#### Where agency general.

It has been held that where the powers of the selling agent are general, it is competent for him, with the consent of the purchaser, to rescind a prior executed sale, revert the title, and make a conditional sale to the same purchaser on terms which would leave the property at his principal's risk until the conditions were performed. *Scott v. Wells*, 6 Watts & S. 357, 40 Am. Dec. 568.

An agent authorized to contract generally for the purchase of grain may rescind a contract theretofore made by him for the purchase of certain grain so long as authority to make other purchases continues. *Anderson v. Coonley*, 21 Wend. 279.

A person having charge of an elevator, with authority to buy and receive grain, to contract for future deliveries, and attending generally to the principal's business at the place where the elevator is located, has 37 L.R.A. (N.S.)

authority to rescind a contract to purchase grain. *Middle Division Elevator Co. v. Vandeverter*, 80 Ill. App. 669.

General authority as managing clerk, in the absence of the principal, authorizes the clerk to consent to take back goods sold to another, who tendered them back on the ground that he was insolvent and unable to pay for them, and such rescission is binding upon attaching creditors of the insolvent, attaching the goods after the rescission. *Sturtevant v. Orser*, 24 N. Y. 538, 82 Am. Dec. 321.

A general agent taking in his own name a bond importing a direct obligation for a conditional reconveyance of land to him within a certain time has the right to discharge, modify, or control the obligation. He may entirely release the obligor, or cause him to reconvey to himself or another. *Ricketson v. Richardson*, 19 Cal. 330.

#### Authority to rent or collect rent.

Authority to collect rent does not imply authority to accept a surrender of the lease. *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671, 38 Pac. 1072. Neither does authority to rent premises and collect the rent. *Berry v. No. 1465 Broadway Co.* 132 N. Y. Supp. 1050. That a husband living with his wife has collected the rents from her property and attended to the making of repairs raises no implication of authority on his part to accept a surrender of a lease. *Rex v. Forbes*, 36 N. B. 333. Authority to approve of a subtenant implies no authority to accept a surrender of a lease. *Baylis v. Prentice*, 75 N. Y. 604. A lawyer controlling the general legal business of a lessor has no implied power to consent to the surrender of a lease and release the lessee for rent thereunder. *Jamestown & F. R. Co. v. Egbert*, 152 Pa. 53, 25 Atl. 151.

#### Miscellaneous.

Power to receive and receipt for money paid does not include power to release or exchange a security for the balance of a debt. *McHany v. Schenk*, 88 Ill. 357.

Authority to obtain a release of a right

factory, and that he did not want them. He testified that the salesman then told him to box the goods up, and he would advise him where to send them. Thereupon the appellee delivered the goods to a common carrier, taking bill of lading therefor, and shipped same to appellant, who refused to take them back. The lower court ruled that all the testimony introduced by appellee relative to the statements of the salesman at the time the written order was signed, to the effect that the goods would be sent on trial with the privilege to appellee of shipping them back if not satisfactory, was incompetent, and instructed the jury not to consider same in evidence. Thereupon the lower court, among other instructions, gave the following to the jury: "(2) I further instruct you that if the agent salesman who sold the goods to defendant took up the goods in question, ordered the goods boxed and held for further orders, that it would be a cancellation of the order, and you should find for the defendant."

It is urged that the court erred in giving said above instruction, because the salesman had no authority to rescind or can-

cel the sale after it had been completed. It is well settled, we think, that the power which an agent has to bind his principal rests upon the authority which the principal has given to him. If the agent has acted without authority, or outside of the scope of his authority, real or apparent, then the principal is not bound for such act. One who deals with an agent is at once put upon inquiry, and must discover whether the agent has the authority to do the proposed act. But, where the agency is proved without showing its extent, then it is presumed that general authority has been given in regard to the business in which such agency is concerned. Without notice to the contrary, the agent is presumed to have authority to do all acts necessary to carry out the particular employment in which he is engaged by the principal. This court has held in the case of *Keith v. Herschberg Optical Co.* 48 Ark. 138, 2 S. W. 777, that "a third person has a right to assume, without notice to the contrary, that the traveling salesman of a wholesale house has an unqualified authority to act for the firm he represents in all matters which come within the scope of that employment." The ob-

of way does not imply authority to cancel a release after having obtained it. *Guess v. South Bound R. Co.* 40 S. C. 450, 19 S. E. 68.

Mere authority to act for the charterers of a vessel in procuring a cargo in a foreign port does not authorize the agent to modify or cancel the charter party of his principal. *Ye Seng Co. v. Corbett*, 7 Sawy. 368, 9 Fed. 423; *Ricketson v. Richardson*, 19 Cal. 330.

A husband taking out an insurance policy in favor of his wife has no implied authority to consent to its cancellation where the policy is irrevocable so far as concerns the husband, since authority to make a contract for another is not sufficient to authorize its cancellation or surrender. *Stilwell v. Mutual L. Ins. Co.* 72 N. Y. 385.

The purchaser of a ticket for the transportation of another has implied authority to return the ticket so long as it remains in his possession, and receive the money therefor, the seller having no knowledge that the ticket belonged to others for whom the purchaser was acting as agent. *Lurie v. Public Bank*, 65 Misc. 583, 120 N. Y. Supp. 855.

#### Right to agree to subsequent rescission.

An agent authorized to sell may stipulate as one of the terms of sale that the goods sold may be returned if not satisfactory. *Oster v. Mickley*, 35 Minn. 245, 28 N. W. 710; *Eastern Mfg. Co. v. Brenk*, 32 Tex. Civ. App. 97, 73 S. W. 538. If intrusted with an article to sell, with no restrictions on his authority, he may sell subject to

trial, and agree that the property may be returned and the sale rescinded if the article is not satisfactory to the purchaser. *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350. And after entering into a contract for the sale of a machine, the agent has authority to modify the contract by agreeing that the purchaser may take the machine home, try it, and if not satisfactory, return it, and the sale be rescinded. *Warder, B. & G. Co. v. Pischer*, 110 Wis. 363, 85 N. W. 968.

Authority to sell goods is presumed to authorize sales in the usual manner in which similar articles are sold, and does not imply authority to give the purchaser the right to return goods subsequently purchased from the principal. *Ide v. Brody*, 156 Ill. App. 479.

A traveling salesman without express authority or the right of custom or trade so to do cannot, on the sale of goods to a customer, agree in behalf of his principal that the goods or any portion of them may be returned up to the date of settlement, even though at the time the season for the sale by his principal of such goods to the retail trade had quite, if not entirely, expired. *Friedman & Sons v. Kelly*, 126 Mo. App. 279, 102 S. W. 1066.

A soliciting agent whose authority is by the contract restricted to the mere solicitation of contracts, with no authority to receive money thereon, the contract also containing a provision that "any statement, verbal or otherwise, to be recognized, must be written on the face of this contract, in ink," has no power to rescind or modify the contract by verbal agreement. *White v. Massey*, 65 Mo. App. 260. A. G. S.

ject of the employment and the authority, real or apparent, given to an agent who makes sales or solicits orders for goods, is to do all those things and to enter into such agreements as are necessary to make the sales or to secure the orders for the goods. He has the authority, real or apparent, to agree upon the terms of the sale, and to sell conditionally or unconditionally, where the person with whom he deals has no notice of any limitation upon his authority. *Ibid.*; *Jacobway v. Insurance Co.* 49 Ark. 320, 5 S. W. 339. But, according to the great weight of authority, an agent who is only empowered by his principal to solicit orders for or to make sale of goods has no implied authority to receive payment therefor or to modify or cancel such sale. After an order is executed or a sale completed, the authority of the agent in the matter is at an end. His authority is only to make contracts, to solicit orders for goods, or to make sale thereof. He has no implied power to give up interests that have been acquired, or to cancel rights which have been obtained.

The agent who solicits orders for or makes sales of goods has no implied power, once the order is executed or the sale made, either to modify or to rescind the contract. As is said in 1 *Clark & Skyles Law of Agency*, 588: "It is well-settled rule that an agent with authority to sell goods has no authority, after the contract of sale has been completed or executed, to revoke or rescind the sale and receive back the goods which he had previously sold, or to alter his contract in any material point." 2 *Mechem, Sales*, §§ 1448, 1456; 31 *Cyc.* 1360. The case at bar was tried by the lower court upon the theory that the appellee had entered into a written contract by which he had made an unconditional purchase of the goods. The agent representing the appellant in making the sale was a traveling salesman. The scope of his authority was only to make such an agreement as was necessary to secure the order for or make the sale of the goods. After the order was executed and the sale completed his authority ceased, and he could not bind his principal by any act done which was thereafter without the scope of his employment. There is no testimony indicating that this salesman had express authority to cancel or to alter the contract of sale after it was made, and he had no implied authority under the law to do this.

He therefore had no authority by which his principal could be bound, to direct the appellee to box up the goods and ship them back, and thereby to settle his indebtedness to appellant. He had no power, either

actual or apparent, to compromise the debt by taking the goods back. There was therefore no evidence adduced upon the trial of this case upon which to base the above instruction No. 2, which was given by the court; and it follows that the court erred in giving said instruction to the jury.

The appellant also urges in his brief that the court erred in permitting the introduction of the parol testimony that the sale was made with the further parol agreement that appellee could return the goods in event they did not prove satisfactory after a thirty-day trial. This contention is made upon the ground that such verbal testimony would add to or vary the terms of the written contract. But appellant is in no attitude to complain of the action of the court in this particular, for the reason that the court subsequently withdrew this testimony from the consideration of the jury, and specifically instructed them not to regard it as evidence in the case. The question raised by that testimony was not afterwards made an issue in the case, by instructions or otherwise. Inasmuch, however, as this case must be remanded for a new trial, we deem it proper to note the question thus raised by the attempted introduction of this parol testimony.

It is a well-settled rule of evidence that, where a written contract is plain, unambiguous, and complete in its terms, parol evidence is not admissible to contradict, vary, or add to any of its terms. *Dalhoff Constr. Co. v. Maurice*, 86 Ark. 162, 110 S. W. 218; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Bradley Gin Co. v. J. L. Means Mach. Co.* 94 Ark. 130, 126 S. W. 81; *Cox v. Smith*, — Ark. —, 138 S. W. 978. But this rule of evidence applies only to those written contracts which have been fully executed and finally consummated. Parol testimony is always admissible to show that a purported written contract was not actually executed and concluded as a completed contract, and that the written instrument, though signed, was not, in fact, finally executed and finally delivered as a contract. It is competent to show by parol testimony that a written instrument, though signed, should not be a binding and completed contract until certain precedent conditions should be fulfilled; in other words, that a written instrument was not in fact to take effect in event of certain contingencies not happening or conditions not being performed.

In the case at bar, if the written instrument, though signed, was not actually delivered as a binding contract, but was signed with the understanding that it should only be held, without becoming effective, until after the appellee had an opportunity to



inspect the goods and accept them, if satisfactory, then the instrument, though signed, would not be a completed contract. Such testimony tended to prove that the purported written instrument was not actually executed and delivered. Instead of adding to or varying any of the terms of the written contract, such testimony tended to show that the written contract was not actually entered into. A written contract, actually entered into, which is unconditional in its terms, cannot be varied by parol testimony, which tends to add a condition as one of the terms of the contract. *Cox v. Smith*, supra. But parol testimony is admissible to show that a written instrument was not signed or delivered as a concluded contract, but was only signed and delivered, to be held pending the happening of a contingency or the performance of some condition, and that subsequently such contingency did not happen or that such condition was not performed, and therefore that the written instrument did not actually become effective as a completed contract. *Graham v. Remmel*, 76 Ark. 140, 88 S. W. 899, 6 A. & E. Ann. Cas. 167; *Barr Cash & Package Co. v. Brooks-Ozan Mercantile Co.* 82 Ark. 219, 101 S. W. 408.

We do not deem it proper to pass on the question as to the sufficiency of the above parol testimony adduced upon the trial of this case to show that the written instrument was not a completed contract, for the reason that upon the further trial of this case other and different testimony may be introduced upon this question of fact.

For the error in giving said above instruction No. 2, the judgment is reversed, and the cause remanded for new trial.

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

PERRI W. FRISBY, Appt.,

v.

UNITED STATES.

(38 App. D. C. 22.)

**Criminal law — *ex post facto* law — changing rules of evidence.**

The repeal, after the commission of an alleged forgery, of a statute which pre-

**Note.**—*Ex post facto* law: repeal of statute excluding evidence discovered or obtained by judicial proceedings against accused.

No other case has been found passing upon this precise point. Some light is thrown upon it, however, by general principles laid down by the courts.

It is stated that laws which make con-

vents the use against accused of any discovery or evidence obtained from him by means of any judicial proceeding, so as to permit the use against him of the paper alleged to have been forged, which was originally exhibited by him in an equity suit, and of his testimony in that suit, is *ex post facto* and invalid, where the crime could not have been established without the aid of the record in the other suit.

(Shepard, Ch. J., dissents.)

(January 2, 1912.)

**A** PPEAL by defendant from a judgment of the Supreme Court, convicting him of forging a contract for the sale of land. Reversed.

The facts are stated in the opinion.

Mr. Henry E. Davis for appellant.

Mr. Jesse C. Adkins, with Mr. Clarence R. Wilson, for the United States:

The repeal of the statute is not *ex post facto*.

*Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Hopt v. Utah*, 110 U. S. 574, 587-589, 28 L. ed. 262, 267, 268, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; *Robinson v. State*, 84 Ind. 452; *Mrous v. State*, 31 Tex. Crim. Rep. 600, 37 Am. St. Rep. 834, 21 S. W. 764.

Mr. Justice Van Orsdel delivered the opinion of the court:

The appellant, Perri W. Frisby, hereafter for convenience referred to as defendant, was indicted in the supreme court of the District of Columbia for the forgery of a certain written instrument purporting to be a contract for the sale of real estate. This paper was originally produced by defendant as an exhibit to his answer in a suit in equity, in which cause he also testified as a witness in his own behalf. It was after the alleged forged instrument had been exhibited in the equity pleading and defendant had testified in said cause that he was indicted for forging the instrument.

At the time the instrument was filed, § 860, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 661, was in force in this District. It was as follows: "No pleading of a party, nor any discovery or evidence ob-

viction easier by changing the rules of evidence, so that less or different evidence is required to convict, are *ex post facto* as to prior offenses. 8 Cyc. 1031. And this rule goes to support the doctrine of *FRISBY v. UNITED STATES*.

Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to

tained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfei-

ture; provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." Between the finding of the indictment and the conviction of defendant this statute was repealed. 36 Stat at L. 352, chap. 216.

convict the offender, is an *ex post facto* law within the words and the intent of the constitutional prohibition. It is stated by the court that Sir William Blackstone also considered such a law *ex post facto*, and that the same opinion was confirmed by the editor of the Federalist. *Calder v. Bull*, 8 Dall. 391, 1 L. ed. 650.

This definition has been accepted and followed in other cases. *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Goode v. State*, 50 Fla. 45, 39 So. 461.

*Calder v. Bull*, supra, is a leading case upon the scope of the constitutional prohibition against *ex post facto* laws. The court seems, however, to have gone beyond the actual necessities of the case, and the broad definition laid down there has been said to be a mere *dictum*.

Where, under the law as it stood at the time of the offense, a conviction of murder in the second degree, even though set aside or reversed, was conclusive evidence of innocence of the charge of murder in the first degree, a subsequent change providing that murder in the second degree, if reversed or set aside, shall not operate as a bar to a conviction of murder in the first degree, is an *ex post facto* law within the meaning of the constitutional prohibition. *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443.

A law authorizing conviction upon different testimony than was required at the time the act was done is *ex post facto* as to such an act. This rule was applied to a statute giving the term "horse" a generic meaning, so that an indictment for stealing a horse could be sustained by proof of the theft of a gelding. *Valesco v. State*, 9 Tex. App. 76. Same rule applied to a statute allowing an allegation of ownership of joint property to be in either of the joint owners. *Calloway v. State*, 7 Tex. App. 585; *Hannahan v. State*, 7 Tex. App. 664.

Where, after an indictment for bigamy, a law was passed allowing marriages to be proved by circumstantial evidence in addition to direct evidence, it was held, as to such an indictment, *ex post facto*. *State v. Johnson*, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241.

There was a strong dissenting opinion, however, in *FRISBY v. UNITED STATES*. And there is considerable weight of authority to support this opposing view. Thus it is said that a constitutional provision against *ex post facto* laws cannot properly be regarded as affecting a change of a rule of evidence. 1 Greenl. Ev. § 2a.

But alterations which do not increase the punishment nor change the ingredients of

the offense, nor the ultimate facts necessary to establish guilt, but leave untouched the nature of the crime, and the amount or degree of proof essential to conviction, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922.

A statute which enlarges the class of persons who may be competent as witnesses is not *ex post facto* in its application to offenses previously committed, for it does not attach criminality to any act previously done, and which was innocent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree or lessen the amount or measure of the proof made necessary to conviction for such offenses. Such alterations relate to modes of procedure only, which the state may regulate at pleasure, and in which no one can be said to have a vested right. *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Laughlin v. Com.* 13 Bush, 261; *Hart v. State*, 40 Ala. 32, 88 Am. Dec. 752; *Mrous v. State*, 31 Tex. Crim. Rep. 597, 37 Am. St. Rep. 834, 21 S. W. 764.

There is no vested right in a rule of evidence. Such rules affect the remedy only, and it is within the constitutional power of the legislature to change them. This was applied to a case where a statute was passed, permitting husband and wife to testify against each other in special cases. *Burk v. Putman*, 113 Iowa, 232, 86 Am. St. Rep. 372, 84 N. W. 1053; *Meadowcroft v. People*, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303.

Opening new sources of light, or increasing the means of proving or detecting crime, cannot be said to require less evidence to convict, or become *ex post facto*. So with a statute permitting a seduced woman to testify against the accused. *Mrous v. State*, 31 Tex. Crim. Rep. 597, 37 Am. St. Rep. 834, 21 S. W. 764.

After a conviction for arson a statute was passed making an authenticated copy of a former judgment and commitment competent and prima facie evidence of such judgment and commitment. In a later trial for larceny, this statute was alleged to be *ex post facto*; but the court disregard the allegation, chiefly, however, upon the ground that the record did not show that the trial court considered the statute at all. *State v. Dowden*, 137 Iowa, 573, 115 N. W. 211.

H. C. Sh.

On trial, the contract as it appeared in the equity cause, together with certain portions of defendant's evidence in that proceeding, was admitted in evidence against the accused over the objection and exception of his counsel, who contended that defendant could not be deprived of the immunity granted by § 860, *supra*, and that the repealing act was, as to him, *ex post facto* legislation, and therefore void. This is the sole question presented on this appeal.

It is not always an easy task to determine just when a statute is *ex post facto* in its application to a given case. The provision of the Federal Constitution forbidding the enactment of *ex post facto* laws (art. 1, § 9, cl. 3) has called forth a vast volume of opinion by the Federal and state courts. In the early case of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, the court defined an *ex post facto* law as follows: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. (2d.) Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive."

It will be observed from the above definition that a law, to be *ex post facto*, must be one that deprives the person accused of crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense. In other words, any statute is held to be *ex post facto* "which, by its necessary operation, and in relation to the offense or its consequences, alters the situation of the accused to his disadvantage." However, it has generally been held that the constitutional inhibition does not extend to enactments affecting mere matters of procedure. Public policy, it is said, demands that remedies shall always be under the control of the legislature. This is true where a statute does nothing more than to admit evidence of a particular kind upon an issue of fact arising in the trial of a criminal case which was not admissible when the crime was committed, and which does not create a new issue in the case. In such a case it merely adds to the quantum of evidence to prove the facts existing and subject to proof when the crime was committed. Within these limits the accused is

held not to be deprived of a substantial right or immunity such as is contemplated in the prohibitive clause of the Constitution.

It is well settled, however, that the general rule that laws regulating mere matters of procedure are not *ex post facto* is subject to numerous exceptions. The word "procedure," as a legal term, has a most indefinite meaning. The leading law dictionaries do not attempt to define it. Bishop, in his work on Criminal Procedure, § 2, says: The term "procedure" is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, "pleading," "evidence," and "practice." The same author defines "practice" as meaning "those legal rules which direct the course of proceeding to bring parties into court, and the course of the court after they are brought in." In *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, Mr. Justice Miller, referring to the above definition of procedure, said: "If this be a just idea of what is intended by the word 'procedure,' as applied to a criminal case, it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law, both by the decision in *Calder v. Bull*, *supra*, and in *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; for in the former case this court held that 'any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offense in order to convict the offender,' is an *ex post facto* law; and in the latter, one of the reasons why the law was held to be *ex post facto* was that it changed the rule of evidence under which the party was punished. But it cannot be sustained without destroying the value of the constitutional provision that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as 'pleading,' 'practice,' and 'evidence.' Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does, according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

Even conceding that the changes wrought in the status of the defendant by the repealing statute relate alone to procedure, that is not of itself sufficient to warrant an affirmation of the judgment, if it appears that he has been deprived of a substantial right which amounted to an immunity at the time the offense was committed.

With these general rules and their exceptions before us, what is the situation of this defendant? "Forgery at the common law is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bishop, *Crim. Law*, § 523. To constitute the crime of forgery, three things must exist: There must be a false making or other alteration of some instrument in writing; there must be a fraudulent intent; and the instrument must be apparently capable of effecting a fraud. *Clark, Crim. Law*, § 118. Our Code defines the crime as follows: "Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish, as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years." [D. C. Code, § 843, 31 Stat. at L. 1326, chap. 854.] It will be observed that the statute defines two distinct criminal acts, either of which constitutes the crime of forgery. The making of a false instrument with intent to defraud is forgery. The uttering of a forged instrument with intent to defraud is forgery. But where the instrument is both forged and uttered by the same person, as in this case, there is only the single crime of forgery committed. *State v. Klugherz*, 91 Minn. 406, 98 N. W. 99, 1 A. & E. Ann. Cas. 307.

Intent in forgery will not be presumed from the mere making of a false instrument. It must be gathered from some affirmative act or from the existence of circumstances from which criminal intent may be inferred. No such circumstances were present in this case; hence criminal intent could not be imputed to defendant until he uttered the instrument by incorporating it in the pleadings in the equity cause. The utterance, therefore, was essential to establish the commission of the crime charged. To find the existence of an essential element of the crime,—in fact, to find the crime itself,—the government was compelled to search the record in the equity

proceeding. Without it the crime of forgery could not have been established or even charged against the defendant. It is true that defendant committed the crime of forgery before he incorporated the instrument into the equity pleading, and its utterance was only the disclosure of the criminal intent which existed concealed in his mind when he made it. But the record in the equity case does not serve the mere purpose of amplifying the evidence already existing of the commission of the crime; it furnishes not only the sole evidence of intent, an essential element of the crime itself, but the complete disclosure of the crime. What before the repeal of the act could not be used as the basis of the charge of forgery and proof of its commission, it is sought by the repeal, not only to make the basis of the crime, but the sole proof of its commission.

Under the existing law the utterance of the forged instrument and the disclosure of the complete crime of forgery by means of the pleading in a civil suit did not constitute a crime for which the defendant could be punished, unless it could be established without reference either to the pleadings or evidence of the defendant in the equity case. It is not contended that the crime charged could have been established upon any theory independent of such reference. Had witnesses been produced to prove that the signatures to the contract were all in the handwriting of defendant, they could have testified only to information gained from a reference to the instrument itself as it appeared in the equity pleading. Such reference was expressly forbidden by the statute. Any use of defendant's testimony in the civil proceeding was also forbidden. Witnesses could not have been produced to testify to the substance of defendant's testimony in the equity case, since the immunity granted by the statute extended to both the pleadings and evidence in the civil suit. The immunity granted by the statute is comprehensive. It forbids the use of such evidence or pleadings "in any manner" against the defendant "in any criminal proceeding," except for perjury. If the instrument was a forgery, defendant clearly subjected himself in the equity proceeding to a criminal prosecution for the crime of perjury, the only crime chargeable under the statute.

To sustain this conviction would be equivalent to holding that the repealing statute changed an unpunishable forgery, because of the source of its disclosure, into a punishable forgery. Before the act, defendant, by existing law, was granted absolute immunity from any criminal prosecution growing out of disclosures made by him in the

civil proceeding, except for perjury. After the act, it is contended that the immunity no longer exists, and he is liable to answer for another crime, which we must assume but for the immunity would never have been committed. As was said in *Calder v. Bull*, supra: "The restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law." To sustain the contention of counsel for the government would be to totally disregard the immunity afforded the defendant by the existing law, which this court held in the former case to constitute a substantial right. *Frisby v. United States*, 35 App. D. C. 513.

Under the inducement of the existing law, defendant placed in the hands of the prosecution something which could not be used against him or made the basis of the present case, but which, by the repealing act, it is insisted, was made competent evidence to establish the crime charged. It must be remembered that this is not an instance of merely increasing the number of witnesses to prove the same case that formerly existed, as in *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417, or of changing the method of proving an existing fact, as in *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922. In each of those cases the evidence made competent by statutes enacted after the commission of the crime (murder in each instance) was of so little consequence as proof that former convictions had been secured and the death penalty imposed in both cases without the evidence legislated into existence being used until the second trials. The statute here took the thing upon which the charge of the commission of the crime was predicated, which defendant had placed in the hands of the prosecution before indictment, under the protection and immunity afforded by the existing law, and made it the chief instrument in encompassing his conviction. Can it be said that defendant's situation had not been changed to his disadvantage by the enactment of the repealing act? We think not.

The judgment is reversed, and it is so ordered.

Mr. Chief Justice Shepard, dissenting:

I find myself unable to concur in reversing the judgment in this case.

In my opinion, § 860, Revised Statutes (U. S. Comp. Stat. 1901, p. 661), regulates procedure, and its repeal is not, as to this appellant, an *ex post facto* law.

Changing a rule of evidence merely, the repealing section did not alter, add to, or diminish the ultimate facts necessary

to establish the guilt of the appellant. Having no relation to the amount or degree of proof essential to conviction, it did nothing more than remove a restriction upon the competency of certain evidence. The conditions shown bring the case entirely within the principle declared by the Supreme Court in cases the authority of which has not been limited or impaired in any later decision. *Hopt v. Utah*, 110 U. S. 574-589, 28 L. ed. 262-268, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Thompson v. Missouri*, 171 U. S. 380-387, 43 L. ed. 204-207, 18 Sup. Ct. Rep. 922. As shown in *Thompson's Case*, the statute declared *ex post facto* in *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, took from the defendant a complete defense against the charge of murder in the first degree. It was more than a change of procedure affecting the competency of evidence; it operated to increase the degree of crime. The following language of Mr. Justice Harlan, who delivered the opinion of a unanimous court in *Thompson's Case*, is, in my judgment, directly applicable to the conditions here presented: "If persons excluded, upon grounds of public policy, at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. . . . The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate essential fact to be established; namely, the guilt of the accused."

Section 860, rendering incompetent as evidence in any criminal case against him, the pleadings of a party or any evidence or discovery obtained from him in a judicial proceeding, was the result of the sense of Congress, at the time of its enactment, that it established a rule of evidence in accord with sound public policy. A change of opinion in that regard caused its repeal. The section made no change in, and had no relation to, the substantive criminal law. It merely created a new rule of evidence, applicable in criminal cases, and operating generally, which, for satisfactory reasons, had been repealed prior to the trial of appellant, thereby restoring the rule of the common law.

I cannot concur in the contention that the

section was practically an offer of immunity, of the benefit of which the appellant cannot be deprived by its repeal. Immunity statutes are intended to compel the production of evidence that would, without their protection, tend to show that the witness had committed a crime. See 27 Stat. at L. 443, chap. 83, U. S. Comp. Stat. 1901, p. 3173; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644. In this case the appellant pleaded the forged instrument in his own interest and under no compulsion. In so doing he was protected by the section while it was in force, but he took the risk, as did Hopt and Thompson in the cases cited, that the rule of evidence might subsequently be changed. It is true that the forged instrument was uttered when set up in his answer in the civil suit, and it may be conceded for the sake of the argument, that it could not be offered in evidence against him in a prosecution for uttering the instrument. But that question is not involved and need not be discussed. Forgery, and uttering a forged writing are separate and distinct offenses by the terms of § 843 of the Code, which, in that respect, follows the common law. It is forgery to falsely make or alter any writing of a public or private nature, with intent to defraud or injure another. The offense is complete when the writing shall have been falsely made or altered with that intent. Uttering the forged writing is not an ingredient of the offense. It is not perceived that proof of utterance is essential to conviction of the offense charged, though it would ordinarily be quite sufficient to establish the intent to defraud. That intent may be shown by other facts and circumstances surrounding the transactions, against the proof of which no objection could be made on any valid ground. The government may, indeed, have difficulty in proving the fraudulent intent if deprived of the right to prove the particular utterance of the forged writing, but it is the same difficulty that would occur in all prosecutions for forgery, where the false writing may never have been uttered at all. If deprived of the right to prove this particular utterance, it ought not to be prevented from using the writing in connection with evidence of other facts and circumstances that might tend to show that it had been falsely made, with intent to defraud or injure.

Convinced that the trial court did not err in admitting the writing in evidence, I must dissent from the conclusion of my brethren.

37 L.R.A. (N.S.)

## ILLINOIS SUPREME COURT.

CITY OF EDWARDSVILLE, Appt.,  
v.

COUNTY OF MADISON.

(251 Ill. 265, 96 N. E. 238.)

### Eminent domain — power of municipality to take county property.

Authority conferred upon a municipality to exercise the power of eminent domain to take private property for the purpose of laying out streets does not by implication include authority to condemn land owned by the county and used for a poor farm.

(October 25, 1911.)

**A**PPEAL by the city from a judgment of the Circuit Court for Madison County in defendant's favor in a proceeding to condemn land for a public street. Affirmed.

The facts are stated in the opinion.

Mr. Charles E. Gueltig, for appellant:

The power granted necessarily implies and includes the power to institute condemnation proceedings for the purpose of carrying into effect the donated powers.

*Chicago & N. W. R. Co. v. Cicero*, 154 Ill. 658, 39 N. E. 574; *Summerfield v. Chicago*, 197 Ill. 272, 64 N. E. 490.

The grant of power, being for a public purpose, carries with it the right to condemn under the eminent domain act.

*Helm v. Grayville*, 224 Ill. 278, 79 N. E. 689; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704; *People ex rel. Escott v.*

*Note. — Eminent domain: power to take property already devoted to a public use by a political or governmental agency.*

It is well established that property previously devoted to a public use may, by the exercise of the power of eminent domain, be taken for a different public use whenever the interests of the public so require. 15 Cyc. 612, 613. This note, however, is confined to the taking of property which has been devoted to a public use by some political or governmental agency, and the cases are limited to those in which public property of this character is sought to be taken.

In the case of streets and highways, the taking is more frequently for a use that does not exclude entirely the previous use, and collateral questions, not in point in this note, arise. The cases, therefore, relating to the taking of streets and highways have been excluded. Likewise, the cases relating to the taking of drains are excluded, as are also those relating to the taking of cemeteries, whether such cemetery is owned by a private corporation or a municipal body. The power of diversion from a particular public use is beyond the scope of the pres-

Hoffman, 97 Ill. 234; Perry County v. Jefferson County, 94 Ill. 214; Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; Chicago & N. W. R. Co. v. Cicero, 154 Ill. 656, 39 N. E. 574; Chicago & N. W. R. Co. v. Morrison, 195 Ill. 277, 63 N. E. 96; English v. Danville, 170 Ill. 133, 48 N. E. 328.

Land held for a public use can be condemned for another public use, when the

latter use is more beneficial to the general public, and not destructive of the rights of the public under the first.

Chicago & N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 589; Chicago & N. W. R. Co. v. Morrison, 195 Ill. 271, 63 N. E. 96; Chicago West Div. R. Co. v. Metropolitan West Side Elev. R. Co. 152 Ill. 520, 38 N. E. 736.

ent note. For discussion of this question, see references at the end of the note.

The power of eminent domain resides in the state, and can be exercised only by it, or some agency to which the power has been delegated. It may be delegated under general statutes, or the agency may have been authorized to take the particular property by express words or necessary implication.

In the absence of authority conferred expressly or by necessary implication, an agency of the state cannot take land devoted to a public use by a political or governmental agency. *Re New York & B. B. R. Co.* 20 Hun, 201 (railway company seeking to take land belonging to a city and used as a seaside concourse or park); *Re Boston & A. R. Co.* 53 N. Y. 574 (railway company seeking to take land held by a village upon a special trust for park purposes); *Re Milwaukee Southern R. Co.* 124 Wis. 490, 102 N. W. 401 (railroad company seeking to take land devoted by a city to park purposes); *State, Jersey City, Prosecutor, v. Montclair R. Co.* 35 N. J. L. 328 (railway company seeking to take land owned by a city and being filled up for use as a reservoir in connection with the city waterworks); *Tyrone Twp. School Dist.'s Appeal*, 22 W. N. C. 513, 1 Monaghan (Pa.) 20, 15 Atl. 667 (school district seeking to take as a site for a schoolhouse part of a poor farm which was scarcely large enough for the purposes for which it was then used); *Rockport & P. A. R. Co. v. State*, — Tex. Civ. App. —, 135 S. W. 263 (railroad company seeking to take land set aside by the state as a quarantine station, although the part sought to be taken did not run through, nor interfere with, the part inclosed and actually in use); *Atlanta v. Central R. & Bkg. Co.* 53 Ga. 120 (city seeking to take for a street land of the state used for car shops and other buildings in connection with a state railroad, although the road had been leased to private parties for a term of years); *St. Louis, J. & C. R. Co. v. Illinois Inst. for Edu. of Blind*, 43 Ill. 303 (railroad company seeking to take a portion of the grounds owned by the state and used and occupied for an institution for the education of the blind); *Re Utica*, 73 Hun, 256, 26 N. Y. Supp. 564 (city seeking to take for street purposes land owned by the state and used for a state hospital).

In *United States v. Chicago*, 7 How. 185, 12 L. ed. 660, the right of a city to take for streets land reserved by the United States government for military purposes was denied.

37 L.R.A. (N.S.)

In *Re Pottsgrove Twp. Road*, 5 Pa. Co. Ct. 361, it is held that a public school property cannot be taken for a road when, by a slight curve in the road, the necessity of the taking can be avoided.

And see *Moline v. Greene*, post, 104.

In *Davis v. Nichols*, 39 Ill. App. 610, the right to compel a school board to proceed to condemn a part of the public square of the village as a site for a schoolhouse was denied, on the ground that the public square could not thus be appropriated to a use inconsistent with, and destructive of, the original use.

In *United States v. Ames*, 1 Woodb. & M. 76, Fed. Cas. No. 14,441, an award which allowed land of the United States used for an armory to be overflowed upon payment of damages as provided by a state statute was held invalid. In this case there were several reasons given for holding the award void, and it does not clearly appear that the court regarded the reason that it was a taking of public property as alone sufficient.

But in *Re Certain Land*, 119 Fed. 453, it is held that land dedicated to a city for use as a public park may be taken by the United States government as a site for a post-office, if the latter use is more important than the former. There is *dictum* to the effect that it may be taken also if there is express legislative authority to take the particular tract. The Federal government in this case was acting under authority delegated it by the state, and not by virtue of its paramount authority.

In *Indiana C. R. Co. v. State*, 3 Ind. 421, the right of a railroad company to cross a farm owned by a state institution for educating the deaf and dumb was upheld. The charter of the railroad authorized it to construct the road along a general route named therein, and the farm was on this route, and the court seems to proceed on the theory that there is a necessary implication from the grant to the railroad company to take this particular land.

In *Portland & W. Valley R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299, 12 Pac. 265, land held by a municipal corporation in trust for the use of the public as a levee or public landing was held subject to be condemned by a railroad company without compensation to the city, under express authority from the legislature, so long as that use was not inconsistent with the purposes of the dedication of such land.

In *Rominger v. Simmons*, 88 Ind. 453, it is held that lands acquired by a township for school purposes, but not absolutely necessary to the enjoyment of the franchise of

Mr. F. E. Sebastian, with Mr. J. F. Gillham, for appellee:

To authorize the taking by a municipality for a public use, of land already devoted to another public use, the legislative intent to grant the authority must be shown by clear and express language, or by necessary implication from the words of the grant.

such municipal corporation, may be taken for the location of a highway by the county commissioners.

In *Easthampton v. Hampshire County*, 154 Mass. 424, 13 L.R.A. 157, 28 N. E. 298, it is held that the county commissioners may take a strip of land from a schoolhouse lot for a town way without express authority, although the taking will injure the lot considerably for school purposes, but will not prevent its use.

In *Southwest Pennsylvania Pipe Lines v. Directors of Poor*, 1 Pa. Co. Ct. 460, the right of the pipe line company to take property of a county poor farm for the purpose of laying a pipe line through it was upheld. This case was heard on demurrer to the counter petition of the directors of the poor, and the demurrer sustained, but without prejudice to future proceedings in law or equity.

So, in *Boston v. Brookline*, 156 Mass. 172, 30 N. E. 611, it is held that a strip of land used by a city in which to lay its water pipes may be crossed by a highway of a town, through which it runs, when there is no interference with the first use.

In *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25, a taking of land owned by a university, but not actually used by the university, by a city for the purpose of widening a street, was held valid, in an action to avoid an assessment on the ground that the land could not be thus taken.

In *Re St. Paul & N. P. R. Co.* 34 Minn. 227, 25 N. W. 345, the right of a railway company to take some lots belonging to the state university, but not contiguous to the university ground, was upheld.

In *McCullough v. Board of Education*, 51 Cal. 418, an action by a contractor against a school board for failure to put him in possession of a part of a public square on which it was agreed he should erect a schoolhouse, it is stated that the board of education had no authority to thus appropriate the public square for schoolhouse purposes, consequently it was held that the contract sued upon was *ultra vires*, and the plaintiff could derive no rights thereunder.

In *State ex rel. Gotzian v. District Ct.* 77 Minn. 248, 79 N. W. 971, it is held that the board of public works of a city is authorized, where the city does not object, to condemn for a public street or alley a part of a lot owned by the city and used as a site for an engine house for its fire department, the part condemned not being covered by the building.  
57 L.R.A.(N.S.)

*Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist.* 218 Ill. 292, 2 L.R.A.(N.S.) 226, 75 N. E. 892; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 357, 37 N. E. 842; *Mills, Em. Dom.* § 46; 2 *Lewis, Em. Dom.* 3d ed § 440.

A city has no right to condemn public property, as distinguished from property merely devoted to public use; and the Madison county poor farm is public property.

In *State, Pancoast, Prosecutrix, v. Troth*, 34 N. J. L. 377, it is held that an engine house owned by a fire company and situated on privately owned land is not such a public building as is contemplated by a statute prohibiting the surveyors of highways from destroying public buildings, and that such a building may be taken.

In *California & N. R. Co. v. State*, 1 Cal. App. 142, 81 Pac. 971, the nature of the property sought to be taken does not clearly appear, the real question involved being one of statutory construction. It was held that under subdivision 2 of § 1240 (a statute that does not appear in the opinion) of the Code of Civil procedure, private property of the state of California was subject to condemnation for the use of a railroad.

In *People v. Sanitary Dist.* 210 Ill. 171, 71 N. E. 334, a strip of land owned by the state lying along a river bank was sought to be taken by a city. It does not appear whether or not this land had been devoted to any public use. It is held that property of the state is not thus subject to condemnation under a statute which authorizes the courts of a state to entertain jurisdiction of proceedings after condemnation, when the right to take private property for public use is involved.

In *Daniel v. Columbus*, 8 Ohio C. C. 642, 4 Ohio C. D. 293, it is held that land owned by a city on a conditional fee for the purpose of a market house may not be taken by the state as a site for an armory and market house without compensation; and an act which authorized such taking was held unconstitutional. The act further provided for the taxing of the cost of such building upon the state and county where located, and this fact was regarded also in arriving at the conclusion that the act was unconstitutional. This case seems to treat the question from the point of diversion, a class of cases that are excluded from this note, and the court expressly states that it does not attempt to answer the argument of counsel that property held for a public use may be appropriated for another consistent use.

For note on the power of the legislature to control use to which property taken for the purpose of a park or square may be put, see 27 L.R.A.(N.S.) 938.

For discussion of question as to what use of squares, parks, or common amounts to diversion from the use for which they were dedicated, see note in 25 L.R.A.(N.S.) 980.  
W. A. E.



Lewis, Em. Dom. 3d ed. § 2; St. Louis, J. & C. R. Co. v. Illinois Inst. for Edu. of Blind, 43 Ill. 303; Davis v. Nichols, 39 Ill. App. 610; People v. Sanitary Dist. 210 Ill. 171; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; Harris v. Whiteside County, 105 Ill. 445, 44 Am. Rep. 808; State v. Boone County, 78 Neb. 271, 110 N. W. 629, 15 A. & E. Ann. Cas. 487; Atlanta v. Central R. & Bkg. Co. 53 Ga. 120; Shamburg v. Jersey Shore Line R. Co. 73 N. J. L. 572, 64 Atl. 114; Gist v. Owings, 95 Md. 302, 52 Atl. 395; Tyrone Twp. School Dist.'s Appeal, 1 Monaghan (Pa.) 20, 15 Atl. 607; Re Utica, 73 Hun, 256, 26 N. Y. Supp. 564.

Dunn, J., delivered the opinion of the court:

The city of Edwardsville attempted to condemn for a street a strip of land through the Madison county poor farm, consisting of 19 acres, within the corporate limits of the city. On motion of the county of Madison the court dismissed the petition, and this appeal presents the question of the right of the municipality to condemn for public use the property of a county used for public purposes connected with the administration of the state government.

The right of eminent domain is the power of the state to appropriate private property to the public use, and it extends to every kind of property and to every public use. It is inherent in the state, and may be exercised by a municipality only by virtue of a grant from the state. The power has been granted to cities for the purpose of laying out streets. Such power extends, however, only to the taking of private property. The statute does not authorize the taking of the property of the state, or of the subordinate municipalities through whose agency the state government is administered, by the exercise of the right of eminent domain. Such property is already devoted to the public use, and is subject to the control of the state, which may authorize such use of it as it sees fit. The legislature may authorize one use to-day and another use to-morrow, and, except where private rights are affected, its discretion is absolute. People ex rel. Bransom v. Walsh, 96 Ill. 232, 36 Am. Rep. 135.

A county is merely a political subdivision of the territory of the state, organized for the convenient exercise, locally, of such powers of the government as may be delegated to it. It has no powers except such as are derived from the statutes constituting

tionally enacted, and it can own no private property.

Property, the title to which is vested in the county, is public property, held by the county as a state agency, and in the absence of positive constitutional restriction is subject to the disposition of the legislature without the consent of the county authorities. Harris v. Whiteside County, 105 Ill. 445, 44 Am. Rep. 808; Marion County v. Lear, 108 Ill. 343; Wilson v. Sanitary Dist. 133 Ill. 443, 27 N. E. 203; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; People ex rel. Wies v. Bowman, 247 Ill. 276, 93 N. E. 244. The property of the state is not subject to condemnation under our law. Our statute (Hurd's Rev. Stat. 1909, chap. 47) only authorizes the courts of the state to entertain jurisdiction of proceedings for condemnation when the right to take private property for public use is involved (People v. Sanitary Dist. 210 Ill. 171, 71 N. E. 334); otherwise the city might condemn the courthouse square for an engine house, the school district might condemn the engine house for a schoolhouse, the county might condemn the schoolhouse for a courthouse, and an endless chain of condemnations by various municipalities might be set in operation. Such a series would, in any event, be unlikely to occur; but under the law the occurrence is impossible.

The judgment of the Circuit Court is right, and it will be affirmed.

## ILLINOIS SUPREME COURT.

CITY OF MOLINE, Appt.,  
v.

NELSON H. GREENE et al.

(252 Ill. 475, 96 N. E. 911.)

**Municipal corporation — power to widen street — taking public property.**

1. Charter authority to widen streets does not empower a municipal corporation to condemn for such purpose property already devoted to public use, such as a public library.

**Eminent domain — right to object to taking — taxpayer.**

2. A citizen and taxpayer of a city for the benefit of the citizens of which property is held in trust for library purposes may file objections against the taking of a portion of the library property for the purpose of widening a street.

Note. — As to power to take property already devoted to a public use by a political or governmental agency, see note to *Edwardsville v. Madison County*, ante, 101.

**Public improvement — dismissal of petition — partial invalidity of ordinance.**

3. A petition to take land to widen a street for a distance of three blocks will be dismissed *in toto* if the ordinance under which the proceedings are instituted is invalid as to certain public property, the taking of a portion of which is an essential part of the improvement.

(December 21, 1911.)

PPEAL by the city from a judgment of the County Court for Rock Island County, dismissing its petition for a local improvement by special assessment. Affirmed.

The facts are stated in the opinion.

Mr. W. R. Moore, with Mr. G. A. Shallberg, for appellant:

The library property was subject to be taken for the purpose of widening the street.

Fagan v. Chicago, 84 Ill. 227; Illinois & M. Canal v. Chicago, 12 Ill. 403; Rominer v. Simmons, 88 Ind. 453; Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 97 Ill. 506; Metropolitan City R. Co. v. Chicago West Div. R. Co. 87 Ill. 317; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Chicago & N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 589; Chicago & W. I. R. Co. v. Chicago, St. L. & P. R. Co. 15 Ill. App. 587; Chicago West Div. R. Co. v. Metropolitan West Side Elev. R. Co. 152 Ill. 519, 38 N. E. 736; Peoria, P. & J. R. Co. v. Peoria & C. R. Co. 66 Ill. 174; Suburban R. Co. v. Metropolitan West Side Elev. R. Co. 193 Ill. 217, 61 N. E. 1090; Sanitary Dist. v. Pittsburgh, Ft. W. & C. R. Co. 216 Ill. 575, 75 N. E. 248; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; Easthampton v. Hampshire County, 154 Mass. 424, 13 L.R.A. 157, 28 N. E. 298; Boston v. Brookline, 156 Mass. 172, 30 N. E. 611; Union P. R. Co. v. Colorado Postal Teleg. Cable Co. 30 Colo. 133, 97 Am. St. Rep. 114, 69 Pac. 564; Mobile & O. R. Co. v. Postal Teleg. Cable Co. 120 Ala. 21, 24 So. 408; Southwestern Teleg. & Teleph. Co. v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 52 S. W. 106; Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; Salt Lake City v. Salt Lake City Water & Electrical Power Co. 24 Utah, 249, 61 L.R.A. 648, 67 Pac. 672; Colorado Eastern R. Co. v. Union P. R. Co. 41 Fed. 293; Baltimore & O. S. W. R. Co. v. Jackson County, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

Defendants had no right to object to the taking of the property.

Buck v. People, 78 Ill. 560; Dowie v. Cht. 37 L.R.A. (N.S.)

Chicago, W. & N. S. R. Co. 214 Ill. 49, 73 N. E. 354; Northwestern University v. Wilmette, 230 Ill. 80, 82 N. E. 615; Walker v. Aurora, 140 Ill. 402, 29 N. E. 741; Gibler v. Mattoon, 167 Ill. 18, 47 N. E. 319; Allen v. Chicago, 176 Ill. 113, 52 N. E. 33; Birket v. Peoria, 185 Ill. 369, 57 N. E. 30; Hyman v. Chicago, 188 Ill. 402, 59 N. E. 10; Thomas v. South Side Elev. R. Co. 218 Ill. 571, 75 N. E. 1058; McWethy v. Aurora Electric Light & P. Co. 202 Ill. 218, 67 N. E. 9; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Hill v. St. Louis & N. E. R. Co. 243 Ill. 344, 90 N. E. 676; Chicago v. Union Bldg. Assn. 102 Ill. 379, 40 Am. Rep. 598; Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; Pennsylvania Co. v. Chicago, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825; Hamilton v. Semet Solvay Co. 227 Ill. 501, 81 N. E. 538; St. Louis & C. R. Co. v. Postal Teleg. Co. 173 Ill. 515, 51 N. E. 382; Irwin v. Armuth, 129 Ind. 340, 28 N. E. 702.

The proceedings as a whole should not have been dismissed.

Wilbur v. Springfield, 123 Ill. 395, 14 N. E. 871.

Messrs. Peek & Dietz, James Johnston, Frank J. Landee, and William A. Meese, for appellees:

Defendants had a right to object to the taking of the property.

Chicago v. Rosenfeld, 24 Ill. 495; Wright v. Bishop, 88 Ill. 302; Chestnutwood v. Hood, 68 Ill. 132; Martin v. Jamison, 39 Ill. App. 248; Jackson v. Norris, 72 Ill. 364; Chicago v. Union Bldg. Assn. 102 Ill. 379, 40 Am. Rep. 598; McCord v. Pipe, 121 Ill. 288, 2 Am. St. Rep. 85, 12 N. E. 259; Carter v. Chicago, 57 Ill. 288; Smith v. Bangs, 15 Ill. 400; Stevens v. St. Mary's Training School, 144 Ill. 345, 18 L.R.A. 832, 36 Am. St. Rep. 438, 32 N. E. 962; Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Gorman v. Tidholm, 94 Ill. App. 371.

Public libraries and grounds cannot be appropriated for another public use except by act of the general assembly.

Davis v. Nichols, 39 Ill. App. 610; St. Louis, J. & C. R. Co. v. Illinois Inst. for Edu. of Blind, 43 Ill. 303; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Central City Horse R. Co. v. Ft. Clark Horse R. Co. 81 Ill. 523; Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 97 Ill. 506; St. Louis & C. R. Co. v. Postal Teleg. Co. 173 Ill. 508, 51 N. E. 382; Re Wellington, 16 Pick. 87, 26 Am. Dec. 631; Re New York & B. B. R. Co. 20 Hun, 201; Re Boston & A. R. Co. 53 N. Y. 574; Re Pottsgrove Twp. Road, 5 Pa. Co. Ct. 361; Baltimore & O. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Tyrone Twp. School Dist.'s Appeal,

1 Monaghan (Pa.) 20, 15 Atl. 667; Re Utica, 73 Hun, 256, 26 N. Y. Supp. 564.

Farmer, J., delivered the opinion of the court:

This is an appeal from a judgment of the county court of Rock Island county, dismissing a petition of the city for a local improvement by special assessment. The special assessment was for the purpose of improving Fifth avenue, a street of said city running east and west, by widening it from 60 feet to 70 feet from Fifteenth street to Eighteenth street, and paving it. The widening was proposed to be done by taking a strip 10 feet wide from the property abutting upon the south side of the street. The Moline Public Library is situated at the southeast corner of Fifth avenue and Seventeenth street, and has a frontage of 160 feet on Fifth avenue, and extends south 150 feet to an alley. Ten feet of the library property was proposed to be taken for the widening of the street. Upon the filing of the petition by the city, commissioners were appointed, as provided by § 14 of the local improvement act (Hurd's Rev. Stat. 1909, chap. 24, § 520). They made a report in accordance with the provisions of § 15. Appellees Nelson H. Greene and A. A. Crampton, who were not the owners of any property proposed to be taken or assessed, and were not members of the library board, but were residents and taxpayers of said city, filed objections. The only objection necessary to be referred to is that the property of the library sought to be taken was public property already devoted to a public use, and could not be condemned or taken for another public use. This objection was sustained, and the petition dismissed. From the judgment sustaining the objection and dismissing the petition, the city has prosecuted this appeal.

Appellant contends (1) that the property of the library was subject to be taken for the purpose of widening the street, which is a different public use from that to which it is now devoted; (2) that Greene and Crampton had no right to file objections to the taking of the property; and (3) that if they were authorized to file objections, and the property could not be taken, it was error to dismiss the petition as to the property other than the library property.

The library was established by an ordinance adopted in 1892 in accordance with the provisions of the statute. The property was purchased for \$10,000, and the money to pay for it was raised by subscription. The deed was made to the board of directors of the Moline Public Library of Moline, Illinois, and contained no con-

ditions. A donation of \$40,000 was made by Andrew Carnegie for the construction of the building.

Conceding that the legislature has power to authorize public property devoted to one public use to be taken and appropriated to a different use for the public benefit, the question here for decision is: Has the legislature, by any act adopted by it, authorized the taking of the library property by appellant? The library is a public library, and the land sought to be taken from it is devoted to a public use. The general rule is that such property cannot be taken and appropriated to another and different use, unless the legislative intent to so take it has been manifested in express terms or by necessary implication. *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Chicago & N. W. R. Co. v. Chicago*, 151 Ill. 348, 37 N. E. 842; 10 Am. & Eng. Enc. Law, 1094; 15 Cyc. 616.

It is not contended by appellant that express authority is found in any legislative act to take the property here sought to be taken; but it is insisted such authority is necessarily implied from the 7th clause of § 1 of article 5 of the cities and villages act (Hurd's Rev. Stat. 1909, chap. 24, § 62), which confers power upon the municipal authorities "to lay out, to establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same." In *Chicago & N. W. R. Co. v. Chicago*, supra, the right of the city to extend streets across the right of way of the railroad company was denied by the company. The court held that the clause of the cities and villages act above quoted did not authorize the taking of property already devoted to a public use, but that the 89th clause of § 1 of article 5 did authorize the city to extend its streets across the railroad right of way and tracks. That clause confers power upon the city to extend, by condemnation or otherwise, any street, alley, or highway over or across any railroad track, right of way, or land of any railroad company within the corporate limits. Section 17 of the chapter on railroads (Hurd's Rev. Stat. 1900, chap. 114, § 18) confers power upon railroad corporations to take, by condemnation, property necessary to the building, operating, or running of its road; but in *Illinois C. R. Co. v. Chicago, B. & N. R. Co.* 122 Ill. 473, 13 N. E. 140, it was held that this general grant of power to railroad corporations to take real estate for railroad purposes was not intended to extend to property already applied to a public use. In that case the Chicago, Burling-

ton, & Northern Railroad Company sought to condemn for railroad purposes land belonging to the Illinois Central Railroad Company running longitudinally with and constituting a part of that company's right of way. The court held this was unauthorized, and said: "That the legislature of the state might, subject to the conditions imposed by the Constitution, take the property for the purposes in question, we have no doubt. And we think it equally clear that the legislature might, by a general law manifesting such intention, authorize one railroad company to condemn a part of the right of way of another to the extent and for the uses proposed in this case; but without such legislative authority or enabling act it is manifest the taking of it would be unauthorized."

Appellant cites numerous cases where the right of one railroad corporation to cross the right of way and tracks of another railroad corporation, and to condemn the property for such crossing, has been sustained. But those decisions have been based upon the express authority conferred upon railroad corporations by clause 6 of § 19 of chapter 114 of the Revised Statutes. Power is also given cities by the local improvement act to take private property for the purpose of local improvements, but no authority is given, as we construe the act, to take property already devoted to a public use and apply it to a different use. The grant of power to take property by the local improvement act is general, and the same rule of construction is applicable to it that applies to the general grant of power to railroad corporations under the railroad act.

Cases are cited by appellant from other jurisdictions, where a general grant of power to take property has been construed to authorize an appropriation of property devoted to a public use to another use, when it does not essentially interfere with the public use to which the property is already devoted. But those cases, we think, can have no application to this case, for the reason that it is proposed to take the land from the library and devote it to a use that will prohibit the library hereafter from any use or control over it.

Appellant argues that taking 10 feet of land will not destroy the library; that it will still have sufficient ground for carrying out the purposes for which it was established. The case must be controlled by legal principles, and not by considering the practical effect of allowing the taking of the land in this particular case. If it is held appellant has authority to take part of the property, it would necessarily require holding that all of the property could

be taken by virtue of the same authority, if that were sought to be done. Our conclusion upon this branch of the case is that no authority exists in appellant to take the property of the library for the purpose of devoting it to a public street.

Appellant contends no one could be heard to object, except owners of or parties having some interest in the land sought to be taken; that the title to the property of the Moline Public Library is in the board of directors; and that they alone are authorized to object to the taking of its land. On this ground it is urged that the county court erred in overruling the appellant's motion to strike the objections from the files, and that the judgment should be reversed for that reason, even though it be held that the appellant had no authority to condemn the land. Section 20 of the local improvement act requires that every person named in the commissioners' report as an owner of property to be taken or damaged, and every person who shall be named in the report as an occupant of any such parcel of land, shall be made defendant to the proceeding; also "all other persons having or claiming interests in any of said premises shall be described and designated as 'all whom it may concern,' and by that description shall be made defendants." The act further provides for notice to defendants and an opportunity for them to be heard. The object of the legislature clearly was to provide for notice to every owner and party interested in the land to be taken of the proceeding, and to afford them an opportunity to be heard. The legal title to the library property is in the library board, but it is held by them in trust for the inhabitants of the city; the use of the library and property to be forever free to said inhabitants. The inhabitants of the city are the real parties in interest, for whose benefit the title is held in trust by the board of directors. It has been repeatedly held that any taxpayer of a city may enjoin the incurring of illegal indebtedness or the misapplication of public money. *McCord v. Pike*, 121 Ill. 288, 2 Am. St. Rep. 85, 12 N. E. 259; *Wright v. Bishop*, 88 Ill. 302; *Chestnutwood v. Hood*, 68 Ill. 132; *Jackson v. Norris*, 72 Ill. 364; *Springfield v. Edwards*, 84 Ill. 626. If the appellant has no right to condemn the property of the library for the purpose for which it is here sought to be condemned, and if appellees, as taxpayers and two of the *cestuis que trustent* for whose benefit the property is held, would have the right, by injunction, to prevent the illegal appropriation of the property, it would seem illogical to hold that they have no such interest as would entitle them to be heard in

the proceeding to take the property, but would be entitled to a hearing in another and different forum upon the same question and for the same purpose. In other words, if appellees might have enjoined the taking of the land by application to a court of equity, we see no valid reason for holding that to be their only remedy, when the same result might be accomplished by objections in the county court. As inhabitants and taxpayers of the city, for whose use and benefit the library was established and the title to it held in trust, they were interested and concerned in the preservation of the property for the purposes to which it was devoted. In our opinion, the court did not err in entertaining the objections and overruling appellant's motion to strike them.

It is also urged that the court erred in dismissing the petition. The appellant contends that, even if the ordinance was void and the proceeding unauthorized, in so far as the taking of the library property was concerned, that did not justify dismissing the petition as to the whole improvement, but it should have been dismissed only as to the library property. The principle sought to be applied by appellant is that, if a provision of an ordinance relating to one subject be void and as to another it be valid, unless the two are necessarily and inseparably connected, the valid provision of the ordinance may be enforced, and the invalid provision disregarded. We do not think that principle applicable to this case. The taking of the library property was an essential part of the contemplated improvement by widening the street for a distance of three blocks. Whether the city might, by an ordinance and proceedings thereunder, have widened the street from Fifteenth street to Eighteenth street, except where the street abutted upon the library property, if the ordinance has so provided, is not the question to be decided. The ordinance was for improving the street by widening it from Fifteenth street to Eighteenth street. This required taking a strip of land belonging to the library abutting upon the street a distance of 100 feet. If this could not be taken, then the contemplated improvement by widening the street from Fifteenth street to Eighteenth street must fail. This conclusion is not based upon the ground that it would not be a public benefit to widen the street a part of the distance and leave it its present width a part of the distance,—for that is probably not a judicial question,—but it is based upon the ground that widening the street where it abuts upon the library property is an essential and material part of the improvement, and 37 L.R.A.(N.S.)

its omission necessarily destroys the proposed improvement. *Chicago v. Hill*, 251 Ill. 502, 96 N. E. 223.

The judgment of the County Court is affirmed.

## KANSAS SUPREME COURT.

J. B. CRAMER

v.

JAMES R. McCANN et al., Appts.

(83 Kan. 719, 112 Pac. 832.)

### Descent and distribution — inheritance of cousins.

1. Cousins do not inherit immediately from each other, but only mediately through the parents of each, and children cannot inherit immediately from a cousin of their parent.

### Same — inheritance through aliens.

2. Under the provisions of the alien land act (Laws of 1891, chap. 3), resident citizens of the United States could not inherit lands in this state through the operation of the statute of descents and distributions, when they must trace their descent through a cousin of their parent, who was an alien at the time of his death.

### Appeal — suit to quiet title — claim of defendant.

3. In an appeal from a judgment quieting title to lands, where there was sufficient evidence to sustain a judgment in favor of the plaintiff finding that when the action was brought he was in the peaceable, quiet possession of the real estate, claiming title, the first inquiry must necessarily be as to what title the defendant has; for, if he have no title, he cannot question that of the plaintiff.

### Same — sufficiency of evidence.

4. The evidence in this case examined, and held to be sufficient to warrant a finding that when the action was brought, the plaintiff was in the peaceable, quiet possession of the real estate, claiming title, and, it appearing that the defendants never acquired any title themselves, the judgment is affirmed.

(January 7, 1911.)

Headnotes by PORTER, J.

### Note. — Descent and distribution: tracing descent through alien.

At common law no descent could be traced through an alien ancestor (1 Laws of England [Halsbury] 307, citing Co. Litt. 8a; *Rittson v. Stordy*, 2 Jur. N. S. 410, 4 Week. Rep. 438); although the rule has been partially abrogated in England since 1700 by statute (11 & 12 Wm. III. chap. 6, as explained by 25 Geo. II. chap. 39) by grace of which all natural-born subjects may inherit as heirs, and may trace their descent

**A**PPEAL by defendants from a judgment of the District Court for Barber County in plaintiff's favor in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Eldon M. Votaw and Harris F. Williams, with Mr. Samuel Griffin, for appellants.

Messrs. A. L. Noble and J. N. Tincher for appellee.

Messrs. A. A. Godard and H. E. Valentine, *amici curiæ*.

Porter, J., delivered the opinion of the court:

The appellee brought this action to quiet his title to certain real estate in the city of Kiowa, of which he was in possession and

to which he claimed title by a conveyance from the heirs at law and next of kin of Kate Craven, who died intestate April 30, 1900, while seised of the title. At the time of her death, Mrs. Craven was a widow and left no parent or children or descendants of children living. Her next of kin were brothers and sisters and descendants of brothers and sisters, all of whom were nonresident aliens living in Ireland. The common ancestor of Mrs. Craven and the appellants was her grandfather and their great-grandfather, who lived and died a nonresident alien, as did also his two sons, the father of Mrs. Craven and the grandfather of the appellants, respectively. Richard St. Lawrence, father of three of the appellants, was a cousin of Mrs. Craven. He was born in Ireland and came to

from any of their ancestors, lineal or collateral, although such ancestors were born out of the allegiance of the Crown (*Ibid.*).

This rule, as is shown by a note to Easton v. Huott, 31 L.R.A. 177, on "Alien's right to inherit," has been generally adopted in the United States, except in Connecticut. See Campbell's Appeal, 64 Conn. 277, 24 L.R.A. 667, 29 Atl. 494. See also to the same effect, 2 Cyc. 95, note 49.

The common-law rule that one citizen cannot inherit from another where kinship must be traced through a nonresident alien cannot be rejected as repugnant or inapplicable to our institutions or the condition of things in this country, under a statutory adoption of the general principles of the common law so far as applicable. Beavan v. Went, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91.

In many states the common-law rule that descent cannot be traced through an alien ancestor is varied by enabling acts of various sorts. The earlier cases as to the construction and effect of such statutes may be found in a note to De Wolf v. Middleton, 31 L.R.A. 146.

But this rule does not so operate as to prevent inheritance between brothers, or between a brother and sister, it having been settled in the leading case of Collingwood v. Pace, 1 Vent. 413, 1 Lev. 59, 1 Keble, 671, that the descent in such case being immediate, the alienage of the father does not impede the descent between children. The father is *medium differens sanguinis*, but not *medium differens hæreditatis*. See to this effect Luhrs v. Eimer, 80 N. Y. 179; Smith v. Mulligan, 11 Abb. Pr. N. S. 438; Bradley v. Dwight, 62 How. Pr. 300; Banks v. Walker, 3 Barb. Ch. 446; Jackson ex dem. Doran v. Green, 7 Wend. 333; McGregor v. Comstock, 3 N. Y. 409; Renner v. Müller, 57 How. Pr. 229; Campbell v. Campbell, 58 N. C. (5 Jones, Eq.) 246.

The rule which enables brothers, sons of an alien father, to inherit of each other for the reason that the descent between them is immediate, applies between one of the brothers and the representatives of the other, 37 L.R.A. (N.S.)

and also between the representatives of both. Renner v. Müller, 12 Jones & S. 535.

But it is otherwise in the case of a descent from cousin to cousin. Jackson ex dem. Doran v. Green, 7 Wend. 333. And see also Meier v. Lee and Smith v. Lynch, *infra*.

This rule was held in Renner v. Müller, 12 Jones & S. 535, not to be changed by the New York statute of 1786, which changed the order of descent so as to allow brothers and sisters to take where there is no father living, or, if living, he is incapable of taking by reason of alienage, not, however, through the father, but immediate from the decedent as at common law.

Where property passes from brother to brother under a statute of descents providing for inheritance by parents, and that, if both parents be dead, the portion which would have fallen to their share shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the property, the inheritance is direct, and does not depend on the fact of the parents at the time of their decease being capacitated to take. Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 201.

But a statute providing that in certain contingencies the estate of an illegitimate person shall descend to and vest in the next of kin to the mother of such person does not render the descent immediate, so as to preclude the application of the rule that one cannot take by inheritance where compelled to trace kinship through alien ancestors. Meadowcroft v. Winnebago County, 181 Ill. 504, 54 N. E. 949.

Nor does a statutory provision that an estate shall descend in equal parts to next of kin make the descent to collateral kindred immediate, so as to avoid the effect of alienage of ancestors through whom kinship is traced. Beavan v. Went, 155 Ill. 592, 31 L.R.A. 85, 41 N. E. 91.

A statute providing that under certain contingencies parents shall inherit, and that if they are both dead the portion which would have fallen to their share shall be

the United States in 1862, and at the time of his death, which preceded that of Mrs. Craven, he was a resident and citizen of this country. He had four children, Patrick R. St. Lawrence, Mary A. Doherty, James J. St. Lawrence, and Richard T. St. Lawrence. These children are all living and reside in Chicago, Illinois. They were all citizens of the United States at the time of the death of Mrs. Craven. One of them, Richard T. St. Lawrence, has conveyed any interest he had in the real estate in controversy to James R. McCann, who is the other appellant. In June, 1900, after Mrs. Craven's death, James J. St. Lawrence, one of the appellants, who is a lawyer residing in Chicago, procured from the next of kin in Ireland, who are the same persons through whom the appellee claims, a power of attorney as "next of kin and heir at law of Kate Craven, deceased," which gave him full power and authority to represent them as their attorney in fact as to the real and personal property of the deceased. On October 16, 1900, Mr. St. Lawrence went to Kiowa and took possession of the real estate in controversy, which consists of a hotel and a number of lots appurtenant thereto. He had the property insured in his name as "attorney for the heirs of Kate Craven, deceased." His power of attorney was filed for record in Barber coun-

ty, August 4, 1902. On his first visit to Kiowa he was there several weeks. Before leaving for his home, he found a tenant for the hotel and arranged with an agent in Kiowa to collect the rents. This agent collected the rents and remitted the same to him until some time in June, 1906, when he declined to have anything more to do with procuring tenants or looking after the property, but agreed to continue to remit to Mr. St. Lawrence the rents which were afterwards collected by J. B. Cramer & Company, real estate agents. This firm, of which appellee was a member, acted as the agents of Mr. St. Lawrence in procuring tenants. They collected rents, charged a commission, and paid the balance to the former agent at Kiowa, who remitted to Mr. St. Lawrence. This arrangement continued until July 1, 1907. In April, 1907, the alien next of kin living in Ireland executed a new power of attorney to John W. Ellis, of Chicago, Illinois, in which they revoked the former power of attorney executed to James J. St. Lawrence, and authorized John W. Ellis to represent them in all matters connected with the estate of Kate Craven, deceased, and to sell and convey by warranty deed all their right, title, and interest in the real estate. On April 22, 1907, John W. Ellis, acting under his power of attorney, notified the local agent

disposed of in the same manner as if they had outlived the intestate and died in possession and ownership of the property, does not render the descent between cousins immediate; so that where their common ancestor, if alive, would be incapacitated by alienage from taking, one cousin cannot inherit from another. *Meier v. Lee*, 106 Iowa, 303, 76 N. W. 712; *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329.

Because of the prohibition of the statute providing that a nonresident alien shall not be capable of acquiring title, or taking or holding any lands or real estate by descent, devise, purchase, or otherwise, the lands of a deceased citizen dying intestate cannot be acquired under the statute of descents, by a collateral kinsman, although a resident citizen, when the ancestor through whom the claim of inheritance is made was at the time of his death a nonresident alien. *Smith v. Lynch*, supra.

Under a statute providing that a person capable of inheriting otherwise shall not be precluded from such inheritance by reason of alienism of an ancestor, second cousins who are citizens can inherit, irrespective of the alienage of the common ancestor. *Douglass v. Douglass*, 70 Misc. 412, 128 N. Y. Supp. 912.

A statute providing that no person shall be deprived of his right to take title to real estate as heir at law by descent from any deceased person because he may be compelled to trace his relationship to such de-

ceased person through one or more aliens is inapplicable to a case in which the property has escheated prior to its taking effect. *Meadowcroft v. Winnebago County*, 181 Ill. 504, 54 N. E. 949.

It is immaterial whether the death of the alien ancestor through whom descent is traced takes place before or after the passage of a statute incapacitating nonresident aliens from acquiring title to lands by descent, devise, or purchase, the rights of the inheritors not being fixed as of the date of the death of the one through whom they immediately claim, but as of the date of the death of the intestate whose property they claim. *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329.

But the alienage of a son, which would prevent his inheritance, at the time of the death of testator, who made an executory devise to his heirs at law according to the statute of descents, will not exclude a descendant of the son from this class, where a statute passed before the time of determining the heirs has removed the disability of alienage. *De Wolf v. Middleton*, 18 R. I. 814, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271.

As to the effect of state Constitutions and statutes upon the question of inheritance by or from an alien, see note to *Beavan v. Went*, 31 L.R.A. 85.

As to the effect of treaties upon an alien's right to inherit, see note to *Rixner's Succession*, 32 L.R.A. 177. E. S. O.

at Kiowa, who had been remitting rents to James J. St. Lawrence, that he represented the next of kin and heirs of Kate Craven, and procured from the agent a statement in writing recognizing him as the lawful agent of the heirs. On May 7, 1907, John W. Ellis, as attorney in fact for the Irish heirs, sold and conveyed the real estate in question to Harry A. Lewis, of Cook county Illinois, and on July 1, 1907, Lewis conveyed the same by warranty deed to J. B. Cramer. From that date Cramer retained the rents. The same tenant continued to occupy the hotel. Afterwards, on September 5, 1907, Cramer brought this action to quiet his title. The appellants filed their answer and cross petition, each claiming to own an undivided one-fourth interest in the property in controversy. It was alleged that the appellants were all resident citizens of Chicago, Illinois, at the time of the death of Kate Craven, and that the persons through whom the appellee claims were not her true and lawful heirs. The answer and cross petition further expressly denied that J. B. Cramer was in the possession of the real estate when the action was commenced, and alleged that whatever possession he held was obtained by fraud and collusion and without their knowledge, and that in truth and fact his possession was theirs, inasmuch as he had secured the same while acting as their agent for the purpose of collecting the rents. They asked for affirmative relief, quieting their title as against him. Issues were joined and the cause tried to the court. The court found for the plaintiff, and rendered judgment quieting and confirming his title to the real estate as against the appellants. This is the judgment which is sought to be reversed.

The controversy is between the appellee, who is the grantee of the Irish heirs of Kate Craven, who were her brothers and sisters and children of deceased brothers and sisters, all of whom were aliens at the time of Kate Craven's death, and the Chicago heirs, whose father was Kate Craven's cousin, and who were citizens and residents of the United States at the time of her death. The family tree showing the next of kin of Kate Craven, both citizens and aliens, appears in the accompanying diagram, [see next page] the names of citizens being in bold-faced type:

As the Constitution was originally adopted in 1859, § 99 thereof, which is § 17 of the Bill of Rights, read as follows: "No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property." In 1888 the Constitution was amended and this section made to read: "No distinc-

tion shall ever be made between citizens of the state of Kansas and the citizens of other states and territories of the United States in reference to the purchase, enjoyment, or descent of property. The rights of aliens in reference to the purchase, enjoyment, or descent of property may be regulated by law." Pursuant to this amendment, the legislature of 1891 adopted what is known as the alien land act, which is chapter 3 of the Laws of 1891. Kate Craven died on April 30, 1900. At that time the alien land law was in full force and effect, although it was afterwards repealed. Chapter 1, Laws 1901. The act itself is entitled "An Act in Regard to Aliens, and to Restrict their Rights to Acquire and Hold Real Estate, and to Provide for the Disposition of the Lands now Owned by Nonresident Aliens." It has frequently been before the court and was construed in the following cases: *Wuester v. Folin*, 60 Kan. 334, 56 Pac. 490; *Smith v. Lynch*, 61 Kan. 609, 60 Pac. 329; *Omnium Invest. Co. v. North American Trust Co.* 65 Kan. 50, 68 Pac. 1089; *Madden v. State*, 68 Kan. 658, 75 Pac. 1023; *State v. Ellis*, 72 Kan. 285, 83 Pac. 1045.

It is one of the contentions of the appellants that, under the alien land act as construed by these decisions, the appellee acquired no title whatever to the land in controversy by virtue of the conveyance from the Irish heirs, who were all nonresident aliens at the time of her death. This was an action to quiet title, and the judgment in favor of the appellee is in effect a finding that, when the action was brought, he was in possession of the property, claiming title. As there was evidence sufficient to sustain this judgment, the first inquiry must necessarily be with respect to the title of the appellants themselves; for, if they have no title, they cannot question that of the appellee. Being in the peaceable possession of real estate, claiming the title thereof, he has such an interest therein, although his title be ever so defective, that he may maintain this action to quiet his title and possession as against the appellants, who have no title at all. *Giltinan v. Lemert*, 13 Kan. 476; *Brenner v. Bigelow*, 8 Kan. 496; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157. The appellants are children of a cousin of Kate Craven, and, in order to inherit as next of kin, they must trace their descent through their father up to their grandfather, who was always a nonresident alien. That they cannot do this is settled by the doctrine in *Smith v. Lynch*, supra. They do not take as brothers and sisters of Kate Craven immediately, and therefore they acquired no title to the real estate because they must claim through their grandfather, who, by reason





of his alienship, could not inherit by descent. The precise question here, whether a cousin can inherit immediately from a cousin, or whether children can inherit immediately from the cousin of their parent, was not decided in *Smith v. Lynch*, supra, but the principle involved in both cases is the same. That was a case where nephews and nieces sought to inherit immediately from an uncle without tracing the descent through their deceased alien father. It was said in the opinion: "The effect of the alien land law is not only to exclude living aliens from acquiring title to lands in this state by descent, but is also to prevent the transmission of title through them under the operation of the act concerning descents and distributions before quoted. The disqualification is not alone of the living, but it is, as it were, of the dead as well." It was held that the effect of the alien land law was to exclude the nephews and nieces from inheriting. One of the cases relied upon in *Smith v. Lynch*, supra, is *Meier v. Lee*, 106 Iowa, 303, 76 N. W. 712, holding that a cousin does not inherit immediately from a cousin, but only mediately through the parents of each. Other authorities in point are *Jackson ex dem. Doran v. Green*, 7 Wend. 333; *Levy v. McCartee*, 6 Pet. 102, 8 L. ed. 334; *McGregor v. Comstock*, 3 N. Y. 408; *Wilcke v. Wilcke*, 102 Iowa, 173, 71 N. W. 201. See also *State v. Ellis*, 72 Kan. 285, 83 Pac. 1045.

There is considerable discussion in the briefs as to whether the evidence shows that Kate Craven was an alien or a citizen at the time of her death. In our view of the case, this question is not material. The grantors of the appellee had a claim of title based on the contention that their intestate died an alien. Since none of the appellants acquired any interest in the property, they are not in a position to contest this claim, and, as said in *Omnium Invest. Co. v. North American Trust Co.* 65 Kan. 50, 68 Pac. 1089: "The state is competent to care for itself and protect its own interests." The state not being a party to this action, the ultimate rights of the appellee as against the state are not involved, and it becomes unnecessary to consider or determine whether or not the grantors of the appellee acquired any interest in the property. Nor is it necessary to consider a question raised by the appellee as to the constitutionality of the alien land law.

But one question remains, and it is in respect to the character of the appellee's possession. The judgment is a finding that he had peaceable, quiet possession. It is not disputed that the real estate firm of which the appellee was a member were the agents

of James J. St. Lawrence and represented him in renting the hotel property and collecting the rents. At the time St. Lawrence took possession of the real estate, he held a power of attorney from the Irish heirs, authorizing him to represent their interests in the property. He took possession of the real estate under it, had the property insured in his name as agent for the heirs at law of Kate Craven, deceased, and placed his power of attorney on record. He testified at the trial that about the time the power of attorney was being executed, he learned through some correspondence with Mr. Noble, who is now one of the attorneys for the appellee, that there was some question as to whether the Irish heirs could inherit the land on account of being aliens. He testified that from that time on it was a problem in his mind as to whether he represented the Irish heirs by virtue of his power of attorney, or whether he represented himself and his brothers and sister; but that at the time he first learned of this action having been brought, he believed he represented the interests of his brothers and sister, not, however, as their attorney or agent, but simply as the adviser of the family. He testified further as follows: "I was always adviser of the family and looked after the matter in a general way, and in a manner I had possession of the real estate for them. . . . I held in common for them as well as for myself. I never accounted for one cent to my brothers and sister, and never settled with them for any rents that I received, because my expenses had to come out of the estate." Again, he testified: "I really do not know whether I was attorney for the heirs in Great Britain, or attorney for the heirs in Chicago. That was the predicament I was in, and consequently I cannot answer the question intelligently. The point is that I did not know who the heirs were." There can be no question under the evidence that he was acting as the attorney for the foreign heirs and no one else. He had a duly executed power of attorney from all of them authorizing him to represent them. He had no authority to represent his brothers and sister. Besides, neither he nor his brothers and sister ever had or could acquire by the laws of descent any interest in the property. The next of kin competent to take by the laws of descent were the Irish heirs, unless they were prohibited from taking by virtue of the alien land law. We think the evidence warranted a finding that he took possession of the property as the attorney in fact of the Irish heirs. When they revoked his power of attorney and authorized another person to act for them, his authority

ceased. So far as J. B. Cramer & Company, or the appellee, acted for him, they acted as the agents of his principals. The revocation of the power of attorney under which he had acted restored to the Irish heirs whatever rights in the property they possessed, including the right to the possession as against him and any agents he had appointed.

The appellants can only prevail upon their cross petition upon the strength of their own title, and not upon the weakness of their adversary's.

Never having acquired any title to the real estate themselves, they were not entitled to affirmative relief, and, the appellee having been in the peaceable possession of the property under a claim of title when the action was brought, the judgment, so far as any rights of the appellants are concerned, is affirmed.

All the Justices concur.

Petition for rehearing denied.

#### NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA EX REL.  
C. W. TEMPLE et al.

v.

FRANK BARNES, Sheriff.

(— N. D. —, 132 N. W. 215.)

#### Habeas corpus — to review errors.

1. Irregularities occurring at the trial, and errors of the trial court in its procedure in a criminal action, are not reviewable on habeas corpus.

#### Same — tender of fine — sufficiency.

2. The petition of the relators alleges as one ground for their release, that they tendered the sheriff who held them in custody under a commitment from the police court of the city of Bismarck, the sum of \$50 in payment of the fine imposed by such court. The sheriff's return, containing commitment and judgment, discloses that the fine was \$50 each, and that no tender was made other than \$50 to release both defendant petitioners. Held, that the return of the sheriff was a complete answer to the petition on that point.

Headnotes by SPALDING, J.

**Note.**—The subject of discrimination or classification in Sunday laws is considered in the notes to *State v. Dolan*, 14 L.R.A. (N.S.) 1259, and *Carr v. State*, 32 L.R.A. (N.S.) 1190.

The general questions as to what amusements are prohibited by Sunday laws is treated in the note to *Re Hull*, 30 L.R.A. (N.S.) 465, and notes therein referred to. 37 L.R.A. (N.S.)

#### Religious liberty — Sunday labor.

3. Section 4 of the Constitution of this state provides that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state." Held that, in general, laws prohibiting the doing of certain acts and the performance of certain kinds of labor upon the first day of the week, commonly called "Sunday," are not in violation of this provision, as they in no way work an establishment of a religion, provide for compulsory support, by taxation or otherwise, of religious institutions, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expressions of religious belief.

#### Statute — prohibition of Sunday shows — validity.

4. Chapter 285, Laws 12th Leg. Assem., making it unlawful to keep open, or run, or permit to be run, any theater, show, moving picture show, or theatrical performance, upon the first day of the week, commonly called the Sabbath, and prescribing penalties for violation thereof, is not special legislation, as, if the legislative interpretation of the former law was correct, and it did not include theatrical performances in its provisions, chapter 285, supra, is in the nature of an addition to former prohibitions of the statute, making it more general and more universal in its application than it was previous to the enactment of said chapter; and in any event, if said chapter stood alone, it would constitute a valid enactment.

(June 6, 1911.)

**A**PPPLICATION for a writ of habeas corpus to secure the release of petitioners from the custody of the sheriff of Burleigh county to which they had been committed for running a moving picture show and theatrical performance on Sunday in violation of law. Writ quashed.

The facts are stated in the opinion.

Messrs. Niles & Koffel for relators.

Mr. W. L. Smith opposed.

Spalding, J., delivered the opinion of the court:

Chapter 285 of the Laws of the Twelfth Legislative Assembly of the State of North Dakota, introduced as House Bill No. 328, omitting title, reads as follows:

"Sec. 1. Theaters Open on Sunday Unlawful.—It shall be unlawful to keep open,

or to run or permit the running of, any theater, show, moving picture show, or theatrical performance, upon the first day of the week, commonly called the Sabbath.

"Sec. 2. Penalty.—Any person, firm or corporation violating any of the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than \$25 or more than \$50.

"Sec. 3. Emergency.—Whereas, there is no express provision of law prohibiting the keeping open, or running, or permitting the running, of any theater, show, moving picture show or theatrical performance, upon the first day of the week, commonly called the Sabbath, an emergency exists, and this act shall take effect and be in force from and after its passage and approval."

It took effect March 3, 1911. On the 22d day of April, 1911, the relators were convicted in the police court of the city of Bismarck of violating the above law, and on the verdict rendered the police magistrate entered judgment against them imposing a fine of \$50 each, and adjudging that, on failure to pay such fine, they each be imprisoned in the Burleigh county jail for a period of twenty-five days or until the fine be paid. Bail was fixed on appeal in the sum of \$250. The specific charge was that of running a moving picture show and theatrical performance upon Sunday, the 16th day of April, 1911, in said city of Bismarck. They refused to pay the fine imposed, and were duly committed to the county jail in accordance with the judgment. They subsequently applied to the judge of the sixth judicial district for a writ of habeas corpus, which was denied. The writ was issued by this court, and the sheriff directed to have the bodies of the said relators before this court on a date specified, "to do and receive what shall then and there be concerning the said C. W. Temple and Clara Wright." Upon the day specified the sheriff made return to the effect that he detained the petitioners in jail as sheriff and by virtue of a certain commitment issued to him out of the office of the police magistrate of the city, which commitment was set forth in his return and included a copy of the judgment. He also averred that neither of said petitioners had paid or offered to pay the fine of \$50 so assessed against each of them, and that the period of twenty-five days, as commanded in the judgment and commitment, had not expired.

1. On the hearing a great number of reasons were assigned by the petitioners why they should be discharged from the custody of the sheriff. Most of such reasons

relate solely to alleged irregularities occurring on the trial, or to errors of the trial court in its procedure, and are not reviewable on habeas corpus. *State ex rel. Mears v. Barnes*, 5 N. D. 350, 65 N. W. 688; *State ex rel. Peterson v. Barnes*, 3 N. D. 131, 54 N. W. 541.

2. It is alleged as a ground for the discharge of the petitioners that they tendered to the respondent sheriff the sum of \$50 in release of the restraint imposed, and that the same was refused. This allegation is supported by the affidavit of counsel, which is to the effect that on behalf of the relators he tendered the sum of \$50 to the sheriff in satisfaction of the fine and in payment of the release of the petitioners named, and in accordance with the commitment under which said sheriff holds said petitioners, and that said tender was refused on the ground that it was insufficient. A sufficient answer to this objection is that the commitment as set out in the petition of the relators does not conform to the commitment under which the sheriff returns he was restraining them; that such commitment, in fact, recited that each of the relators was sentenced to pay a fine of \$50. No claim is presented that any tender was made except of the sum of \$50 for the release of both defendants, and this was insufficient to satisfy the judgment.

3. It is urged that the law in question conflicts with the state Constitution, article 1, § 4, of which provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." Whatever the effect of the provisions of the Penal Code with reference to abstaining from labor on the Sabbath or first day of the week may be, we have little doubt that they, as well as all such statutes, were enacted with the purpose of protecting that part of the public which consists of a large majority, in the exercise of their varying and different methods of religious worship, and in recognition of the sacredness of the Christian Sabbath. A number of the courts of the different states have passed upon this question, and have held that this is a Christian nation, and that laws enacted to prevent the desecration of the Sabbath are valid for that reason, notwithstanding constitutional provisions similar to § 4, *supra*,

and others peculiar to different states. The courts of practically all other states have sustained such statutes as a legitimate exercise of the police power intended to promote the welfare, morals, and sanitary condition of the people. Many of these courts appear to have avoided determining its relation to the question of religion. We do not deem it necessary to pass upon that question; but, in view of this being the first time the law has been questioned in this court, a brief reference to the history of legislation on the subject may not be inappropriate, and a similar reference to a few of the decisions of other jurisdictions will throw some light upon the general subject.

The early Christians substituted the first day of the week, or Sunday, for the Jewish Sabbath, or seventh day of the week, and it has since been observed as a day of rest and worship in Christian lands, and, we think, generally by civilized peoples. Legislation on the subject was first had in Rome, about A. D. 321, when Constantine the Great commanded all judges and inhabitants of cities to rest on the venerable day of the Sun. Under Theodosius II. 425, games and theatrical exhibitions were prohibited, and about a century later all labor was prohibited on that day. In England laws of this kind were in force in the reign of Athelstan, 925 to 940 A. D. The statute of 29 Chas. II., passed in 1678, seems to have laid the foundation for laws on the subject in England and in many states of this country. It provided that no craftsman, artificer, workman, laborer, or other person whatsoever should do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity excepted), and placed prohibitions upon public sales on the Lord's Day. Fairs were prohibited in the reign of Henry VI., and amusements in the first year of Charles I. On the immigration from England to America, the act of 1678 was taken as a model in most of the colonies, its terms, however, being varied somewhat; but a Sunday law was enacted in each of the colonies, and such a law is found in the statutes of every state in the Union. It has been attacked in nearly every state, and almost as often sustained. Where not sustained, courts have based their decisions on some peculiar or special feature not applicable here. Without quoting at great length from authorities explaining and sustaining such statutes, in some degree or wholly, from a religious standpoint, we mention *Charleston v. Benjamin*, 2 Strobb. L. 508, 49 Am. Dec. 608; *Lindenmuller v. People*, 33 Barb. 548; *Shover v. State*, 10 37 L.R.A. (N.S.)

Ark. 259; *State v. Amba*, 20 Mo. 215; 2 Bl. Com. 63. Mr. Freeman, in his note, 49 Am. Dec. 617, says: "In the earliest contested cases, the constitutionality of acts for the observance of the Lord's Day was defended on the ground of the assumed right of a free Christian people, looking to the conservation of the public order, peace, and morality, and the promotion, within well-guarded limits, of the religious ideas immemorably pervading their history and indelibly stamped upon the character of their laws and institutions, to set apart the Lord's Day as a recurring period of ceremonial rest and voluntary worship. That ground seems to have been abandoned in later times, to a great extent, but it has never yet been conclusively settled that it was not well taken." Judge Story asserts that the Christian religion is the religion of liberty, and may well be regarded as the true basis of our popular form of government, and that, at the adoption of the Constitution, and the Amendment to it which provides that Congress shall pass no law respecting an establishment of religion or prohibiting the free exercise thereof, it was probably the universal sentiment in America that Christianity should receive the support of the state, so far as was consistent with the general freedom of conscience and religious worship. The real object of the Amendment respecting religion was to prevent the establishment of a hierarchy which would control the exclusive patronage of the government; and it may well be conceived that a proper recognition of the prevailing faith, supported by no compulsory acceptance of its doctrines or attendance upon its rites, would still be within constitutional limits, as the Amendment to the Federal Constitution embodies the idea embraced in the Constitutions of the states. Story, Const. §§ 1873, 1874, 1877.

In New York and some other states it has been held that Christianity is a part of the common law of the state and entitled to recognition and protection by the temporal courts. *People v. Ruggless*, 8 Johns. 291, 5 Am. Dec. 335; *Vidal v. Philadelphia*, 2 How. 198, 11 L. ed. 234; *Shover v. State*, 10 Ark. 259; *Sedgwick's Statutory Constitutional L. 14*. Judge Cooley was of the opinion that, while the religious freedom of the people is protected and defended by the American Constitution, there is no prohibition against the solemn recognition by the authorities of a superintending Providence in public transactions and exercises; and no principle of constitutional law is violated when thanksgiving days or fast days are appointed, when chaplains are designated for the army and navy, and legislative sessions are opened with prayer, or

by the general exemption of houses of religious worship from taxation. In *State v. Amba*, 20 Mo. 215, the court said: We must regard the character and condition of the people for whom our organic law was made. It appears to have been made by Christian men, and shows on its face that the Christian religion was the religion of its framers. The convention that adopted it sat under a Sunday law, adjourning in obedience to it, and in the conclusion of the instrument it is solemnly affirmed by its authors that their signatures were attached thereto A. D. 1820, a form adopted by all Christian nations in solemn public acts. And *Lindenmuller v. People*, supra, was a case sustaining a conviction for a violation of a city ordinance prohibiting theatrical performances on Sunday, and holding it valid on the ground that Christianity was the basis of our free institutions, the conservator of the peace, order, morality, and social welfare of the commonwealth, and that the compulsory observance of the Lord's Day was not only compatible with the constitutional provisions prohibiting the enactment of any law interfering with religion or restricting the free exercise thereof, but conducive to every need of good government; that the act was passed in deference to a prevailing sentiment that could not be ignored; and that, as no religious test was set up, and no religious rite or ceremony exacted, it was well within the restrictions of the state Constitution. *Lindenmuller v. People* was approved in *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235, *People v. Moses*, 140 N. Y. 214, 35 N. E. 499, and in *People v. Havnor*, 140 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, and perhaps in later cases, by the New York courts, and is a leading case on the subject.

It is in the light of these considerations that such laws must be construed. Chapter 4 of the Penal Code of this state (Rev. Codes 1905, §§ 8559-8584) is the first chapter of that Code in the order of chapters classifying crimes, and is entitled, "Crimes Against Religion and Conscience," and includes definitions of the crimes of blasphemy, profane swearing, obscene language, and Sabbath breaking. If we may judge of the sentiments of the legislature enacting our Penal Code, by the order of precedence given the different classes of offenses treated therein, it would seem that they considered this among the most important. They began with crimes against religion and conscience, and followed in the order named with crimes against the elective franchise, against the executive power of the state, against the legislative power,

er, against public justice, etc. Our Penal Code was enacted by the territorial legislature on the 11th day of January, 1865, and the title of this chapter has remained unchanged, and no material alterations have been made in its text. When our Constitution was adopted in 1889, article 4, supra, was taken literally from the Constitution of California of 1879, and *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231, shows the construction of the highest court of California of its provisions prior to its adoption into our Constitution. It sustains the validity of a law of that state punishing the transaction of business upon Sunday. In the opinion in that case previous decisions of that court were reviewed and commented upon by the learned chief justice. He also reviewed, at considerable length, other authorities. See also *Ex parte Koser*, 60 Cal. 177. The first Constitution of the state of New York, adopted in 1777, contained the following provision: "(38) And whereas, we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention does further, in the name and by the authority of the good people of this state, ordain, determine, and declare that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind; provided that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." And the Constitution of 1821 of New York (§ 3, art. 7) reads: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." This section was copied literally in § 3 of article 1 of the Constitution of 1846 of New York, except that there was interpolated the provision now found in the Constitution of this state, that no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief. It thus appears that in all material respects California adopted its provisions regarding religion from New York, in which state, by a long line of authorities, only a few of which are cited in this opinion, laws prohibiting la-

bor, amusements, etc., have been sustained, both on religious grounds and as being within the police power of the state. While, as we have said, we have no doubt that the intent of the framers of the different Constitutions and laws was to protect Sunday as a sacred day set apart for religious observance and rest, yet, for the purposes of this case, it is immaterial what their purpose was. If the provisions are clear, we need not consider the motives which prompted the lawmakers; and they are clear. The law here in question in no manner interferes with the religious convictions or scruples of any inhabitant of the state. It neither prescribes for nor compels the petitioners or others to observe any form of religious worship. It creates no establishment of religion. The wills and consciences of all the people are left free in this respect. In the language of Chancellor Kent, "the constitutional provision is fully satisfied by a free and universal toleration." People are at liberty to attend the church of their choice, or to continuously remain away from church. They are not required by it to contribute by taxation or otherwise to the maintenance of any form of religious practice or worship. They are at liberty to ignore, so far as their individual conduct is affected by the statute, the existence of churches and of religion. The legislative assembly has, however, said that in doing so they must not interfere with the purpose of the day, as viewed in the light of the history of the times when our Constitutions were framed, and the purpose of the founders. In fact, it may be maintained that the only effect of Sunday laws like our own is to secure peace and quiet in the observance of the religious ceremonies and worship of an overwhelming majority of our people. The fact that they happen to be adherents of the Christian faith may in no manner affect the principle. The legislature has reached the conclusion that the performance of ordinary labor and certain other acts are infringements upon the right of a great majority of the people to worship and to observe the day as set apart for that purpose, and as a day of rest. It is not for the courts to split hairs in an attempt to determine whether the judgment of the legislature has been exercised to the last degree of refinement so as to include nothing which may in any manner relate to such rights. In the exercise of the police power, the question as to what provisions are needful or appropriate is primarily for the legislature to determine, and, when it does not appear clearly that a statute thought to be within that power has no real or substantial relation thereto and the rights

of the citizen, the judgment of the legislative assembly is conclusive. The preamble to the Constitution recites that "the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution." Elsewhere, Sunday is expressly recognized by excluding it from the time required for the return of bills by the governor during the sessions of the legislature. Const. § 79. Officers are required to take an oath on entering upon the performance of the duties of their office. The same requirement is made of witnesses before testifying, with certain exceptions. The Constitution is witnessed by the signature of the President and Secretary, as well as the members of the convention which framed it, "in the year of our Lord, 1889." All these things show that the character of our institutions was recognized by the delegates who framed the Constitution, and by the people who voted for its adoption; so when we find it provided, in the same section that guarantees the free exercise and enjoyment of religious profession and worship, that the legislature may enact laws to prevent practices inconsistent with the peace or safety of this state, we have a very strong intimation that the supreme authority regards laws of the nature of the one complained of as necessary to secure the peace and safety of the state, and, if so, unless clearly without relation to that subject, they are valid. It also seems almost incredible that the power of the legislature to enact such laws should be questioned at this day, when the tendency throughout the American nation is towards a more general observance of all laws protecting people in the observance of the first day of the week. It is plain to us that this statute, if invalid, must accomplish one of five things: First, it must work an establishment of a religion; second, provide for compulsory support, by taxation or otherwise, of religious instruction; third, make attendance upon religious worship compulsory; fourth, work a restriction upon the exercise of religion according to the dictates of conscience; or fifth, impose restrictions upon the expression of religious belief. The statute complained of does neither of these things, and therefore, as against the objection which we have considered, it is valid. Such laws have been so universally sustained that we cite only a few of the authorities bearing on the subject, in addition to those to which reference has already been made. *Charleston v. Benjamin*, 2 Strobb. L. 508, 49 Am. Dec. 608; *Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Shover v. State*, 10 Ark. 259; *Tucker*

v. West, 29 Ark. 386; Hennington v. State, 90 Ga. 396, 4 Inters. Com. Rep. 413; 17 S. E. 1009; Story v. Elliot, 8 Cow. 27, 18 Am. Dec. 423; People v. Moses, 140 N. Y. 214, 35 N. E. 499; Com. v. Dextra, 143 Mass. 28, 8 N. E. 756; State v. Amba, 20 Mo. 215; St. Joseph v. Elliott, 47 Mo. App. 418; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419; People v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; State v. Sopher, 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482; note in 12 A. & E. Ann. Cas. 1096; State v. Dolan, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995; State v. Petit, 74 Minn. 376, 77 N. W. 225; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; Topeka v. Crawford, 78 Kan. 583, 17 L.R.A.(N.S.) 1156, 96 Pac. 862, 16 A. & E. Ann. Cas. 403.

4. It is urged that even though Sunday laws may, as a general proposition, be found unobnoxious to the provision of the Constitution to which reference has been made, and that if the act complained of were a part of the general Sunday law, and as such constitutional, that, having been passed as a separate and independent measure, it is in contravention of the terms of §§ 11 and 20 of the Constitution. In other words, that it is special legislation. We need not take the trouble to define special legislation, nor to determine whether this might not be such if it were the only law on the subject. The only answer necessary to be made to this contention is that, as evidenced by the terms of the emergency clause attached to this law, the legislative assembly considered the general Sunday law as not prohibiting the maintaining and running of theaters and similar shows on Sunday, and that until the enactment of this statute, it was legal to maintain such shows upon that day. Without determining whether the legislative interpretation of the old law was correct, but assuming it to be so, it is quite evident that, instead of this being a special law, it is in the nature of an addition to the old statute on the subject, making it more general in its terms and more universal in its application than it was before the new enactment took effect. It enlarges the scope and application of the statute by enumerating theaters and shows among the prohibited avocations, and is not subject to the objection made. However, if it did stand alone, the books are replete with authorities passing upon the constitutionality of similar statutes, and almost without exception holding them valid as against these identical, and similar objections. Ex parte Koser, 60 Cal. 177; Ex parte Donnellan, 49 Wash. 460, 95 Pac. 1085; State v. Dolan, 13 Idaho, 693, 14 37 L.R.A.(N.S.)

L.R.A.(N.S.) 1259, 92 Pac. 995; State v. Sopher, 25 Utah, 318, 60 L.R.A. 468, 95 Am. St. Rep. 845, 71 Pac. 482; Bohl v. State, 3 Tex. App. 683; St. Louis v. De Lassus, 205 Mo. 578, 104 S. W. 12; People ex rel. Woodin v. Hagan, 36 Misc. 349, 73 N. Y. Supp. 564; Liberman v. State, 26 Neb. 464, 18 Am. St. Rep. 791, 42 N. W. 419; State v. Bellet, 99 Mich. 151, 22 L.R.A. 696, 41 Am. St. Rep. 589, 57 N. W. 1094; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; State v. Petit, 74 Minn. 376, 77 N. W. 225; State ex rel. Hoffman v. Justus, 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, and note to same case, 1 A. & E. Ann. Cas. 93; State v. Weiss, 97 Minn. 127, 105 N. W. 1127, 7 A. & E. Ann. Cas. 932; State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 A. & E. Ann. Cas. 979.

The statute in question is not vulnerable to the attacks made upon it, and we hold that its terms bring it within the proper exercise of the legislative power. The writ heretofore allowed is quashed. The petitioners are remanded to the custody of the sheriff, with directions that on payment of the fines imposed, or, in lieu thereof, imprisonment as adjudged, they be discharged.

Morgan, Ch. J., not participating. Hon. W. J. Kneeshaw, Judge of the Seventh Judicial District, sat by request.

#### UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

TIPPETT & WOOD, Interveners, Appts.,  
v.

JOHN A. BARHAM et al.

(103 C. C. A. 430, 180 Fed. 76.)

**Fixtures — standpipe — rights of mortgagee.**

Persons undertaking to erect a standpipe as part of a waterworks system, which is to be attached to the foundation by bolts em-

*Note. — Rights of seller of chattel, retaining title thereto or a lien thereon, as against existing mortgagees of the realty to which it is affixed by the owner.*

As is illustrated by TIPPETT v. BARHAM and Blanchard v. Eureka Planing Mill Co. post, —, there is a difference of opinion as to the right of a prior mortgagee of realty to claim property as a fixture as against the seller thereof, who claims it as personalty. Although the preponderance of opin-



bedded in it, cannot, by contract to which the mortgagee is not a party, reserve a right to remove it in case of failure to pay the purchase price, as against rights under a mortgage covering after-acquired property of the water company, and which embraces its entire working plant, including franchises.

(July 12, 1910.)

**A**PPEAL by intervening petitioner from an order of the Circuit Court of the United States for the Eastern District of Virginia, overruling exceptions to the report of a special master, disallowing its claim to priority in a general creditors' suit against the Peninsula Pure Water Company. Affirmed.

ion favors the equitable rule that unless the property sold has become an integral part of the realty, or (what is practically the same thing) unless its removal would seriously injure the premises, the seller thereof, retaining title thereto, or taking back a chattel mortgage thereon, may assert his lien as against a mortgagee of the realty whose lien was in existence at the time of the annexation, there are some jurisdictions which, adhering to the opinion which determines the rights of the parties from a purely legal standpoint independently of any equitable considerations, have adopted the so-called Massachusetts rule, that the rights of the mortgagee cannot be affected by any agreement to which he is not a party, and therefore that such rights are superior to those of the seller of the fixture.

This want of harmony is attributable not only to the movement toward an equitable tempering of the rigor of the maxim, *Quicquid plantatur solo, solo cedit*, but also to the conflict between the conception of the mortgagee as being the owner of the land, and the modern idea that he is to be considered merely as a lienor, whose rights are equitable rather than legal in character.

The decisions arriving at the conclusion that the right of a prior mortgagee of the realty is not superior to the lien retained by the seller of the so-called "fixture" are based upon two different kinds of reasoning. One, which may be termed the legal doctrine, and of which the New York cases are an instance, is that the intention of the parties to the sale that the chattel shall retain the character of personalty will keep it from becoming a fixture. The other, which may be termed the equitable doctrine, and of which the New Jersey cases may be cited as an instance, is that where the security of the mortgagee of the realty is not diminished, the rights of the seller of the fixture will be recognized.

Before proceeding to the discussion of the cases, it is proper to state that the note includes only those falling strictly within its scope, without attempting to present even cases so closely analogous as those in-  
37 L.R.A.(N.S.)

Statement by Keller, District Judge:

The question at issue upon this appeal arises between the holders of bonds of the Peninsula Pure Water Company, issued under and secured by a mortgage to the Knickerbocker Trust Company, and Tippet & Wood, the appellants.

By deed bearing date February 1, 1906, and recorded in the clerk's office of Elizabeth City county, Virginia, February 16, 1906, the Peninsula Pure Water Company conveyed to the Knickerbocker Trust Company of New York City all of its property rights, and franchises to secure an issue of \$300,000 of first-mortgage bonds. This deed contains what is generally known as the "after-acquired property clause," the language being: "Does grant, bargain, sell,

volving the rights of a creditor taking a chattel mortgage upon personalty prior to its annexation. While such cases may depend upon much the same considerations as those herein discussed, the two are not exactly parallel, as in one case the seller is usually aware of the contemplated annexation, while one taking a chattel mortgage on personalty as such may often reasonably suppose that it is to continue of that character. For a discussion of the specific point stated, see note in 15 L.R.A. 56, on "Efficacy of a chattel mortgage on fixtures."

And see also, in connection with this note, a note in 19 L.R.A. 441, on "Effect of agreement to prevent fixtures from becoming a part of realty."

It should also be stated that the present note, as indicated by its title, does not assume to include cases where the personalty has been annexed by its purchaser to realty in which he has no interest, as, for instance, where property sold to a contractor for the erection of a building has been installed by him as a fixture therein.

#### Where seller retains title.

As above stated, the preponderance of authority is to the effect that where the removal of the fixture will not materially injure the premises, a seller thereof retaining title thereto may assert his right as against a prior mortgagee of the realty. Wood v. Holly Mfg. Co. 100 Ala. 326, 48 Am. St. Rep. 56, 13 So. 948; Warren v. Liddell, 110 Ala. 232, 20 So. 89; J. L. Mott Iron Works v. Middle States Loan, Bldg. & Constr. Co. 17 App. D. C. 584; Anderson v. Creamery Package Mfg. Co. 8 Idaho, 200, 56 L.R.A. 554, 101 Am. St. Rep. 188, 87 Pac. 493; Schumacher v. Edward P. Allis Co. 70 Ill. App. 556; Baldwin v. Young, 47 La. Ann. 1466, 17 So. 883; Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064; Cochran v. Flint, 57 N. H. 514; Langdon v. Buchanan, 62 N. H. 657; General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 460, 42 Atl. 101; Duffus v. Howard Furnace Co. 8 App. Div. 567, 40 N. Y. Supp. 925, reversing 15 Misc.

and convey . . . all other property—real, personal, or mixed—of whatsoever kind or description, and wheresoever situated, now owned or possessed by it, or which may hereafter be acquired by it, the said Peninsula Pure Water Company; also all corporate and other franchises, privileges, rights, benefits, immunities, and exemptions . . . either by legislative grant or contract, or otherwise.” By deed bearing date March 18, 1906, and recorded March 29, 1906, Thomas Harmond and wife conveyed to the Peninsula Pure Water Company a certain tract of land located in the town of Hampton, in the county of Elizabeth City. And by a contract bearing date March 9, 1906, but which was actually executed some time after that date, Tip-

pett & Wood, the intervening petitioners, entered into an agreement with the Peninsula Pure Water Company and Whetstone & Company by which they agreed to erect for the use of the Peninsula Pure Water Company a certain standpipe for the price of \$8,148, and according to plans and specifications referred to in said contract, said contract being under the corporate seal of all parties. This standpipe was subsequently erected on the tract of land purchased of Thomas Harmond *et ux.*, and was completed according to plans and specifications, although the water company was placed in the hands of the receivers before there was a formal acceptance of the standpipe by it. The water company prepared a concrete foundation upon which the

169, 37 N. Y. Supp. 19; Condit v. Godwin, 107 App. Div. 616, 95 N. Y. Supp. 1122, affirming 44 Misc. 312, 89 N. Y. Supp. 827; Nichols v. Potts, 35 Misc. 273, 71 N. Y. Supp. 765; Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 A. & E. Ann. Cas. 936; Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069; Davenport v. Shants, 43 Vt. 546; Buzzell v. Cummings, 61 Vt. 213, 18 Atl. 93; Page v. Edwards, 64 Vt. 124, 23 Atl. 917; Paine v. McDowell, 71 Vt. 28, 41 Atl. 1042; German Sav. & L. Soc. v. Weber, 16 Wash. 95, 38 L.R.A. 267, 47 Pac. 224; New Chester Water Co. v. Holy Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 19, affirming 48 Fed. 879. And see also Thomas v. Inglis, 7 Ont. Rep. 588, under heading, “English and Canadian doctrine,” *infra*.

So, also, in Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107, it was held that one who leased an engine and boiler for the period of two months, with privilege of purchasing it for \$1 at the expiration of the term, to a person who had possession of land under a contract, knowing that it was to be affixed by the latter to the land, but not knowing that the land contract provided that everything put upon the land should belong to it, was entitled to hold the articles as personality as against the vendor of the land.

In General Electric Co. v. Transit Equipment Co. 57 N. J. Eq. 460, 42 Atl. 101, it was said that where the contract for the sale of the affixed property contained not only a reservation of the title, but also a right to remove the property from the premises, the conditional vendor could not be considered as having consented that the property should become a part of the freehold, and therefore subject to a prior mortgage thereon.

In Cochran v. Flint, 57 N. H. 514, it was held that, in order to pass title to machinery to the holder of a real-estate mortgage on the property to which it was affixed, as against the vendor retaining title thereto until the purchase price should be fully paid, the latter must have had actual or constructive notice that the property was

to be put upon mortgaged land; of which fact the mere existence of a real-estate mortgage on record, covering the property to which the machine was actually affixed, is not sufficient, if the owner of the machinery was not aware that it was to be placed on such land; but that he had a right to assume that the machinery would be placed on property free from mortgage, and should not be deemed to have consented to any annexation which would jeopardize his rights. Compare Larue v. American Diesel Engine Co. — Ind. —, 96 N. E. 722, and Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co. 231 Pa. 129, 80 Atl. 568, *infra*, under heading, “Effect of after-acquired-property clause.”

The fact that a conditional vendor is aware of the purchaser's intention to annex the property purchased as permanent additions to the realty, or as a substitution for other fixtures, will not give a prior mortgagee of the realty a superior right thereto, —at least, where the value of his security is not thereby impaired or diminished. Cox v. New Bern Lighting & Fuel Co. 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 A. & E. Ann. Cas. 936.

In Blanchard v. Eureka Planing Mill Co. post, —, it is held that an agreement as between the purchaser and seller of machinery, that the title thereto should remain in the seller until payment of the purchase price, was valid as against a prior mortgagee of the realty to which it was affixed, the court saying that the rule in all such cases is that, to preclude the vendor from claiming the chattel under such an agreement, the owner of the realty must have been the purchaser thereof for value, subsequent to the annexation of the fixture, without notice that the vendor retained the title.

Similarly, the rights of a seller of fixtures, retaining title thereto until paid for, will prevail against the lien of the vendor of the realty to which they have been annexed (Harris v. Hackley, 127 Mich. 46, 86 N. W. 389; Palmateer v. Robinson. 60 N. J. L. 433, 38 Atl. 957; Davis v. Bliss, 187 N. Y. 77, 10 L.R.A.(N.S.) 458, 79 N. E. 851, reversing 105 App. Div. 636, 93 N. Y.

standpipe was constructed, and to which it was attached by bolts and taps. This contract, which was never recorded, contained the following clauses: "No right or title to said standpipe, or to the material of which the same is composed, shall pass to Whetstone & Company or Peninsula Pure Water Company, or to any other persons or companies until all the payments above mentioned shall be fully made; and if, in any case, all the payments are not made, Tippet & Wood may enter upon the property and remove the material or standpipe as furnished by them." "If said Whetstone & Company and Peninsula Pure Water Company shall keep and perform all the terms of this agreement, and make no default in any of said payments

as they become due, and in that case said Tippet & Wood will make, execute, and deliver to Whetstone & Company or Peninsula Pure Water Company a good and sufficient bill of sale for said standpipe." Said standpipe was built and completed according to plans and specifications prior to receivership proceedings; but default was made in the payments provided for, leaving a balance unpaid of \$2,548, with interest from February 1, 1907, and \$97.78, with interest from March 1, 1907 (this latter sum was for repairs and labor caused by the alleged delay of the water company to make proper tests after completion of the work), whereupon Tippet & Wood filed its petition, setting up its contract, and praying leave of court to enter

Supp. 1127), except where the fixture is not removable without considerable damage to the freehold. *Andrews v. Powers*, 66 App. Div. 216, 72 N. Y. Supp. 597. But it has been held in *Cockshutt Plow Co. v. McLoughry*, 2 Sask. L. R. 259, in accordance with the general English doctrine, that the conditional vendor may not reclaim his property as against the vendor of the land in possession.

But equitable considerations may preclude the successful assertion of a right which would otherwise be recognized.

Thus, in *Larue v. American Diesel Engine Co.* — Ind. —, 96 N. E. 772, where it appeared that the vendor's agent had procured the sale of an electric lighting plant to a third party, representing to the owners that he wished to install therein an engine for purposes of demonstration, and that he had one bought and paid for, and the owners took back a purchase-money mortgage which by its terms included all machinery, apparatus, and appliances that might thereafter be placed upon the premises; and that the real estate would be seriously damaged by the removal of the engine,—it was held that the vendor of the engine could not assert any right under its contract of conditional sale as against the mortgagees of the realty.

And in *East New York Refrigerator & Woodworking Co. v. Halpern*, 140 App. Div. 201, 125 N. Y. Supp. 111, the lien of a building loan mortgage on which advances had been made by the mortgagee without knowledge of the existence of any contract of conditional sale, and prior to its filing, was held superior to that of the conditional vendor of mantelpieces affixed to the property.

#### Where seller takes chattel mortgage.

The doctrine that where the fixture may be removed without material injury, the seller may enforce his lien as against the prior mortgagee of the realty, is applicable where the seller of the fixtures has taken a chattel mortgage thereon. *Anderson v. Creamery Package Mfg. Co.* 8

*Idaho*, 200, 56 L.R.A. 554; 101 Am. St. Rep. 188, 67 Pac. 493; *Andrews v. Chandler*, 27 Ill. App. 103; *Ellison v. Salem Coal & Min. Co.* 43 Ill. App. 120; *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; *First Nat. Bank v. Elmore*, 52 Iowa, 541, 3 N. W. 547; *Crippen v. Morrison*, 13 Mich. 23; *Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co.* 58 N. J. Eq. 59, 43 Atl. 418; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Hine v. Morris*, 7 Ohio Dec. Reprint, 482; *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237.

In *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753, it is said that whether a chattel mortgage given to secure the purchase price of property annexed to real estate shall be postponed to a prior mortgage on the realty "must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real-estate mortgagee as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon."

In *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279, which reversed *Roddy v. Brick*, 42 N. J. Eq. 218, 6 Atl. 806, the mortgagor of real estate subsequently purchased machinery under an arrangement with the seller which was construed to be practically the equivalent of a chattel mortgage thereon to secure the purchase price, and then affixed it to the realty. The court, after discussing the various rules which might be applied to the case, concluded that the equitable way of dealing with the property was to reserve the right of the prior real-estate mortgagee to the same degree of security which he would have enjoyed had the property remained as when mortgaged; saying, that as long as he has secured the full amount of indemnity which

upon the premises and remove the said standpipe according to the terms of its contract.

The decree for sale of the water companies' properties included the standpipe in question, the court reserving "to all persons claiming a lien or liens against any of the assets or property herein authorized to be sold the same liens, rights, or claim against the money derived from the said sale as such person or persons may have, or could set up and establish, against the said assets or properties as if no sale had been had hereunder," Tippet & Wood consenting, without prejudice, that its claim be paid either in money or by removing the standpipe. The properties of the water companies, including the standpipe in

question, claimed by Tippet & Wood, were subsequently sold as a whole, and the said sale duly confirmed.

The report of the special master, filed on September 29, 1909, allowed the claim of Tippet & Wood as an unsecured debt, and disallowed the priority of the same over the first-mortgage bonds. Tippet & Wood, by counsel, filed exceptions to said report of the special master, which exceptions were overruled by the court.

Argued before Goff, Circuit Judge, and Keller, District Judge.

Mr. William C. L. Tallafiero, for appellant:

A mortgage intended to cover after-acquired personal property can only attach

he took, he has no ground for complaint; and that the real-estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. This decision proceeds not only upon the theory that the chattel character of the property was preserved, but upon the theory of an equitable preservation of the vendor's lien upon the chattels after they have been transmuted into realty.

In *Henry v. Von-Brandenstein*, 12 Daly, 480, it was held that where, nearly five years after judgment of foreclosure of a mortgage of real estate, but before a sale, the owner of the land placed machinery thereon, at the same time giving a chattel mortgage on it, the machinery could not be claimed as fixtures, as against the chattel mortgagee.

In *Tibbetts v. Moore*, 23 Cal. 208, 9 Mor. Min. Rep. 348, it was held that a chattel mortgage executed to secure the purchase price of a boiler and engine, which were subsequently placed in a quartz mill, so that they became a part of the realty, took precedence of a prior chattel mortgage on the mill, the court saying that while ordinarily the lien in such case would be construed to relate back to the date of the mortgage on the mill, this doctrine of relation will not be so applied as to defeat or divest intermediate rights and liens lawfully acquired.

Fixtures installed by a lessee and sold by him to the lessor do not inure to the benefit of an existing mortgagee of the realty, where, as part of the same transaction, the seller takes security thereon for the purchase price. *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 665.

Notice to the prior mortgagee of the realty of the annexation of chattels covered by a chattel mortgage or conditional-sale agreement is not essential to preserving the rights of the chattel vendor or mortgagee. *Cox v. New Bern Lighting & Fuel Co.* 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 A. & E. Ann. Cas. 936.

It has likewise been held that the rights of a seller of fixtures taking back a chattel

mortgage thereon will prevail against the lien of a vendor of realty to which they have been annexed. *Miller v. Wilson*, 71 Iowa, 610, 33 N. W. 128; *Alberson v. Elk Creek Min. Co.* 39 Or. 552, 65 Pac. 978; *Willis v. Munger Improved Cotton Mach. Mfg. Co.* 13 Tex. Civ. App. 607, 36 S. W. 1010.

An opposite result, which, however, appears to be warranted by the peculiar state of facts involved, was reached in *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875, 55 Atl. 196. The complainant had entered into a contract by which he was to build a mill for one Smith, and to sell him the land and mill at an agreed price, Smith to make certain payments from time to time, and to pay as rental, until the purchase was completed, interest on the price of the land and the money expended by the complainant in erecting the mill. Smith also agreed to furnish a part of the material for the mill, and to furnish an engine and boiler, with shafting and pulleys, "to be considered a part of the real estate." Thereafter Smith bought an engine under an agreement by which it was to remain the property of the seller until paid for. Each of these agreements was unknown to the other. It was held that the complainant stood, as to Smith, equitably as a mortgagee; that upon equitable ground his claim to the engine was stronger than that of the seller, whose duty it was to make inquiry as to the ownership of the realty to which the engine was to be affixed; that the complainant having invested money on the agreement by Smith to furnish the engine and boilers, his claim was equally as strong as if he had advanced money after the annexation of the engine.

As against purchaser on foreclosure.

It has also been held that a conditional vendor (*Brand v. McMahon*, 60 Hun, 582, 38 N. Y. S. R. 576, 15 N. Y. Supp. 39; *Atlantic Safe Deposit & T. Co. v. Atlantic City Laundry Co.* 64 N. J. Eq. 140, 53 Atl. 212) or a chattel mortgagee (*Eaves v. Es-*

to such interest as may come into the mortgagor's hands; if that property is already subject to mortgage or other liens, the general mortgage does not displace them, though they may be junior to it in point of time.

*United States v. New Orleans & O. R. Co.* (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 65, 13 So. 948; 1 Jones, *Mortg.* § 158; *Fosdick v. Schall*, 99 U. S. 250, 25 L. ed. 342; *Myer v. Western Car Co.* 102 U. S. 9, 26 L. ed. 60; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 423, 34 L. ed. 1014, 1017, 11 Sup. Ct. Rep. 354; *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 35, 19 N. E. 753; *Sword v. Low*, 122 Ill. 487, 13

N. E. 827; *Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 879.

When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intention of the parties will prevail, unless the property be of such nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation.

*Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 35, 19 N. E. 753; *Taylor v. Watkins*, 62 Ind. 511.

The execution of a chattel mortgage by

tes, 10 Kan. 314, 15 Am. Rep. 345) may assert his rights as against a purchaser on the foreclosure of a prior real-estate mortgage. But compare *Richardson v. Copeland*, *infra*.

See also, in this connection, *Deal v. Smart*, 1 Tex. App. Civ. Cas. (White & W.) 610, in which machinery installed on trial in a flouring mill under a conditional-sale agreement was held not to pass to the purchaser on foreclosure of the lien of the vendor of the realty.

Since the statute providing that no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition whatever as against creditors of the vendee, or subsequent purchasers from such vendee, in good faith, unless such condition shall be evidenced by writing and duly recorded, must be construed, in view of its manifest purpose, as protecting subsequent creditors only, a conditional sale of machinery annexed by the purchaser to realty subject to a prior deed of trust is nevertheless good against the purchaser upon foreclosure of such trust deed. *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69.

But the conditional vendor of gas ranges installed in an apartment house, whose contract is not duly filed, as provided by the lien law, cannot, in view of the provision of such law that every contract for the conditional sale of any goods and chattels attached or to be attached to a building shall be void as against subsequent bona fide purchasers or encumbrancers of the premises on which said building stands, unless such contract shall have been duly and properly filed on or about the date of delivery of such goods or chattels at such building, assert his right to the ranges against a bona fide purchaser on foreclosure of a prior mortgage of the realty. *Central Union Gas Co. v. Browning*, 131 N. Y. Supp. 464.

#### Effect of after-acquired property clause.

The fact that a prior mortgage of real estate contains a provision that it shall

cover additions thereto does not give the mortgagee a superior claim to chattels annexed thereto, as against the vendor by conditional-sale contract, since the after-acquired property clause in a mortgage attaches only to such interest as the mortgagor acquires. *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 56, 13 So. 948; *J. L. Mott Iron Works v. Middle States Loan, Bldg. & Constr. Co.* 17 App. D. C. 584; *Cox v. New Bern Lighting & Fuel Co.* 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 A. & E. Ann. Cas. 936. *Contra*, *Union Trust Co. v. Southern Sawmills & Lumber Co.* and *Re Williamsburg Knitting Mill*, *infra*, and *TIPPETT v. BARRHAM*. And see also *Larue v. American Diesel Engine Co.* and *Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co.* *infra*.

In this view of the rights accruing to the mortgagee under an after-acquired property clause, a delay or failure to register the contract of conditional sale is immaterial where the mortgagee has parted with nothing of value upon the faith of his security, and is in no way prejudiced thereby. *Cox v. New Bern Lighting & Fuel Co.* 151 N. C. 62, 134 Am. St. Rep. 966, 65 S. E. 648, 18 A. & E. Ann. Cas. 936.

And in *Defiance Mach. Works v. Trisler*, *supra*, it was held that where title to a machine was retained as security for the payment of the purchase price, the lien of a deed of trust which, by its terms, covered any machinery, tools, and fixtures which might thereafter be acquired by the grantor therein, and placed on the premises, nevertheless did not attach to the machine, because the title to it never vested in the purchaser; and that therefore the trustee under the deed of trust could pass no title to a purchaser at a foreclosure sale, although he had no notice of the terms of the sale of the machine.

So, also, in *Davis v. Bliss*, 187 N. Y. 77, 10 L.R.A. (N.S.) 458, 79 N. E. 851, reversing 105 App. Div. 636, 93 N. Y. Supp. 1127, it was held that an agreement between a conditional vendor of real estate, and the vendee, that any machinery placed upon the

the owner of the land, upon machinery which he afterwards places in a building thereon, is regarded as an unequivocal declaration of his intention that the act of annexation shall not change or take away the character of the machinery as personalty until the debt secured by the mortgage has been fully paid.

*Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 35, 19 N. E. 753; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Sword v. Low*, 122 Ill. 487, 13 N. E. 832; *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 60, 13 So. 948; *Harris v. Powers*, 57 Ala. 143; *Tillman v. De Lacy*, 80 Ala. 103; *Vann v. Lumsford*, 91 Ala. 576, 8 So. 719; *Ware v.*

*Hamilton Brown Shoe Co.* 92 Ala. 151, 9 So. 136; *Ewell, Fixtures*, §§ 66, 316; *Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 886; *Shelton v. Ficklin*, 32 Gratt. 727; *Tunis Lumber Co. v. Dennis Lumber Co.* 97 Va. 686, 34 S. E. 613; *Auditor v. Andrews*, 28 Gratt. 118; *Monarch Laundry v. Westbrook*, 109 Va. 382, 63 S. E. 1070.

The appointment of a receiver or receivers deprived no party of any legal right that he may have had at the time of such appointment, nor did such appointment give or confer any additional rights; the *status quo* of all the parties was preserved.

*Fosdick v. Schall*, 99 U. S. 250, 25 L. ed. 342; *Myer v. Western Car Co.* 102 U. S. 9, 26 L. ed. 60.

premises should become a part of the realty, could not affect the rights of the seller of machinery, reserving title thereto until the price should be paid.

No rights can be asserted on behalf of holders of bonds who purchase them with notice of the reservation of title by the conditional vendor of ice-manufacturing machinery installed on the premises, under a provision of a prior mortgage of the realty that all machinery affixed shall be treated as real estate. *Central Trust Co. v. Arctic Ice Mach. Mfg. Co.* 77 Md. 202, 26 Atl. 493.

But in *Union Trust Co. v. Southern Sawmills & Lumber Co.* 92 C. C. A. 101, 166 Fed. 193, machinery and fixtures attached to, used in, and which became a part of, the sawmill plant, and in *Re Williamsburg Knitting Mill*, 190 Fed. 871, an automatic sprinkler system, were held to have become subject to mortgages containing an after-acquired property clause, notwithstanding a reservation of title on the part of the vendor under a contract which had not been registered. These decisions, although apparently emphasizing the fact of the existence of the after-acquired property clause, seem to have been made with the idea of following the Massachusetts rule hereinafter discussed, under which rule the same result would follow regardless of the presence or absence of an after-acquired property clause, or of the registration of the contract of conditional sale.

In *Larue v. American Diesel Engine Co.* — Ind. —, 96 N. E. 772, the fact that the conditional vendor had, through a record of a real-estate mortgage which, by its terms, covered property to be put in the plant, constructive notice thereof, was referred to as important and controlling.

And in *Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co.* 231 Pa. 129, 80 Atl. 568, in which generators installed in an electric power house, which replaced others removed, were permanently built into the plant, and were an essential part of the construction for which the plant was erected, were held to become subject to a prior real-estate mortgage thereon, stress was laid on the fact that, at the time the agreement for 37 L.R.A. (N.S.)

the sale of the generators was concluded, the contracting parties had record notice of the terms of the mortgage, one of which was that all generators that might thereafter be acquired should be subject to its lien.

Compare with the two cases last preceding, *Cochran v. Flint*, 57 N. H. 514, *supra*, under heading, "Where seller retains title," with which, however, they are entirely consistent.

#### Where new fixture replaces old.

There is a difference of opinion as to the effect upon the rights of the parties of the circumstance that the machinery to which the seller reserves title takes the place of old machinery removed from the premises.

In *Page v. Edwards*, 64 Vt. 124, 23 Atl. 917, it is held that machinery sold under a contract of conditional sale will retain the character of personalty against the holder of an existing mortgage on the realty, notwithstanding that machinery in place when the real-estate mortgage was taken has been removed to make room for the machinery in question.

And compare *Davis v. Bliss*, 187 N. Y. 77, 10 L.R.A. (N.S.) 458, 73 N. E. 851, where such circumstance was held to give a conditional vendor of the realty no greater rights than he would otherwise possess, in the absence of anything to show that he assented to the removal of the old machinery in reliance upon its being replaced by new.

And see also *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209, in which it was held that boilers hired for use in a mill, which could be removed without other injury than taking down the boiler wall, did not become subject to an existing mortgage on the realty, though they replaced others which had become worn out.

On the other hand, in *Bass Foundry & Mach. Works v. Gallentine*, 99 Ind. 525, machinery for a mill, sold under an agreement that the title should not pass until it was paid for, and which took the place of old machinery, was held subject to an existing real-estate mortgage on the premises, the court saying: "The old machinery was subject to the mortgage; the mortgagor

Mr. Henry W. Anderson, with Messrs. Munford, Hunton, Williams, & Anderson, for appellees:

Where a corporate mortgage contains an after-acquired property clause, any property acquired by that corporation subsequent to the execution and delivery of such mortgage becomes in equity subject to the lien of the mortgage, if the terms thereof are sufficiently broad to embrace the property, or to manifest an intent that the same should pass under the mortgage when acquired.

*Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. Rep. 29; *Branch v. Jesup*, 106 U. S. 468, 27 L. ed. 279, 1

could not substitute new for old, and compel the mortgagee purchasing at the foreclosure sale to take the mill in a dismantled condition, because of a contract made by the mortgagor with some third person, to which the mortgagee was not a party, to which he never consented, and of which he had no notice."

#### The Massachusetts rule.

In opposition to the doctrine of the foregoing cases are those which support the so-called Massachusetts rule, which, taking the view that the rights of the mortgagee cannot be affected by an agreement to which he is not a party, hold such rights to be superior to those of the seller of the fixture, retaining title thereto (*Watertown Steam Engine Co. v. Davis*, 5 Houst. [Del.] 192; *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *Clary v. Owen*, 15 Gray, 522; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Lorain Steel Co. v. Norfolk & B. Street R. Co.* 187 Mass. 500, 73 N. E. 646; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; *TIPPETT v. BARHAM*; and see also in this connection, *Union Trust Co. v. Southern Sawmills & Lumber Co.* 92 C. C. A. 101, 166 Fed. 193, and *Re Williamsburg Knitting Mill*, 190 Fed. 871, above set forth); or taking back a chattel mortgage thereon (*Maguire v. Park*, 140 Mass. 21, 1 N. E. 750; *Pierce v. Emery*, 32 N. H. 484; *Frankland v. Moulton*, 5 Wis. 1). And see also the cases following.

In *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192, it was held that machinery which the seller thereof knew would become a fixture became subject to the lien of a prior mortgage on the realty, in the absence of fraudulent conduct on the part of the mortgagee, or a valid agreement on his part that it should not be bound by the mortgage, notwithstanding the retention of the title by the seller, the theory of the court apparently being that where the seller contemplates annexation, he takes the risk of all legal consequences resulting from that act.

In *Hunt v. Bay State Iron Co.* 97 Mass. 37 L.R.A. (N.S.)

Sup. Ct. Rep. 495; *Meyer v. Johnston*, 53 Ala. 237.

Structures or property may be erected upon real estate which is subject to a mortgage, and thereby become a part of the real estate, and thus, by operation of law, become subject to the mortgage, without regard to any contracts or agreements between the mortgagor and the person supplying or furnishing such property or erecting such structures, or any limitations upon the title to such property, as between the mortgagor and such person.

*United States v. New Orleans & O. R. Co.* (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434; *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; 1

279, it was held that an agreement that railroad rails laid in a track should be subject to removal and remain personal property until they were paid for, although valid as to the parties, was not valid as to a prior real-estate mortgagee, the court saying that a mortgagor in possession is not competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold.

In *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424, it was held that where an engine and boiler had been affixed to real estate by the owner of the freehold in such a manner as to make them a part thereof, notwithstanding that, at the time of their purchase, the purchaser agreed to treat them as personalty, and gave a chattel mortgage on them for the purchase price, such mortgage was inoperative and void as against a subsequent purchaser of the real estate at an assignee's sale, upon the petition of prior mortgagees of the realty, though he had notice of the mortgage.

In *Clary v. Owen*, 15 Gray, 522, it was held that one who constructs fixtures on mortgaged property under a contract with the mortgagor that the fixtures shall remain the property of the builder until paid for is not entitled to them as against an assignee of the mortgage with notice of the contract, taking possession of the premises for breach of condition before completion of the fixtures, and who afterward purchased the equity of redemption, the court saying that, although the mortgagor, for some purposes, and as to all persons except the mortgagee, may be regarded as the absolute owner of the land, yet the title of the mortgagee is in all respects to be treated as paramount, and that it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which, as between the mortgagor and the mortgagee, would become a part of the realty.

The case of *Stanton v. Thompson*, 49 N. H. 272, which is sometimes regarded as sustaining the broad proposition that a mortgagee of real estate has good title to a chat-

Union Trust Co. v. Southern Sawmills & Lumber Co. 92 C. C. A. 101, 166 Fed. 193; *Phoenix Iron Works Co. v. New York Secur. & T. Co.* 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 757; *Evans v. Kister*, 35 C. C. A. 28, 92 Fed. 828; *Clary v. Owen*, 15 Gray, 522; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 139; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; *Ekstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *McFadden v. Allen*, 134 N. Y. 489, 19 L.R.A. 446, 32 N. E. 21; *Bass Foundry & Mach. Works v. Gallentine*, 99 Ind. 525; *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep.

867, 85 N. W. 698; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 65, 13 So. 948; 1 *Jones*, Mortg. § 158; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Myer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 34 L. ed. 1014, 11 Sup. Ct. Rep. 357; *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 35, 19 N. E. 735; *Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 879.

The standpipe in question lost its character as personalty, and became a part of the freehold or real estate subject to the mortgage.

*Phoenix Iron Works Co. v. New York Secur. & I. Co.* 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 760; *Teaff v. Hewitt*, 1

tel affixed thereto after execution of the mortgage, as against the conditional vendor thereof, is limited in *Cochran v. Flint*, 57 N. H. 514, upon the ground that the annexation was made by the conditional vendor of the machinery.

In *Sinker v. Comparet*, 82 Tex. 470, where the vendors of certain realty had sold it, taking back a mortgage, the purchaser agreeing as part of the consideration to erect a mill thereon, it was held that the lien of the mortgagees of the realty upon machinery which had been installed in the mill under a contract of conditional sale was protected by a statutory provision that where any reservation or limitation shall be pretended to have been made by way of condition, reversion, remainder, or otherwise, in goods and chattels the possession whereof shall have remained in another, the same shall be taken, as to the creditors or purchasers of the person so remaining in possession, to be fraudulent.

In *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593, it was held that where machinery was put into a flouring mill upon trial, and permitted to remain there long after the time allowed for trial had expired, and long after the possession of the occupant had ended, and after the premises had been rented by another person, and the mill and machinery delivered up to him, the machinery became subject to a mortgage on the realty; the court saying that the doctrine that the legal rule as to fixtures may be modified by the contract of the parties applies only when the contract is made by the party who, without such contract, would be entitled to the personal property as part of the real estate.

A ground for distinction between cases which hold that a chattel which becomes attached to realty becomes subject to a prior mortgage thereon, notwithstanding an agreement between the owner or occupant of the realty and the seller of the fixture that the title thereto shall not pass until payment of the purchase price, or notwithstanding the giving of a chattel mortgage as security therefor, and the decisions which hold

that such arrangements are effectual to preserve the chattel character of the fixtures as against such prior mortgagees of the realty, is discussed in *Crippen v. Morrison*, 13 Mich. 23, in which it is said that while, under the English rule, which gives the mortgagee an immediate right of possession, the mortgagor cannot give others a right he does not possess himself to remove improvements from the premises, yet, in view of changes effected in the rights of the parties by statutory provisions, he is, until actual foreclosure, to be regarded as in possession by right, and not by sufferance, and may make such arrangements for the use of the property as any other person during his term.

—effect of consent by mortgagee of realty.

Where the consent of the mortgagee of the realty to the arrangement is obtained, the rights of a seller retaining title to the fixture, until payment of the purchase price, may be enforced. *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14; *Bartholomew v. Hamilton*, 105 Mass. 239; and see also *Pierce v. Emery*, 32 N. H. 484; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698.

And where such consenting mortgagee while in possession made no claim to the property, and did not object to its removal, it cannot be reclaimed by a subsequent assignee of the mortgage. *Bartholomew v. Hamilton*, 105 Mass. 239.

In *Crippen v. Morrison*, supra, it was held that where it was expressly agreed that a steam engine and its appurtenances should continue to be the property of the seller until he should receive a chattel mortgage thereon and a mortgage upon the land, an assignee of a prior mortgage on the realty, with notice of the chattel mortgage on the engine, took subject thereto.

Where property becomes integral part of realty.

Where the property sold is regarded as becoming an integral part of the realty, the



Ohio St. 511, 59 Am. Dec. 634; Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744; Green v. Phillips, 26 Gratt. 752, 21 Am. Rep. 323; Morotock Ins. Co. v. Rodefer Bros. 92 Va. 747, 53 Am. St. Rep. 846, 24 S. E. 303; Haskin Wood Vulcanizing Co. v. Cleveland Ship-Bldg. Co. 94 Va. 439, 26 S. E. 878; Porter v. Pittsburgh Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Shelton v. Ficklin, 32 Gratt. 727.

Mr. William H. White, Jr., also for appellees.

Keller, District Judge, delivered the opinion of the court:

In the argument it was admitted that if the standpipe which was the subject of the

retention of title thereto or the reservation of a lien thereon has been held to be ineffectual to preserve the rights of the seller, as against a prior mortgagee of the realty, —as where iron rails are laid down and become part of a railroad (United States v. New Orleans & O. R. Co. [New Orleans & O. R. Co. v. Mellen] 12 Wall. 362, 20 L. ed. 434); or where bridges are sold to a railroad company (Porter v. Pittsburgh Bessemer Steel Co. 122 U. S. 267, 30 L. ed. 1210, 7 Sup. Ct. Rep. 1206); or where powerhouse machinery is sold to a street railroad company (Phoenix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 757; Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828; Guaranty Trust Co. v. Galveston City R. Co. 46 C. C. A. 305, 107 Fed. 311; Westinghouse Electric Mfg. Co. v. Citizens' Street R. Co. 24 Ky. L. Rep. 334, 68 S. W. 463; Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co. 231 Pa. 129, 80 Atl. 568); nor will registration of the contract of conditional sale prevent this result (Evans v. Kister, 35 C. C. A. 28, 92 Fed. 828, *supra*).

#### English and Canadian doctrine.

The effect of the English and Canadian decisions on the question (other than those made under the civil law) appears to be that, in the absence of some stipulation in the mortgage negating such implication, such as a covenant not to remove any of the fixtures without the mortgagee's consent, a mortgagor in possession has an implied authority to unfix chattels annexed to the premises during the existence of the mortgage, and therefore that he may give the seller of chattels such right; but that any implied license arising from the mortgagee's leaving the mortgagor in possession is determined by the mortgagee's entering and taking possession.

In *Cumberland Union Bkg. Co. v. Maryport Hematite Iron & Steel Co.* [1892] 1 Ch. 415, 61 L. J. Ch. N. S. 227, 66 L. T. N. S. 108, 40 Week. Rep. 280, it was held that where the lessees of a colliery entered

contract between appellants, Whetstone & Company (the general subcontractors) and Peninsula Pure Water Company, became a fixture, so as to become annexed to the freehold, it would pass under the lien of the mortgage by virtue of the "after-acquired property" clause; but it was strenuously insisted that by the terms of the contract it is apparent that no such annexation was contemplated by the parties to that contract. We do not so understand this contract that the subject of it was never to become annexed to the freehold, but rather that there was an attempt to so preserve the status of the subject of the contract as that, in the event of necessity, it might be reclaimed as personal property the title whereof had not been parted with by the appellants. The standpipe was to

into an agreement for the erection of a trade fixture, it being stipulated that, until the purchase price should be fully paid, it should remain the property of the vendors, such vendors were, upon a receiver's (appointed in an action to foreclose a prior mortgage) desiring to give up possession of the colliery, entitled to remove the machine. This decision appears to proceed upon the theory that the claim of the mortgagee was not based so much on the annexation of the fixture to the realty, as on a provision in the mortgage that not only the existing machinery and chattels, but also all the machinery and chattels to be thereafter brought upon the premises, should be included in the security. North, J., referring to such provision, said: "That, in my opinion, was a perfectly good bargain as between the parties to it. But I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them." The passage quoted appears to have given rise to some difficulty; but, taken in connection with the facts involved in the case, is not at variance with the decisions which hold that upon a mortgage in fee of the land, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. See *Hobson v. Gorringer* [1897] 1 Ch. 182, 66 L. J. Ch. N. S. 114, 75 L. T. N. S. 610, 45 Week. Rep. 356, 12 Eng. Rul. Cas. 208; also *Gough v. Wood* [1894] 1 Q. B. 713, 63 L. J. Q. B. N. S. 564, 9 Reports, 509, 70 L. T. N. S. 297, 42 Week. Rep. 469, and *Huddersfield Bkg. Co. v. Henry Lister & Son* [1895] 2 Ch. 273, 64 L. J. Ch. N. S. 523, 12 Reports, 331, 72 L. T. N. S. 703, 43 Week. Rep. 567, where it was said that the *Maryport* Case turned on the view that there was an implied authority given by the mortgagees to unfix chattels annexed to the premises.

In *Gough v. Wood* [1894] 1 Q. B. 713, 63 L. J. Q. B. N. S. 564, 9 Reports, 509, 70 L. T. N. S. 297, 42 Week. Rep. 469, a

be erected "for the use of the Peninsula Pure Water Company," and when erected in accordance with specifications attached to and made a part of the agreement, was to be "accepted by Whetstone & Company, and Peninsula Pure Water Company."

The special master found: That the standpipe in question was erected upon a foundation which is supposed to be 25 feet in diameter and 10 feet in depth, and is attached to this foundation by anchor bolts 10 feet in length and 2 inches in diameter. These anchor bolts are imbedded in the foundation. The standpipe is 18 feet in diameter and 140 feet high above the top

of the foundation. That the standpipe is a part of the original construction work of the system of waterworks intended to be constructed, and an indispensable part of such system, as without such a standpipe it would have been impossible for the water company to have furnished its consumers with water. That it is one of the integral parts of the property which, as a whole, was to constitute the security of the mortgage creditors.

As between the parties to the contract, doubtless the rights reserved to Tippet & Wood would be binding; but as the question here is between the appellants, on the

tenant under a ninety-nine-year lease contracted for heating apparatus, consisting of a boiler and piping, for the carrying on of his business of nurseryman, under a hire-purchase agreement containing a stipulation that, in case of default in payment, the seller might enter and carry away the apparatus. This agreement, not being under seal, did not amount to a grant of land, or an easement, to which any subsequent mortgage would be subject. He thereafter, and before the installation of the apparatus, mortgaged his interest in the property to one who had no notice of the agreement. Shortly afterwards the seller, who had no notice of the mortgage, installed the apparatus; subsequently, there being a default, he entered and retook it, the mortgagor still being in possession. It was held that the mortgagee could not recover damages for the removal. Lindley, L. J., said: "By leaving the mortgagor in possession, the mortgagee impliedly authorized him to carry on his business and to sell and remove the plants, trees, and shrubs which, though fixed to the soil, constituted his stock in trade. This implied authority can hardly be confined to such things, but may fairly be regarded, and I think ought to be regarded, as authorizing the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business, and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing bona fide with mortgagors in possession will be exposed to very unreasonable risks; and honest business with them will be seriously impeded. This implied authority and the fact that the hot-water apparatus was not the property of the mortgagor are the important features of this case, and are, in my opinion, sufficient to protect the defendants from the claim of the plaintiff." Kay, L. J., expressing himself to the same effect, said: "As the boiler and pipes were removed while the mortgagor was in possession and was carrying on, with the assent of the mortgagee, a business for the purposes of which they were fixed, I think his license may be held to extend so far as to permit the removal while that business was being carried on by the mortgagor, and before the mort-

gagee put an end to it by taking possession." The questions whether the vendor could have removed the apparatus if it had been put before the mortgage of the realty, or if the mortgagee had taken possession before removal, were expressly left undecided.

The foregoing case is distinguished in *Ellis v. Glover & Hobson* [1908] 1 K. B. 388, 77 L. J. K. B. N. S. 251, 98 L. T. N. S. 110, in which the mortgagor's covenant not to remove any of the fixtures without the written consent of the mortgagee was held to preclude the implication of a permission to fix and unfix trade fixtures while the mortgagor retained possession; and that therefore in such a case trade fixtures installed under a hire-purchase agreement became subject to a prior mortgage of the realty.

Any implied license to remove a fixture, arising from the mortgagee's leaving the mortgagor in possession, is determined by the mortgagee's entering and taking possession of the land. *Hobson v. Gorringe* [1897] 1 Ch. 182, 66 L. J. Ch. N. S. 114, 75 L. T. N. S. 610, 45 Week. Rep. 356, 12 Eng. Rul. Cas. 208; *Reynolds v. Ashby* [1904] A. C. 466, 1 B. R. C. 653, 73 L. J. K. B. N. S. 946, 20 Times L. R. 766, 53 Week. Rep. 129, 91 L. T. N. S. 607; *Goldie & McC. Co. v. Hewson*, 35 N. B. 349.

In *Thomas v. Inglis*, 7 Ont. Rep. 588, it was held that a conditional vendor of an engine and boiler which had become annexed to realty might enforce his rights against the objection of a prior mortgagee of the realty, and this even though the engine and boiler replaced old ones; but it was found that the security of the mortgage was ample without resorting to the machinery.

In *Oates v. Cameron*, 7 U. C. Q. B. 228, it was held that the seller of an engine so attached to the realty as to become a fixture, retaining a lien thereon for the payment of the price, could not reclaim it as against an existing mortgagee of the realty, in possession.

In connection with the subject under discussion reference may be made to *Seeley v. Caldwell*, 18 Ont. L. Rep. 472, in which it was held that the lessor of machinery which had become so annexed to realty subject to

one side, and the trustee under the mortgage and the bondholders, on the other, it is pertinent to inquire whether there is any reason or principle upon which the interests of these latter parties who were not parties to this contract can be affected by it. There is a line of cases which, with more or less unanimity, holds that where a mortgage exists on real estate, and an accession is subsequently made of property agreed between the vendor and the mortgagor to be treated as personalty, and a reservation of title until paid for agreed upon between vendor and mortgagor-purchaser, such accession, if it can be severed

from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, will be impressed with the same character as between the vendor and the mortgagee as between the vendor and mortgagor; in other words, that it does not become real estate, and may be removed without invading the rights of the mortgagee. Of this class are *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Binkley v. Forkner*, 117 Ind. 185, 3 L.R.A. 33, 19 N. E. 753; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L.R.A. 267, 47 Pac.

a previous mortgage as *prima facie* to constitute it, as between the mortgagor and mortgagee, a fixture, was not entitled to recover it from the mortgagee in possession.

And see also *Cockshutt Plow Co. v. McLoughry*, 2 Sask. L. R. 259, which holds that a windmill, pump, tank, piping, and a sawmill for the operation of which shafting was attached to the windmill, purchased under a contract of conditional sale by one in possession of the premises under a land contract, and affixed thereto by him as a permanent improvement, could not be reclaimed by the seller as against the vendor of the land, who, under a provision contained in the agreement of sale in that behalf, had canceled such sale and resumed possession.

#### Under the civil law.

Although, it is not intended in this note to go into the question as to when property ordinarily of a personal character becomes a fixture upon annexation to the realty, the question under discussion being as to the rights of the parties in regard to property which has concededly, as between the owner of the realty and a purchaser or encumbrancer thereof, become a fixture, the absence of a strict analogy between the common law of "fixtures" and the civil law of "immovables by destination" appears to warrant the inclusion of a number of decisions upon the question whether immobilization by destination takes place where the seller of the chattel retains title thereto until the purchase price shall be fully paid, or resorts to any other of the variant forms of what may be generically characterized as conditional sales or hire-purchase agreements.

Before taking up those cases it may be stated that it has been established by a decision of the supreme court in *Ontario Car & Foundry Co. v. Farwell*, 18 Can. S. C. 1, that although the immobilization of a movable does not operate against its unpaid vendor, the rule applies only between the vendor and the vendee as long as the vendee is in possession of the thing sold, but does not operate against a third party who comes

into possession of an immovable to which are attached movable things which, by law, are immovable *par destination*, nor against a mortgage creditor, even though the buyer remains in possession. This conclusion is based upon certain French decisions and opinions expressed by commentators upon the civil law.

Although the rights of an unpaid vendor have thus become clearly defined where the property has indubitably become immobilized, it has been a much controverted question whether immobilization by destination can take place where the owner of the immovable is not at the same time the owner of the movable.

In *La Banque d'Hochelaga v. Waterous Engine Works Co.* 27 Can. S. C. 406, it was held by two justices that, as between one subrogated to the hypothec and privilege of the vendor in the land, and the conditional vendor of sawmill machinery annexed to the land, such machinery did not become immobilized by destination, upon the ground that, under the provisions of the Quebec Civil Code, movable property does not become immovable by destination unless there is a common ownership of the movable and of the real property with which it is incorporated. Two justices concurred in the result reached, while the fifth, in an extensive dissenting opinion, maintained that the statutory provision in question merely requires that the incorporation be made by the proprietor of the realty; and that the incorporation having been made by the proprietor of the realty with the express consent of the proprietor of the chattels, the effect is the same as where the incorporation is made by the proprietor of both.

In *Leonard v. Willard*, Rap. Jud. Quebec 23 C. S. 482, Lynch, J., although personally of the opinion that movable property, the title to which was reserved by the vendor under a suspensive conditional sale, nevertheless became an immovable by the simple fact of the incorporation made by the proprietor of the immovable, considered himself bound by the judgment in the foregoing case to hold that the property might, even after a sheriff's sale of the immovable, be revindicated by the vendor. E. S. Q.

224, and *Northwestern Mut. L. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, and these cases and some others support this doctrine more or less completely.

Upon the other hand, there are many cases (some of which will be hereinafter referred to) which hold that personal property incorporated into or affixed to real estate in such manner that it would be subject to the lien of an existing mortgage thereon as between the mortgagor and mortgagee will be so subject to the lien of the mortgage, notwithstanding the existence of an agreement between the vendor and the mortgagor that it shall retain its character as personal property, unless the mortgagee be also a party to such agreement. This is what is generally known as the Massachusetts rule, and it has been affirmed by many other courts of last resort, and particularly by the Supreme Court of the United States in several cases hereinafter separately referred to.

We think this latter doctrine announces the correct principle; especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes. In this case the mortgage to the Knickerbocker Trust Company was executed February 1, 1906, and recorded February 16, 1906. The deed from Thomas Harmond and wife to the Peninsula Pure Water Company for the land upon which the standpipe was erected was executed on March 8, 1906, and recorded on March 29, 1906. The contract between appellants, Whetstone & Company, and the Peninsula Pure Water Company, was dated March 9, 1906, but was not really executed until some time after its date, and was not recorded.

Under an after-acquired property clause such as that contained in the mortgage executed to secure the bondholders in the 37 L.R.A. (N.S.)

case at bar, any property acquired by the mortgagor subsequent to the date of execution and delivery of the mortgage, and which is within the general description contained therein, will become as fully subject to the lien of the mortgage in equity as if such property had been owned by the mortgagor at the date of the execution and delivery of the mortgage. *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 109; *Branch v. Jesup*, 106 U. S. 478, 27 L. ed. 279, 1 Sup. Ct. Rep. 495; *Thompson v. White Water Valley R. Co.* 132 U. S. 68, 33 L. ed. 256, 10 Sup. Ct. Rep. 29. As a matter of course, such subsequently acquired real estate comes under the lien of the mortgage subject to such limitations as are imposed upon it when acquired by the mortgagor,—in other words, only such interest passes as passed to the mortgagor,—and hence, had the property conveyed by Thomas Harmond and wife to the Peninsula Pure Water Company been subject to a lien (for purchase money or otherwise) on March 8, 1906, when it was acquired, such lien would have been preserved as against any claims of bondholders or trustee. Of this nature were the facts in the cases of *Wood v. Holly Mfg. Co.* 100 Ala. 326, 46 Am. St. Rep. 65, 13 So. 948, and *Holly Mfg. Co. v. New Chester Water Co.* (C. C.) 48 Fed. 879, cited by appellants. So also if personal property which is not and never becomes a part of the freehold mortgaged is acquired by the mortgagor after the execution and delivery of the mortgage, the interest of the mortgagor may pass under the after-acquired property clause of the mortgage if the general description in that clause will cover it, but it must pass burdened by whatever restrictions were imposed upon it in respect to the mortgagor, because only such title can pass to the trustee as was vested in the mortgagor through whom it passed. This was the situation in *United States v. New Orleans & O. R. Co.* (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 20 L. ed. 434, *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, and *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59, cited by the appellants, and the situation is readily distinguishable from that existing in the case at bar. In the case at bar the structure in issue, having become affixed to a part of the freehold which, at the time it was so affixed, was subject to the lien of the mortgage in equity, thereby became (except as to parties to the contract) a part of the real estate, and, by operation of law, became subject to the mortgage without regard to

any agreement between the mortgagor and the person furnishing or erecting such property or structure.

In *United States v. New Orleans & O. R. Co.* (*New Orleans & O. R. Co. v. Mellen*) 12 Wall. 363, 364, 20 L. ed. 434, 436, cited by appellants, the court draws a clear distinction between the character of the personal property in that case (rolling stock) which never became affixed to the freehold, and property of the character of that in the case at bar, and held that, if the property had been rails or other material which became affixed to and a part of the principal thing mortgaged, the existing mortgage on the real estate would have had priority of lien over any lien reserved for purchase money.

In *Porter v. Pittsburg Bessemer Steel Co.* 122 U. S. 282, 30 L. ed. 1211, 7 Sup. Ct. Rep. 1206, where the contract between the bridge company and the railway company provided that the bridges erected by it should remain the property of the bridge company until they had been fully paid for, and that, in default of payment, the bridge company should have the right to remove the bridges and bridge material, the Supreme Court of the United States said: "The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled in the decisions of this court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham v. Cincinnati, C. & P. R. Co.* 1 Wall. 254, 17 L. ed. 584; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 480, 482, 20 L. ed. 199, 206, 207; *United States v. New Orleans & O. R. Co.* (*New Orleans & O. R. Co. v. Mellen*) 12 Wall. 362, 365, 20 L. ed. 434, 436; *Dillon v. Barnard*, 21 Wall. 430, 440, 22 L. ed. 673, 677; *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. ed. 330, 342."

To the same effect, see *Clary v. Owen*, 15 Gray, 522; *Hunt v. Bay State Iron Co.* 97 Mass. 283; *Thompson v. Vinton*, 121 37 L.R.A. (N.S.)

*Mass.* 139; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327; *Elkstrom v. Hall*, 90 Me. 186, 38 Atl. 106; *McFadden v. Allen*, 134 N. Y. 489, 19 L.R.A. 446, 32 N. E. 21; *Bass Foundry & Mach. Works v. Gallentine*, 99 Ind. 525; *Cunningham v. Cureton*, 96 Ga. 489, 23 S. E. 420; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; *Demby v. Parse*, 53 Ark. 526, 12 L.R.A. 87, 14 S. W. 899; *Anderson v. Creamery Package Mfg. Co.* 8 Idaho, 200, 56 L.R.A. 554, 101 Am. St. Rep. 188, 67 Pac. 493; *Watertown Steam Engine Co. v. Davis*, *Houst. (Del.)* 192. In *Clary v. Owen*, *supra*, what we have called the Massachusetts doctrine is thus tersely expressed: "We think it is not in the power of the mortgagor by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which, as between mortgagor and mortgagee, would become a part of the realty."

In *Hunt v. Bay State Iron Co.* 97 Mass. 283, the court expressed the same view, saying: "Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails when once laid down is determined by the law to be that of real estate. Mortgagees as well as all other parties in interest are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver."

In *Meagher v. Hayes*, 152 Mass. 228, 23 Am. St. Rep. 819, 25 N. E. 105, the same court held that a building put on mortgaged land, and annexed to it in the usual way, notwithstanding an agreement between the owner of the building and the mortgagor that it should remain personal property, with the right of the owner to remove it, became a part of the mortgage security, the mortgagee not being a party to such agreement, and that the purchaser of the land at foreclosure sale became the owner of such building, though he bought with notice of such agreement.

We think the rule as enunciated by all these cases is applicable to the case at bar, and that there was no error in the decree entered by the Circuit Court on the 27th day of January, 1910, overruling the exceptions of the appellants to the report of the special master, filed on the 29th day of September, 1909, and the same is accordingly affirmed, with costs.

## OREGON SUPREME COURT.

DEAN BLANCHARD, Resp't.,  
v.EUREKA PLANING MILL COMPANY  
and  
COLUMBIA RIVER DOOR COMPANY  
et al., App'ts.

(58 Or. 37, 113 Pac. 55.)

**Fixture — conditional sale — existing mortgage.**

The agreement between a seller and purchaser of machinery to be affixed to the realty, that the title shall remain in the seller until the price is paid, is binding on the existing mortgagee of the realty, although the contract is not recorded so as to be effective against subsequent purchasers without notice.

(February 7, 1911.)

**A**PPEAL by defendants Columbia River Door Company et al. from a judgment of the Circuit Court for Columbia County in plaintiff's favor in an action brought to enjoin defendants from removing certain machinery claimed by plaintiff to be a fixture and subject to his real estate mortgage. Reversed.

**Statement by Eakin, Ch. J.:**

On November 7, 1906, the defendant Eureka Planing Mill Company executed and delivered to plaintiff, as security for the repayment of a \$2,500 loan, with interest, a mortgage on the following described property: "Commencing at a point where a line running parallel with and along the north side of Water street, in the town of Rainier would intersect the east boundary line of a certain piece of tide land sold and deeded by Dean Blanchard to F. C. Winchester; thence running northerly along the east boundary line of said piece of tide land to the Columbia river; thence easterly up the Columbia river 60 feet; thence southerly parallel with said northerly line to a point on line with the north side of Water street; thence westerly 60 feet to the place of beginning." Thereafter, in a proceeding to foreclose the mortgage, the usual decree was rendered by the circuit court for Columbia county on July 7, 1908. For the purpose of satisfying the decree, the sheriff of such county duly advertised the premises for sale on August 15, 1908. On November 3, 1908, the defendant Columbia River Door Company entered into a contract in writing with the Eureka Planing Mill Company, by

which the former delivered to the latter certain machinery to be used in connection with the planing mill and to be placed in a building situated upon the property described in the above mortgage, namely, two molders, a surfacer, matcher, and mortiser, together with heads, knives, bits, bolts, etc., for the consideration of \$925, payable in instalments, for which promissory notes were executed. The contract contained the following clause: "Title to the property shall continue to vest in the first party until fully paid for as above provided. In case of default, the first party or its agents may enter upon the premises, and retake the property without process of law, sell the same and apply the proceeds on said notes as a credit thereon." On or about the 10th day of November, 1908, the personal property mentioned in the agreement was delivered to the Eureka Planing Mill Company, and placed in the building, and used therein in connection with the operation of the mill. After the decree of foreclosure, but prior to the sale of the property upon the decree, namely, about August 1, 1908, the defendant Columbia River Door Company entered upon the premises for the purpose of retaking all of the property mentioned in the contract, as therein provided, and removed the same from the building and placed it without the building, awaiting an opportunity to ship it. Defendant Tatum & Bowen, on December 14, 1906, entered into an agreement in writing with the Eureka Planing Mill Company, by which they were to deliver to the mill company one Hoyt planer and mortiser, and one set of matcher heads with ship lap attachments, in furtherance of the mill company's plan to equip the building to be used as a planing mill on the real estate above mentioned. Tatum & Bowen agreed to "deliver to the second party, subject hereto, and upon the full performance hereof, will sell and transfer to the second party, the following personal property: . . . This is to be located by the second party, and to remain until the full performance hereof, in Columbia county, state of Oregon, unless the first party's written consent to removal be first obtained. . . . Title to the property shall continue to vest in the first party until fully paid for, as above provided,"—the price being \$870, payable in instalments. The machinery was established in such building. About August 1, 1908, Tatum & Bowen removed it from the building to the platform outside preparatory to shipping it to Portland. On August 10, 1908, plaintiff brought a suit against the Columbia River Door Company and also one against Tatum & Bowen, to enjoin them from removing the machinery

Note.—For annotation of the question involved in this case, see note to Tippet & Wood v. Barham, ante, 119.  
37 L.R.A. (N.S.)

from the premises, contending that it became a fixture and a part of the real estate covered by the mortgage. Defendants contend that by these contracts the property was intended to and did remain personal property, and the title thereto continued in the vendors, a portion of the purchase price thereof being still unpaid. For the purpose of the trial, the two suits were consolidated under the above title. Plaintiff, by his reply to the answer of the Columbia River Door Company, alleged that the money so loaned by him was to be used in purchasing machinery, among which was that in question here; that the same was to be placed in the mill and made a part thereof, so as to become subject to plaintiff's mortgage; and that he did not at any time have knowledge that the machinery had not been paid for in full, or that defendants claimed to have retained the title thereto. In his reply to the answer of Tatum & Bowen, he alleges that the building was on the premises at the time of the execution of the mortgage, and thereafter the machinery was placed in it, firmly fastened and affixed, namely, bolted, to the building, so as to become a part thereof, and that he had no knowledge of defendants' claim thereto. Upon the trial the lower court made findings in favor of plaintiff, and rendered a decree adjudging that the machinery became a fixture, subject to the mortgage, and enjoined its removal. The defendants Columbia River Door Company and Tatum & Bowen appeal.

**Messrs. R. C. Wright and Coovert & Stapleton**, for appellants:

Where title is retained until fully paid for, with power to remove on default, such property is impressed with the character of a chattel as between the parties, notwithstanding it is affixed to real property.

*Helm v. Gilroy*, 20 Or. 522, 26 Pac. 851; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Schneider v. Lee*, 33 Or. 578, 17 Pac. 269; *Henkle v. Dillon*, 15 Or. 613, 17 Pac. 148.

A real estate mortgage does not take precedence over a subsequent conditional bill of sale of personal property that may be attached to said real estate subsequent to the mortgage, where, under the terms of the conditional bill of sale, title remained in the seller until fully paid for, with power of removal upon default of payment, even though the mortgagee was without knowledge that such transfer of the personalty was conditional.

*Bronson, Fixtures*, 147; *German Sav. & L. Soc. v. Weber*, 16 Wash. 95, 38 L.R.A. 267, 47 Pac. 224; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 3 McCrary, 130, 57 L.R.A. (N.S.)

11 Fed. 1; *Boston Safe Deposit & T. Co. v. Bankers' & M. Teleg. Co.* 36 Fed. 297; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069; *Coleman v. Stearns Mfg. Co.* 38 Mich. 40; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Tibbetts v. Moore*, 23 Cal. 208, 9 Mor. Min. Rep. 348; *Anderson v. Creamery Package Mfg. Co.* 8 Idaho, 200, 56 L.R.A. 554, 101 Am. St. Rep. 188, 67 Pac. 493; *Ellison v. Salem Coal & Min. Co.* 43 Ill. App. 120; *Binkley v. Forkner*, 117 Ind. 176, 3 L.R.A. 33, 19 N. E. 753; *Taylor v. Watkins*, 62 Ind. 511; *North Western Mut. L. Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064; *Pioneer Sav. & L. Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831; *Edwards & B. Lumber Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. Rep. 889, 14 Atl. 279; *Bernheimer v. Adams*, 175 N. Y. 472, 67 N. E. 1080; *Willis v. Munger Improved Cotton Mach. Mfg. Co.* 13 Tex. Civ. App. 677, 36 S. W. 1010; *Paine v. McDowell*, 71 Vt. 28, 41 Atl. 1042; *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237; 19 Cyc. 1052.

**Mr. L. S. Thomas** for respondent.

**Eakin, Ch. J.**, delivered the opinion of the court:

1. The rule that whatever is affixed to the soil becomes a part of the realty has been much relaxed in accordance with trade and modern business requirements. In many instances the personal quality of the chattel is retained, even though there is an appreciable annexation. Whether it shall remain a chattel after it is affixed to the realty depends upon three conditions, annexation, real or constructive, adaptability to the use or purpose of the realty to which it is attached, and the intention of the parties making the annexation to make it a permanent accession to the freehold.

2. As between the vendor and vendee of such personalty, it may, by agreement, be made to retain its personal character, even though affixed to the realty in a manner in which it cannot be removed without injury to the building. Therefore in this case, as between the defendant Eureka Planing Mill Company and defendants Columbia River Door Company and Tatum & Bowen, the title to the property remained in the vendors until full payment of the purchase price, according to the terms of this agreement. *Helm v. Gilroy*, 20 Or. 517, 26 Pac. 851; *Muir v. Jones*, 23 Or. 332, 19 L.R.A. 441, 31 Pac. 646; *Arberson v. Elk Creek Min. Co.* 39 Or. 552, 65 Pac. 978; *Washburn v. In-*

ter-Mountain Min. Co. 56 Or. 578, 109 Pac. 382.

3. But when the chattel is affixed to the realty, the situation is changed as to the rights of a purchaser or an encumbrancer without notice of the terms of the agreement. The condition of the agreement, being unrecorded, is in the nature of a secret lien, which is contrary to the policy of the law, and where the machinery was sold for that purpose and was affixed, it became a fixture. This question is fully discussed and decided in the cases above cited. The query arises here as to plaintiff's rights under the facts disclosed. It appears from the pleadings that this machinery was installed in the building subsequent to the execution of the mortgage. Plaintiff therefore is not a subsequent purchaser for value, and cannot complain of the terms of the sale of the chattel by which the title is retained by the vendor. By the act of 1909 (Laws 1909, p. 237; L. O. L. § 7414), it is now necessary to file notice of sale, but is not applicable to this case.

This question was discussed in *Alberson v. Elk Creek Min. Co.* supra, where the lessee under a contract to purchase had placed fixtures upon the property of the lessor subject to a chattel mortgage. It was there contended that after forfeiture of the lessee's right to purchase, the fixtures became the property of the original owner of the mine, and the court say: "Now, going back to the election to purchase, when that was done, the property became a part of the freehold in the status it had then assumed, the owners paid nothing of value for it, and it is difficult to see how a forfeiture could give them the standing of a purchaser in good faith. We are satisfied that it could have no such effect." The rule in all such cases is that, to preclude the vendor from claiming the chattel under such an agreement, the owner of the realty must have been a purchaser thereof for value subsequent to the annexation of the fixture, and without notice that the vendor retained the title. *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649, *Union Bank & T. Co. v. Fred W. Wolf Co.* 114 Tenn. 255, 108 Am. St. Rep. 903, 86 S. W. 310, to which case there is an exhaustive note in 4 A. & E. Ann. Cas. 1073, where the rule is stated: "That, in the absence of notice, a subsequent purchaser or mortgagee of the land is not bound by an agreement between the owner of the land and one from whom he purchases chattels, that such chattels, though annexed to the realty, shall retain their character as personalty, and that the title to them shall remain in the seller until he has been paid for them." In *Bos-*  
37 L.R.A. (N.S.)

*Safe-Deposit & T. Co. v. Bankers' & M. Teleg. Co.* (C. C.) 36 Fed. 297, referring to telegraph wires stretched upon poles on the railroad right of way, which was subject to mortgage, it is said: "With respect to this class of property, the parties in interest may agree that it shall remain personalty, subject to be removed; and such an agreement determines the real character as against an existing mortgage." To the same effect are *Brand v. McMahon*, 38 N. Y. S. R. 576, 15 N. Y. Supp. 39; *Padgett v. Cleveland*, 33 S. C. 339, 11 S. E. 1069; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537.

In this case plaintiff is not a purchaser for value, or mortgagee of the property subsequent to the annexation of the fixtures, and the title of the defendants thereto is unaffected by the mortgage.

The decree of the lower court will be reversed, and the suit dismissed.

McBride, J., took no part in the decision of this case.

## NEBRASKA SUPREME COURT.

MAGGIE WALLENBURG

v.

MISSOURI PACIFIC RAILWAY COMPANY, Appt.

(86 Neb. 642, 126 N. W. 289.)

**Railroad — pedestrian at crossing — duty to look at most advantageous point.**

1. It is the duty of a pedestrian upon a highway, in approaching a railway crossing, to look and listen for moving trains before attempting to cross the railway; but if he does so, he is not necessarily negligent because he did not look at the most advantageous point, and where, if he had taken heed, he probably would have seen an oncoming train, and avoided injury.

Headnotes by ROOT, J.

*Note. — Duty of traveler approaching railway crossing as to place and direction of observation.*

- I. Care required in selecting place for observation, 136.
- II. Distance, 137.
- III. Looking at the customary place, 138.
- IV. At a place dangerous in itself, 138.
- V. Duty to look more than once.
  - a. In general, 138.
  - b. Circumstances making failure to look again negligence, 139.
  - c. Circumstances under which failure to look again was not negligence as matter of law, 140.



**Trial — inapplicable instructions — duty to give.**

2. Instructions not applicable to the evidence should not be given, although they may state correct abstract principles of law.

**Same — verdict — inconsistent special findings — effect.**

3. Where special findings of a jury can be reconciled with a general verdict and the relevant evidence in the record, the verdict will control.

(Barnes, J., dissents.)

(April 23, 1910.)

**A** PPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought

**VI. Duty where view near track is obstructed.**

- a. In general, 142.
- b. By a passing train, 143.
- c. By smoke from another train, 144.
- d. Duty to go ahead of team to look, 144.

**VII. When looking would have been useless, 145.**

**VIII. Direction for looking.**

- a. In general, 146.
- b. Where greater danger is to be apprehended from one direction, 147.
- c. Where a second train or car follows the first on the same track, 147.

As to the care required of a driver of an automobile at railroad crossings, see *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794, and *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, and the notes appended thereto. Also see *Dickinson v. Erie R. Co.* — N. J. —, post, 150, 81 Atl. 104.

For the effect of a flagman's signal to proceed upon the duty of one approaching a crossing, see *Union P. R. Co. v. Rosewater*, 15 L.R.A.(N.S.) 803, and note.

For fright of a team as an excuse for omission to look and listen at railroad crossings, see *Salles v. Chicago, M. & St. P. R. Co.* 21 L.R.A.(N.S.) 415, and note.

As to the right of one about to cross railroad track to rely upon train schedules, see *Schwartz v. Mineral Range R. Co.* 17 L.R.A.(N.S.) 1253, and note.

**I. Care required in selecting place for observation.**

While ordinary care is all that is required in the selection of the time and place for making observations before going upon a railroad crossing (*Baltimore & O. S. W. R. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869; *Grand Trunk Western R. Co. v. Reynolds*, — Ind. App. —, 90 N. E. 94; *Defrieze v. Illinois C. R. Co.* — Iowa, —, 94 N. W. 505; *Moberly v. Kansas City*, 37 L.R.A.(N.S.)

to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. James W. Orr, B. F. Waggener, and Francis A. Brogan, for appellant: The defendant is not liable, since, if the plaintiff had looked at any time after she was within 37 feet of the crossing, she must have seen and known of the approach of defendant's train in time to have averted the accident complained of.

*Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530, 85 N. W. 561; *Gehring v. Atlantic City R. Co.* 75 N. J. L. 490, 14 L.R.A.(N.S.) 312, 68 Atl. 61; *Philadelphia & R. R. Co. v. Peebles*, 14 C. C. A. 555, 28 U. S. App. 405, 67 Fed. 591; *Louisville & N. R.*

*St. J. & C. B. R. Co.* 98 Mo. 183, 11 S. W. 569; *Gulf, C. & S. F. R. Co. v. Younger*, — Tex. Civ. App. —, 40 S. W. 423), the place selected must be such that the observation will be reasonably effective (*Fitzhugh v. Boston & M. R. Co.* 195 Mass. 202, 80 N. E. 792; *McCanna v. New England R. Co.* 20 R. I. 439, 39 Atl. 891; *Washington Southern R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Stokes v. Southern R. Co.* 104 Va. 817, 52 S. E. 855; *Bates v. San Pedro, L. A. & S. L. R. Co.* — Utah, —, 114 Pac. 527).

Thus, in *Wojochoski v. Central R. Co.* 10 Pa. Super. Ct. 469, it was held to be negligence for a driver after stopping at a place where he could not see, to pass without looking a point with which he was familiar, where he could have seen.

In *Missouri, K. & T. R. Co. v. Jenkins*, 79 Kan. 17, 98 Pac. 208, where plaintiff stood in the rear of his wagon, where he could not see the train until his horses were on the track, when by standing in the front of the wagon he could have seen it in time, it was held that he assumed the additional duty of stopping to look, and was negligent in failing to do so.

In *Turner v. Hannibal & St. J. R. Co.* 74 Mo. 602, a traveler was held to be guilty of contributory negligence where the only place he looked was 20 yards from the track, where there was an obstruction, there being plenty of opportunity for seeing the train before that.

And it was held to be negligence as matter of law for a driver, after looking from a point where he could see but 300 feet of the track, to hurry his team across without again looking, when he could have taken a position giving him a view for half a mile. *Atchison, T. & S. F. R. Co. v. Booth*, 53 Ill. App. 303.

But whether plaintiff, who stopped and listened 79 feet from the track, where the view was obstructed, was negligent in not looking through an opening in the trees 199 feet from the track, was held in *Nash v. New York C. & H. R. R. Co.* 23 N. Y. Week. Dig. 572, 1 N. Y. Supp. 269, to be a question for the jury.

And ordinarily it is for the jury to de-

Co. v. Richards, 100 Ala. 365, 13 So. 944; Chicago, B. & Q. R. Co. v. Lee, 68 Ill. 576; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88; Louisville, N. A. & C. R. Co. v. Stommel, 126 Ind. 35, 25 N. E. 863; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 153; Sala v. Chicago, R. I. & P. R. Co. 85 Iowa, 678, 52 N. W. 664; Brown v. Texas & P. R. Co. 42 La. Ann. 350, 21 Am. St. Rep. 374, 7 So. 682; Union R. Co. v. State, 72 Md. 153, 19 Atl. 449; Grostick v. Detroit, L. & N. R. Co. 90 Mich. 594, 51 N. W. 667; Braudy v. Detroit, G. H. & M. R. Co. 107 Mich. 100, 64 N. W. 1056; Groner v. Delaware & H. Canal Co. 153 Pa. 390, 26 Atl. 7; Gangawer v. Philadelphia & R. R. Co. 168 Pa. 265, 32 Atl. 21; Seamans v. Delaware, L. & W. R. Co. 174 Pa. 421,

34 Atl. 568; Galveston, H. & S. A. R. Co. v. Kutae, 72 Tex. 643, 11 S. W. 127; Bates v. New York C. & H. R. R. Co. 84 Hun, 287, 32 N. Y. Supp. 337; Aiken v. Pennsylvania R. Co. 130 Pa. 380, 17 Am. St. Rep. 775, 18 Atl. 619; Schaefer v. Chicago, M. & St. P. R. Co. 62 Iowa, 624, 17 N. W. 893; Nosler v. Chicago, B. & Q. R. Co. 73 Iowa, 268, 34 N. W. 850; Hinkle v. Richmond & D. R. Co. 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884; Hajsek v. Chicago, B. & Q. R. Co. 5 Neb. (Unof.) 67, 97 N. W. 327.

Messrs. McCoy & Olmsted, for appellee:

It is not negligence *per se*, for a traveler to fail to look and listen, but such fact is some evidence, like other evidence, to go to the jury, to enable it to determine, in

termine whether the traveler selected a proper place for making observation, and otherwise exercised ordinary care for his own safety, in approaching a crossing. Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 156, 62 N. E. 831, affirmed in 93 Ill. App. 483; Lake Shore & M. S. R. Co. v. Anthony, 12 Ind. App. 126, 38 N. E. 831; Nosler v. Chicago, B. & Q. R. Co. 73 Iowa, 268, 34 N. W. 850; Case v. Chicago G. W. R. Co. 147 Iowa, 747, 126 N. W. 1037; Greany v. Long Island R. Co. 101 N. Y. 419, 5 N. E. 425; Wheeling & L. E. R. Co. v. Parker, 29 Ohio C. C. 1; McNeal v. Pittsburgh & W. R. Co. 131 Pa. 184, 18 Atl. 1026; Bare v. Pennsylvania R. Co. 135 Pa. 95, 19 Atl. 935; Ellis v. Lake Shore & M. S. R. Co. 138 Pa. 506, 21 Am. St. Rep. 914, 21 Atl. 140; Urias v. Pennsylvania R. Co. 152 Pa. 326, 25 Atl. 566; McGill v. Pittsburgh & W. R. Co. 152 Pa. 331, 25 Atl. 540; Whitman v. Pennsylvania R. Co. 156 Pa. 176, 27 Atl. 290; Pennsylvania & N. Y. Canal & R. Co. v. Huff, 6 Sadler (Pa.) 60, 8 Atl. 789; Lehigh & W. Coal Co. v. Lear, 6 Sadler (Pa.) 272, 9 Atl. 267.

## II. Distance.

It is not ordinarily possible to affirm the precise number of feet from the crossing at which a traveler must look and listen, the test being ordinary care in selecting the place. Antonian v. Southern P. Co. 9 Cal. App. 718, 100 Pac. 877; Malott v. Hawkins, 159 Ind. 127, 63 N. E. 308; Chicago, I. & L. R. Co. v. Turner, 33 Ind. App. 204, 69 N. E. 484.

Thus, it was held not to be negligence *per se*, where plaintiff stopped, looked, and listened at a point from 4 to 6 rods from the track, and then drove on, looking from right to left, although he might have been able to see the train had he stopped at a nearer point. Renwick v. New York C. R. Co. 36 N. Y. 132.

In Lynch v. Northern P. R. Co. 16 C. C. A. 151, 29 U. S. App. 664, 69 Fed. 86, affirmed without opinion in 176 U. S. 701, 43 L. ed. 1185, 19 Sup. Ct. Rep. 878, where plaintiff looked when 36 feet from the track,

it was held to be for the jury to say if he was negligent in not looking sooner, there being a good view at any point within 200 feet of the track.

In Sprague v. Northern P. R. Co. 40 Mont. 481, 107 Pac. 412, it was held to be for the jury to determine whether plaintiff was negligent, where he stopped and listened from 100 to 300 feet from the crossing, there being an obstruction of view till within 10 or 20 feet from the track, and made every effort to avoid the train as soon as it could be discovered.

But the fact that one does not look for trains at the instant of stepping on the track is held not conclusive of a want of due care, in Plummer v. Eastern R. Co. 73 Me. 591.

In Burns v. Louisville & N. R. Co. 136 Ala. 522, 33 So. 891, it was held to be negligence for a pedestrian to stop so near the track, after passing obstructing cars, that he was struck by the pilot beam of an engine before having time to look in both directions.

However, the traveler must bear in mind that trains move much faster than horses, and not rest content with an observation made at a considerable distance from the crossing. Day v. Boston & M. R. Co. 96 Me. 207, 90 Am. St. Rep. 335, 52 Atl. 771.

Thus, in New York, C. & St. L. R. Co. v. Kistler, 66 Ohio St. 326, 64 N. E. 130, the court says: "The looking should usually be just before going upon the crossing, or so near as to enable the person to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. There should be such looking before going upon the track, even though there was a looking farther away when no train was seen approaching."

And in some cases it is held to be contributory negligence to look only at so great a distance that a train could cover the track observable before the traveler could cross. Central R. Co. v. Foshee, 125 Ala. 212, 27 So. 1006; Louisville & N. R. Co. v. Calvert,

the light of all the circumstances, whether the traveler's conduct was careful or negligent.

*Nilson v. Chicago*, B. & Q. R. Co. 84 Neb. 594, 121 N. W. 1128; *Henry v. Cleveland*, C. C. & St. L. R. Co. 236 Ill. 219, 86 N. E. 231; *Winn v. Cleveland*, C. C. & St. L. R. Co. 239 Ill. 132, 87 N. E. 954.

A traveler is not obliged to be constantly looking and listening up to the moment of crossing, as that would require the traveler to assume that the company might be negligent, and require him to look out for and avoid the company's possible negligence, and would exact of the traveler more than reasonable or ordinary care, and in fact make him an insurer of his own safety.

*Campbell v. Chicago* G. W. R. Co. 108

— Ala. —, 55 So. 812; *Winter v. New York & L. B. R. Co.* 66 N. J. L. 677, 50 Atl. 339.

### III. Looking at the customary place.

A traveler cannot be declared negligent as matter of law in the selection of a place to look for trains at crossings, where the place selected is the one customarily used by the public for that purpose, as such use is an indication that it is a place which would be selected by a person of ordinary care. *Cookson v. Pittsburg & W. R. Co.* 179 Pa. 184, 36 Atl. 194; *Muckinhaupt v. Erie R. Co.* 196 Pa. 213, 46 Atl. 364; *Newman v. Delaware, L. & W. R. Co.* 203 Pa. 530, 53 Atl. 545; *Messinger v. Pennsylvania R. Co.* 215 Pa. 497, 114 Am. St. Rep. 970, 64 Atl. 682; *Calhoun v. Pennsylvania R. Co.* 223 Pa. 298, 72 Atl. 556; *Toban v. Lehigh & W. Coal Co.* 24 Pa. Super. Ct. 475; *Fry v. Pennsylvania R. Co.* 24 Pa. Super. Ct. 147; *Erie R. Co. v. Hanna*, 103 C. C. 227, 179 Fed. 669; *Baltimore & O. R. Co. v. Coppock*, 103 C. C. 86, 179 Fed. 682, affirming 174 Fed. 264.

### IV. At a place dangerous in itself.

It is not a traveler's duty to stop, look, and listen at a point so near the track as to be dangerous in itself. *Chesapeake & O. R. Co. v. Steele*, 29 C. C. A. 81, 54 U. S. App. 550, 84 Fed. 93; *Cookson v. Pittsburg & W. R. Co.* 179 Pa. 184, 36 Atl. 194.

Thus, in *St. Louis, I. M. & S. R. Co. v. Hitt*, 76 Ark. 227, 88 S. W. 908, 990, it was held that it was not negligence as matter of law for a traveler to fail to look and listen after passing an obstruction, where the team would be on the track before the driver passed the obstruction sufficiently for him to see the train.

And, conversely, it was held in *Killian v. Chicago, M. & St. P. R. Co.* 86 Mo. App. 473, where plaintiff drove out on the first track, and then stopped to look and listen for trains, when he was injured by his horse becoming frightened by an engine run in front of it without signals, that he was

*Minn.* 104, 28 L.R.A.(N.S.) 346, 133 Am. St. Rep. 417, 121 N. W. 429; *Bonnell v. Delaware, L. & W. R. Co.* 39 N. J. L. 189.

The law does not fix any specific point or place from which the traveler must look. *Elliott, Railroads*, § 1166 (a).

Looking negatives the idea of negligence, and it is therefore for the jury to determine whether the looking was from a reasonable distance and place.

*Calhoun v. Pennsylvania R. Co.* 223 Pa. 298, 72 Atl. 556; *Antonian v. Southern P. R. Co.* 9 Cal. App. 718, 100 Pac. 877.

Where the plaintiff, when within a reasonable distance from the track, and having a view for a reasonable distance both ways of the track, both looks and listens for a train, but, because of a curve in the

negligent in not stopping and listening before going upon the first track.

### V. Duty to look more than once.

#### a. In general.

It may be stated as a general rule that the duty to look before crossing a railway track is not discharged by looking only once, but that it is a continuing duty. *Louisville & N. R. Co. v. Calvert*, — Ala. —, 55 So. 812; *Moberly v. Kansas City, St. J. & C. B. R. Co.* 98 Mo. 183, 11 S. W. 569; *Kelsay v. Missouri P. R. Co.* 129 Mo. 362, 30 S. W. 339; *Gangawer v. Philadelphia & R. R. Co.* 168 Pa. 265, 32 Atl. 21; *Muckinhaupt v. Erie R. Co.* 196 Pa. 213, 46 Atl. 364; *Walsh v. Pennsylvania R. Co.* 222 Pa. 162, 70 Atl. 1088; *Southern R. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Chesapeake & O. R. Co. v. Hall*, 109 Va. 296, 63 S. E. 1007.

And this duty must be observed until danger is past (*St. Louis & S. F. R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *St. Louis, I. M. & S. R. Co. v. Johnson*, 74 Ark. 372, 86 S. W. 282; *Griffie v. St. Louis, I. M. & S. R. Co.* 80 Ark. 186, 96 S. W. 750; *Chicago, R. I. & P. R. Co. v. Batsel*, — Ark. —, 140 S. W. 726), unless there are exculpatory circumstances (*St. Louis, I. M. & S. R. Co. v. Hitt*, 76 Ark. 224, 88 S. W. 911; *Stevens v. Missouri P. R. Co.* 67 Mo. App. 356).

But in *Defrieze v. Illinois C. R. Co.* — Iowa, —, 94 N. W. 505, it is held that a traveler on the highway is not required to keep a constant lookout for trains.

In *Winey v. Chicago, M. & St. P. R. Co.* 92 Iowa, 622, 61 N. W. 218, an instruction that it is his duty to look and listen at all points in his passage is held to be erroneous and ground for reversal.

And in *Kain v. New York & N. E. R. Co.* 20 N. Y. S. R. 891, 3 N. Y. Supp. 311, it was held that the court could not say as matter of law that a driver was negligent in failing to see a train which could have been seen at 200 feet until it was within 100 feet, it requiring but three seconds for it to travel the intervening distance.

track or other obstructions, neither sees nor hears one, the train being out of sight and hearing, and, believing and judging it safe to go on across the track, proceeds to do so, still listening, but using his eyes in walking to keep from stumbling or falling, and the train suddenly at high and unlawful speed comes around the curve or from behind the obstructions, unknown to him, and, without blowing the whistle or ringing the bell or checking its speed, approaches the crossing and runs him down, the question of contributory negligence is for the jury.

Farrell v. Erie R. Co. 70 C. C. A. 396, 138 Fed. 28; St. Louis & S. F. R. Co. v. Barker, 172 U. S. 643, 43 L. ed. 1181, 19 Sup. Ct. Rep. 879, affirmed in 23 C. C. A.

***b. Circumstances making failure to look again negligence.***

In the following cases it was held to be contributory negligence to fail to look again where the only observation made by the traveler was at a point:

—about 12 feet from the track, after which he gave his attention to a switch engine for a minute or two. Pyle v. Clark, 75 Fed. 644, affirmed in 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744;

—where the view was partially obstructed, plaintiff being on foot and there being an unobstructed view 7 feet from the track. Chicago G. W. R. Co. v. Smith, 73 C. C. A. 164, 141 Fed. 930;

—15 feet from the track, after which he walked diagonally across it. Horan v. Boston & M. R. Co. 106 C. C. A. 105, 183 Fed. 559;

—125 paces from the track, where observation just before going on the track would have been effective. Central R. Co. v. Barnett, 151 Ala. 407, 44 So. 392;

—30 feet from the track, where he had a view for 800 feet, he being on foot. Green v. Los Angeles Terminal R. Co. 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 724, reversing on rehearing, — Cal. —, 69 Pac. 694;

—100 feet from the crossing, the view along the track increasing as he approached it, although he relied on the absence of the flagman as an indication of safety. Smith v. Wabash R. Co. 141 Ind. 92, 40 N. E. 270;

—before passing an intervening obstruction on foot. Cleveland, C. C. & St. L. R. Co. v. Lynn, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017;

—270 feet and again at 60 feet from the track, where the view was obstructed, when at 25 feet a view of the track for 700 feet could have been had. Aurelius v. Lake Erie & W. R. Co. 19 Ind. App. 584, 49 N. E. 857;

—200 feet from the track. Baltimore & O. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250;

—300 feet from the track, where the view was obstructed, and a good view could have been obtained at 80 feet. Schaefer v. 37 L.R.A. (N.S.)

475, 40 U. S. App. 739, 77 Fed. 810; Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; Chicago, B. & Q. R. Co. v. Pollard, 53 Neb. 730, 74 N. W. 331; Kafka v. Union Stock Yards Co. 78 Neb. 140, 110 N. W. 672; Chicago, St. P. M. & O. R. Co. v. Lagerkrans, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2; Union P. R. Co. v. Elliott, 54 Neb. 299, 74 N. W. 627; Zelenka v. Union Stock Yards Co. 82 Neb. 511, 118 N. W. 103; Chicago, B. & Q. R. Co. v. Harley, 74 Neb. 462, 104 N. W. 862; Williams v. Chicago, B. & Q. R. Co. 78 Neb. 695, 14 L.R.A. (N.S.) 1224, 111 N. W. 596, 113 N. W. 791; Hartman v. Chicago G. W. R. Co. 132 Iowa, 582, 110

Chicago, M. & St. P. R. Co. 62 Iowa, 624, 17 N. W. 893;

—111 feet from the track, when, by looking at any point within 100 feet of the track, she could have seen the train. Atchison, T. & S. R. Co. v. Holland, 60 Kan. 209, 56 Pac. 6;

—35 feet from the track, where he had a view of 465 feet, though his view thereafter was not obstructed for 500 to 1,000 feet. Chicago, R. I. & P. R. Co. v. Wheelbarger, 75 Kan. 811, 88 Pac. 531;

—about 130 feet from the crossing, where he could see but 250 feet of the track, and after the regular car passed he drove on without again looking, and was struck by an extra car. Hatcher v. McDermott, 103 Md. 78, 63 Atl. 214;

—100 feet from the track, after which she drove past an obstruction without again looking, though an opportunity was afforded 20 feet from the track. Shufelt v. Flint & P. M. R. Co. 96 Mich. 327, 55 N. W. 1013;

—93 feet from a diagonal crossing, after which he drove on, telling his fifteen-year-old daughter to keep watch, and was struck by a train which could have been seen in time to be avoided, had either been looking. Tucker v. Chicago & G. T. R. Co. 122 Mich. 149, 80 N. W. 984;

—50 to 100 feet from the crossing, except such as was made by a companion through the small glass in the back of the buggy top from which he could see but a few rods of the track. Proper v. Lake Shore & M. S. R. Co. 136 Mich. 352, 99 N. W. 283;

—just before starting to cross, when he had a clear view for 500 feet, after which he started to cross diagonally, walking about 50 feet before he was struck. Sandberg v. St. Paul & D. R. Co. 80 Minn. 442, 83 N. W. 411;

—40 feet from the track, the court saying: "With the view east obstructed by houses, shrubbery, embankments, and box cars, it was his imperative duty to vigilantly observe from every available point the approaching train." Jobe v. Memphis & C. R. Co. 71 Miss. 734, 15 So. 129;

N. W. 10; *Rader v. Louisville & N. R. Co.* 126 Ky. 722, 104 S. W. 774; *Louisville & N. R. Co. v. McNary*, 128 Ky. 408, 17 L.R.A.(N.S.) 224, 129 Am. St. Rep. 308, 108 S. W. 898; *Stearns v. Boston & M. R. Co.* 75 N. H. 40, 71 Atl. 21; *Boyd v. St. Louis Southwestern R. Co.* 101 Tex. 411, 108 S. W. 813; *Gorson v. Atlantic City R. Co.* 77 N. J. L. 264, 72 Atl. 1; *Cleveland, C. C. & St. L. R. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; *Nichols v. Chicago, B. & Q. R. Co.* 44 Colo. 501, 98 Pac. 808; *Stewart v. Omaha & C. B. Street R. Co.* 83 Neb. 97, 118 N. W. 1106; *Ward v. Marshalltown Light, P. & R. Co.* 132 Iowa, 578, 108 N. W. 323; *Detroit United R. Co. v. Nichols*, 91 C. C. A. 257, 165 Fed. 289; *Baltimore & O. S. W. R. Co. v. Ros-*

*borough*, 40 Ind. App. 14, 80 N. E. 869; *Serano v. New York C. & H. R. R. Co.* 188 N. Y. 156, 117 Am. St. Rep. 833, 80 N. E. 1025; *Zwack v. New York, L. E. & W. R. Co.* 160 N. Y. 362, 54 N. E. 785; *Fitzhugh v. Boston & M. R. Co.* 195 Mass. 202, 80 N. E. 792; *Hicks v. New York, N. H. & H. R. Co.* 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721; *Brusseau v. New York, N. H. & H. R. Co.* 187 Mass. 84, 72 N. E. 348; *Evensen v. Lexington & B. Street R. Co.* 187 Mass. 77, 72 N. E. 355; *Clark v. Boston & M. R. Co.* 164 Mass. 434, 41 N. E. 666; *Chicago, R. I. & P. R. Co. v. Hansen*, 78 Kan. 278, 96 Pac. 668; *Chicago, R. I. & P. R. Co. v. Clinkenbeard*, 77 Kan. 481, 94 Pac. 1001; *Johnson v. Southern P. R. Co.* 154 Cal. 285, 97 Pac. 520; *Martin v. South-*

—200 feet from the track, where obstructions prevented a view, there being a clear view of the track at any point within 25 feet thereof. *Kelsay v. Missouri P. R. Co.* 129 Mo. 362, 30 S. W. 339;

—at some distance from the track, there being a nearer point where the train could easily have been seen in time to avoid it. *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180;

—20 feet from the track, though he was delayed on the track by his bicycle becoming stuck. *Gehring v. Atlantic City R. Co.* 75 N. J. L. 490, 14 L.R.A.(N.S.) 312, 68 Atl. 61;

—15 feet from the track, where he could see about 40 yards, after which he started to cross on foot. *Moore v. New York C. & H. R. R. Co.* 42 N. Y. S. R. 489, 17 N. Y. Supp. 205;

—200 feet from the track, where he could have seen the train from one half to one mile, although he might have seen it at a point 60 feet from the crossing. *Cleveland, C. C. & I. R. Co. v. Elliott*, 28 Ohio St. 340;

—where she could see only 41 feet of the track, she being on foot. *Derk v. Northern C. R. Co.* 164 Pa. 243, 30 Atl. 231;

—290 feet from the crossing, although the track could be seen for 500 feet. *Plummer v. New York & H. R. R. Co.* 168 Pa. 62, 31 Atl. 887;

—330 feet away, though between there and the track there were several places where the train could have been seen. *Gleim v. Harris*, 181 Pa. 387, 37 Atl. 515;

—300 feet from the track, though the view was unobstructed for 3,675 feet. *Born v. Philadelphia & R. R. Co.* 198 Pa. 409, 48 Atl. 263;

—125 feet from the track, though his wagon curtains were down, and it was raining hard, and his view was obstructed till he reached the tracks. *Knox v. Philadelphia & R. R. Co.* 202 Pa. 504, 52 Atl. 90;

—before passing an obstruction, if there was a safe place to look after passing it. *Newman v. Delaware, L. & W. R. Co.* 203 Pa. 530, 53 Atl. 345;

—20 feet from the track, where there

was a view for 300 feet, except to watch safety gates at a crossing about 200 feet distant. *Harvey v. Erie R. Co.* 210 Pa. 95, 59 Atl. 691.

—105 feet from the track, where the view was obstructed, views for 500 feet at 30 feet, and for 1,000 feet at 10 feet, being obtainable. *Dehoff v. Northern C. R. Co.* 229 Pa. 192, 78 Atl. 104;

—at a point where he could not see along the track, though it could be seen for 1 mile at any point within 16 feet from the track. *McClure v. Lake Shore & M. S. R. Co.* 41 Pa. Super. Ct. 227;

—25 feet from the track, where he could see about 100 yards, when the reason for his stopping was that he thought he heard a train bell. *Nagle v. Pennsylvania R. Co.* 43 Pa. Super. Ct. 400;

—before he passed behind a building obstructing his view where he remained about one minute before driving on. *Nelson v. Duluth, S. S. & A. R. Co.* 88 Wis. 392, 60 N. W. 703;

—200 to 300 feet, though the track could be seen for nearly a mile at any point between there and the crossing. *Lenz v. Whitcomb*, 96 Wis. 310, 71 N. W. 377;

—88 feet from a diagonal crossing, where he could see but 725 feet, though a view for over 2,000 feet could have been had at a point nearer the track. *Schneider v. Chicago, M. & St. P. R. Co.* 99 Wis. 378, 75 N. W. 169;

—78 feet from the track, though the track could be seen for over 750 feet all the way. *Smith v. Chicago, M. & St. P. R. Co.* 137 Wis. 97, 118 N. W. 638.

*c. Circumstances under which failure to look again was not negligence as matter of law.*

However, it has been held that it was for the jury to determine whether a traveler was negligent in failing to look again after making observation at a point:

—50 yards from the track, a view of which was, partially at least, obstructed by cars and buildings to within 10 or 12

ern P. Co. 150 Cal. 124, 88 Pac. 703; Kunz v. Oregon R. & Nav. Co. 51 Or. 206, 94 Pac. 504; Dougherty v. Chicago, M. & St. P. R. Co. 20 S. D. 46, 104 N. W. 672; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Henry v. Cleveland, C. C. & St. L. R. Co. 236 Ill. 219, 86 N. E. 231; Chicago & A. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739; Howard v. Baltimore & O. R. Co. 219 Pa. 358, 68 Atl. 848; Ellis v. Lake Shore & M. S. R. Co. 138 Pa. 506, 21 Am. St. Rep. 914, 21 Atl. 140; Rogers v. West Jersey & Seashore R. Co. 75 N. J. L. 568, 68 Atl. 148; Louisville & N. R. Co. v. Gilmore, — Ky. —, 114 S. W. 752; Cincinnati, N. O. & T. P. R. Co. v. Champ, 31 Ky. L. Rep. 1054, 104 S. W. 988; Cherry v. Louisiana & A. R. Co.

121 La. 471, 17 L.R.A.(N.S.) 505, 126 Am. St. Rep. 323, 46 So. 596; Inman v. North Carolina R. Co. 149 N. C. 123, 62 S. E. 878; Holmes v. Missouri P. R. Co. 207 Mo. 149, 105 S. W. 624; O'Connor v. Missouri P. R. Co. 94 Mo. 150, 4 Am. St. Rep. 364, 7 S. W. 106; Dunham v. Wabash R. Co. 126 Mo. App. 643, 105 S. W. 21; Welch v. Michigan, C. R. Co. 147 Mich. 207, 110 N. W. 1069; Garran v. Michigan C. R. Co. 144 Mich. 26, 107 N. W. 284; Corbs v. Michigan C. R. Co. 144 Mich. 73, 107 N. W. 892; Kujawa v. Chicago, M. & St. P. R. Co. 135 Wis. 562, 116 N. W. 249; Weaver v. Columbus, S. & H. R. Co. 76 Ohio St. 164, 81 N. E. 180; Wheeling & L. E. R. Co. v. Parker, 29 Ohio C. C. 1; Moore v. Chicago, St. P. & K. C. R. Co.

feet from the main track. Louisville & N. R. Co. v. Summers, 60 C. C. A. 487, 125 Fed. 719;

—25 or 30 feet, from which he had a view for 200 feet. St. Louis, I. M. & S. R. Co. v. Dillard, 78 Ark. 520, 94 S. W. 617;

—10 or 12 feet from the track, where he had a view for 685 feet from the track, after which he started across on foot. Nichols v. Chicago, B. & Q. R. Co. 44 Colo. 501, 98 Pac. 808;

—13 feet from the track, he being on foot. Baltimore & O. S. W. R. Co. v. Rosborough, 40 Ind. App. 14, 80 N. E. 869;

—60 feet from the track, where the view was obstructed. Cincinnati, I. St. L. & C. R. Co. v. Grames, 136 Ind. 39, 34 N. E. 714;

—60 feet from the crossing, although he could have seen the train when 40 feet from the track. Moore v. Chicago, St. P. & K. C. R. Co. 102 Iowa, 595, 71 N. W. 569;

—75 to 200 yards from the track where he could see the track for a mile. Wright v. Cincinnati, N. O. & T. P. R. Co. 94 Ky. 114, 21 S. W. 581;

—110 feet from the crossing, when she saw a standing freight train 150 feet away, which was thereafter put in motion without signals, and struck her as she was walking across the track. Louisville & N. R. Co. v. Cooper, 23 Ky. L. Rep. 1658, 65 S. W. 795;

—8 or 10 feet from the track, there being a blinding rain and electric storm at the time, and he being on foot. Louisville & N. R. Co. v. Ueltschi, 29 Ky. L. Rep. 1136, 97 S. W. 14;

—3 feet from the tracks, he being on foot. Giddings v. Chicago, R. I. & P. R. Co. 133 Mo. App. 610, 113 S. W. 678;

—112 feet from the track, where he had a view of the track for 30 rods. Ernest v. Hudson River R. Co. 39 N. Y. 61, 100 Am. Dec. 405;

—20 feet from the near track, where he waited for a train on the far track to pass, his view of the near track, on which he was struck, being partly obstructed. Carr v. New York C. & H. R. R. Co. 60 N. Y. 632;

—60 feet from the track, where there was 37 L.R.A.(N.S.)

a view of only 125 feet, after which he started to walk rapidly across. Austin v. Long Island R. Co. 69 Hun, 67, 23 N. Y. Supp. 193, affirmed in 140 N. Y. 639, 35 N. E. 892;

—Immediately after passing a pile of stone close to the track, where he could see the track about 105 feet. Manley v. New York C. & H. R. R. Co. 39 App. Div. 144, 57 N. Y. Supp. 182;

—25 feet from the track, where he could see 1,500 feet, he having a heavy load of ice. Frederick v. Fonda, J. & G. R. Co. 52 App. Div. 603, 65 N. Y. Supp. 440;

—near the track, where he waited for an engine to pass, he being struck by the engine, which was suddenly reversed. Berkery v. Erie R. Co. 55 App. Div. 489, 67 N. Y. Supp. 189, affirmed in 172 N. Y. 636, 65 N. E. 1113;

—30 feet from the track, where he could see for 500 feet. Cromley v. Pennsylvania R. Co. 208 Pa. 445, 57 Atl. 832;

—20 to 25 feet from the tracks, where there were cars on a siding obstructing the view. Confer v. Pennsylvania R. Co. 209 Pa. 425, 58 Atl. 811;

—at the safety gates, which were up. Bracken v. Pennsylvania R. Co. 32 Pa. Super. Ct. 22;

—at some distance from the track, her view being somewhat obstructed as she approached the track on foot. Hammon v. San Antonio & A. P. R. Co. 13 Tex. Civ. App. 633, 35 S. W. 872;

—50 feet from the crossing, where he had a view for 950 feet. Galveston, H. & S. A. R. Co. v. Huebner, — Tex. Civ. App. —, 42 S. W. 1021;

—150 yards from the track, after which he drove on at a trot to the right of way fence, where he slackened his speed and drove upon the crossing, the view being obstructed by weeds, and the train running without a headlight. Galveston, H. & S. A. R. Co. v. Eaton, — Tex. Civ. App. —, 44 S. W. 562.

—quite near the track, though there was a closer point where he could probably have seen the train in time to avoid it. Misener v. Wabash R. Co. 12 Ont. L. Rep. 71.

102 Iowa, 595, 71 N. W. 569; *Coffee v. Pere Marquette R. Co.* 139 Mich. 378, 102 N. W. 953; *Greenawaldt v. Lake Shore & M. S. R. Co.* 165 Ind. 219, 74 N. E. 1081.

**Root, J.**, delivered the opinion of the court:

This is an action for personal injuries caused by the defendant's alleged negligence. The plaintiff prevailed, and the defendant appeals.

1. The defendant introduced no evidence, but insists that the testimony conclusively establishes plaintiff's contributory negligence. The plaintiff was injured by one of the defendant's locomotives at the intersection of its railway and Thirtieth street in a sparsely settled neighborhood in the

outskirts of the city of Omaha. The street upon which the accident occurred is paved, runs north and south, and is frequently used by the public. The railway approaches the street on a curve from the southwest, and is about 18 inches above the surface of the street at said intersection. South of the track, and west of the street, earth has been taken from the defendant's right of way to construct an embankment, so that the railway grade is elevated from 6 to 10 feet above the bottom of the borrow pits a short distance west of the street, and thence southwest several hundred feet. At the time the plaintiff was injured, August 14, 1905, there were weeds from 6 to 9 feet in height in the borrow pits, and smaller weeds upon the sides of the fill

#### **VI. Duty where view near track is obstructed.**

##### **a. In general.**

Where obstructions prevented a view of the track by a traveler until near the track, it was held to be negligence for him to fail to look after passing them, under the following circumstances:

—where there was a space of 50 feet between the cars obstructing the view and the track on which a driver was struck. *Hines v. Texas & P. R. Co.* 55 C. C. A. 654, 119 Fed. 157;

—when a good view was afforded 20 to 25 feet from the track. *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801, 3 A. & E. Ann. Cas. 700;

—where the obstruction was 17 feet from the track. *Haines v. Illinois C. R. Co.* 41 Iowa, 227;

—where a pedestrian went upon the track after looking at an obstructed point, without looking after passing the obstruction. *Hinken v. Iowa C. R. Co.* 97 Iowa, 603, 66 N. W. 882;

—where a view of the track was obstructed for a considerable distance. *Beech v. Missouri, K. & T. R. Co.* 85 Kan. 90, 116 Pac. 213;

—though he had stopped to look and listen at a point where the view was obstructed, when a sufficient view was obtainable nearer the track. *Brehm v. Philadelphia, B. & W. R. Co.* 114 Md. 302, 79 Atl. 592;

—though he could have seen the train at a point 40 feet from the track. *Lundergan v. New York C. & H. R. R. Co.* 203 Mass. 460, 89 N. E. 625;

—where the obstruction was 6 feet from the track, he being on foot. *Clark v. Northern P. R. Co.* 47 Minn. 380, 50 N. W. 365; *Daily v. Richmond & D. R. Co.* 106 N. C. 301, 11 S. E. 320;

—where the obstruction was 22 feet from the track, and plaintiff was driving a team that would stand beside trains without fright. *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. W. 24; 37 L.R.A. (N.S.)

—where deceased could have seen the train after passing obstructions in time to avoid it. *Hayden v. Missouri, K. & T. R. Co.* 124 Mo. 566, 28 S. W. 74;

—where the obstructions were 8 feet from the track, plaintiff being on foot. *Rodrian v. New York, N. H. & H. R. Co.* 125 N. Y. 526, 26 N. E. 741;

—where the obstruction was 60 feet from the track. *Conkling v. Erie R. Co.* 63 N. J. L. 338, 43 Atl. 666;

—where a pedestrian passed between cars obstructing his view of the next track. *Kippleman v. Philadelphia & R. R. Co.* 190 Pa. 333, 42 Atl. 697.

And in *Boston & M. R. Co. v. McGrath*, 102 C. C. A. 507, 179 Fed. 323, it is held that the presence of a freight car on a side track, obstructing the view of a pedestrian, is an admonition to him of the necessity for looking after passing it, rather than an excuse for failure to do so.

However, the circumstances may be such that failure to look after passing obstructions will not be held to be negligence as matter of law, and the question of contributory negligence where the traveler failed so to look was left to the jury in the following cases:

—*White v. Southern P. Co.* 122 Cal. 305, 54 Pac. 956, where plaintiff failed to look and listen after passing obstructing cars on one side of the track, another driver having crossed from the other way just before him;

—*Mackay v. New York C. R. Co.* 35 N. Y. 75, where plaintiff's view was obstructed till the horses were on the track, and he drove carefully to that point, and then did all he could to avoid the collision;

—*Meddaugh v. New York, O. & W. R. Co.* 67 N. Y. S. R. 540, 33 N. Y. Supp. 793, affirmed in 153 N. Y. 659, 47 N. E. 1105, where intestate was sitting on the rear end of his wagon, and drove onto the crossing, where obstructions prevented him from seeing the train until the horses were on the track;

—*Kenney v. Hannibal & St. J. R. Co.* 105 Mo. 270, 15 S. W. 983, 16 S. W. 837, where plaintiff stopped twice within 120 feet, and

to within 4 feet of the railway, but this vegetation could in no manner obscure a pedestrian's view of a train approaching from the southwest. There are trees within the defendant's right of way west of the highway, so that 50 feet south of the railway an oncoming train may be seen a distance of only 200 feet southwest of the crossing; 36 feet south of the south rail a train is visible 400 feet distant, and 7 feet south of the track a train may be noticed 575 feet to the southwest. The railway grade is about 1 per cent, and declines towards the east and northeast. On the west side of the street a wooden sidewalk 82 feet in length extends to within 16 feet of defendant's main line, and the intervening footway is a cinder walk. At the

time the plaintiff was injured she weighed 218 pounds, enjoyed good eyesight and hearing, and was in no manner distracted or confused. The train with which she collided consisted of a locomotive and from seven to fourteen freight cars. It was coasting downgrade at an estimated speed of from 35 to 50 miles an hour, and no warning by way of sounding a whistle, ringing a bell, or otherwise, was given of its approach.

The sixth instruction given by the court on its own motion reflects the testimony concerning plaintiff's conduct, and will advise the reader concerning the law of the case upon this phase of the suit: "You are instructed that the plaintiff has alleged in her petition, and has given evidence tending to show, that on the morning of the

listened, the view being obstructed till within a few feet of the track;

—Missouri, K. & T. R. Co. v. Oslin, 26 Tex. Civ. App. 370, 63 S. W. 1039, where pedestrians looked and listened near the track, but either failed to look after their view was unobstructed, or looked only so far as a train running at a proper speed would be likely to reach the crossing before they could pass.

#### *b. By a passing train.*

In the following cases, it was held to be negligence for a traveler after waiting for a train to pass on the near track, to start across behind it without waiting until it had passed far enough to enable him to see a train approaching from the opposite direction on another track. *Stowell v. Erie R. Co.* 39 C. C. A. 145, 98 Fed. 520; *Delaware & H. Co. v. Flannely*, — L.R.A. (N.S.) —, 97 C. C. A. 112, 172 Fed. 328; *Fletcher v. Fitchburg R. Co.* 149 Mass. 127, 3 L.R.A. 743, 21 N. E. 302; *Marty v. Chicago, St. P. M. & O. R. Co.* 38 Minn. 108, 35 N. W. 670; *Purdy v. New York C. & H. R. R. Co.* 87 Hun, 97, 33 N. Y. Supp. 952; *Hamm v. New York C. & H. R. R. Co.* 18 Jones & S. 78; *Morrow v. North Carolina R. Co.* 146 N. C. 14, 59 S. E. 158; *Kraus v. Pennsylvania R. Co.* 139 Pa. 272, 20 Atl. 993; *Hughes v. Delaware & H. Canal Co.* 176 Pa. 254, 35 Atl. 190.

Or for him to go behind a passing train without looking for danger on another track. *Gumm v. Kansas City Belt R. Co.* 141 Mo. App. 306, 125 S. W. 796; *Daniels v. Staten Island Rapid Transit Co.* 125 N. Y. 407, 26 N. E. 466.

Such action is not ordinary care, especially where trains were to be expected at any moment. *Benson v. Chicago & N. W. R. Co.* 41 Ill. App. 227.

And it was held to be negligence as matter of law for a bicyclist to circle to avoid getting off, and then start across immediately behind the passing train, there being a space of 7 feet in which he could have seen the coming train, in *Robertson v. Pennsylvania R. Co.* 180 Pa. 43, 57 Am. St. Rep. 620, 36 Atl. 403.

37 L.R.A. (N.S.)

But it is not necessary to wait long enough for the passing train to get far enough so that it no longer obstructs the view. *Boyden v. Fitchburg R. Co.* 72 Vt. 89, 47 Atl. 409.

And under the following circumstances, the question of contributory negligence was held to be for the jury:

—where a pedestrian, after looking along the track 1,300 feet, waited for a train to pass on the far track, and, after looking along the near track, which he could see for only 100 feet because of the passing train being on a sharp curve, started to cross, when he was struck by a train coming from that direction at an unlawful speed. *Farrell v. Erie R. Co.* 70 C. C. A. 396, 138 Fed. 28;

—where plaintiff started across a side track behind a train which had just passed on the main track, without looking along the side track. *Bryson v. Southern R. Co.* 3 Ga. App. 407, 59 S. E. 1124;

—where a pedestrian passed behind a train, and was struck by one coming from the opposite direction at an unlawful speed. *Wabash R. Co. v. Smith*, 162 Ill. 583, 44 N. E. 856;

—where plaintiff looked along the tracks, where he could see 1,200 feet, as he was waiting for a train to pass on a nearer track, and then crossed behind it and was struck by a train backing from the opposite direction. *Newbacher v. Indianapolis Union R. Co.* 134 Ind. 25, 33 N. E. 798;

—where plaintiff waited till the train had passed 266 feet from the crossing. *Puff v. Lehigh Valley R. Co.* 71 Hun, 577, 24 N. Y. Supp. 1068;

—where deceased started to drive across, it not appearing definitely how far the train had passed, and there being no flagman in view, though there had been one there previously when deceased had crossed. *Wilbur v. Delaware, L. & W. R. Co.* 85 Hun, 155, 32 N. Y. Supp. 479;

—where plaintiff waited and looked till she could see about 300 feet along the farther track, she being delayed by tripping and falling on the track. *Philadelphia & R. R. Co. v. Carr*, 99 Pa. 505;



accident in question, and just prior to its occurrence, she was walking north on the sidewalk on the west side of Thirtieth street, proceeding in the direction of the railway in question; that at a point on said sidewalk from 35 to 37 feet south of the center of defendant's track on said crossing, she looked and listened for approaching trains on defendant's road, but neither saw nor heard any. You are likewise instructed that the undisputed evidence, as well as the admissions of counsel for both parties in open court, establishes conclusively the following facts: (a) That at the point last above stated, where plaintiff claims she looked and listened for approaching trains, the same being from 35 to 37 feet south of the center of defendant's

track, plaintiff had a clear, unobstructed view of defendant's track to the southwestward for a distance of 400 feet. (b) That the clear, unobstructed view of defendant's track in the direction named increased in proportion as the plaintiff proceeded northward, and that at a point 3 or 4 feet south of defendant's track, as it entered upon said crossing, there was a clear and unobstructed view of defendant's track to the southwestward 600 feet. (c) That plaintiff did not look again for approaching trains after the occasion above referred to (at a point from 35 to 37 feet south of defendant's track), but proceeded north, until she had stepped upon, or was about to step upon, defendant's track at said crossing, when she collided with, or was

—where the driver permitted the train to pass 240 feet or more before starting to cross. *Wolfe v. Pennsylvania R. Co.* 22 Pa. Super. Ct. 335;

—where pedestrians started across after a freight train cleared the track, and were struck by an engine backing without lights or signals. *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860.

#### *c. By smoke from another train.*

It is negligence *per se* to attempt to cross tracks hidden by the smoke from a passing train, without waiting for a clear view. *Heaney v. Long Island R. Co.* 112 N. Y. 122, 19 N. E. 422; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574, 27 Atl. 1064; *Lortz v. New York C. & H. R. R. Co.* 83 Hun, 271, 31 N. Y. Supp. 1033; *Hovenden v. Pennsylvania R. Co.* 180 Pa. 244, 36 Atl. 731.

But where under similar circumstances there was a conflict in the evidence as to the extent to which the view was actually obstructed by the smoke, the question of contributory negligence was held to be for the jury. *McNamara v. New York C. & H. R. R. Co.* 136 N. Y. 650, 32 N. E. 765.

#### *d. Duty to go ahead of team to look.*

The Pennsylvania courts have promulgated a rule that if the view of the track is obstructed, a traveler should get down from his vehicle and go forward to a point where he can see. *Pennsylvania R. Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753; *Central R. Co. v. Feller*, 84 Pa. 226; *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238; *Kinter v. Pennsylvania R. Co.* 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276; *Man-kewicz v. Lehigh Valley R. Co.* 214 Pa. 386, 63 Atl. 604; *Bistider v. Lehigh Valley R. Co.* 224 Pa. 615, 73 Atl. 940; *Keller v. Philadelphia & R. R. Co.* 35 Pa. Super. Ct. 488.

This rule, however, does not meet with much favor outside of Pennsylvania, it being generally held that no such duty is imposed upon the traveler. *Georgia P. R. Co. v. Lee*, 92 Ala. 262, 9 So. 230; *Louis-37 L.R.A.(N.S.)*

*ville & N. R. Co. v. Bryant*, 141 Ala. 292, 37 So. 370; *Vance v. Atchison, T. & S. F. R. Co.* 9 Cal. App. 20, 98 Pac. 41; *Chicago, I. & L. R. Co. v. Turner*, 33 Ind. App. 264, 69 N. E. 484; *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 236; *Kelly v. Chicago & A. R. Co.* 88 Mo. 534; *Huckshold v. St. Louis, I. M. & S. R. Co.* 90 Mo. 548, 2 S. W. 794; *Hinkle v. Richmond & D. R. Co.* 109 N. C. 472, 26 Am. St. Rep. 581, 13 S. E. 884. Such precaution being extraordinary care, which is not required. *Kelly v. St. Paul, M. & M. R. Co.* 29 Minn. 1, 11 N. W. 67; *Davis v. New York C. & H. R. R. Co.* 47 N. Y. 400; *Duffy v. Chicago & N. W. R. Co.* 32 Wis. 269.

Even in Pennsylvania the rule is enforced only when a view could not be had in any other way. *Ellis v. Lake Shore & M. S. R. Co.* 138 Pa. 506, 21 Am. St. Rep. 914, 21 Atl. 140.

And so where plaintiff had a view of the track for a short distance at least, the question whether he should have gone ahead was held to be for the jury, in *Newton v. Pittsburgh & L. E. R. Co.* 18 Pa. Super. Ct. 18.

And it was also left to the jury where a driver stopped at the usual and ordinary place for observation by persons using the highway, the court saying: "To hold that in every instance and without exception a traveler must leave his team standing, however unprotected, on the highway, and walk ahead of it to look along the track before entering upon it, would be more likely to produce accidents in many instances than to prevent them." *Tressler v. Baltimore & O. R. Co.* 40 Pa. Super. Ct. 224.

And in *Pennsylvania R. Co. v. Ackerman*, 74 Pa. 265, it was held that the duty to go ahead of the horses did not apply where such a position would in itself have been dangerous, and probably would have resulted in the death of plaintiff as well as his horses.

Some cases in other states than Pennsylvania recognize that the circumstances may be such that ordinary prudence would require a traveler to go ahead of his team to

struck by, defendant's engine attached to a freight train coming from the south-westward, and was injured. And it is now for you to say, under these admitted facts and all the other evidence in the case and these instructions, whether or not plaintiff was guilty of contributory negligence as the same has been above defined to you. To aid you in determining this question, you are also at liberty to take into consideration the situation of the crossing, the general surroundings and conditions in the immediate vicinity of the same and southwestward along and adjacent to defendant's track, as disclosed by the evidence, the manner in and the speed with which the trains of defendant were accustomed to being run or operated at and

near that point, if such appears from the evidence, and all other attendant facts and circumstances bearing on the question, as shown by the evidence, including, in your consideration, the knowledge or lack of knowledge of said plaintiff as to these matters. And in this connection you are further instructed that, on the one hand, plaintiff was bound to know that a railroad crossing is a dangerous place, and that she should approach it accordingly, having in view such dangers as a person of ordinary prudence would have reason to apprehend; and that, on the other hand, she was not required to anticipate, in view of the public character of the crossing in question, that an approaching train of the defendant would proceed at an unusual or

look for trains, but that whether the conditions demand this precaution is a question for the jury. *St. Louis & S. F. R. Co. v. Barker*, 23 C. C. A. 475, 40 U. S. App. 739, 77 Fed. 810, affirmed without opinion in 172 U. S. 643, 43 L. ed. 1181, 10 Sup. Ct. Rep. 879; *Chicago & B. Q. R. Co. v. Reith*, 65 Ill. App. 461; *Pittsburgh, C. C. & St. L. R. Co. v. Terrell*, — Ind. —, — L.R.A.(N.S.) —, 95 N. E. 1109; *Dolan v. Delaware & H. Canal Co.* 71 N. Y. 285; *Kelsey v. Staten Island Rapid Transit R. Co.* 78 Hun, 208, 28 N. Y. Supp. 974; *Bennett v. Grand Trunk R. Co.* 7 Ont. App. Rep. 470.

Thus, it may be his duty to go ahead where he could neither see nor hear an approaching train. *Chicago & E. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040; *Lang v. Missouri P. R. Co.* 115 Mo. App. 489, 91 S. W. 1012.

But mere inability to hear the ordinary noises of a train is not sufficient to require such precaution, if signals are required or ordinarily given at that place, and could have been heard if given. *Alexander v. Richmond & D. R. Co.* 112 N. C. 720, 16 S. E. 896; *Mitchell v. St. Louis & S. F. R. Co.* 122 Mo. App. 50, 97 S. W. 552; *Elliott v. Chicago & A. R. Co.* 105 Mo. App. 523, 80 S. W. 270; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150, 33 N. W. 161.

In *Cincinnati, N. O. & T. P. R. Co. v. Farra*, 13 C. C. A. 602, 31 U. S. App. 306, 66 Fed. 496, it is held that while there may be circumstances requiring a driver to go ahead of the team to look, to constitute ordinary care, it was not negligence for plaintiff to fail to do so where the view was obstructed for 400 feet, and she drove carefully, listening for trains, and knew that none were due at that time, and she was encumbered with a sleeping baby and another small child.

In *Brehm v. Philadelphia, B. & W. R. Co.* 114 Md. 302, 79 Atl. 592, where the view at a dangerous crossing was obstructed, the court says that a prudent driver might have suggested that one of those with him get out and look up and down the track, 3; L.R.A.(N.S.)

but does not decide that failure to do so was contributory negligence.

And in *Hook v. Missouri P. R. Co.* 162 Mo. 569, 63 S. W. 360, the court was divided as to whether the traveler should have left his wagon and gone ahead to look at a crossing where obstructions prevented a view from the seat, before reaching a dangerous position.

#### VII. When looking would have been useless.

A traveler is "not guilty of contributory negligence in failing to look for trains when to look would be useless:

—as where obstructions prevented seeing the train till it was too late. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Vance v. Atchison, T. & S. F. R. Co.* 9 Cal. App. 20, 98 Pac. 41; *Allen v. Boston & M. R. Co.* 197 Mass. 298, 83 N. E. 863 (*dictum*); *McGuire v. Hudson River R. Co.* 2 Daly, 76; *Cranston v. New York C. & H. R. R. Co.* 39 Hun, 308; *Leonard v. New York C. & H. R. R. Co.* 10 Jones & S. 225; *Norfolk & W. R. Co. v. Burge*, 84 Va. 63, 4 S. E. 21;

—or where the engine striking deceased was being run without lights on a dark night, at a place where it could not be heard. *Smedis v. Brooklyn & R. B. R. Co.* 88 N. Y. 13;

—or where the engine was backing without light or signal on a dark foggy morning. *Pruey v. New York C. & H. R. R. Co.* 41 App. Div. 158, 58 N. Y. Supp. 797, affirmed without opinion in 166 N. Y. 616, 59 N. E. 1129;

—or where an engine was backed at night without lights a short distance behind another train going in the same direction on the same track. *Fejdowski v. Delaware & H. Canal Co.* 168 N. Y. 500, 61 N. E. 888;

—or where the train causing the injury was running 60 miles an hour, and came from behind a freight train which prevented its being seen;

—or where it appeared that the train was not within view when plaintiff was at

dangerous rate of speed at that point, and that it would not give such warning of its approach by sounding of whistle or ringing of bell as the law required. Having, then, in view of the foregoing conditions and the evidence, probably a fair test to the solution of the point in question is: Estimating the distance at which the track seemed to be clear when plaintiff claimed to have observed the same as above stated, the time it would take a train to travel that distance, proceeding at a reasonable rate of speed, considering the nature of the locality, and the time it would require the plaintiff to cross the track in safety, proceeding northward from the point from which she observed defendant's track as above stated, would a person of ordinary

care and prudence, under the same circumstances, have considered it safe to cross, without again looking for approaching trains? In other words, was her act in this respect, in view of all of the conditions, facts, and circumstances in the case, as shown by the evidence, such as ordinarily would have been taken by a prudent person? If it was, then it might fairly be said that the plaintiff was not guilty of contributory negligence; but if you should find, from a preponderance of the evidence, that it was not, and that such act directly contributed to the accident in question, then it might fairly be said that plaintiff was guilty of contributory negligence, and, in that event, she cannot recover in this action."

Cobbey's Anno. Stat. 1909, §§ 10,579 et

the point where it was claimed he should have looked. *Hendrickson v. Great Northern R. Co.* 52 Minn. 340, 54 N. W. 189.

### VIII. Direction for looking.

#### a. In general.

A large number of cases lay down the general rule, or make a general statement, to the effect that a traveler approaching a railroad crossing is bound to look both ways, or "up and down the track," or "every direction in which the tracks run," examples of which are: *St. Louis & S. F. R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *Illinois C. R. Co. v. Goddard*, 72 Ill. 567; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Thornton v. Cleveland, C. C. & St. L. R. Co.* 131 Ind. 492, 31 N. E. 185; *Guta v. Lake Shore & M. S. R. Co.* 81 Mich. 291, 45 N. W. 821; *Gorton v. Erie R. Co.* 45 N. Y. 660; *Haight v. New York C. R. Co.* 7 Lans. 11; *Kunz v. Oregon R. & N. Co.* 51 Or. 191, 93 Pac. 141, 94 Pac. 504. No attempt, however, has been made to include all such cases, for the reason that such statements are mere variants of the general rule that it is the duty of a traveler on a highway to look for trains upon approaching a railway crossing. For other cases of this nature, see 33 Cyc. 1009.

There are cases, however, where because of circumstances, such as facts which it is contended excuse the failure to look in one direction, the question of direction for looking becomes important.

Thus, in *Duane v. Chicago & N. W. R. Co.* 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. 394, it was held that a driver was not guilty of contributory negligence where he drove onto the track after a train had just passed on the main track, without looking in that direction, and was struck by it as it was reversed and run back over the crossing.

In *Weber v. New York C. & H. R. R. Co.* 58 N. Y. 451, it was held not to be negligence as matter of law for plaintiff to fail to look up in the sky, over cars obstruct-

ing his view, and see a lantern in the hands of a man standing upon the approaching train.

In *Louisville, N. A. & C. R. Co. v. Patchen*, 167 Ill. 204, 613, 47 N. E. 368, 48 N. E. 828, where deceased drove onto the track with a high load of lumber, while walking beside it, so it cut off his view one way, the question of contributory negligence was held to be for the jury.

But in *Schwartz v. Mineral Range R. Co.* 153 Mich. 40, 17 L.R.A. (N.S.) 1253, 116 N. W. 540, under almost identical facts, the traveler was held to have been guilty of contributory negligence.

In *Stackus v. New York C. & H. R. R. Co.* 7 Hun, 559, plaintiff was held to be guilty of contributory negligence where, after looking both ways 20 rods from the crossing, where he could see only 50 rods to the east, he drove onto the track looking only west thereafter.

And in *Mann v. Belt R. & Stock Yard Co.* 128 Ind. 138, 26 N. E. 819, the same conclusion was reached where plaintiff, who was struck by a train from the east, looked east when 250 feet away, and thereafter looked only west, where there were some obstructions, there being a clear view of the east track for half a mile at a point 100 feet from the crossing.

But where obstructions prevent a view until close to the track, the mere fact that the traveler looks in one direction first, and it is too late to avoid injury when he turns to look the other way, when by looking the other way first he would have avoided the injury, is not sufficient to charge him with contributory negligence, as the direction in which he should look first, and the frequency with which he should change the direction of his observation, depend upon circumstances, and are for the jury to determine. *Choctaw, O. & G. R. Co. v. Baskins*, 78 Ark. 355, 93 S. W. 757; *Haupt v. New York C. & H. R. R. Co.* 20 Misc. 291, 45 N. Y. Supp. 666; *Lewis v. New York, L. E. & W. R. Co.* 1 Silv. Sup. Ct. 393, 5 N. Y. Supp. 313; *Young v. New York, L. E. & W. R. Co.* 107 N. Y. 500, 14 N. E. 434.

seq. commands a railway company to give notice of the approach of its trains to public crossings by sounding a whistle or ringing a bell commencing at least 80 rods from the highway, and continuing the warning until the train shall have crossed the road or street. Failure to give this warning does not in itself establish the carrier's negligence, but may be evidence tending to prove that fact. The proof in this case justified a finding that defendant was negligent in failing to give the highway warning, and that such negligence was the proximate cause of plaintiff's injury.

**b. Where greater danger is to be apprehended from one direction.**

In *St. Louis, I. M. & S. R. Co. v. Dillard*, 78 Ark. 520, 94 S. W. 617, and *St. Louis, I. M. & S. R. Co. v. Tomlinson*, 78 Ark. 251, 94 S. W. 613, it is held that while it is the duty of a traveler to look both ways, nevertheless where greater danger is reasonably to be expected from one direction than the other, he is justified in paying most attention to that direction.

In *Greenawaldt v. Lake Shore & M. S. R. Co.* 165 Ind. 219, 74 N. E. 1081, where plaintiff, in driving west toward an acute-angle crossing, looked east once for a distance of 1,500 feet, the west-bound track being occupied with a standing train, and then devoted her attention to her frightened horse, and to the westward, where there was danger of an east-bound train, and was struck by a west-bound train running on the east-bound track, contrary to a custom by which trains were run west on the south track, and east on the north track, the question whether she used ordinary prudence was held to be for the jury.

And in *Toledo, St. L. & K. C. R. Co. v. Cline*, 31 Ill. App. 563, reversed on other points in 135 Ill. 41, 25 N. E. 846, where plaintiff looked one way when about 100 yards from the crossing, and then gave his attention to the other direction, from which a train was due, it was held that he was not negligent as matter of law.

However, in *Bates v. San Pedro, L. A. & S. L. R. Co.* — *Utah*, —, 114 Pac. 527; *Nixon v. Chicago, R. I. & P. R. Co.* 84 Iowa, 331, 51 N. W. 157; *Hartman v. Harris*, 182 Pa. 172, 37 Atl. 942; and *Cincinnati, H. & I. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37, it was held that the duty of a traveler to look both ways was not excused by the fact that a train was due from the direction toward which he did look.

In *Jones v. Barnard*, 63 Mo. App. 501, where plaintiff drove from behind obstructions about 30 feet from the track, and looked only one way, thinking that danger was to be expected from that direction if any, he was held to be guilty of contributory negligence.

And in *Cleveland, C. C. & St. L. R. Co. v. Lynn*, — Ind. —, 95 N. E. 577, the court 37 L.R.A. (N.S.)

The next inquiry concerns the plaintiff's negligence. Contributory negligence is but an inference to be deduced from primary facts. Individual minds frequently differ radically in drawing the conclusion of negligence from admitted or established facts, and the judgment of a layman not infrequently is as sound as the logic of a judge upon the subject. The questions of negligence and contributory negligence are therefore as likely to be wisely solved by a jury as by a court, and ordinarily should be committed to the tribunal provided by law for ascertaining litigated facts. In

held that it was not contributory negligence for a pedestrian to fail to keep a constant lookout in the direction toward which his view was obstructed, as it was his duty to look both ways, although the view the other way was unobstructed.

**c. Where a second train or car follows the first on the same track.**

The fact that a train has just passed seems to be regarded by the courts as some excuse, at least, for a traveler who fails to look in the direction from which it came, for in the following cases it was held to be for the jury to determine if failure to look in both directions under such circumstances was contributory negligence on the part of one who was struck by another train or detached cars following closely after the first on the same track: *McGhee v. White*, 13 C. C. A. 608, 31 U. S. App. 366, 66 Fed. 502; *Grand Rapids & I. R. Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183; *Baker v. Kansas City, Ft. S. & M. R. Co.* 122 Mo. 533, 26 S. W. 20; *Suiter v. New York L. E. & W. R. Co.* 7 N. Y. S. R. 687; *Fejdowski v. Delaware & H. Canal Co.* 12 App. Div. 589, 43 N. Y. Supp. 84; *Gray v. Pennsylvania R. Co.* 172 Pa. 383, 33 Atl. 697; *Williamsport & N. B. R. Co. v. Weiss*, 2 Walk. (Pa.) 217; *International & G. N. R. Co. v. Sein*, 11 Tex. Civ. App. 386, 33 S. W. 558; *International & G. N. R. Co. v. Knight*, — Tex. Civ. App. —, 52 S. W. 640; *Ferguson v. Wisconsin C. R. Co.* 63 Wis. 145, 23 N. W. 123.

However, where a pedestrian started to cross the track some little time after an engine had passed, and the view of detached cars approaching was clear had he looked, he was held to be guilty of contributory negligence, in *Schlimgen v. Chicago, M. & St. P. R. Co.* 90 Wis. 186, 62 N. W. 1045, distinguishing *Ferguson v. Wisconsin C. R. Co.* 63 Wis. 145, 23 N. W. 123.

And one who proceeded to cross behind a passing engine without looking in the direction from whence it came, and was killed by cars following, making a flying switch, was held to be guilty of contributory negligence. *Ormsbee v. Boston & P. R. Corp.* 14 R. I. 102, 51 Am. Rep. 354.

R. L. S.

the instant case the primary facts upon the issue of plaintiff's contributory negligence are undisputed, and the rule to be applied is well settled in Nebraska. If, from those facts, different minds may honestly conclude that plaintiff was guilty of negligence which proximately contributed to her injury, or that she was free therefrom, the jury, and not the court, should draw the inference and find the secondary fact. *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *American Waterworks Co. v. Dougherty*, 37 Neb. 373, 55 N. W. 1051; *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37, 58 N. W. 535; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730, 74 N. W. 331; *Schwanenfeldt v. Chicago, B. & Q. R. Co.* 80 Neb. 790, 115 N. W. 285. The defendant argues that the plaintiff had a clear view of the railway track many feet west of the crossing; that if she had looked westward at any time before stepping upon the track, she would have seen the train, and is guilty of contributory negligence because she did not look at a time when her sense of sight would have been an effective means to warn her of her peril. Decisions in point to sustain the proposition have been cited, but they do not appeal to us as sound. The rule seems harsh, and practically compels the individual to insure his own safety.

In *Omaha, N. & B. H. R. Co. v. O'Donnell*, 22 Neb. 475, 35 N. W. 235, we held that ordinarily the question of contributory negligence in cases like the one at bar is for the jury. In that case, if the injured traveler had looked subsequent to his first and second observations, and while yet in a place of safety, he could have seen the approaching train; but we held that his default did not, as a matter of law, convict him of contributory negligence.

In *Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599, we held that it is the duty of a traveler upon the public highway to look and listen while advancing towards a railway crossing, and if he fails to do so, he will be guilty of negligence barring a recovery, even though the carrier was negligent in operating the train with which he collided. In that case the man in control of a team drove onto a railway crossing without looking or listening, and had not looked or listened while traveling 40 rods just before coming to said crossing.

In *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, 76 N. W. 901, the plaintiff, a section hand, had been injured by a locomotive following a gravel train; he stepped off the railway and down an embankment; before returning to work, and while at the foot of the grade, he looked in the direction from whence the passing train had come, but

could not see the approaching engine because of an intervening wing fence; thereafter he did not look, although he had been warned by his superior to do so, before stepping onto the track, and we held that he was guilty of contributory negligence as a matter of law. The case is reported on a second appeal in 61 Neb. 530, 85 N. W. 561, and a statement in the first paragraph of the syllabus might, if considered apart from the facts disclosed in the opinion, lead an indifferent observer astray. It must be remembered that Yost had violated a positive order of his employer made to secure the servant's safety. It is competent for a railway company to make a rule of that nature to govern the conduct of its employees, but it has no such control over the public. The power to compel a pedestrian to take so extreme a precaution under all circumstances is vested in the legislature, and it has not spoken upon this subject. The court did not hold, nor intend to hold, in the Yost Case that all pedestrians, without regard to surrounding circumstances, must, just before stepping onto a railway, look for trains, or in default thereof be convicted of contributory negligence as a matter of law. The facts in the Yost Case clearly distinguish it from the case at bar and all other crossing cases reported in this jurisdiction. It does not rule the instant case, and should not be considered as authority in suits between a railway company and persons not in its employ.

At the time the first appeal in the Yost Case was determined, the opinion in *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730, 74 N. W. 331, was on file, and no attempt was made to repudiate the principles of law announced in the Pollard Case. The facts in that case are that Pollard was driving along the highway and over a railway crossing: his attention was challenged by a pillar of smoke to the east, which he thought indicated the presence of a train; turning from a consideration of the smoke just as his wagon was upon the crossing, he observed a train approaching from the opposite direction. It was held that the jury should say whether he was negligent or not. Mr. Chief Justice Harrison, speaking for the court, said: "It was not for the trial court, and is not for this court to determine and say as a matter of law at just what exact point in the plaintiff's approach to the railroad, he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose. The question was, Did he, under his surroundings and all the circumstances, observe the care which ordinarily would have been taken by a prudent person?"

The plaintiff had crossed defendant's railway at Thirtieth street several times before the accident. She testifies that she was accustomed when traveling from the south to stop about 35 feet from the track and look southwest for trains; that at times she had waited for trains to pass before attempting to cross, and in her judgment an observation made at said point would advise her of an approaching train so that she could protect herself; that on the day she was injured, after looking east and west at her usual point of observation, she heard no sounds to indicate an oncoming train; thought it was safe to cross, and continued to listen for and to think about the train, but was giving attention to her walking; she was heavy, and it behooved her to notice the path she was traveling. Mrs. Wallenburg insists that she did not hear or see the defendant's train until it collided with her. The evidence is uncontradicted that the defendant's train was being operated at a rapid and an unusual rate of speed, and that the highway warning was not given as it approached the crossing in question. Mrs. Wallenburg had traveled about half way between the southern line of the defendant's right of way and its track, at the time she last looked for a train, and it does not seem to us, as a matter of law, that she should be charged with the duty of anticipating that the defendant would negligently operate its train without warning the public by sounding the locomotive whistle or ringing the bell. The law does not arbitrarily and invariably fix the distance at which the plaintiff should have commenced to look and listen, so long as she did so at a sufficient distance to enable her to discover the approach of a train and avoid injury by the exercise of reasonable and ordinary care, and whether she did exercise that care under the circumstances of this case is a question for the jury, and not for this court to determine. *Schwanenfeldt v. Chicago, B. & Q. R. Co.* 80 Neb. 790, 115 N. W. 285; *Moore v. Chicago, St. P. & K. C. R. Co.* 102 Iowa, 595, 71 N. W. 569; *Nichols v. Chicago, B. & Q. R. Co.* 44 Colo. 501, 98 Pac. 808; *Boyd v. St. Louis Southwestern R. Co.* 101 Tex. 411, 108 S. W. 813; *Farrell v. Erie R. Co.* 70 C. C. A. 396, 138 Fed. 28, 29; *Oldenburg v. New York C. & H. R. R. Co.* 124 N. Y. 414, 419, 26 N. E. 1021; *Greany v. Long Island R. Co.* 101 N. Y. 419, 5 N. E. 425; *Bonnell v. Delaware, L. & W. R. Co.* 39 N. J. L. 189. While we might not have found the facts as did the jury, the trial court properly submitted the issues to the triers of fact, and in our opinion there is sufficient evidence to uphold the verdict.

37 L.R.A. (N.S.)

2. Instruction numbered 4, requested by defendant, was properly refused. The first proposition of law therein stated will apply to some cases, but not the instant one, and the closing paragraph is a command that the jury shall find for defendant. Instruction numbered 5, requested by defendant, does not correctly state the law. In so far as defendant complains because the jury were not told in so many words that a pedestrian in approaching a railway crossing should look each way for trains, it may be said that the court in the fifth paragraph of its charge said: "It was likewise the duty of the plaintiff before going upon the track of defendant, to look and listen for the approach of an engine or train, and to observe such reasonable precaution before attempting to cross the track as an ordinarily prudent man, under the same or like circumstances, would have observed." There is nothing in the record tending to prove that plaintiff looked to the east, and not to the west, but the proof is that she looked in the direction of the approaching train, so that the failure of the court to use the word "each," or its equivalent, in its instructions, did not prejudice defendant. Instruction numbered 8, requested by defendant, was properly refused; it is not applicable to the evidence. Instruction numbered 11, requested by defendant, may be correct as an abstract principle of law, but, in the light of the evidence adduced, was unnecessary. The evidence does not tend to support the last clear chance doctrine, and the court's instructions did not present any phase of that theory to the jury, hence it was proper to refuse the instruction last referred to. Instruction numbered 13, requested by defendant, purports to state the evidence in some particulars; it is not entirely accurate, is argumentative, and was properly refused. Instruction numbered 16, requested by defendant, states a rule of law in conflict with that announced in *Chicago, B. & Q. R. Co. v. Pollard*, supra, and invades the province of the jury. The special findings do not control the general verdict. The situation in this case upon the point considered is very much like the one created in *Kafka v. Union Stock Yards Co.* 78 Neb. 140, 110 N. W. 672.

3. The recovery is moderate, the nature and extent of plaintiff's injuries being considered. There is no suggestion in the brief that errors were committed in admitting or rejecting evidence, and the charge to the jury is fair and dispassionate.

The judgment of the District Court therefore is affirmed.

**Barnes, J., dissenting:**

I am unable to concur in the majority opinion in this case, for the reason that, to my mind, the undisputed facts show such gross contributory negligence on the part of the plaintiff as should prevent a recovery. The effect of this opinion is to overrule *Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Guthrie v. Missouri P. R. Co.* 51 Neb. 746, 71 N. W. 722; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730, 74 N. W. 331; *Brady v. Chicago, St. P. M. & O. R. Co.* 59 Neb. 233, 80 N. W. 809; and many other cases. By our judgment we make a railroad company an absolute insurer of the safety of pedestrians at its grade crossings.

I am of opinion that we should hold in this case, that the plaintiff's conduct in not looking or listening for the approach of the defendant's train for the distance of 35 feet while approaching the crossing where the accident occurred, and by deliberately stepping onto the railroad track in front of the oncoming train, and at the instant it reached the crossing, where there was an unobstructed view of the track in the direction from which the train approached of from 400 to 500 feet, should be held to be contributory negligence, as a matter of law.

The judgment of the trial court should be reversed, and the cause dismissed.

Petition for rehearing denied September 26, 1910.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

JOEL DICKINSON, Plff. in Err.,  
v.

ERIE RAILROAD COMPANY.

(— N. J. —, 81 Atl. 104.)

### Railroad — crossing accident — automobile — duty.

1. Where the view of a driver of an automobile approaching a railroad grade crossing was obstructed by permanent obstructions, so that he could not see the train approach—

Headnotes by TRENCHARD, J.

**Note.**—For the care required of the driver of an automobile at railroad crossings, see *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794, and note; *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, and subsequent cases.

The general question of the duty of a traveler approaching railway crossings as to place and direction of observation is discussed in a note appended to *Wallenburg v. Missouri P. R. Co.* ante, 135. 37 L.R.A.(N.S.)

ing on the west-bound track until the front wheels of his automobile were on the east-bound track, and it appeared that, upon reaching the top of a hill 200 feet distant from the crossing, he turned off power and proceeded by force of gravity, noiselessly, at a speed of 4 miles an hour, constantly looking and listening, but hearing no signals, and it further appeared that there were no transient noises nor temporary obstructions to the view, he was not guilty of contributory negligence as a matter of law in not stopping before his view became effective.

### Same — mistake of judgment — effect.

2. Where a traveler upon a highway, without any fault on his part, is placed in a position of imminent peril at a railroad crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence in failing to give proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances; it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care.

### Trial — contributory negligence — jury.

3. Where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff in doubt, the determination of the question must be submitted to the jury.

(Gummere, Ch. J., and Parker, J., dissent.)

(September, 14, 1911.)

**ERROR** to the Supreme Court to review a judgment of nonsuit in an action brought to recover damages for personal injuries to plaintiff and for the destruction of his automobile, which were alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. Herbert Clark Gilson, for plaintiff in error:

Where the view is interfered with by obstructions, until a person is almost on the tracks or in the act of crossing, the question whether he is guilty of contributory negligence is for the determination of the jury.

*Dobbs v. West Jersey & S. R. Co.* 78 N. J. L. 679, 75 Atl. 905, 20 A. & E. Ann. Cas. 293; *Danskin v. Pennsylvania R. Co.* 79 N. J. L. 528, 76 Atl. 975; *Wolcott v. New York & L. B. R. Co.* 68 N. J. L. 421, 53 Atl. 297; *Weston v. Pennsylvania R. Co.* 74 N. J. L. 484, 65 Atl. 1015; *Petrie v. New York C. & H. R. R. Co.* 63 App. Div.

476, 71 N. Y. Supp. 866; Keyley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811; Delaware, L. & W. R. Co. v. Toffey, 38 N. J. L. 529.

The question whether the plaintiff was less prudent in jumping from the automobile than a reasonably prudent man would have been in sudden fright should have been submitted to the jury.

Weston v. Pennsylvania R. Co. 74 N. J. L. 484, 65 Atl. 1015; Connelly v. Trenton Pass. R. Co. 56 N. J. L. 704, 44 Am. St. Rep. 424, 29 Atl. 438; Davis v. Central R. Co. 67 N. J. L. 680, 52 Atl. 561; Tuttle v. Atlantic City R. Co. 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Atl. 450; Goodenough v. Pennsylvania R. Co. 55 N. J. L. 596, 27 Atl. 931; Hires v. Atlantic City R. Co. 66 N. J. L. 30, 48 Atl. 1002; Ellis v. Erie R. Co. 66 N. J. L. 451, 49 Atl. 437; McLean v. Erie R. Co. 69 N. J. L. 57, 54 Atl. 238, 70 N. J. L. 337, 57 Atl. 1132; Schramm v. Parker, 72 N. J. L. 243, 62 Atl. 410; Buchanan v. West Jersey & R. Co. 52 N. J. L. 265, 19 Atl. 254; Coulter v. American Merchants' Union Exp. Co. 56 N. Y. 585; Twomley v. Central Park N. & E. River R. Co. 69 N. Y. 159, 25 Am. Rep. 162; Stanies v. Central R. Co. 72 N. J. L. 268, 61 Atl. 385; Wolcott v. New York & L. B. R. Co. 68 N. J. L. 421, 53 Atl. 297.

Messrs. Cortlandt Parker and Wayne Parker, for defendant in error:

The plaintiff should have had his car under sufficient control to stop instantly, and should have stopped as soon as the obstruction of the freight shed had been passed; and in not doing so was guilty of contributory negligence.

Dotty v. Atlantic City R. Co. 64 N. J. L. 710, 46 Atl. 772; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Diele v. Erie R. Co. 70 N. J. L. 138, 56 Atl. 156; Van Riper v. New York, S. & W. R. Co. 71 N. J. L. 345, 59 Atl. 26; Leithead v. West Jersey & S. R. Co. 78 N. J. L. 148, 72 Atl. 453; Doty v. Atlantic City R. Co. 64 N. J. L. 710, 46 Atl. 772; Swart v. New York C. & H. R. R. Co. 81 App. Div. 402, 80 N. Y. Supp. 906; McSweeney v. Erie R. Co. 93 App. Div. 496, 87 N. Y. Supp. 837; Bomboy v. New York C. & H. R. R. Co. 47 Hun, 425; Passman v. West Jersey & S. R. Co. 68 N. J. L. 719, 61 L.R.A. 609, 96 Am. St. Rep. 573, 54 Atl. 809; New York C. & H. R. R. Co. v. Maidment, 21 L.R.A. (N.S.) 794, 93 C. C. A. 413, 168 Fed. 21; Turk v. New York C. & H. R. R. Co. 108 App. Div. 142, 95 N. Y. Supp. 1100; Coleman v. New York C. & H. R. R. Co. 98 App. Div. 349, 90 N. Y. Supp. 264.

The plaintiff is not excused from the effects of his negligence by reason of the fact 37 L.R.A. (N.S.)

that, on account of his lack of care, he was placed in a position of sudden peril.

Elliott, Railroads, § 1173; 3 Elliott, Railroads, 1174; Getman v. Delaware, L. & W. R. Co. 162 N. Y. 21, 56 N. E. 553; Buchanan v. West Jersey & S. R. Co. 52 N. J. L. 265, 19 Atl. 254; Tuttle v. Atlantic City R. Co. 66 N. J. L. 327, 54 L.R.A. 582, 88 Am. St. Rep. 491, 49 Pac. 450; Davis v. Central R. Co. 67 N. J. L. 680, 52 Atl. 561; Dobbs v. West Jersey & S. R. Co. 78 N. J. L. 679, 75 Atl. 905; 20 A. & E. Ann. Cas. 293; Danskin v. Pennsylvania R. Co. 79 N. J. L. 526, 76 Atl. 975; Merkle v. New York, L. E. & W. R. Co. 49 N. J. L. 473, 9 Atl. 680; Keeley v. Central R. Co. 64 N. J. L. 355, 45 Atl. 811.

Trenchard, J., delivered the opinion of the court:

This action was brought to recover damages sustained by the plaintiff in the way of injuries to his person and the destruction of his automobile, occasioned by a collision with a locomotive engine operated by the defendant company, at a highway grade crossing at Howells, Orange county, New York. According to the evidence introduced by the plaintiff, no bell, whistle, or other warning was given by the defendant's train, and there was no flagman, gate, or electric bell at the crossing. At the trial, and here, therefore, it seems to have been properly conceded that there was thus presented at least a jury question as to the negligence of the defendant. The trial judge nonsuited the plaintiff on the ground of his contributory negligence, and the judgment entered thereon is now here for review.

It appeared that the highway upon which the plaintiff was traveling runs north and south, and the railroad east and west. The plaintiff, who was riding in and operating an automobile, was going in a northerly direction. His wife and daughter were riding with him. As the plaintiff approached the crossing, he came to the top of a hill about 200 feet distant from the crossing, and from that point the highway runs slightly downgrade until a point 20 feet from the track is reached. There were three tracks; the first to be crossed was the east-bound; the second, the west-bound, on which the train was coming; and the third was a siding. When the plaintiff reached the top of the hill, he slowed down, and from that point proceeded "very slowly; about as fast as a man would walk, 4 or 5 miles an hour." The power of the automobile was turned off, and it was at "low speed, which acted as a brake." According to the testimony, the automobile then made no noise. As the plaintiff approached, the view to the west was unobstructed. The



view to the east, from which direction the train came, was obstructed by a high bank of earth running parallel with the highway for about 500 feet to a point about 26 feet from the tracks. A considerable part of that space was occupied by the defendant's freight shed, and by telegraph poles and other obstructions. The result was, as stated by the trial judge, in dealing with the motion to nonsuit: "It would not be until a person on the highway had cleared the northerly line of the freight shed that he would have a distinct view of the west-bound track to the east for a sufficient distance to make his observation of much practical use. This northerly line of the freight shed is 9 feet 3 inches south from the nearest rail." After referring to the testimony as to the length of the automobile and the position of the plaintiff therein, the trial judge concludes: "It results, I think, from the proofs, that Mr. Dickinson could first get a long unobstructed view to the east at just about the time when his front wheels came on the south rail of the east-bound track." It was clearly open to the jury to have drawn like inferences from the testimony. The plaintiff looked both to the east and west, and listened constantly from the time the crossing could first be seen which was at the top of the hill. When the last obstruction (the freight shed) was passed, the train was suddenly seen approaching at a speed of 40 or 50 miles an hour. Whereupon the plaintiff turned the steering wheel to the west and jumped from the automobile, dragging his wife with him. In jumping he injured his knee. His daughter also jumped, and the automobile continued by force of gravity over the first track, and was struck by the locomotive on the west-bound track. The distance between the south rails of the two tracks was 13 feet. The plaintiff and his family all testify that they alighted upon the east-bound track. The learned trial judge held the view that when he jumped, the plaintiff was in a place of safety, and nonsuited upon the theory that he was guilty of contributory negligence in not stopping the automobile, instead of jumping. We are of opinion that the nonsuit cannot be supported upon the ground taken by the trial judge, nor upon any other ground.

The defendant first contends that the plaintiff "was bound to stop before crossing the tracks." As a general rule, a traveler on a highway approaching a railroad crossing is bound to exercise reasonable care—that is, such care and prudence as an ordinarily prudent man would exercise under like circumstances—in looking and listen-

ing for approaching trains before going on the crossing; and if he fails to do so, whereby he is injured, he is guilty of contributory negligence barring a recovery, although the railroad company itself is guilty of negligence. *Passman v. West Jersey & Seashore R. Co.* 68 N. J. L. 719, 61 L.R.A. 609, 96 Am. St. Rep. 573, 54 Atl. 809; *Swanson v. Central R. Co.* 63 N. J. L. 605, 44 Atl. 852; *Pennsylvania R. Co. v. Pfuelb*, 60 N. J. L. 278, 37 Atl. 1100, affirmed 61 N. J. L. 287, 41 Atl. 1116. Such duty to look and listen before crossing requires, especially where physical conditions interfere with the free use of vision or hearing, that the traveler should exercise care to select a position from which an effective observation can be made, and to use the necessary means within his control to render the act of looking and listening reasonably effective. *Conkling v. Erie R. Co.* 63 N. J. L. 339, 43 Atl. 666.

Where there are permanent obstructions to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger, without waiting for hearing to become effective. *Central R. Co. v. Smalley*, 61 N. J. L. 277, 39 Atl. 695. But the duty to stop before crossing has not been held in this state to arise except where there are transient noises or temporary obstructions to the view. *Wise v. Delaware, L. & W. R. Co.* — N. J. —, 80 Atl. 459; *Merkle v. New York, L. E. & W. R. Co.* 49 N. J. L. 473, 9 Atl. 680; *Central R. Co. v. Smalley*, 61 N. J. L. 277, 279, 39 Atl. 695; *Keyley v. Central R. Co.* 64 N. J. L. 355, 45 Atl. 811.

We have pointed out that in the present case it was open to the jury to find that the view of the plaintiff to the east was obstructed, so that he could not see the approaching train until the front wheels of his automobile were on the first or east-bound track. The uncontradicted testimony was that the automobile made no noise as it proceeded downgrade to the crossing, and there was no evidence of other transient noises, nor of temporary obstructions to the view. Under the cases cited, it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence in not stopping before his view became effective. Since the plaintiff was not negligent up to the point where the train came into view, no negligence can thereafter be imputed to him as a matter of law, because, as we have pointed out, it was open to the jury to find that, when he cleared the freight shed so as to enable him to see the approaching train, the

front wheels of his automobile were on the first rail of the first track, and only about 13 feet from the west-bound track. *Dobbs v. West Jersey & S. R. Co.* 78 N. J. L. 679, 75 Atl. 905, 20 A. & E. Ann. Cas. 293; *Danakin v. Pennsylvania R. Co.* 79 N. J. L. 526, 76 Atl. 975.

The defendant argues that the plaintiff should have stopped his automobile on the first track, instead of jumping. But clearly his failure to stop and his conduct in jumping cannot be said to be negligence as a matter of law. Where a traveler, without any fault on his part, is placed in a position of imminent peril at a crossing, the law will not hold him guilty of such negligence as to defeat his recovery if he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer; and this rule is especially applicable where the person is placed in such perilous position by reason of the railroad company's negligence, as in failing to give the proper signals. All that is required of a person in such an emergency is that he act with ordinary care under the circumstances; it being for the jury to determine whether such an emergency existed, and whether the traveler acted with due care. *Weston v. Pennsylvania R. Co.* 74 N. J. L. 484, 65 Atl. 1015, and cases there cited. In the case at bar the plaintiff was confronted by a sudden peril, without any fault upon his part, and by reason of the failure of the defendant's servants to give proper signals. It may well have been, as the plaintiff testifies, that he could not determine, in the time at his disposal, on which track the train was coming. He was required to act quickly. He might have applied the brakes, taking the chance of the train being on the first track and the risk that the brakes would fail to work. He might possibly have attempted to escape by resort to some other means. If he had chosen any such other courses, and had been struck by the train, it might have been argued with equal weight that he should have jumped when he had the opportunity.

We are of opinion that the evidence left the contributory negligence of the plaintiff in doubt, and the determination of the question should have been submitted to the jury.

The judgment of the court below will be reversed, and a venire de novo awarded.

Gummere, Ch. J., and Parker, J., dissent.

37 L.R.A.(N.S.)

# KENTUCKY COURT OF APPEALS.

EDWARD NAVILLE et al., by Guardian  
ad Litem, Appts.,  
v.

AMERICAN MACHINE COMPANY et al.

(145 Ky. 344, 140 S. W. 559.)

Will — devise to children — estate taken.

A devise to testator's daughter "for herself and her children forever" vests the fee in the daughter.

(November 14, 1911.)

**A**PPEAL by defendants from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County in plaintiffs' favor in a suit to determine the character of the estate taken by the daughter of Philip Seiler, deceased, under his will. Affirmed.

The facts are stated in the opinion.

Mr. Robert L. Page for appellants.

Messrs. Wehle & Wehle for appellee German Insurance Bank.

Messrs. M. A. Sachs, D. A. Sachs, J. G. Sachs, W. W. Davies, and Edward G. Hill for other appellees.

Lassing, J., delivered the opinion of the court:

By his last will, which was probated in 1887, Philip Seiler devised all of his property, after making some special bequests to churches and church societies, to his daughter. The language used in making this devise is as follows: "The balance of my property, real estate or personal, wheresoever or whatsoever or what nature or kind, I give, devise, and bequeath to my beloved daughter, Anna Maria Naville (*née* Seiler) for her to enjoy for herself and her children forever."

There passed to Mrs. Naville, under this clause of the will a certain lot, fronting on the south side of Main street, in Louisville, Kentucky, described as follows: "Beginning at a point on the south side of Main street, 180 feet and 9 inches east of Jackson street, running thence east with said south side of Main street 78 feet and 9 inches, thence extending back south, of the same width throughout, between lines parallel to Jackson street 204 feet to an alley, together with improvements thereon," etc. After her fa-

**Note.** — The question involved in the above case is covered by annotation in 4 L.R.A.(N.S.) 948, on "Conveyance of fee by devise to one and his or her child or children."

And see also note to *Wills v. Foltz*, 12 L.R.A.(N.S.) 283, on "Children as a word of purchase or limitation."

ther's death, the improvements on this lot were destroyed by fire, and Mrs. Naville and her husband, in April, 1906, sold and conveyed the vacant lot to the American Machine Company for \$3,700. The company paid \$300 in cash and executed a note for \$3,400, payable in one year, and bearing interest from date. It was provided in this deed that as Mrs. Naville's children reached their majority they would each execute a quitclaim deed to the company. Those children who have arrived at age have complied with this provision of the deed by executing the quitclaim deed. There are several children still under age. The machine company owned other property adjoining this property purchased of Mrs. Naville, and, desiring to erect commodious buildings thereon for the conduct of their business, borrowed from the German Insurance Bank \$50,000, and executed a mortgage on all their property, including the lot in question. This suit was brought by the American Machine Company to have the court determine the character of estate which Mrs. Naville took under her father's will.

Plaintiff asks that it be declared a fee-simple title; but, in the event the court should hold that less than a fee-simple title passed to her, it asks for a sale of the property, and that Mrs. Naville, her husband, their children, and the German Insurance Bank, be made parties defendants. Mrs. Naville answered, and claimed that under the will of her father she took a fee-simple title, and that she conveyed this to the plaintiff company, and such of her children as had reached their majority had quitclaimed to the plaintiff in compliance with the terms of her agreement with it, as set out in her deed; and she asks for a judgment on her note, with interest, and the enforcement of her vendor's lien. The German Insurance Bank answered, and asserted that Mrs. Naville owned the fee, and asked that its mortgage be adjudged a lien upon the fee, subject only to the vendor's lien for the remainder of the purchase money. A guardian *ad litem* was appointed for the infant defendants, and for them he pleaded that, under the will of their grandfather, Mrs. Naville took only a life interest in the property, while the remainder was in her children.

On this issue the case was submitted for judgment, and the chancellor was of opinion, and so held, that Mrs. Naville, under this clause of her father's will, took the fee-simple title to the property in question, and her children had no interest whatever in it. From that judgment, the guardian *ad litem* for the infant children has prosecuted this appeal.

The correctness of this ruling depends  
37 L.R.A. (N.S.)

upon the meaning of the word "children," preceding the word "forever," as used in the clause of the will disposing of the residue of testator's estate. In construction, the aim of the court is to arrive at the intention of the testator as gathered from the whole instrument. The clause in which the residue of the estate is disposed of is the only clause in which any reference is made by the testator to his daughter, so that no light is thrown upon this question by any other clause of the will. Hence we must look to the language used by the testator, and from this, taken in connection with the fact that the devise is to his daughter, determine what estate the testator intended her to take.

In *Moran v. Dillehay*, 8 Bush, 434, the court had under consideration the following language: "I give unto my daughter Harriet Givens and her children forever, and if she should die and have no heirs of her body, it is my will that all the land and negroes I have given her should go to my daughter, Eleanor Hocker and her children." It was held that the words, "I give unto my daughter Harriet Givens and her children forever," showed the intention on the part of the testator to give to his daughter a defeasible fee, i. e., a fee, subject to be defeated only by her dying without issue. And in holding that her children had no interest in the property, the court said: "In the present case, we are well satisfied that the deviser, in using the words, 'I give unto my daughter Harriet Givens and her children forever,' meant and intended the words 'children forever' to be words of inheritance only, and used them in the sense of heirs or heirs of the body."

In the later case of *Hood v. Dawson*, 98 Ky. 285, 33 S. W. 75, the testator devised to his nephew certain property, using the following language: "At the death of my wife, I give to James Willson . . . the farm . . . to him and his children forever, but if . . . [he] shall die leaving no child nor children, . . . I give said farm to my two nephews," etc. It was held that this language invested James Willson, the nephew, with the fee, subject to be defeated only upon his dying without issue. The cases of *Moran v. Dillehay*, *supra*, *Lachland v. Downing*, 11 B. Mon. 34, and *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330, were cited with approval as supporting this construction. In holding that the children took nothing under this devise, the court said: "We conclude from the authorities cited that by the language used in this will . . . an estate in fee simple was created in James Wilson, to be defeated only in the event that he should die without children; . . . that the further

clause 'to him and his children forever' is but descriptive of the estate taken, and not intended to introduce new beneficiaries." Continuing, the court said: "Quite a number of cases cited by appellant arise under wills made by husbands in favor of their wives and children. They are of such frequent occurrence in the court that they may be almost said to make a class by themselves. In such cases the constant and uniform tendency of the court has been, in cases where the language was in substance to the wife and children, . . . or of the wife and the heirs of her body or issue, etc., to hold that the wife takes a life estate only, and that the children take in remainder. The reason assigned by the court for this favorite construction is that otherwise, if the wife was to take a part in fee simple, this part of the estate might pass to some stranger in blood to the husband, a possibility not to be supposed consonant to his wishes and intention. This rule has been also applied to cases where the consideration for the conveyance moves from the husband to the grantor."

The language of the will under consideration is almost identical with that used by the testator in *Hood v. Dawson*, the one being "for her and her children forever," and the other "to him and his children forever;" and both are very much like the language used by the testator in *Moran v. Dillehay*. The use by the testator in each of these wills of the word "forever," following the word "children," illustrates the sense in which the word "children" was used; i. e., in the sense of "heirs." In the two cases from which we have quoted the court so held. If the word "children" were not followed by the word "forever," we would incline to the construction given the language under consideration in *Kuhn v. Kuhn*, 24 Ky. L. Rep. 112, 68 S. W. 16; *Mefford v. Dougherty*, 89 Ky. 58, 25 Am. St. Rep. 521, 11 S. W. 716; *Adams v. Adams*, 20 Ky. L. Rep. 655, 47 S. W. 335, and *Carr v. Estill*, 16 B. Mon. 309, 63 Am. Dec. 548. In each of these cases, the devise was to a blood relation of the testator and his or her children, and the court held that by this language the testator conveyed to the parent a life estate, with remainder in fee to the children, the opinion in these cases being rested upon the declaration that the language was subject to no other construction; there being no other provision in the will indicating a contrary intent on the part of the testator. As stated in *Hood v. Dawson*, a different construction has invariably been given in that class of cases where a devise is made by a husband to his wife, in which mention is made of the children. In that class of cases, the will has almost invariably

been construed to convey to the wife a life estate, with remainder to the children; the court being influenced in reaching this conclusion by the idea that a husband would not want his estate to pass into the hands of those strangers in blood to him, in the event that his wife died leaving no children by him living. In *Koenig v. Kraft*, 87 Ky. 95, 12 Am. St. Rep. 463, 7 S. W. 622; *Frank v. Unz*, 81 Ky. 621, 16 S. W. 712; *Weaver v. Weaver*, 92 Ky. 491, 36 Am. St. Rep. 604, 18 S. W. 228, and *Poland v. Chism*, 23 Ky. L. Rep. 1072, 64 S. W. 833, this court has so held.

From the foregoing, we are enabled to divide the decisions of this court, bearing upon the question under consideration, into three general classes: First, devises by a father or mother to a son, daughter, or blood relation, in which the language "to him and his children forever" is used; second, devises to a blood relation and his children, where the word "forever" is not used following the word "children;" and, third, devises by a husband to his wife and her children. In all those cases falling within the first class, the word "children" has been construed as meaning "heirs," and under this construction it has been held that they took no interest in the property devised. In the second class of cases it has been held that the children took a fee, subject to the life estate of their parent. And in the third class of cases the children have been held to take the fee and the parent the life estate; the opinion in the cases falling within this class being rested, as stated, upon the idea that the testator, while wanting his wife to have the full use, benefit, and enjoyment of his property during her life, would not want it, after her death, to pass to those strangers in blood to him.

Of course, in the multiplicity of suits involving the construction of wills, many cases will be found that are not properly assignable to any of these classes. Other clauses in the will frequently throw some light upon the clause submitted for construction, and in such cases the court can be governed by no fixed rule, but must determine from the language used in the will as a whole the character of estate devised.

In *Webb v. Holmes*, 3 B. Mon. 404, the devise was to the mother and her children forever; but, because of other language in the will, showing an intent on the part of the testator that the mother should take only a life estate and the children the remainder, the court so decided. But, in the absence of this other language, which exercised a controlling influence in the construction of that will, it would undoubtedly have been held to fall within the first class. *Smith v. Smith*, 119 Ky. 899, 85

S. W. 169, 1094, and *Harkness v. Lisle*, 132 Ky. 767, 117 S. W. 264, also illustrate this principle.

Appellant cited and relies upon the cases of *Hall v. Wright*, 121 Ky. 16, 87 S. W. 1129, *Crews v. Glasscock*, 32 Ky. L. Rep. 913, 107 S. W. 237, and *Baskett v. Sellars*, 93 Ky. 3, 19 S. W. 9, in which the court had under consideration the construction of a deed in which the children of the grantee are mentioned as parties, or whose names appear in the granting or habendum clause. An examination of these cases shows that they do not fall within any of the three classes named; but in each that construction was adopted by the court which carried out the intention of the grantor, as appeared from an inspection of the entire instrument.

We are of opinion that by clause 7 of the will of Philip Seiler the testator intended to give to his daughter the fee-simple title to all the property which passed to her under this clause, and that the word "children," as used therein, is a word of inheritance, and not of purchase, being used as equivalent to, or in place of, the word "heirs."

The Chancellor having so held, the judgment is affirmed.

#### MINNESOTA SUPREME COURT.

GREGORY COMPANY, Respt.,  
v.

LEWIS J. CALE, Appt.

(115 Minn. 508, 133 N. W. 75.)

#### Exemptions — exception — remedy.

1. Where property, though exempt from the general debts and obligations of the owner, is subject to the payment of a particular debt, the creditor has the election of remedies to subject the same to the payment of his claim: (1) He may proceed in equity, setting up all the facts, and have the amount of the debt decreed a specific

Headnotes by BROWN, J.

*Note. — Judgment on antecedent debt as lien on property to which exemption law has attached in meantime.*

The precise question covered by this note is whether a judgment rendered after the exemption laws attach to property, upon a debt contracted previously, operates as a lien upon the property; and it is not purposed to go into the general question whether the exemption laws may be successfully asserted against a debt contracted before they became applicable to the property purchased.

The jurisdictions in which the question 37 L.R.A. (N.S.)

lien upon the property; (2) he may proceed by attachment; or (3) by an execution issued upon a judgment in an ordinary action for the recovery of the debt.

#### Bankruptcy — exempt property — privileged judgment.

2. The entry and docketing of a judgment against a bankrupt, pending the bankruptcy proceedings, and before the discharge of the bankrupt, becomes a valid lien upon real property of the bankrupt, which, by reason of the homestead exemption at the time of the adjudication in bankruptcy, did not pass to the bankrupt estate, but which was liable to the payment of the debt represented by the judgment, because not a part of the homestead when the debt was created; the homestead exemption having been enlarged by statute subsequent to the creation of the debt.

#### Same — discharge — effect.

3. The subsequent discharge of the bankrupt does not, in such a case, annul or extinguish the judgment, except so far as it imposes a personal liability upon the bankrupt.

#### Judgment — lien on exemptions — special execution.

4. The judgment is a valid lien upon the particular property, and may be enforced by special execution.

#### Same — extent of lien — parol evidence.

5. Though the judgment record does not disclose that particular property is liable for its payment, that fact may be established by extrinsic evidence on application for a special writ of execution, or other proceeding, when the right to resort to the land is called in question.

(November 3, 1911.)

**A**PPEAL by defendant from an order of the District Court for Crow Wing County, refusing to vacate a judgment for plaintiff in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. W. W. Bane and Lind, Ueland, & Jerome, for appellant:

The court erred in denying defendant's motion for an order perpetually staying the execution of the plaintiff's judgment.

which is the subject of this note has been raised are agreed, aside from California, that a judgment rendered after the exemption laws have attached to property, upon a debt previously contracted, is a lien on the property.

Thus, it is held that a judgment rendered upon a debt which was contracted before the property became impressed with the character of a homestead becomes a lien thereon, when filed according to law, and a subsequent purchaser takes subject thereto. *Kimball v. Wilson*, 59 Iowa, 638, 13 N. W. 748.

In *Bills v. Mason*, 42 Iowa, 329, involv-

Cavanaugh v. Fenley, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711.

Defendant having been adjudged a bankrupt, no valid judgment could be entered against him, and no lien could be acquired against his property.

Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751; Ashton v. Slater, 19 Minn. 347, Gil. 300; Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086.

Messrs. A. E. Boyesen, H. H. Flor, and Leon E. Lum, for respondent:

The discharge in bankruptcy does not operate to discharge a lien acquired upon property which did not pass to the trustee in bankruptcy.

Bank of Commerce v. Elliott, 109 Wis.

648, 85 N. W. 417; Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 58 L.R.A. 770, 88 N. W. 703; Peck v. Jenness, 7 How. 612, 623, 12 L. ed. 841, 845; Doe v. Childress, 21 Wall. 642, 22 L. ed. 549; Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725.

Brown, J., delivered the opinion of the court:

In August, 1905, defendant, for value received, made and delivered to plaintiff his promissory note whereby he promised to pay plaintiff the sum of \$3,420.73. At that time defendant was and still is the owner of three certain lots in the city of Brainerd, designated in the record as lots 7, 8, and 9 of block 43. Under the then-

ing a suit by the vendee of homestead property to restrain the levy of execution thereon by a judgment creditor of the vendor, the court declared that the date of contracting the debt, and not that of the rendition of the judgment, was the test as to whether the property was exempt from sale on an execution issued on the judgment; and that since the debt was contracted prior to the acquisition of the homestead, the property was subject to such execution. It appeared in the case that the judgment was upon a note given as the purchase price of property which became the homestead, and which was subsequently exchanged for other property which was also occupied as a homestead, and upon which the levy was made, and the court invoked a statute in relation to exchange of homesteads, providing that the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other or in any greater degree.

So, it was held in Hale v. Heaslip, 16 Iowa, 451, that a judgment rendered subsequently to the perfection of a homestead, but upon a debt contracted previously thereto, was a lien upon the homestead property which was paramount to a mortgage executed after the rendition of the judgment. It was contended that a party taking a mortgage is not bound to go back of the record of the judgment and inquire the date of the contract upon which the judgment was rendered, but the court said that if, in addition to the right which a mortgage ordinarily gives, the mortgagee claims the benefit of the homestead rights of his mortgagor, he is bound to ascertain when those rights began; and points out that the records of the court in which the judgment was obtained would have disclosed the fact, if examined, that the judgment was founded upon a debt contracted prior to the acquisition of the homestead rights.

And it was held in Phelps v. Finn, 45 Iowa, 447, that, as against an execution purchaser under another judgment, a judgment creditor was entitled to show by proof 37 L.R.A. (N.S.)

*aliunde* that his judgment was rendered upon a debt contracted before the property became a homestead, so as to entitle him to redeem from such purchaser under a statute providing that any creditor whose demand is a lien upon the real estate may redeem the same. It was, of course, contended in the case that the judgment having been acquired subsequently to the acquisition of the homestead, it was not a lien within the meaning of the act, and could not be made so by proof *aliunde*, and that, as between the judgment creditor and third persons acquiring an interest in ignorance of the fact, such proof should not be regarded as competent. The court, however, said: "This principle can apply only to persons whose rights would be prejudicially affected by such proof, and who have an equitable right to protection. The plaintiff is not in that position; he made his bid upon the property with full knowledge that other lien creditors would have the right to redeem from him by paying the amount of his bid and interest. If he bid the full value of the property, he is not prejudiced and has no right to complain that he has been repaid this amount with interest. If, upon the other hand, he bid less than the value of the property, believing that there was no lien creditor to redeem, and that he would, if the property was not redeemed by the judgment debtor, get it for much less than its value, and still have the greater part of his debt unsatisfied, he ought not to be heard to complain that he has lost this advantage. The plaintiff is now seeking relief in a court of equity, and he ought not to be permitted to show that his bid was much less than the value of the property, and that his rights will be prejudiced if he is not now permitted to bid more."

It was held in Nowland v. Lanagan, 45 Ark. 108, that since the promise of a debtor to pay a debt discharged in bankruptcy was not to be considered as a distinct and original contract, but as renewing the old obligation, with all its incidents and consequences, a constitutional exemption in force at the time of the promise and of the rendition of the judgment thereon could not

existing statutes of the state, lot 9 was exempt to defendant as his homestead; but lots 7 and 8 were subject to and liable for the payment of the indebtedness created by the promissory note just mentioned. The statute then provided for an exemption of a tract of land not exceeding one lot, and as defendant resided upon lot 9, it constituted his homestead. No part of the note was ever paid, except \$420.73. In May, 1908, a petition in bankruptcy was filed against defendant, and on June 11, 1908, he was in the due course of procedure duly adjudged a bankrupt. By an amendment to the homestead exemption statute by R. L. 1905, § 3453, the debtor's homestead was enlarged to a tract of land not exceeding one fourth of an acre, and lot 9 and a part of

lots 7 and 8 were claimed by defendant in the bankruptcy proceedings as his homestead. Under the amended statute the bankruptcy court set the same aside to him accordingly.

In May, 1908, and before defendant was adjudged a bankrupt, plaintiff commenced an action against him to recover upon the promissory note mentioned. The summons was duly served; but he failed to appear in the action, or to apply for a stay of proceedings therein pending the proceedings in the bankruptcy court, and on August 26, 1908, a default judgment was duly rendered against him in the district court of Crow Wing county for the amount due upon the note, with interest and costs, amounting in all to the sum of \$3,218.25. The judg-

be asserted by the debtor for the purpose of defeating the execution on the judgment, where the original debt was contracted under a prior Constitution which did not prevent the creditor from reaching the property.

The last case was cited with approval in *Cohn v. Hoffman*, 45 Ark. 376, involving an action in ejectment by an execution purchaser against a transferee of the judgment debtor, and holding that where a debt was contracted while the earlier Constitution was in force, it was of no consequence that the debtor, after the adoption of the later Constitution, made his note in settlement of the pre-existing debt, since the debt remained the same notwithstanding the evidence of its existence was contained at one time in an account, later in a note, and lastly in a judgment. The court said: "The judgment lien attached to the homestead as well as to all of his other lands in that county. The judgment creditor could not sell the homestead as long as Bray [judgment debtor] resided upon and claimed it in the manner designated by law. But the land could not be alienated to his prejudice. The purchaser would take subject to the encumbrance. If Bray abandoned his residence upon it, it became immediately subject to seizure and sale. And if he died, it was assets for the payment of his debts, subject to certain homestead rights in his widow and minor children, which rights were limited in point of time. So that if the creditor used due diligence in reducing his claim to judgment before Bray had parted with his interest, and in keeping the judgment lien alive, the land must eventually and inevitably be subjected to the payment of the debt."

In *Kinder v. Lyons*, 38 La. Ann. 713, involving an action by a homesteader to restrain the sale of the homestead property under a judgment against him, and holding that the homestead exemption could not be successfully asserted where it appeared that the declaration of homestead was made after the debt was contracted, but before the judgment became effective, the court merely

cites as controlling, *Thomas v. Guilbeau*, 35 La. Ann. 927, which declares in general terms that the judgment does not create the debt, but merely recognizes the rights and obligations which were created by the original contracting of the debt, and applies this doctrine to reach the result that the right to assert homestead exemptions as against a debt contracted during the force of the homestead law is not lost by the fact that the judgment was rendered after a subsequent homestead law came into effect, and that the debtor registered his homestead claim thereunder, and after the seizure of his farm under the judgment.

In holding that a judgment rendered after the adoption of a constitutional provision increasing exemptions is, so far as regards the additional exemptions, subject to a *fi. fa.* levied thereon, where it was founded upon a debt contracted before the Constitution, the court, in *Hiley v. Bridges*, 60 Ga. 375, merely cites without discussion *Bush v. Lester*, 55 Ga. 579, which involved a judgment which was itself rendered before the Constitution.

In reaching a decision as to whether equity had jurisdiction of a suit to subject certain property to debts which were contracted before the property became a homestead, notwithstanding the debtor had been discharged in bankruptcy, the court in *Groves v. Osburn*, 46 Or. 173, 79 Pac. 500, declares with a briefness which seems to assume rather than to decide the point, that since the debt was contracted before the homestead exemption act was adopted, the creditor would have had, but for the proceedings in bankruptcy, a clear right to enforce a judgment obtained against the property.

And in *Linsey v. McGannon*, 9 W. Va. 154, involving a suit in equity to enforce a judgment, the court regarded the defense of homestead rights as entirely met by the fact that the debts were contracted before the declaration of exemption was recorded.

A debtor cannot claim exemptions under a statute which expressly applies only to debts contracted after its adoption, as

ment so rendered was subsequently duly docketed. Plaintiff thereafter presented the claim represented by the promissory note to the bankruptcy court, and the full amount thereof was allowed as a claim against the estate. Subsequently, however, on a rehearing, the order was modified by allowing the sum of \$150 only, the theory of the modification being that a part of the land set aside to defendant as his homestead was subject to the payment of the claim, it having been contracted before the change in the homestead by R. L. 1905, and, since plaintiff had acquired a lien thereon by the entry and docketing of its

judgment, resort should be had to that, and not to the general property of the estate; the land so subject to payment of the claim being of the value of \$3,000. This order of modification was affirmed on appeal to the Federal district court. Defendant thereafter, in the due course of procedure, received his discharge from the bankruptcy court, as provided for by law.

Defendant then moved the court below for an order vacating the judgment so entered in plaintiff's favor upon the promissory note, and for leave to interpose in defense to the action his discharge in bankruptcy, and, further, for an order perpetually re-

against a judgment rendered after such adoption, upon a debt previously contracted. *Smith's Appeal*, 23 Pa. 310.

The case of *Bachman v. Crawford*, 3 *Humph.* 213, 39 *Am. Dec.* 163, is governed by an express statutory provision that the exemption thereby created should extend only to executions issued upon judgments founded upon contracts entered into after a certain date.

In *Douglass v. Gregg*, 7 *Baxt.* 384, involving a suit in equity to subject lands to the satisfaction of a judgment, it was held that since the judgment, although rendered after the enactment of the homestead law, was founded upon a debt contracted previously, it was a lien against the property which would prevail against the judgment debtor, and also against one who took a conveyance from him after the filing of the bill.

On the other hand, as already noted, the California court holds that where a judgment is not founded upon a debt secured by a mortgage or a mechanics' laborers' or vendors' lien, it cannot be enforced against a homestead which was declared before the rendition of the judgment, although there was an attachment levied upon the premises before the filing of such declaration. *McCracken v. Harris*, 54 *Cal.* 81. The court pointed out that the Code distinctly provided that, except in cases of mechanics' laborers' or vendors' liens, or mortgages duly made, the homestead could not be subjected to a forced sale upon a judgment unless the judgment imparting a lien on the premises was obtained before the homestead declaration was filed. So, the rule of the case appears to be that the fact of levying an attachment before the declaration of homestead will not prevent the application of the statutory provision. This decision was followed without discussion in *Sullivan v. Hendrickson*, 54 *Cal.* 258.

A vendors' lien, within the meaning of this statute, must be adjudicated and declared by a court of equity so as to bring the case within the exception, and to subject the homestead to a lien for a judgment rendered after the declaration of homestead. Thus, it is held in *Fitzell v. Leaky*, 72 *Cal.* 477, 14 *Pac.* 198, that the lien which the vendor of real property retains for the un-

paid purchase money is not a specified and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee; that, in other words, it is in its nature a personal privilege and unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced; and that where he, instead of having the lien adjudicated and declared by a court of equity, sues for and obtains a general judgment, he waives the vendor's lien, and cannot enforce the judgment, where it was entered after the declaration of homestead. While not highly important in this connection, it is interesting to note that it was contended in this case that the declaration of homestead was fraudulent because made during the process of litigation which subsequently resulted in the ordinary judgment against the homesteader; but the court points out that the very purpose of the homestead law is to give to one, except as against an indebtedness already merged in a judgment, or as against certain enumerated judgments rendered after the declaration of homestead, the right to preserve and protect the homestead from forced sale; and that the doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of the homestead. The decision as to this latter phase of the case was followed without discussion in *Simonson v. Burr*, 121 *Cal.* 582, 54 *Pac.* 87.

And it is held in California that where a creditor obtains a judgment *in personam* and a decree foreclosing a mortgage given to secure the debt, execution issued for a balance reported and docketed after a sale of the mortgaged property cannot be levied upon homestead property which was not covered by the mortgage, where the declaration of homestead was filed and recorded before the balance was reported and docketed. *Culver v. Rogers*, 28 *Cal.* 520. This, of course, is upon the ground that the deficiency judgment did not become a lien until docketed.

As to the application to existing judgments of statute abolishing or diminishing exemptions, see the note to *Laird v. Carton*, 25 *L.R.A.* (N.S.) 189. L. A. W.



straining the enforcement of the judgment. Plaintiff presented a counter motion, based upon the facts stated, for an order directing the issuance of a special execution for the sale of that part of the lots which was included in the homestead assigned to defendant by the bankruptcy court, but which was not exempt as to plaintiff's claim. The court denied the motion to set the judgment aside, granted plaintiff's motion for a special execution, particularly designating the land to be sold thereunder, but ordered the enforcement of the judgment enjoined, except as to the particular land. Defendant appealed.

It is contended by defendant (1) that his discharge in bankruptcy annulled and discharged plaintiff's judgment, and that its enforcement should be perpetually enjoined; and (2) that the judgment did not create a lien upon the nonexempt land, because at the time of its entry the whole tract was exempt, and that, if plaintiff had a remedy for the enforcement of its claim against the same, it should have been asserted in a proceeding in equity before the discharge in bankruptcy, and, not having so proceeded, plaintiff has no further redress. We are unable to sustain either of these contentions.

1. Whether the judgment was annulled by the discharge in bankruptcy depends entirely upon the question whether it became, when docketed, a valid lien upon that part of the homestead assigned in the bankruptcy proceedings which was subject to the payment of this particular debt. If it so became a valid lien, the discharge in bankruptcy extinguished it only so far as concerned defendant's personal liability. The right to enforce the judgment against the specific property, not a part of the bankrupt estate, was not thereby extinguished or discharged. If no lien was created, then the rule laid down in *Cavanaugh v. Fenley*, 94 Minn. 505, 110 Am. St. Rep. 382, 103 N. W. 711, would apply. So the first contention of defendant depends upon the existence or nonexistence of a lien, and requires no further mention at present.

2. Whether the judgment became a lien upon the nonexempt land must be determined from our statutes upon the subject, and without reference to the bankruptcy proceedings in the Federal court. Plaintiff brought its action in the state court, as it had the right to do. It was an ordinary action at law for the recovery of money, and though it might have been stayed by proper application pending the bankruptcy proceedings, and plaintiff thus put to an

equitable action to reach the nonexempt land, no stay was applied for, and the action proceeded to judgment. It did not, of course, operate upon or become a lien upon any of the property of defendant which passed upon the adjudication in bankruptcy to the bankrupt estate; nor did it create a personal liability against defendant, continuing after his discharge. But that it became a valid lien upon that part of the defendant's land which did not pass to the bankrupt estate because a part of the homestead under the then-existing statutes, that part of the present homestead which was subject to the payment of the debt when created, seems to us quite clear. Section 4272, R. L. 1905, provides that a judgment for the recovery of money from the time of docketing the same shall be a lien upon all real property in the county where docketed then or thereafter owned by the judgment debtor. This court has construed the statute as creating a lien upon every estate, legal or equitable, held or owned by the debtor, at the time of or subsequent to the rendition of the judgment. 2 *Dunnell's Dig.* 169, and cases cited. This land was subject to the payment of this particular debt. The legal title at the time the same was contracted, and when the judgment was recovered, stood in the name of defendant; and it was not necessary that the judgment affirmatively disclose the right of plaintiff to resort thereto for the collection of the amount due.

The creditor has an election of remedies in situations like that here presented,—that is, where property which is exempt from general debts, but liable for particular obligations, for instance, the purchase price, work, labor, and material furnished in its construction and repair; and he may proceed (1) in equity, setting forth in his complaint all the facts, and demand a lien upon the particular property; (2) he may proceed by attachment; or (3) by an ordinary action for the recovery of money. *Langevin v. Bloom*, 69 Minn. 22, 65 Am. St. Rep. 546, 71 N. W. 697; *Nickerson v. Crawford*, 74 Minn. 366, 73 Am. St. Rep. 354, 77 N. W. 292; *Hassey v. McMullen*, 109 Minn. 332, 123 N. W. 1078; *Douglass v. Gregg*, 7 Baxt. 384; *Durham v. Bostick*, 72 N. C. 357; *Bills v. Mason*, 42 Iowa, 329. The same result follows either remedy; namely, the appropriation of the property charged to the payment of the debt. And it would seem in this state, where all forms and distinctions between law and equity are abolished, to be immaterial which method is pursued.

The lots here involved, and not a part of the original homestead of defendant, are severable from lot 9, his homestead under the former statute. Separate buildings stand upon each tract, though they are, perhaps, joined together. But this latter fact in no way changes the rights of the parties. The nonexempt lots are of the value of \$3,000, and it is clear that a statute increasing the homestead right to that extent, if that be the test of the constitutionality of the statute, would necessarily, as a matter of law, prejudice the rights of existing creditors and render the statute so increasing it invalid as to them, whether the rights be expressly protected by the statute changing the law or not. *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348; *Waples, Homestead & Exemptions*, 277, 278.

It is not necessary in a case of this character, where the creditor elects to proceed at law by an ordinary action for the recovery of money, that the judgment record disclose the fact that particular property is subject to the payment of the claim. That fact may be established in subsequent proceedings by extrinsic evidence. Nor do we apprehend from this holding any particular difficulty, not now experienced, in the examination of abstracts of title to land. *Prima facie* a docketed judgment is a lien upon all land standing in the name of the debtor. The homestead, however, is exempt; but what land constitutes the homestead must be ascertained by inquiry. It is not disclosed by the record. When inquiry brings to light the homestead, then further inquiry will disclose whether it is subject to the payment of the particular judgment.

The case of *Groves v. Osburn*, 46 Or. 173, 79 Pac. 500, cited and relied upon by defendant, is not in point. There was no action or other proceeding in that case looking to the enforcement of the debt for which the homestead was liable until after the discharge of the bankrupt. The discharge extinguished the debt, and there was no basis for the subsequent action to enforce the claim. In the case at bar plaintiff proceeded before the discharge and obtained a lien upon the property. This distinguishes the two cases.

It follows that since plaintiff's judgment became a valid lien upon the property, and the remedy adopted for its enforcement is within the rules of procedure in such cases, the learned trial court properly disposed of the case.

Order affirmed.

37 L.R.A. (N.S.)

MISSOURI SUPREME COURT.  
(Division No. 2.)

LAURA D. LINDSLEY, Resp't.,

v.

CLINTON L. CALDWELL, Appt.

(234 Mo. 498, 137 S. W. 983.)

Attorney and client — holding property to compel settlement of claim.

1. An attorney in whose name stock is placed under the express agreement that he would indorse and turn it over to his client cannot hold it to compel a settlement of his claim against the client; at least when, to his knowledge, the stock belongs to a stranger.

Contract — to defraud creditors — *pari delicto* — attorney and client.

2. An attorney in whose name his client has placed property for the purpose of defrauding the creditors of the client cannot refuse to comply with his agreement to return it, on the theory that the parties being *in pari delicto*, equity will leave them where it finds them.

(May 23, 1911.)

**A**PPEAL by defendant from a judgment of the Circuit Court of the City of St. Louis in plaintiff's favor in a suit to require defendant to indorse in blank and return to plaintiff's agent a certificate of stock belonging to her and to enjoin him from disposing of said stock. Affirmed.

Statement by Ferriss, J.:

This suit arises upon a bill in equity filed by plaintiff in the circuit court of the city of St. Louis against the defendant. The petition charges that W. H. Stevenson, acting as agent for plaintiff, Mrs. Lindsley, entered into an agreement with defendant to the effect that defendant should receive in his own name the certificate of stock alleged to belong to plaintiff for 60 shares of stock in the Helmbacher Forge & Rolling Mill Company, and indorse same in blank, and immediately transfer it to Stevenson as agent for plaintiff; that the certificate was so issued to defendant, and that defend-

*Note. — Right of client to recover property placed in the name of his attorney in order to defraud creditors.*

As stated in the leading case of *Ford v. Harrington*, 16 N. Y. 285, cited as *LINDSLEY v. CALDWELL*, "the question is, which rule is to govern the case, the one applicable to dealings between attorney and client, or the rule that the court will not lend its aid to either of the parties to an illegal or fraudulent contract?" And upon this question, while the cases are few, they are uniform to the effect that the former rule governs; that is, the parties are not regarded as be-

ant refused to comply with the agreement so made; and the court is asked to decree that the said defendant holds said stock as trustee for plaintiff; also that defendant be enjoined from transferring said stock, and for other and further relief. Defendant in his answer alleged that the plaintiff had no title, right, or interest in such certificate; that she had unlawfully confederated with the said Stevenson, who was the real party in interest, to put herself forward in his place and stead as the owner of said stock; that said Stevenson was insolvent; that said Stevenson had owned certain shares of stock in the Bristol Realty Company, together with the participation contract of that company, and that, with intent to hinder, delay, and defraud

his creditors, said Stevenson transferred said stock and contract to plaintiff, and that such transfer was made without the knowledge or co-operation of plaintiff, and that the bill of sale for same was not delivered to plaintiff until after this suit was instituted; that said shares of stock and contract were exchanged by Stevenson for other property, a part of which consisted of this 60 shares of stock of the Helmbacher Forge & Rolling Mill Company; that said stock was issued to plaintiff at the request of said Stevenson for the purpose, on the part of Stevenson, of hindering, delaying, and defrauding his creditors, and that this claim of ownership by the plaintiff is made in pursuance of the fraudulent plan of said Stevenson to conceal and cover up the prop-

ing *in pari delicto*, and the client is permitted to recover, notwithstanding the illegality of the conveyance, if no rights of innocent purchasers have intervened. 4 Cyc. 962.

As said in *Goodenough v. Spencer*, 15 Abb. Pr. N. S. 248: "Where one party, through the means of an unlawful agreement, acquires the property of another, the law regards them as equally in fault, and will do nothing for the redress or protection of either side. But when that advantage is secured by an attorney or counsel from his client, the parties are not considered as being equally in the wrong. The law then regards the client as being drawn into the violation of its provisions through the controlling influence of his attorney and counsel over him, and for that reason intervenes for his protection. . . . But that relief will not be carried so far as to disturb the rights of an innocent third party, who, in good faith, may have been induced to part with his money or his property, relying upon the title the attorney and counsel had the apparent right and power of transferring; the rule in that case being, that where one of two innocent persons must suffer by the fraud or misconduct of a third, the loss shall be borne by him who conferred upon the wrongdoer the means of deceiving persons honestly dealing with him."

So, where a client, under the advice and suggestion of his attorney and counsel, has executed and delivered to the latter, without consideration, a bill of sale of certain personal property, for the purpose of having such property held by the attorney for the sole use and enjoyment of the client so long as it is in danger of being seized by the latter's creditors for the payment of their debts, and after that danger has been avoided, restored again to him, the client may have the transfer annulled for his relief if that can be done without injury to an innocent purchaser. *Ibid.*

And where an attorney, upon the application of a client for advice merely as to whether a certain equitable interest which he has in land can be reached by a

creditor for the satisfaction of his debt, suggests and recommends, for the purpose of defrauding the creditor, an assignment to himself of such equitable interest, which he procures from the client for a grossly inadequate consideration, promising to reconvey after an arrangement has been made with the creditor, the attorney will be compelled, at the suit of the heir of the client, to restore what he acquired under the assignment. *Ford v. Harrington*, supra.

In this case, the court further said: "The parties, although *in delicto*, did not stand *in pari delicto*. In the transaction, Conway [the client] was a mere instrument in the hands of the defendant [his attorney]. If an attorney will so far forget or wilfully disregard his duty to the courts, whose license to practise he holds; to his clients, who, in consequence of such license, are induced to seek and act upon his counsel; and to the public, as, for the purpose of gain and profit to himself, to induce by his advice the commission of fraud by those who thus confide in him, he at least should be compelled to restore to his victim the fruits of his iniquity."

And an attorney who suggests to, and obtains from, a client a conveyance of real property, for the purpose of defeating the claims of creditors of the client, cannot, under the rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction, retain the property against the grantor, as the parties are not *in pari delicto*, and "equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices." *Herrick v. Lynch*, 150 Ill. 283, 37 N. E. 221, affirming 49 Ill. App. 657.

Likewise, an executor who, acting upon the advice and under the direction of his attorney, upon whose counsel and direction he implicitly relied, has transferred to the attorney a mortgage and certain insurance policies, for the purpose of protecting them

erty so as to hinder, delay, and defraud his creditors, and that the plaintiff and Stevenson unlawfully conspired for this purpose; that it was the purpose of Stevenson to cause the stock involved in this suit to be transferred to a holding corporation the stock of which was to be issued to the defendant and by him indorsed in blank and delivered to Stevenson. It will be perceived that the defendant does not allege any facts which would give him any interest or ownership in this stock. The case was tried before the court, and it developed in the evidence that the defendant asserted a claim against Stevenson for legal services rendered during a period of four or five years, during which time he was the confidential attorney and adviser of Stevenson in the various financial transactions developed in the evidence, which transactions, defendant claimed, were had on the part of Stevenson for the purpose of hindering, delaying, and defrauding his creditors. The defendant does not claim any ownership in this stock, but admits that he was holding it to force Stevenson to settle his claim for attorneys' fees. He claimed that Stevenson owed him \$15,000, which claim Stevenson denied *in toto*. Defendant offered to return this stock to Stevenson if the latter would acknowledge in writing that he owed the defendant \$15,000 for his services, which Stevenson refused to do. The plaintiff introduced evidence which tended to prove that she was the owner of this stock; that Stevenson was her agent; that all of the transactions, so far as she was concerned, were bona fide; that defendant had no claim against Stevenson for fees, and that he had been paid for all of his services. The pleadings were quite lengthy, and the transcript of the evidence presents a large record. It is unnecessary to go into the testimony in detail. The court found the issues in favor

of the plaintiff, and ordered, adjudged, and decreed that defendant indorse to plaintiff and deliver to her or her counsel of record the certificate of stock described in the petition.

Mr. Robert F. Walker, for appellant:

Anyone against whom an action is brought growing out of or based upon an executory contract may plead fraud as a defense. The doctrine of *in pari delicto* applies to such cases in all of its fullness.

Mitchell v. Henley, 110 Mo. 598, 19 S. W. 993; Larimore v. Tyler, 88 Mo. 661; Fenton v. Ham, 35 Mo. 409; Sell v. West, 125 Mo. 621, 46 Am. St. Rep. 508, 28 S. W. 969.

Mr. Daniel Dillon, for respondent:

Where transfer of property is made from a client to his attorney (especially when made under the advice of the latter), for the purpose of defrauding creditors, parties are not regarded as *in pari delicto*, but the client will be relieved if it can be done without injury to an innocent purchaser.

3 Am. & Eng. Enc. Law, 338; 4 Cyc. 962, ¶ d; Ford v. Harrington, 16 N. Y. 285; Goodenough v. Spencer, 46 How. Pr. 347; Place v. Hayward, 117 N. Y. 487, 23 N. E. 25; Herrick v. Lynch, 150 Ill. 283; 1 Story, Eq. Jur. 13th ed. §§ 310, 313.

Ferriss, J., delivered the opinion of the court:

1. After a thorough consideration of the facts in evidence, we are of the opinion that the finding of the court in favor of the plaintiff is fully justified by the record. The evidence for the plaintiff is clear and satisfactory that she was the owner of this stock; that she had permitted Stevenson to use her property in St. Louis, not for the purpose of hindering and delaying his cred-

against the creditors of the husband of the testatrix, may recover from the attorney the proceeds of such mortgage and policies, which the attorney has received, professing to the executor to act in his interest and in the interest of the estate, as the parties were not *in pari delicto*, and the attorney cannot invoke the rule that where one transfers property to another, for the purpose of cheating his creditors, the courts will not aid him to recover it back. Place v. Hayward, 117 N. Y. 487, 23 N. E. 25.

And in Freelove v. Cole, 41 Barb. 318, affirmed in 41 N. Y. 619, where a grantee, while not in fact a licensed attorney, conducted cases in justices' courts and acted as the legal and confidential adviser to the grantor, who believed that he was a lawyer, the court said that the case was clearly within the principle of the case of Ford v. Harrington, supra; and it was held that 37 L.R.A. (N.S.)

where such a person, upon being applied to by a man of infirm mind, incompetent to manage and conduct his business with ordinary prudence and discretion, for advice to aid him in the disposition or conveyance of his property, obtains title to a farm, which is conveyed to him at his instance and upon his advice, to hinder and delay the owner's creditors, the grantee, being within the rule applicable to attorneys, cannot retain the property, but must convey it to the grantor's wife, in accordance with his oral agreement.

As to the recovery of nonexempt property conveyed, to avoid a nonexistent or unfounded demand, to one in a confidential relation, who induced the conveyance by false representations, see subdivision of subject note to Carson v. Beliles, 1 L.R.A. (N.S.) 1013.

A. C. W.

itors, but as a loan to enable him to extricate himself from financial difficulty; and that he had so used the property; that this particular stock was placed in the name of the defendant, who was acting as attorney for plaintiff's agent, with the understanding and agreement that he was to indorse the certificate in blank and turn it over to plaintiff's agent; that defendant, in violation of this agreement, refused to turn over the stock; that he asserted no legal or equitable ownership in same, but held it for the avowed purpose of compelling Stevenson to give him a written acknowledgment that he (Stevenson) owed defendant \$15,000 for legal services.

The defendant did not itemize his claim for services. He testified that he had not and could not render a bill. The evidence fails to establish that he had a claim against Stevenson to the amount of \$15,000 or any other amount; that is to say, he gave no testimony which, even if true, would afford a satisfactory basis for a judgment in his favor against Stevenson in any amount for services rendered as an attorney. He stated in effect that he had represented Stevenson for four or five years, and that his services were worth \$15,000; but it is unnecessary to decide whether defendant had a legal claim against Stevenson for services, because even if he had such claim, he had no right to hold this stock for the sole purpose of forcing a settlement with Stevenson. It was placed in his name as the confidential adviser of Stevenson, under an express agreement that he would immediately indorse and deliver it to Stevenson. Such action on his part is to be condemned if for no other reason than that it is violative of the confidential relation which existed between him and his client. This would be true if the stock in point of fact belonged to Stevenson. It is certainly true when the stock in point of fact belonged to plaintiff; especially where it may be fairly inferred that defendant, because of his knowledge of all of these transactions, knew that the stock belonged to the plaintiff.

2. The defendant, recognizing, no doubt, the weakness of his position so far as his attempt to hold this stock as security for his fees is concerned, defends upon the further ground that the transfer of this stock to him by Stevenson was made for the purpose of hindering and delaying the creditors of Stevenson; and he invokes the rule that where a conveyance is made for such purpose, and an attempt is made by the grantor to regain the property, equity, because of the corrupt purpose which prompted the conveyance, will leave the parties where it finds them. We are of the opinion, how-

ever, that this unhappy defense is not available to the defendant. The rule which he invokes does not apply to a case like this, where the grantee is the confidential attorney of the grantor, and receives the conveyance as such. The rule applicable to this case is clearly expressed in 3 Am. & Eng. Enc. Law, 2d ed. p. 338, and is as follows: "Even where the conveyance by the client to his attorney is for the declared purpose of hindering and delaying the creditors of the client, it cannot be sustained as against him by the attorney or his assignee with notice; the parties are not regarded as being *in pari delicto*, and equity will refuse to sustain such a conveyance." The leading case cited to support the text is Ford v. Harrington, 16 N. Y. 285, which held that, although the object of the assignment was to perpetrate a fraud on the creditors, yet, on account of the relations existing between attorney and client, the attorney must be compelled to restore what he had acquired under the assignment. Therefore, even if the defendant should succeed in establishing as a fact that Stevenson was the real owner of this stock, and that the purpose of the transfer of the stock to defendant was to hinder, delay, and defraud the creditors of Stevenson, still the defendant would have no right to hold the stock as against Stevenson.

This case was very fully tried by the circuit court, and great latitude was allowed the defendant in the introduction of testimony and examination of witnesses. The findings of the court are fully sustained by the evidence, and its judgment and decree are affirmed.

Kennish, P. J., and Brown, J., concur.

#### ILLINOIS SUPREME COURT.

EDWIN ELMER KENDALL et al., Appts.,

v.

OLIVE LILLIAN TAYLOR et al.

(245 Ill. 617, 92 N. E. 562.)

**Will — vested remainder — death without issue.**

1. Under a devise to testator's two sons, and, in case of the death of either without

*Note. — Does contingency of death without issue, children, etc., import their survival of first taker.*

For annotation of the question as to the time to which the contingency of the death of a legatee or devisee without child or issue, upon which a gift is conditioned, is referable, see note to Smith v. Smith, 25 L.R.A. (N.S.) 1045.

issue, his share to go to the survivor, and in case of the death of both without issue, or in the lifetime of testator, then the estate to go to another, the words "without issue" mean death without ever having had issue, and not death without issue living at the time thereof, so that the birth of issue and death of testator vests the fee in the sons.

**Costs — solicitor's fee — partition — construction of will.**

2. The mere fact that the construction of a will is necessary to determine whether or not the relief sought shall be granted in a proceeding to partition real estate is not sufficient to entitle defendant to an allowance of a solicitor's fee as costs, although the relief is denied.

(June 29, 1910.)

This note purposes to present only cases in which the question whether a contingency described as a dying without issue, or children, or some equivalent expression, is defeated by the birth of a child, seems to have been definitely before the court; to which end it has been necessary to exclude cases in which the only question involved was whether a definite or indefinite failure of issue was contemplated, although many of those which hold that the contingency has reference to a definite failure of issue express themselves in the phrase that a dying without issue living at the death of the first taker is meant. Where, however, it is determined that a definite failure of issue is intended, the further question may arise as to the nature of the contingency upon the happening of which the limitation over will take effect; and cases of this sort are, of course, in point in the present inquiry.

Nor has it been deemed proper to extend the scope of the note to include cases in which the question under discussion has been definitely foreclosed by the terms of the contingency, as where the limitation over is in the event of "leaving no issue" or "dying without issue surviving," although there are instances in which the courts have stated that the contingency thus phrased is not defeated by the birth of issue. A case of this sort is *Wilkinson v. Boyd*, 136 N. C. 46, 48 S. E. 516, where testator devised lands to a daughter in terms which gave her a defeasible fee, with the proviso that if she should die "without leaving lawful heirs begotten of her own body," then it should go to testator's other three children and their heirs, and in which it was held that the condition of the will would be fulfilled only if the devisee should have children living at the time of her death.

It may be stated in passing, however, that although the word "leaving" in a gift over upon death without leaving issue *prima facie* means leaving issue living at the death, the word "leaving" will in some cases be so construed as not to destroy prior vested interests; as in the instance

**A** PPEAL by complainants from a decree of the Circuit Court for Menard County in defendants' favor in an action brought to partition certain real estate. Reversed.

The facts are stated in the opinion.

Mr. John M. Smoot, with Mr. L. A. Whipp, for appellants.

Mr. Milton McClure for appellees.

Carter, J., delivered the opinion of the court:

This was a bill filed in the circuit court of Menard county by the appellants, Edwin Elmer Kendall and Albert Leslie Kendall, for a partition of about 238 acres of land in that county. After issues were joined and a hearing had, the court ordered that the partition be made, but determined the

of a gift to A for life, with a gift after his death to his children, so that they take vested interests at birth. See *Theobald*, Wills, 7th ed. p. 705.

The question being purely one of construction, and the decisions usually containing little discussion of the grounds upon which they are based, it is not possible to deduce any general rules, other than that where the provisions of the will or deed and the accompanying circumstances make it seem more likely that the grantor or testator meant rather to put it in the power of the first taker to provide for his family, if any, than to benefit the persons to whom the property is limited over, the contingency will be held to relate to the birth of issue rather than to their survival of the first taker; and that where there is a gift of the remainder to the issue or children, an additional reason for holding the contingency to be defeated by the birth of a child is found in the preference of the courts for a construction which will not divest a remainder once vested.

The statement made in *KENDALL v. TAYLOR*, that "it is the settled rule of law that the courts are inclined to construe the words 'die without issue,' or words of similar import, to mean 'die without having had issue,' unless there are 'expressions or circumstances from which it can be collected that these words are used in a more restricted sense,'" has no basis in authority except the case of *Voris v. Sloan*, 68 Ill. 588, and the other Illinois cases decided on the strength of it. Now, the court in *Voris v. Sloan* based its decision on the language of the master of the rolls in *Barlow v. Salter*, 17 Ves. Jr. 479, which was regarded as stating a rule of construction controlling the case. This language, however, did not relate to the question whether a contingency described as a dying without issue refers to a dying without having had issue born, or a dying without issue surviving, but to the totally distinct question as to whether the phrase had reference to a definite or indefinite failure of issue; the statement therein made that "it is now settled that, unless there are ex-

interests of appellants in the land to be different from that prayed for by them. From this decree they have appealed to this court.

The decision in this case hinges upon the construction to be given to the will of Francis M. Kendall, which, so far as it bears on the issues here, reads as follows: "I give, bequeath, and devise all of my estate, both real and personal, wherever situate, to my two sons, Edwin Elmer Kendall and Albert Leslie Kendall, share and share alike, and in case of the death of either of my said sons without issue, then the estate hereinbefore devised to him shall go to the survivor of them, and in case of the death of both of my said sons without issue, or in case of the death of both of said sons

prior to my decease, then in such case, or either of them, I devise all of my estate, of every kind and character, to my sister, Olive Lillian Taylor, and my half-brothers, Orren Kendall and David Miles Kendall, share and share alike, to have and to hold the same forever."

At the time the will was executed, December 15, 1896, the testator was forty-two years old. Edwin Elmer Kendall was then fourteen years old and Albert Leslie Kendall seven years of age. The testator died May 22, 1909, and the will was duly admitted to probate. He left no widow, and appellants herein were his only children and heirs at law. Both sons are still living, Edwin having a daughter, five years of age, and Albert a son about one year of

age, the property should revert to his lawful heirs, it was held upon the authority of *Voris v. Sloan*, infra, that the contingency should be construed as meaning without having had issue, and not as without surviving issue.

In *Stafford v. Read*, 244 Ill. 138, 91 N. E. 91, where a testator, after directing a sum of money to be laid out in land for a grandson "and the brothers and sisters which he had or may hereafter have, all to share equally," provided that if the grandson and his brothers and sisters should die without issue, then the said land should revert to testator's children, it was held that, in view of the intention manifested by the testator to make provision for the grandson and his brothers and sisters, and the children that might be born to them or one or more of them, and the fact that he did not have in contemplation or attempt to provide for the contingency of a death of children born to them before their deaths, the words "shall die without issue," were not intended to mean without issue or children surviving the first takers at the time of their death, but meant if they should die without having had issue or children born to them.

In *Isbell v. Maclin*, 24 Ala. 315, where testator gave his entire estate to his half-sister "upon the following conditions: should she marry and have lawful issue, the said property is to go to her and her heirs; but in case my said half-sister should die without any lawful issue," then to another, it was held that the estate of the half-sister became absolute upon her marrying and having lawful issue.

In *Essick v. Caple*, 131 Ind. 207, 30 N. E. 900, it was held that under a devise of certain lands to a daughter, followed by a provision that in the event that she "should die having no heirs born to her, then the above-described land is to revert back to my estate, and be divided equally among my heirs, and the same is not to be sold or conveyed until after there shall be an heir born to the body of said daughter," the daughter took a conditional fee, subject to termination in the event she should die without living heirs born to her during her life.

In *English v. McCreary*, 157 Ala. 487, 48 So. 113, where a testator, after giving shares in his estate to his daughters in terms which, standing alone, would create a fee tail estate, which by the statute would be converted into a fee simple, further provided, "should any of my youngest children die before having or leaving any heir, then their shares to be divided between the remainder or surviving part of said four younger children," it was held that, conceding, without deciding, that this was intended as a limitation upon the death of the daughter, and not of the testator, and that it was intended as a restriction upon the estate of the daughters, it did no more than postpone the vesting of the fee until the having of a child, as there was no attempt to entail the property except in case the four younger children died before having or leaving a child.

In *McGennis v. McGennis*, 16 Ky. L. Rep. 598, 29 S. W. 333, it was held that under a conveyance to the grantor's daughter "and her body heirs, if any," containing the provision, "in the event she has no children, then the land hereinafter described is to revert back to my estate," the fee taken by the grantee by virtue of a statute

In *King v. King*, 215 Ill. 100, 74 N. E. 89, where a testator devised realty to his daughter in terms which, standing alone, would give her the fee, and further provided that in case of her death without

37 L.R.A. (N.S.)

age. These two infant grandchildren of the testator, his sister, Olive Lillian Kendall, and his two half-brothers, Orren Kendall and David Miles Kendall (the last named being also executor), were made parties defendant to the bill and are appellees here. The decree found that the will should be so construed that appellants each take a base or determinable fee in the real estate as tenants in common; that the phrase "without issue," as used in the will, means "without leaving issue living at the time of said complainants' decease;" and that, in case of the death of either of said appellants without leaving issue living at the time of his decease, the title to the real estate would vest as a base or determinable fee in the survivor of said two sons;

that, in case of the death of both of said sons without either of them leaving issue living at the time of the decease of such sons, then the title to such real estate should vest in the sister and two half-brothers, share and share alike, in fee simple absolute. The decree also provided that "since the principal relief sought in this proceeding is the construction of the will involved herein, and since such construction and determination of the legal effect of said will was necessary to determine the character of partition to be allowed," \$250 be fixed as the fee for the solicitor for the defendants and taxed as costs.

The principal contention in this case is as to whether the trial court properly con-

verting estates tail into fees became perfect and absolute upon the birth of children to her, rather than upon the condition that she should die leaving children surviving her.

In *Dashiell v. Dashiell*, 2 Harr. & G. 127, where a testator bequeathed to his granddaughter certain negroes, adding, "and in case it should please God to take my granddaughter Elizabeth Sarah Ann before she has an issue, then the said negroes devised to be an equal division between the rest of my heirs," it was held that the obvious meaning of the terms used was that, as soon as the granddaughter had a child, the limitation over as an executory disposition of the property was absolutely gone forever.

In *Clough v. Clough*, 64 N. H. 509, 15 Atl. 127, where a testator devised property to a niece, her heirs and assigns, "if she should have living issue, if she should not have any issue, then to have and use the occupancy of said premises during her natural life," it was held that there being no express condition making a devise of a fee to the niece to depend upon her issue continuing to live as long as she should, and as the will did not show that the testator used the terms "having living issue" in any other than their literal sense, or with an implied qualification that the niece's issue must survive her, the niece took a fee upon giving birth to living issue.

In *Sadler v. Wilson*, 40 N. C. (5 Ired. Eq.) 296, where a testator devised certain lands and negroes to his children with the proviso, "should any of my children die before they have lawful heirs of their body, the property of my child that may decease shall be equally divided among my children that may survive," it was held that the fee taken by each child was contingent upon the birth of issue, the court saying: "The testator meant, if his children should have issue, that they should have the means of advancing them in their lives, and not that they should be restricted to the power of disposing of the estate, if they should leave issue at their deaths. This not only results from the terms of the limitation over, but from the consideration that it is not confined to the land, but embraces all

the property bestowed by the testator on his children; without which they could make no provision for their families."

In *Moore v. Feig*, 17 Ohio C. C. 27, 9 Ohio C. D. 660, where testator, after devising the bulk of his property to his son John, provided: "Now if my said son John shall have an heir of his own body, then all title and interest in and to my real estate, with power to convey and sell, shall vest in him. But if said John should die leaving no heir of his own body, then said estate shall pass to my son Thomas, subject to the same requirements, restrictions, and limitations pertaining to John. And in case Thomas should die and leave no heir of his own body, then it is my will that my said real estate pass absolutely to my son James and his heirs forever, with power to sell and convey. But in no case shall John or Thomas sell or dispose of said real estate unless they shall have an heir of their own bodies,"—it was held that upon the birth of a child to him, John became the owner of the realty in fee; such construction being strengthened by the circumstance that John was required by the will to pay a considerable sum of money to other persons as a condition upon which he should hold whatever estate was granted to him in the will, and by the provision that in no case John or Thomas should sell or dispose of said estate unless they should have an heir of their own bodies.

In *McCullough v. Johnetta Coal Co.* 210 Pa. 222, 59 Atl. 984, where a testatrix, after directing the investment of money in lands for her son, went on to provide that should the son die without issue, the land should be sold and the proceeds divided among her brothers and sisters or other heirs, but should the son have heirs or issue, then the land should be his and his heirs, it was held that, apart from any rule of construction which would operate to the same end by giving the son an estate tail which by statute would become a fee, the manifest intention of the mother was that whenever her son should have issue, the land should become his in fee simple.



strued by its decree the will in question. The decision rests upon whether the words of the will "death without issue" shall be construed to mean "death without having had issue" or "death without issue surviving." The courts are disposed to favor such a construction of the will as to give the absolute fee to the first taker, so as not to tie up the property and prevent its alienation (*Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088), and a construction is uniformly adopted which favors the heir (*Kohtz v. Eldred*, 208 Ill. 60, 69 N. E. 900). In *Voris v. Sloan*, 68 Ill. 588, the words "should die without issue" occurred in a deed of trust, and were construed to mean without having had issue,—not without surviving issue. To the same effect are *Smith*

*v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Field v. Peoples*, 180 Ill. 376, 54 N. E. 304; *King v. King*, 215 Ill. 100, 74 N. E. 89. In *Stafford v. Read*, 244 Ill. 138, 91 N. E. 91, this court, after discussing the authorities just referred to and several others that are cited and relied on by counsel for appellees in this case, construed the words "shall die without issue" as meaning, "if they should die without having had issue or children born to them."

Counsel for appellees argue that the words "die without issue" are construed by the courts to mean "die without having had issue" only when the first taker is vested with a life estate; but that where the first taker receives the fee and the language of the will makes the title return

In *Murrell v. Mathews*, 1 Brev. 190, where a testator after devising all his lands to his son "and the lawfully begotten heirs of his body," went on to provide, "but in case he the lawfully begotten heirs should die without a lawfully begotten heir," the property should go to another, it was held that the son took an estate in fee simple conditional at common law, and that by having issue the condition was performed so as to enable him to alien: and that having aliened after such performance, in the lifetime of the issue, the estate as aliened became absolute in the purchaser.

And in *Graham v. Moore*, 13 S. C. 115, testator devised property to a grandson with the proviso that if the grandson should die not having any male heir, then the land should be the property of his brother, and, after making several similar devises to others of his grandsons, proceeded: "And my will is, and be it well understood, that the before-mentioned lands that is hereby willed to the before-mentioned legatees shall not be alienated or conveyed by them nor their heirs, but shall at each of their deaths descend to each of their oldest male heirs, and so on in regular succession." It was held that, reading the two clauses of the will together, their effect was to create a fee conditional in the grandson, so that an alienation by him after the birth of issue was good, not only to cut off the descent to his male heir *per formam doni*, but to defeat the reversion to the testator or his heirs upon the failure of such issue, even though such issue may have died before him.

In *Pearce v. Pearce*, — Tex. —, 134 S. W. 210, where a testator devised lands to his daughter and the heirs of her body to be born, adding that on the death of either of his children without heirs of their body, the property given to them should return to the body of his estate, to be divided between the survivors, it was held that the fee-simple estate created in the daughter became absolute upon the birth of a child. It is difficult to say, however, whether the court in this case actually meant to decide 37 L.R.A. (N.S.)

the question, it appearing that the daughter had died leaving issue surviving.

In *Chaplin v. Doty*, 60 Vt. 712, 50 Atl. 362, where a testator gave the residue of his estate to his granddaughter, "to be for the proper use and benefit of herself and heirs forever," further providing that "if she shall not marry, or, marrying, shall have no issue living," she should take a life interest only, but if she should "die without lawful issue living," then the residue should go to others, it was held that if the granddaughter should marry and have issue living, the first provision in the clause would have effect and govern the gift; so that the words, "shall die without lawful issue living," mean and are to be read as if they ran, "without having had lawful issue living."

In *Yocum v. Parker*, 130 Fed. 722, reversed on other grounds in 66 C. C. A. 80, 130 Fed. 770, where a testator devised lands to a son absolutely "with the express understanding and restriction, viz., that if my said son dies without legal issue, descendants of his, legitimate issue of his, said lands shall pass to" others, it was held that when a legitimate child was born to the son, the contingency on which the absolute estate was dependent occurred, and thereupon the estate in the son became complete in fee simple.

In *Weakley ex dem. Knight v. Rugg*, 7 T. R. 322, a testator having three daughters made trifling bequests to two of them and then gave a leasehold estate "to his daughter Ann, but if she should happen to die without having child or children lawfully begotten, then he willed that the said premises should be and remain to his daughter Mary, and after her to such child or children as she should happen to have lawfully begotten." Ann was also the residuary legatee. It was held that both by the fair grammatical construction of the will, and in view of the fact that Ann was the great object of testator's bounty, it must be deemed to have been his general intention that her family should first be provided for; and that her estate therefore

upon his dying "without issue," then such first taker only takes a base or qualified fee. No such distinction is made by the authorities in construing the words "die without issue." Their meaning is not controlled by the question whether the first taker has a life estate or a greater or less estate, but rests rather upon the connection in which such words are used and the intention of the testator, as shown by the entire will. It is the settled rule of law that

the courts are inclined to construe the words "die without issue," or words of similar import, to mean "die without having had issue," unless there are "expressions or circumstances from which it can be collected that these words are used in a more restricted sense." *Voris v. Sloan*, supra. And see also *Kales*, *Future Interests*, § 199; *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105.

Counsel for the appellees earnestly insists that there are such expressions or circum-

stances which become absolute upon her giving birth to a child, as otherwise, if she had a child who died in her lifetime, leaving children, such children could not have taken at all, whereas, the prior limitation to Ann being out of the way, the instant Mary had a child the estate would have vested in that child without any regard to such child surviving his mother.

In *Wall v. Tomlinson*, 16 Ves. Jr. 413, 10 Revised Rep. 212, where a residuary bequest was made to one "forever, in case she should have legitimate children; in failure of which" it was to go to others, it was held that as the testator's object appears to have been, in the event of legatee's having children, to give her the means of making a provision for them, and as it was difficult to give the words "in failure of which" the construction of not leaving children at her death, which would tie the property up during her whole life, the legatee's estate became absolute upon her giving birth to a living child.

In *Jeffreys v. Conner*, 28 Beav. 328, where a testator, having given certain leasehold and personal property to his son, and certain other property to his daughter, further provided: "And it is my desire that if my son Charles die without having any child or children, then the whole of the houses and property left to him shall become the property of my said daughter Elizabeth Jeffreys and my said niece Elizabeth Knights. . . . And should my son Charles and daughter Eliza die without any child or children, then the whole of the property to become the property of my niece Elizabeth Knights aforesaid,"—it was held that although it was a very capricious disposition on the part of the testator, the only way of solving the difficulty occasioned by the first and second limitations over was to hold that dying "without having any child or children" in the first limitation means, "without having had any child," and that dying "without any child or children" in the second limitation meant dying "without any child or children living at the death," as otherwise it would be a question whether the first clause must be altered to agree with the second, or the second to agree with the first; and therefore, the son having had a child, the gift over did not take effect.

In *Re Johnston*, 12 Ont. L. Rep. 262, where a testatrix gave to her adopted daughter certain realty "for her sole use and benefit forever," further providing that

in the event of the adopted daughter dying without issue, all her interest in the estate should lapse, it was held that there being no gift over, the provision might be regarded as intended to enable the devisee to make provision for her family, so that she would take an absolute estate in fee upon giving birth to a child.

In *Turney v. Sparks*, 88 Mo. App. 363, where a testator, after giving his daughter his entire estate, subject to the payment of a legacy to a grandson, provided that should the grandson die without bodily heirs the legacy should become the property of the daughter, and that all the property bequeathed to the daughter should belong to the grandson should the daughter die without bodily heirs, it was held to have been testator's intention to give his daughter a life estate in his realty, to ripen into an absolute fee should she give birth to a living child, or should the grandson die without issue during her life.

In *Voris v. Sloan*, 68 Ill. 588, where a father conveyed property in trust for his daughter, and the heirs of her body forever, during her natural life, with a remainder to the heirs of her body, and in case she should die without issue, then the legal title to revert to the grantor or his heirs, it was held that, as there was nothing in the language of the deed implying any intention to restrict the vesting of title to the heirs the daughter might leave at her death, the remainder vested on the birth of children, thereby defeating the limitation over.

In *Field v. Peeples*, 180 Ill. 376, 54 N. E. 304, where a testator devised to his daughter certain real estate for life, "and at her death to descend to her children, and in case she dies without issue," then to others, it was held upon the authority of *Voris v. Sloan*, supra, that the words, "in case she dies without issue," should be construed to mean "without having had issue," not "without surviving issue."

In *Williams v. Leech*, 28 Pa. 89, where a devise to testator's daughters for life, with remainder to their children and their heirs, was followed by the proviso, "and if either of my children should die without issue, their portion shall be equally divided among the survivors," it was held that the remainder vested in the children's children as soon as born, and the devise over fell entirely. The court said: "It may be thought unreasonable that the devise over should be defeated by the birth of children

stances as would lead to the conclusion that these words were not here used with their primary meaning. We cannot assent to this view. The intention of the testator as expressed in the will must be ascertained and given effect if not prohibited by law. *Armstrong v. Barber*, 239 Ill. 389, 88 N. E. 246, and cases cited. The intention of the testator, gathered from the entire will, manifestly was that, if both of appellants had issue born to them, then the entire

estate should vest in said appellants, share and share alike. This conclusion, in our judgment, must necessarily follow under the general rules of law laid down in this and other jurisdictions as to the construction of wills, as well as from the decisions of this court in applying those rules to particular cases. The birth of a child to each of appellants settled any controversy that might arise in regard to the land ever passing to appellees. The chancellor should

who may have died within a few months; but we are only following the testator's law of descent, and not making one. Besides, it is quite as reasonable that the mother should succeed in title to her children, as that their aunts should. And these children might have lived to have grandchildren and then died before their mother, and thus nothing would have gone to their descendants, if the vesting of the remainder depended upon the children's surviving the life estate. And to make the vesting depend upon the surviving would be just as uncertain as the other extreme, for the mother might die a day before, or a day after, even her infant children. This land vested in the children on their birth, and descended on their death to their parent, but subject to open again to let in the right of other children, when born, for their shares; and the devise over fell entirely, never to rise again."

In the cases which follow, however, the contingency was held to refer to a dying without leaving issue or children surviving.

In *Morgan v. Morgan*, 5 Day, 517, where the testator, after devising land to his sons, "their heirs and assigns forever," subsequently provided that if they should either of them die without children, his brothers should have his part in equal proportion, it was held that as in the mind of the testator, had he foreseen the event of the birth and death of a grandson without having had children before the death of his father, the same reason would have existed for designating the person or persons to succeed to the estate as would be on the death of either son without children living at the time of the son's death, the will would not be construed as limiting a son's estate over only in case of his dying, living the others, without having had children; but that the contingency referred to his dying without having children living at the time of his decease.

In *Gannon v. Peterson*, 193 Ill. 372, 55 L.R.A. 701, 62 N. E. 210, where a testator, after devising certain realty to his three sons, their heirs and assigns forever, continued: "It is my will that upon the death of either of them, the surviving brother or brothers shall take such share, like and like; to have and to hold the same to him or them or his and their heirs forever; and in case all three should die without issue, then it is my will that the above-mentioned property in this bequest go to" 37 L.R.A. (N.S.)

certain others, it was held that by the use of the word "issue" the testator meant that children should survive the sons, or some one of them, as a condition upon which the fee should become absolute, and that upon failure of such children, the estate should vest by executory devise in the other persons mentioned.

In *Wells v. Offutt*, 21 Ky. L. Rep. 931, 53 S. W. 530, where testator, after directing his executors to pay over to a daughter the interest on a sum of money so long as they should have the money on interest, added: "But it is my desire that they should lay it out in some realty for her and lawful heirs of her body, and if she should not have any, it shall be returned to her brothers and sisters, to be divided equally between them," it was held that the phraseology of the provision disclosed an intention that the fee taken by the daughter should not become indefeasible upon her giving birth to a child, but only in the event of her death leaving children surviving her, as this was the only time when the devise over to the brothers and sisters would begin, if at all.

In *Calmes v. Jones*, 23 Ky. L. Rep. 504, 63 S. W. 583, where a father conveyed land to his daughter by deed containing a condition that in case of her death without children before that of the grantor, the land should revert to him, and that if she should die after the grantor, without issue, then the property should go to others, it was held that as the title could not become indefeasible in the lifetime of the grantor unless at the time of her death the daughter left issue, it was to be presumed that the grantor intended, in the use of the words "dying without children," and "dying without issue," to convey the same idea that he would have conveyed had he used the words "dying without leaving children," and "dying without leaving issue."

In *Dorr v. Johnson*, 170 Mass. 540, 49 N. E. 919, where a testator gave his entire estate in trust for a granddaughter, further providing that in case of her decease without issue it should be divided in a manner specified, it was held that if the words "without issue" mean a definite failure of issue, the granddaughter took an estate in fee simple, terminable upon her dying without issue then living.

In *Perrett v. Bird*, 152 N. C. 220, 67 S. E. 507, where a testator, after devising lands to a son and the lawful heirs of his body, lawfully begotten, further provided

have entered a decree partitioning the lands in accordance with the prayer of the bill.

Counsel for appellants further insist that the trial court erred in taxing the solicitor's fees of appellees' counsel as costs. It is admitted that the fees are reasonable for the work performed, but it is argued that appellees should personally pay these fees. The general rule is that, when the testator has expressed his intention in his will so ambiguously as to make it necessary to go into a court of chancery to get a construction of

the will in order to determine which of two or more adverse claims to the same fund or property is valid, the costs of the litigation should be borne by the fund or property in question. *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704; *Lombard v. Whitbeck*, 173 Ill. 396, 51 N. E. 61; *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 338, 23 N. E. 603; *Straw v. East Maine Conference*, 67 Me. 493; *Deane v. Home for Aged Colored Women*, 111 Mass. 132; *Noe v. Miller*, 31 N. J. Eq. 234; *Ingraham v. Ingra-*

that in case of the death of either of his three children, "their portion of my estate shall revert to the surviving one; and in case they all die without heirs of their bodies, lawfully begotten, then it shall go to my oldest children," it was held that the son took a fee which remained defeasible although he had several children, the contingency being determinable only upon his death.

In *Dawson v. Ennett*, 151 N. C. 543, 66 S. E. 566, where testator devised property to his grandchild with the proviso that if she should "die without an issue," then over, it was held that the grandchild took an estate in fee simple, defeasible on her dying without issue living at the time of her death, so that the contingency had not been satisfied by her having had a child which had died.

In *Piatt v. Sinton*, 37 Ohio St. 353, where testator devised property to one with the proviso that in case she should die without leaving any legitimate heirs of her body, it should go to certain others, it was held that whether the devise over would ever take effect could not be determined until the first taker's death.

In *Re Booth* [1900] 1 Ch. 768, where testator devised one half of his estate to a niece "for her own absolute use, subject to no control of any husband, but should she die without child or children," then over, it was held that although the case was one of some difficulty, yet, having regard to the form of expression used, the true meaning of the contingency was "dying without child or children then living."

The words "die without children" are said to have been construed in *Re Hambleton* [1884] W. N. p. 157, cited in [1900] 1 Ch. 768, as signifying "die without having had a child;" but the report being inaccessible, it is not possible to state the grounds of the decision.

In *Thicknesse v. Liege*, 3 Bro. P. C. 365, where a testator gave his residuary estate to his daughter for life, and after her death to be divided amongst her issue when the youngest of them should be twenty-one years old, but if the daughter should happen to die without any child, or the youngest of them should not arrive to twenty-one years, and none of them should have left lawful issue, then to other persons, it was held that upon the death of the daughter without any child or issue of any child then living, the devise over took effect, *al-* 57 L.R.A. (N.S.)

though she had had children, who had died in her lifetime.

In *Re Denton*, 137 N. Y. 428, 33 N. E. 432, where testator gave his residuary estate to his four children, adding: "and in case of the death of either of them leaving issue before either of the different parts thereof as hereinbefore mentioned can be divided, then such issue to take the share or part the parent would have been entitled to if living; if without issue, then the survivors to take," it was held that the contingency expressed by the last clause of the proviso was not eliminated by a son's having had issue in his lifetime, but that such clause is an elliptical form of expression, and is antithetic to the first clause, which relates to the time of the death of the son.

In *Parish v. Ferris*, 6 Ohio St. 563, in which the question before the court was whether or not a definite failure of issue was intended, it was held that the limitation over in a will in the event of a daughter's death without children took effect although it appeared that she had given birth to a child, which, however, did not survive her.

In *Korn's Will*, 128 Wis. 428, 107 N. W. 659, where a testator devised a farm to his son with the further provision that in case of the death of the son without issue, then and in that event the property should go to testator's grandchild or grandchildren who might be living at the time of the death of such son, the suggestion was offered by counsel that the condition upon which the son's estate was to terminate had been rendered impossible by the fact of issue born to him, but the court held that the construction of the phrase "death without issue" as "death without issue born" was excluded, except where clearly intended, by a statute providing that "when a remainder shall be limited to take effect on the death of any person without heirs or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." The court in this instance evidently mistook the purport of the statute, which is, to preserve the probable intention of the testator by preventing a construction which would, by imputing to the phrase the signification of indefinite failure of issue, give the first taker an estate tail and thereby defeat the limitation over.

E. S. O.

ham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320. This is not a bill for the construction of a will, but for the partitioning of real estate. No trust was created by the will and no grounds are alleged in the bill that would give a court of equity jurisdiction in the case except that partition is sought of the lands of testator. Under the rules governing the allowance of solicitor's fees in partition proceedings, appellees are not entitled to the payment of such fees out of the funds of the estate. *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524; *McMullen v. Reynolds*, 209 Ill. 504, 70 N. E. 1041; *Jones v. Young*, 228 Ill. 374, 81 N. E. 1042; *Mulloy v. Mulloy*, 231 Ill. 285, 83 N. E. 158. On the facts shown on this record, the circuit court erred in allowing solicitors' fees to appellees.

The decree of the Circuit Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

Petition for rehearing denied October 6, 1910.

#### LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

SPENCER THOMAS, Appt.

(127 La. 576, 53 So. 868.)

#### Homicide — shooting bystander.

One hitting a bystander when shooting at another with intent to kill the latter may be convicted therefor, under a statute pro-

*Note.* — *Assault with intent to murder or kill by unlawful act aimed at another than the one injured.*

#### Injuring other than person intended.

It is well settled that one who, in an attempt to kill another person, injures a third, is guilty of assault with intent to murder or kill the latter.

Thus, a conviction for assault with intent to kill will be sustained where one shoots at a person with felonious intent, but misses him, and wounds another not intended, the felonious intent being transferred to the person injured, rendering the assailant as guilty as though the person intended had been shot. *State v. Montgomery*, 91 Mo. 52, 3 S. W. 379.

So, one who, while trying to murder one person, unintentionally cuts another, is guilty of assault with intent to murder the latter, under a statute providing if one intending to commit a felony, in the act of executing it, by mistake or accident, do another act which, if voluntarily

viding for the punishment of whoever shall shoot any person with a dangerous weapon with intent to commit murder.

(November 28, 1910.)

**A**PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Tangipahoa convicting him of shooting with intent to commit murder. Affirmed.

The facts are stated in the opinion.

Messrs. R. C. Reid and S. Reid, for appellant:

An assault with intent to murder involves the concurrence of two distinct elements,—an intent to murder, and an assault or attempt to carry out that intention.

*People v. Devine*, 59 Cal. 630; *White v. State*, 3 Tex. App. 605; *Bass v. State*, 6 Baxt. 581; *State v. Evans*, 39 La. Ann. 912, 3 So. 63.

The intent to commit the specific crime is the essence of the offense.

*Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Smith v. State*, 83 Ala. 26, 3 So. 551; *Felker v. State*, 54 Ark. 489, 16 S. W. 663; *People v. Mize*, 80 Cal. 41, 22 Pac. 80; *State v. Fiske*, 63 Conn. 388, 28 Atl. 572; *Hamilton v. People*, 113 Ill. 34, 55 Am. Rep. 396; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *State v. White*, 41 Iowa, 316, 20 Am. Rep. 602; *State v. Neal*, 37 Me. 468; *Botsch v. State*, 43 Neb. 501, 61 N. W. 730; *Slatterly v. People*, 58 N. Y. 354.

It is not sufficient to prove a general felonious intent.

*Ogletree v. State*, 28 Ala. 693; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Morgan v. State*, 13 Smedes & M. 242; *Jones v.*

done, would be a felony, he shall receive the punishment fixed by law to the offense actually committed. *Smith v. State*, — Tex. Crim. Rep. —, 95 S. W. 1057.

So, in *Vandermark v. People*, 47 Ill. 122, a conviction for assault with intent to commit murder was sustained where a person shot at one, and accidentally hit another, the act of the party in shooting recklessly, regardless of the lives of others, being construed as implying general malice.

It is held in *O'Rear v. Com.* 25 Ky. L. Rep. 1537, 78 S. W. 407, that one who, in striking at a person in self-defense, wounds another, is not guilty of maliciously stabbing the latter.

#### Mistaking identity of person injured.

If A, intending to murder B, shoots C, supposing C to be B, and wounds C, he is guilty of an assault with intent to murder C. Notwithstanding A's mistake, C is the person whom he assaulted, and whom he intended to kill. *People v. Torres*, 38 Cal. 141.

State, 11 Smedes & M. 315; State v. Gainus, 86 N. C. 632.

When one intending to kill A shoots and wounds B, or if it be doubtful which he shoots at, he cannot be convicted of an assault with intent to kill B.

Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; State v. Mulhall, 199 Mo. 202, 7 L.R.A. (N.S.) 630, 97 S. W. 583, 8 A. & E. Ann. Cas. 781.

Mr. R. G. Pleasant, with Messrs. Walter Guion, Attorney General, and W. H. McClendon, for the State:

When parties engaged in the commission of a crime with malicious intent, and in the execution thereof, perpetrate another criminal act, not originally intended, the unintended act derives its character from

the intended act, and the original malicious intent affects both acts.

State v. Vines, 34 La. Ann. 1083, 4 Am. Crim. Rep. 296; State v. Salter, 48 La. Ann. 204, 19 So. 265; 4 Bl. Com. chap. 14, p. 192.

Provosty, J., delivered the opinion of the court:

The accused quarreled with one Washington in front of the latter's house, walked about 200 yards away, and procured a gun, and returned, and, without excuse, fired at Washington, wounding both him and one Alma Meyers, who was on the gallery of the house back of him. The indictment reads that the defendant "wilfully, feloniously, and of his malice aforethought, did shoot Alma Meyers with a dangerous weap-

So, under statute providing that "every person who shall be convicted of an assault or an assault and battery upon another, with any deadly weapon, with intent to kill and murder such other person, shall be punished," etc., one who, while attempting to kill and murder an enemy in the darkness, dangerously wounds a friend by mistake, is guilty of assault "with intent to kill and murder." *McGehee v. State*, 62 Miss. 772, 52 Am. Rep. 209.

On trial for assault with intent to kill, it was held in *State v. Jump*, 90 Mo. 171, 2 S. W. 279, that where one threw a rock at a person, and by mistake hit another, he was liable in law for all the consequences of his act, unless he acted in self-defense.

In *Olds v. State*, 54 Tex. Crim. Rep. 411, 113 S. W. 272, which affirmed a conviction of assault with intent to murder, and where it was claimed that accused struck one, mistaking her for another, it was said: "Appellant intended either to kill, or he intended to inflict injury of some character upon, the woman that he did strike, and the fact that he made a mistake, or may have made a mistake, under such circumstances, would not justify him, for the law does not authorize him to strike either woman, under the facts stated. Under no view of the law would a mistake of this sort relieve criminality. The purpose of the defendant was to inflict injury, it was intentional, although, under his theory, he may have made a mistake in the individual he intended to strike."

So, a conviction for assault with intent to murder was affirmed in *State v. West*, 152 N. C. 832, 68 S. E. 14, where accused shot a person in the darkness, mistaking him for one whom he intended to kill.

So, in *Reg. v. Lynch*, 1 Cox, C. C. 361, where accused wounded one, supposing him to be another, he was held guilty of the charge of cutting and wounding with intent to do grievous bodily harm.

#### Shooting into crowd.

In *Phillips v. United States*, 2 Okla. Crim. Rep. 628, 103 Pac. 861, it is held that 37 L.R.A. (N.S.)

a person who fires a gun into a crowd, not caring whom he may kill, with the intention of killing someone of them, is guilty of assault with intent to kill each of them.

In *Bray v. State*, 118 Ga. 786, 45 S. E. 597, 15 Am. Crim. Rep. 694, the indictment charged the accused with assault with intent to murder a named person with a rock. Upon the trial the evidence tended to show that the accused wantonly threw a rock likely to produce death if hitting a person in a vital spot, into a street railroad passenger car occupied by a number of passengers, one of whom was the person alleged to have been so assaulted, and whom the rock came near striking. It did not appear that the accused knew such person or any of the other passengers, or that he intended to hit any particular person in the car. No one was hit. It was held that the evidence did not warrant a verdict of guilty of assault with intent to murder, because it tended to make merely a case of the statutory offense of "rocking a passenger train," as defined in Penal Code 1895, § 511, and therefore that the court erred in not granting a new trial.

It is held in *Com. v. McLaughlin*, 12 Cush. 616, that if one designedly fires a loaded pistol in the direction of two persons, and so near them that it would probably kill them or do them some great bodily harm, and with the intent so to do, or entirely regardless which it might actually kill, the jury might properly find him guilty of the same intent as to both.

It is held in *State v. Sloanaker*, *Houst. Crim. Rep. (Del.)* 62, that if a party intentionally and wantonly discharged a pistol into a crowd assembled at a railroad station, regardless of whom he may wound or kill, and wounded one unknown to him, on an assault with intent to kill such person, he will be presumed in law to have intended the probable consequences of his own act, and will be guilty of an assault upon him, but not of the intent to kill him, without proof of such felonious intention like any other material fact in the case.

So, where one fired a pistol toward persons who had ejected him from a store, and wounded one of them, he was held guilty

on, with intent to commit murder, contrary to the form of the statute," etc.

The statute is § 791, Rev. Stat., as amended by act No. 43 of 1890, and reads: "Whoever shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, with intent to commit murder, shall," etc.

The main reliance of defendant is upon three bills covering the difference between his counsel and the judge as to whether there can be a conviction under said statute in a case where the shooting was at another person, and only took effect accidentally upon the person named in the indictment.

We agree with the learned trial judge that in the instant case the terms of the statute are completely satisfied, and the

allegations of the indictment fully proved, if there is the shooting of any person,—no matter of what person,—and the shooting is done with a dangerous weapon and with intent to commit murder; in other words, that there is nothing in the terms of the statute requiring that the person who was shot should have been the person intended in fact to be murdered, or who was shot at.

It will be observed that the indictment does not charge that the intent to murder was directed towards Alma Meyers; and that it did not need so to charge. Whether its so charging would have made any difference, or, in other words, whether its so charging could not have been treated as mere surplusage, is a question that need not be considered. In *Reg. v. Ryan*, 2

of assault with intent to kill, the fact that he shot for effect, and did not intend to do any harm, being no defense. *State v. Hamilton*, 170 Mo. 377, 70 S. W. 876.

#### Poisoning other than one intended.

In *Rex v. Lewis*, 6 Car. & P. 161, it is held that if A sends poison, intending it for B, with the intent to kill B, and it comes into the possession of C, who takes it, but does not die, A may be indicted for capital offense, on the statute, 9 Geo. IV. chap. 31, § 11. In this case Gurney, B., said: "If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person."

And in *Johnson v. State*, 92 Ga. 36, 17 S. E. 974, it is held that "an indictment alleging that the accused, 'with arsenic poison and other poisons to the grand jurors unknown, but all being weapons likely to produce death, did unlawfully, and with malice aforethought, make an assault upon' a named person, 'by putting said arsenic poison and said other poisons to the grand jurors unknown, into coffee, and administering the said poisons to the said person, charges the offense of assault with intent to murder, with sufficient certainty and fullness."

But in *Peebles v. State*, 101 Ga. 585, 28 S. E. 920, it is held that the act of maliciously putting poison into a well, with the intent that the water thereof shall be drunk by another, and that he shall in this manner be killed, does not, without more, constitute an offense of assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same.

#### Necessity of proving specific intent.

There are a number of cases holding that where an indictment in case of assault with intent to kill one, resulting in injury to another, is framed under a statute calling for a specific intent, that intent must be proved.

The following cases failed to sustain a conviction because of failure to prove intent 37 L.R.A. (N.S.)

to kill the particular person named in the indictment: *Ogletree v. State*, 28 Ala. 693; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1 (injury by spring gun); *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *People v. Keefer*, 18 Cal. 638; *Com. v. Morgan*, 11 Bush, 601; note to *State v. Mulhall*, 7 L.R.A. (N.S.) 630 (charging assault with intent to kill, when actual intent directed against another); *Barcus v. State*, 49 Miss. 17, 19 Am. Rep. 1, 1 Am. Crim. Rep. 249; *State v. Shanley*, 20 S. D. 18, 104 N. W. 522; *People v. Robinson*, 6 Utah, 101, 21 Pac. 403; *Reg. v. Lallement*; 6 Cox, C. C. 204; *Morgan v. State*, 13 Smedes & M. 242; *Reg. v. Ryan*, 2 Moody & R. 213 (poison case).

So, in *Hollywood v. People*, 2 Abb. App. Dec. 376, where the statute was in these words: "Every person who shall be convicted of shooting at another, etc., with the intent to kill . . . such other person," it was held that an indictment charging assault with intent to kill the wife could not be supported by proof of shooting at the husband with intent to kill him, and hitting the wife by mere mistake; but a charge that under such indictment a conviction for shooting the wife could not be had was too broad, for, said the court: "It is equally clear, however, that the prisoner might have been convicted under this indictment of another offense than that described in this statute. At common law, feloniously or unlawfully firing or striking at one, and hitting another, is an offense as to the latter, of which the prisoner might have been convicted under this indictment."

So, in *Gentry v. State*, 92 Miss. 141, 45 So. 721, where accused shot into a wagon occupied by several persons, and the indictment charged assault with intent to kill and murder a particular one of them, it was held error to instruct the jury that proof of a design to kill the designated person was unnecessary to a conviction.

To the contention that firing into a body of men indiscriminately, with the intention of killing one, not knowing or caring which, is an assault with intent to kill upon each

Moody & R. 213, where G. took poison which the prisoner had intended for C., and the indictment charged specifically that the prisoner had intended to poison G., Parke, B., doubted whether the verdict could stand, and directed another indictment to be brought charging generally that the prisoner did the act "with intent to commit murder," without specifying against whom the intent was directed. He said that he doubted the correctness of a previous decision (*Rex v. Lewis*, 6 Car. & P. 161), where, upon similar facts, the verdict had been maintained, although the statute then required that the intent should have been to murder "such person,"—i. e., the person named in the indictment. He added that the language of the statute had been altered in order to provide for just such a case as the one in question; so that it was now sufficient to allege generally that the prisoner did the act "with intent to commit murder," without naming the person against whom the intent was directed.

Under the caption "Assault taking effect on one not meant," Bishop, *New Crim. Law*, vol. 2, § 741, ¶ 4, has the following: "Should the assault terminate in a battery of a person not meant, is the offense of assault with intent to kill or murder committed? In legal reason, and in the absence of special terms in the statute, it is; because in such a case both the statutory act and the statutory intent have transpired,—the legislative words are covered, and the wrong done

is completely within their spirit. The indictment might even charge that the assault was made on one named, mistaken by the accused for another one named, with intent to take the latter's life; for here the thing done would be apparently adapted to accomplish the death meant, bringing the case within the general rule of the law of attempt."

From Bacon's *Maxims*, rule 15, we take the following: "In criminal causes, general malice or intent is enough, provided it is combined with a fact of as high a degree. . . . All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor leveled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature." Bacon, *Maxims*, rule 15. See 8 Am. & Eng. Enc. Law, 288.

In support of his contention, the learned counsel for defendant cites the cases of *State v. Evans*, 39 La. Ann. 912, 3 So. 63; *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *State v. Mulhall*, 199 Mo. 202, 7 L.R.A. (N.S.) 630, 97 S. W. 583, 8 A. & E. Ann. Cas. 781.

The doctrine of the *Evans Case*, here cited, is simply that where a specific intent is required by the statute, and a specific intent is, accordingly, charged in the indictment, this specific intent must be proved. In other words, that in such a case a general

and all; that in such a case specific intent to kill is present, and the intention to kill whoever may be reached by the missile includes all and any who may be present, the court in the above case said: "This is true enough, and if the court had limited its charge to the announcement of this principle, we would unhesitatingly affirm the judgment. The argument is, and the principle is, that there must be, there must exist in the testimony, evidence that the defendant did intend to kill and murder the specific person named in the indictment; but this specific intent is furnished by the legal presumption, which is evidence, that one who so shoots recklessly into a crowd intends to kill and murder all, and per consequence, any one of all. In other words the specific intent to kill the person named in the indictment is worked out through this legal presumption. It must exist. This specific intent to kill the very person named in the indictment must be shown by evidence; but the evidence shows such intent when it shows this recklessly shooting into a crowd, which the law says shall mean an intent to kill all, and hence to kill any particular one. There is no relaxation of the principle, fundamental in every such indictment as this, that the testimony, whatever that

testimony may be,—the legal presumption or the testimony of witnesses,—must show the specific intent to kill the very person named, which must be established beyond all reasonable doubt." The court further said that had the charge stopped at the words "with intent to kill and murder," it would have been correct, but it was fatal error where, in the concluding clause of the instruction, the jury was told that it was not necessary to show that there was a design to kill and murder Dale, the person named in the indictment. The court added that the indictment, if correctly drawn, should have charged that defendant shot into a wagon wherein were Dale and divers other persons, with the felonious intent of killing some one or more of the occupants, not caring which, and in fact shot Dale.

But it is held in *Phillips v. United States*, 2 Okla. Crim. Rep. 628, 103 Pac. 861, that where one shoots into a crowd, a conviction will be sustained without proving a specific intention to kill the particular person wounded.

So, in *Christian v. State*, — Tex. Crim. Rep. —, 62 S. W. 422, it is held that one who shoots into a wagon with the intent to kill whoever occupies it may be convicted of assault with intent to murder,



intent to commit a crime will not suffice, but that the specific intent must be proved.

There can be no doubt that where a specific intent is made by the statute an element of the crime, this specific intent must be proved, and that in such a case proof of general malice or criminal intent will not suffice. Thus, in assault with intent to kill, proof of an intent to rape will not suffice; and, *vice versa*, in assault with intent to rape, proof of intent to kill will not answer. But in a case like the present the specific intent required by the statute is proved; the shooting is done with intent to kill. True, the intent was to kill a different person, but, we repeat, the statute does not require that the intent must be to kill the person actually shot; it merely requires that there must be an intent to kill.

In the other case cited by defendant, *supra*,—that of *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8,—the prisoner shot at McClure and hit one Hearstings. He was charged with having made an assault upon Hearstings, "with intent him, the said Hearstings, to kill and murder." The court held that the specific intent to kill Hearstings had to be proved. In support of that view the court cited *Rex v. Holt*, 7 Car. & P. 522; 2 Starkie, Ev. 572; *State v. Neal*, 37 Me. 468; *State v. Jefferson*, 3 Harr. (Del.) 571; *Ogletree v. State*, 28 Ala. 693.

In *Rex v. Holt*, as already pointed out, *supra*, the statute required that the intent

should have been to murder "such person," i. e., the person named in the indictment. This distinguishes that case from ours, and, possibly, also from this *Lacefield Case*, since in this *Lacefield Case* it might perhaps have been possible to treat the allegation of the intent having been to murder the person named in the indictment as surplusage.

Referring to Starkie on Ev. 572, we find there a note announcing broadly, as in this *Lacefield Case*, that "where one aiming at A misses him and wounds B, he cannot be convicted of assault with intent to kill B." Whether this note is by Starkie is not certain. No decision or other authority is cited in support of it.

In *Ogletree v. State*, 28 Ala. 693, the defendant had threatened to kill one Mitchell, and was about to assault Mitchell with a stick when one Tiller intervened to prevent him from doing so, and defendant turned upon Tiller and struck him with the stick, and the indictment was for assaulting Tiller with intent to kill. Proof of the threat made against Mitchell was objected to, on the ground that the threat had been made against a different person. The trial court admitted the evidence on the principle that the general intent which the defendant entertained at the moment to commit a crime could be proved in support of the alleged specific intent to kill Tiller. On appeal the ruling was reversed, the court holding that the evidence had to be restricted to the

whether he knew the occupant or not. The court said: "The fact that the indictment charged the name of the person actually assaulted does not require the state to prove that appellant knew the person assaulted, since it is immaterial whether he knew him or not."

And in *Moore v. State*, 18 Ala. 533, it is held error to charge that, in order to convict for assault with intent to kill and murder, it must be proved that the prisoner had, at the time of the commission of the assault, a positive intention to commit murder, it being well calculated to mislead the jury. The court said: "The statute does not use the word 'positive' as qualifying the intent, and in so far as it may be construed to mean an express intent, as contradistinguished from an intent implied or inferred from the circumstances of the case, by so much would it be erroneous."

It is also held in this case that, on trial for assault with intent to kill and murder, it is error to charge that the same facts and circumstances which would make the offense murder, if death ensued, furnish sufficient evidence of the intention, since in a number of cases a killing may amount to murder, and yet the party did not intend to kill. As, if one from a housetop recklessly throw down a billet of wood

upon the sidewalk, where persons are constantly passing, and it fall upon a person passing by and kill him, this would be, by the common law, murder; but if, instead of killing him, it inflicts only a slight injury, the party could not be convicted of an assault with intent to commit murder.

In *Rex v. Jarvis*, 2 Moody & R. 40, it is held that an indictment under 9 Geo. IV. chap. 31, § 12, for maliciously shooting at A B is supported, if he be struck by the shot though the gun be aimed at a different person. Gurney, B., in summing up, told the jury it was perfectly immaterial for whom the shot was intended. If a man laid poison for one person, and another took it and died, it would be murder; so a blow aimed at one person, and killing another, would make the party equally answerable.

In *Rex v. Lovel*, 2 Moody & R. 39, the prisoner was indicted under 9 Geo. IV. chap. 31, § 12, for maliciously shooting at G. with intent, etc. It was held that the fact of firing a gun into a room of A B's house with intent to shoot A B, the prisoner supposing him to be in the room, will not support a charge of shooting at A B, if he be shown not to be in the room or within reach of the shot.

J. D. C.

specific intent to kill Tiller. The case is authority only to the extent stated in the syllabus, that "to constitute an assault with intent to murder, . . . it is not sufficient to prove a general felonious intent, or any other than the particular intent alleged in the indictment."

The case is not analogous with ours, or with the *Lacefield Case*, supra, in that it was not the case of a blow aimed at one person, and falling accidentally upon another.

So, in *State v. Neal*, 37 Me. 468, there was not presented a case of injury falling upon a different person from the one intended. The question there was simply as to the sufficiency of the evidence to show malice aforethought. The case is authority for no other proposition than that malice aforethought must be proved before a defendant can be convicted with assaulting with intent to murder. What malice there was in that case was directed against the person injured.

The other, and last, decision cited in the *Lacefield Case*, namely, *State v. Jefferson*, 3 Harr. (Del.) 571, we are not able to refer to, the report not being in our library.

The case of *State v. Mulhall*, 199 Mo. 202, 7 L.R.A. (N.S.) 630, 97 S. W. 583, 8 A. & E. Ann. Cas. 781, cited by defendant, we do not consider to be analogous with ours in its facts. The statute in that case read: "Every person who shall, on purpose and of malice aforethought, shoot at . . . another . . . with intent to kill . . . such person, or in the attempt to," etc., "shall," etc.

The defendant had not "shot at" the person he wounded, but had "shot at" another person. It will be observed that the statute required as an essential element in the crime, that the accused should have "shot at" the person named in the indictment: "Every person who shall . . . shoot or stab at another, . . . with intent to kill . . . such person," i. e., the person shot at. Such being the case, it would seem to be plain that he could not be convicted upon facts showing that he "shot at" a different person.

So, in like manner, in *Jones v. State*, 11 Smedes & M. 315, *Morgan v. State*, 13 Smedes & M. 242, and *Com. v. Morgan*, 11 Bush, 601, the indictment was for "shooting at," as in this *Mulhall Case*.

It must be admitted, however, that in these cases, and in many others that could be referred to, the court dealt with the case as if the statute had read like that in the case at bar. And it must be further admitted that, in a large number of cases, the courts have announced broadly that where 57 L.R.A. (N.S.)

the statute requires a specific intent, there cannot be a conviction unless the facts show that the intent was directed against the particular person named in the indictment. But all these cases, except that of *Lacefield v. State*, supra, may be distinguished their facts as we have done hereinabove with that of *State v. Mulhall*, supra. Thus, in *Felker v. State*, 54 Ark. 489, 16 S. W. 663, the accused had armed himself with a gun and gone to the ginhouse of the prosecuting witness with the intention of burning it, and while there, and endeavoring to execute such purpose, had shot the prosecuting witness, who was attempting to arrest him. The indictment was for assault with intent to murder. The trial judge charged that if the jury found the foregoing facts, they should convict. The appellate court said of this charge: "It does not make the defendant's intent to kill . . . [the prosecuting witness] essential to conviction. If he did not shoot with intent to kill, he was not guilty of the felony charged, although he may have entertained a present design to commit another felony. . . . The specific design to commit another felony cannot supply the specific intent to kill."

In *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13, where the charge was larceny, and the defense was absence of intent, the court said: "In larceny, there must be a concurrence with the act,—an intent to do it,—and also a felonious intent; and the same author we have quoted says: 'A bare intentional trespass not being larceny, but the specific intent to steal being necessary, also if one who is too drunk to entertain this specific intent takes property, relinquishing it before the intent could arise in his mind, there is no larceny.'"

In *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1, the accused set a spring gun for trespassers, and accidentally wounded his neighbor, against whom he entertained no enmity. The indictment was for assault with intent to murder. The court said that the doctrine of an intent in law different from the intent in fact, or, in other words, of imputable intent, had no application to the case. That the specific intent to assault the person who was wounded would have to be proved.

This broad statement of the law must be read in connection with the facts of the case, according to which there was no necessity to go further than to hold that whenever a specific intent is required by the statute, as, for instance, to kill or to commit burglary or rape, such intent must be proved; and that malice generally or a general criminal intent will not suffice.

The exact point involved in our case came

up before the high court of justice, England, Queen's bench division, in the case of *Reg. v. Latimer*, L. R. 17 Q. B. Div. 359. Lord Chief Justice Coleridge and Judges Bowen, Field, and Manisty, together with master of the rolls, Lord Esher, rendered separate opinions. Judge Field said: "This is a very important case of wide application, and I am glad that it has received the authoritative decision of this court."

Judge Manisty said that the case raised "an exceedingly important question." The decision was unanimous. The case was one where the prisoner had struck at one person, and wounded another whom he had not intended to strike, and the indictment was under 24 & 25 Vict. chap. 100, § 20, providing that "whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person," etc. On the side of the prisoner, the case of *Reg. v. Pembliton*, L. R. 2 C. C. 119, was invoked as authority. There, a person throwing a stone at some persons in the street had broken a window, and was indicted for "unlawfully and maliciously" causing damage to the window; and Blackburn, J., had said: "It is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do."

On the side of the Crown, the case of *Rex v. Hunt*, 1 Moody, C. C. 93, was cited, where the prisoner, stabbing at one man, cut and wounded another, and, on an indictment for feloniously cutting, the court held that "general malice was sufficient under the statute without particular malice towards the person cut." Coleridge, L. Ch. J., said: "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges called general malice, and that is enough. . . . The master of the rolls has pointed out to me that these sections [18 and 20] are in substitution for, and in correction of, the earlier statutes, in which the unlawful act must be done with intent to injure such person,' making it necessary that the intent should be against the person injured, whereas in 24 & 25 Vict. chap. 100, the words 'such person' are left out, for § 18 says 'any person,' and § 20 'any other person' So, but for *Reg. v. Pembliton*, there would not have been the slightest difficulty. Does that case make any difference? I think not, and, on consideration, that it was quite 57 L.R.A. (N.S.)

rightly decided. But it is clearly distinguishable, because the indictment in *Reg. v. Pembliton* was on the act making unlawful and malicious injury to property a statutory offense punishable in a certain way, and the facts expressly negatived any intention to do injury to property."

In *Rex v. Jarvis*, 2 Moody & R. 40, the prisoner shot at Hale and accidentally hit Lockyer, and was indicted for shooting the latter with intent to murder. The conviction was sustained.

In *Reg. v. Smith*, 1 Dears. C. C. 559, 33 Eng. L. & Eq. Rep. 567, where the accused shot at A supposing it to be B, whom he intended to murder, Baron Parke said: "The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot."

The prosecution was under 7 Wm. IV. and 1 Vict. chap. 85, § 3, for shooting at and wounding B, with intent to murder. The conviction was sustained.

So, where a person deliberately shot into a crowd intending to kill A and wounded B, held that he could be convicted of an assault with intent to murder B. *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686, 4 Am. Crim. Rep. 60; citing *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257, 3 Am. Crim. Rep. 15.

One who, intending to kill A, assails B in the dark, may be indicted for assaulting with intent to kill B. *McGehee v. State*, 62 Miss. 772, 52 Am. Rep. 209.

On an indictment for assaulting with intent to kill, an instruction to the effect that if defendant feloniously shot at A with the intention of killing him, and, missing him, shot B, he was guilty. *State v. Montgomery*, 91 Mo. 52, 3 S. W. 379.

In *Callahan v. State*, 21 Ohio St. 306, the prosecution was under a statute reading "that if any person shall maliciously shoot any other person with intent to kill, every person so offending shall," etc. The court said: "The questions of chief importance presented by the record arise on exceptions by the prisoner's counsel to the ruling of the court, and are based on the assumption that criminal intent, in the sense of the statute, cannot be asserted of a killing, wounding, or maiming in fact, unless the victim of the shot was the real object of the malice which induced it. To us this seems too narrow a construction of the statute."

In *People v. Torres*, 38 Cal. 141, the defendant was indicted for assault with intent to commit murder. He had assaulted one Mittrovich with a knife, but with an intent to kill one Drascovich. The court said: "If A, intending to murder B, shoots C,

supposing C to be B, and wounds C, he is guilty of an assault with intent to murder C. Notwithstanding A's mistake, C is the person whom he assaulted, and whom he intended to kill,"—citing *Reg. v. Smith*, supra.

Other cases in point are where the prisoner struck at one person with intent to kill, and wounded another (*Wareham v. State*, 25 Ohio St. 601); where the prisoner threw a stone at a person and struck another (*State v. Jump*, 90 Mo. 171, 2 S. W. 279); where A mistook B for someone else, and assaulted him (*Reg. v. Stopford*, 11 Cox, C. C. 643). In the same sense: *Mathis v. State*, 39 Tex. Crim. Rep. 549, 47 S. W. 464; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257, 3 Am. Crim. Rep. 15; *Jennings v. United States*, 2 Ind. Terr. 670, 53 S. W. 456; *Territory v. Rowand*, 8 Mont. 432, 20 Pac. 688, 21 Pac. 19; *Musick v. State*, 21 Tex. App. 69, 18 S. W. 95; *Walker v. State*, 8 Ind. 290.

Archbold's Crim. Pr. & Pl. 271, lays down the rule: "If a man fire at A and shoot B, he may be indicted for shooting the pistol or gun against B, for in fact he did so."

In support of this, the author cites *Rex v. Jarvis*, 2 Moody & R. 40, supra; and the annotator cites *Rex v. Holt*, 7 Car. & P. 518, supra, and *Reg. v. Smith*, 1 Dears. C. C. 559, 33 Eng. L. & Eq. Rep. 567, supra.

Our conclusion is that there was no error in the ruling of the trial court on this point.

Defendant also complains of the refusal of the judge to have the clerk take down, in accordance with act 113 of 1896, a statement of facts to be used as a basis for one of his bills of exceptions. The facts in question were a qualification added by the judge to one of the special charges requested by defendant.

It is the right of a defendant to have the judge give his charge in writing, and no part of it verbally. Act No. 113 of 1896 would not seem, therefore, to have been intended to apply to the charge of the judge. But, premitting that question, the defendant has had in the foregoing decision the full benefit of the statement of facts which he desired to have taken down; therefore he has no ground to complain.

Defendant also excepted to the following remarks made by the district attorney in his closing address to the jury: "The testimony of the state's witnesses shows that his mother was there and begged him not to shoot. Why did he not have her here, if it is not true that she was there? And, gentlemen of the jury, it is a circumstance against him."

It is not denied that the witnesses of the prosecution had testified as here stated.

The rest of the remark was by way of argument, and therefore unobjectionable. Judgment affirmed.

Petition for rehearing denied January 3, 1911.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

### HAMPARTZOON MINASIAN

v.  
ROBERT L. OSBORNE et al., Appts.

MINAS H. MINASIAN

v.  
SAME, Appts.

(210 Mass. 250, 96 N. E. 1036.)

### Party—validity of strike—right to test.

1. One who will lose his employment by success of a strike may maintain an action to test its validity.

### Strike—right—unequal system.

2. A labor union has a right to strike against the recognition in a shop of a system of piecework which allows workers to employ helpers, the effect of which is, in times of slack work, to deprive those not employing helpers of continuous work, although success may result in throwing out of employment those who have been employed merely at will as helpers, and injure the employer.

(November 29, 1911.)

**A**PPEAL by defendants from decrees of the Superior Court for Suffolk County in plaintiffs' favor, and from an order

*Note. — System of work as justification for strike.*

The motive of the employees in going on a strike may properly be the subject of inquiry in a civil action for damages brought by a third person under the claim that the primary and direct purpose of going on a strike or threatening to strike was to and did injure him in his business. The motive of the employees is also the subject of inquiry where the right is questioned of employees to resort to some particular means to bring to a successful issue an existing strike, since, if the strike is not justified, the employees may be restrained from resorting to the usual methods which may be properly employed to bring to a successful termination a strike for a cause that has a proper and legitimate relation to the interests of the strikers.

The general question involved in determining the lawfulness of strikes has frequently been determined by the test whether the same action on the part of an individual would be lawful, the theory being that an act lawful if committed by one is not rendered unlawful by reason of concerted

417-170

221-562

226-23

229-418

235-272

245-593

overruling demurrers to the complaint, in an action brought to enjoin a strike. Reversed.

The facts are stated in the opinion.

Mr. Frederick W. Mansfield, for appellants:

It is legal to strike for higher wages, shorter hours, more work, or better conditions of employment.

*L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 113, 23 L.R.A.(N.S.) 1236, 85 N. E. 897; *Pickett v. Walsh*, 192 Mass. 583, 6 L.R.A.(N.S.) 1067, 116 Am St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638; *Martell v. White*, 185 Mass. 260, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085; *Com. v. Hunt*, 4 Met. 134, 38

Am. Dec. 346; *Walker v. Cronin*, 107 Mass. 555; *Bowen v. Matheson*, 14 Allen, 503.

Messrs. J. J. Feely and Roger Clapp, for appellees:

The strike is for an unlawful purpose, and should be enjoined.

*Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A.(N.S.) 162, 84 N. E. 457; *Walker v. Cronin*, 107 Mass. 564; *Beekman v. Marsters*, 195 Mass. 205, 11 L.R.A.(N.S.) 201, 122 Am. St. Rep. 232, 80 N. E. 817, 11 A. & E. Ann. Cas. 332; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 114, 23 L.R.A.(N.S.) 1236, 85 N. E. 897.

action. It is not intended herein to discuss this question. It is discussed in a note in 29 L.R.A.(N.S.) 869, in reference to the question as to the basis of distinction between absolute rights and qualified rights as affecting the right to inquire into the motive. It is also discussed in a note in 32 L.R.A.(N.S.) 748, dealing with the question of boycotts; also in notes in 18 L.R.A.(N.S.) 707, and 16 L.R.A.(N.S.) 85, dealing with the same question.

As to controversy over open or closed shop as a justification for means employed to aid a strike, see notes in 17 L.R.A.(N.S.) 162, and 35 L.R.A.(N.S.) 787.

As to liability for procuring discharge of nonunion employees, see note in 5 L.R.A.(N.S.) 899; and as to civil liability for maliciously procuring the discharge of an employee, or preventing employment, in the absence of a conspiracy or concerted action. see note in 27 L.R.A.(N.S.) 966.

As to the lawfulness of a strike, or a threat to strike, when there is no trade dispute between employers and their own employees, see note in 6 L.R.A.(N.S.) 1067.

The specific question whether an attempt to compel an employer to adopt or change some system in his method of employment or work is a justification for a strike has seldom been raised. As suggested in *MINASIAN v. OSBORNE*, it naturally depends upon the view that the court may take as to whether or not the proposed change is primarily for the purpose of benefiting employees. If this is the primary purpose, it is lawful, and will justify a strike although, as an incident, injury may result to others. In addition to the Massachusetts case, this is also the doctrine of *National Fireproofing Co. v. Mason Builders' Asso.* 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, a case giving the general question very serious and able consideration. The question here raised was whether it was lawful for employees to require their employers, who were contractors, to include in their contracts for building all cutting of masonry, interior brick work, the paving of brick floors, the installing of concrete blocks, the brick work of the damp-

proofing system, and all fireproofing floor arches, slabs, partitions, furring, and roof blocks,—and providing that such contractors shall not lump or sublet the installation, if the labor in connection therewith is bricklayers' work as recognized by the trade. As to all such work the men employed upon the construction of the walls to be given the preference. The court said that the direct object of this requirement was to benefit the employees employed to do the outside mason work, and hence it was lawful.

In this connection, see *Pickett v. Walsh*, 6 L.R.A.(N.S.) 1067, referred to in *MINASIAN v. OSBORNE*, and which holds that a strike is justified where the purpose is to secure for the strikers the work of pointing buildings in which they lay the brick and stone, and to prevent their employer from subletting that portion of the work to others.

In *Albro J. Newton Co. v. Erickson*, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed without opinion in 144 App. Div. 939, 129 N. Y. Supp. 1111, the purpose of the strike was to enable the employees to impose on their employer the union schedule of wages and hours of service, and other conditions not mentioned in the opinion. The purpose of the strike was said to be lawful, although the matter was given little consideration, as the means resorted to, to bring the strike to a successful termination, were held to be unlawful.

On the other hand, in *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837, the court refused to vacate an injunction against picketting where resorted to in aid of a strike, held unlawful because for the purpose of compelling an employer to sign a contract not to employ any nonunion labor, and to give up piecework or the premium system of work. The court reasoned that while a strike would be lawful if for the primary purpose of promoting the welfare of the strikers, yet a strike against the piece or premium system of work was not primarily for that purpose, and hence did not furnish justification for the strike.

A. G. S.

**Rugg, Ch. J.**, delivered the opinion of the court:

The material facts which give rise to this controversy (as found by the judge of the superior court) are that the plaintiff Minas, a skilled laster by trade, had a contract for labor as a laster with the Randall Adams Company, terminable at the will of either. With the consent of his employer, he had in turn employed as helper his father, Hampartoon, the other plaintiff, who was not able to do all the work of a laster, and who received no wages from the Randall Adams Company, and had no relation as servant to it. The work was piecework, and Minas alone received, and was entitled to receive, the compensation for their joint labor. This method of work was known in the craft as "contract" or "cross-handed."

Both of the plaintiffs were, or had been, members of the Lasters' Union, an unincorporated association, of which the defendants are representatives and members. The defendant Osborne, who is the business agent of the Lasters' Union Local No. 1, notified the employer, the Randall Adams Company, that unless the father was discharged, the shop's crew would be "pulled out." The father did not work for a day or two, but returned to work after the superintendent of the employer told the son, Minas, to get him and put him to work again. The next day all the other lasters went out on an orderly strike, which was indorsed by the union. As a consequence, both plaintiffs have lost their employment. The Lasters' Union substantially controls the labor market in the manufacture of shoes, for practically all lasters are members of the union. The effect of the strike, if continued, will be to prevent Randall Adams Company from continuing business unless it discharges Minas, or compels him to dispense with his assistant.

Here is a plain and tangible injury to the plaintiffs as the proximate result of the acts of the defendants. This gives a cause of action to the plaintiffs, unless the defendants have a sufficient justification for their conduct. If they have acted without good cause or excuse, they are liable. *Berry v. Donovan*, 188 Mass. 353-356, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738; *Quinn v. Leathem* [1901] A. C. 495-510, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749, 1 B. R. C. 197; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A. C. 239-244, 246-251, 74 L. J. K. B. N. S. 525, 53 Week. Rep. 593, 92 L. T. N. S. 710, 21 Times L. R. 57 L.R.A.(N.S.)

441, 2 A. & E. Ann. Cas. 436, 1 B. R. C. 1. As was said in *De Minico v. Craig*, 207 Mass. 593, 598, — L.R.A.(N.S.) —, 94 N. E. 317, 319: "Whether the purpose for which a strike is instituted is or is not a legal justification for it is a question of law, to be decided by the court."

The inquiry must be directed to the character of the justification proffered by the defendants in excuse for their conduct. The purpose of the strike (as found by the superior court) was "to compel the plaintiff Minas . . . to cease employing his father to help him, and to induce the employer of Minas either to discharge the father or to require Minas to cease employing a helper, or failing that, to discharge Minas from its employment." But it has been found also that the defendants are not actuated by any ill feeling toward either of the plaintiffs, and that the strike is wholly disconnected with any question of membership in the union. The basis of the strike is objection to the system known as contract labor or cross-hand work. It follows that the real purpose of the strike is to cause the abolition of that system of work in this shop.

It is not of much consequence whether the object of the strike is stated to be the discharge of the father and son without hostility toward them, but for the reason that they practise a certain system of shop labor, or the abolition of the system of shop labor, with the incidental result that one or both of the plaintiffs may be discharged. In its practical effects upon the rights of the parties, the question of law involved is the same whichever way it is put. The question presented for decision is whether the abolition of this particular system of shop work is a legal justification for the interference with the rights of these plaintiffs which arises from an orderly strike by fellow employees.

"The objection to the system is," as found by the trial court, "that where two men work together, as Minas and his father were doing, they can do more work in a day or week than any single man working without a helper, and that, as a result, the men who worked without helpers would not get their fair share of the work that was to be done, and would thus be unable to have a chance to earn as much as they could if there were no helpers employed. The custom in the factory was that when a laster had completed his case of shoes, or had nearly completed it, so as to be ready for another case, he would put his name upon a list, and it was understood that cases of shoes would be furnished him for his work in the order in which the names stood upon the list.

If there was plenty of work, so that any laster could have all he could do, the fact that two men working together could do more than he could would not affect the wages he would ordinarily receive; but in case there was a scarcity of work, or not sufficient work to keep all the lasters employed, the laster who had a helper might be able to do more work, and other lasters might not be able to obtain work. In that aspect of the case, their compensation might be affected by the system of contract labor or cross-hand work." The controversy as presented upon this record is not between employer and employee, but between rival sets of workmen, both of whom were at work in the same shop upon materials of one manufacturer.

This is not a strike which involves any inquiry as to the plaintiffs' habits, conduct, or character which might render them unfit or improper shopmates. It is not for the establishment of any system of shop work or rules directed to the curtailment or limitation of production or interference with reasonable industrial advancement. It is not aimed to prevent the highest efficiency of labor, or the use of modern or economical machinery. It was not instituted to promote a closed shop, or to compel anybody to join or to leave any union, nor primarily to cause the discharge or employment of any person or class of persons. If this results in any instance, it is incidental, and not essential to the chief end. It does not go to the extent of interdicting the absolute and unqualified right of the individual to work, if he desires, contrary to the will or rules of a combination. It is not based upon objections to shop rules established for the reasonable protection of the rights of the employer or promotion of the good order or economical and efficient service of employees. It is not directed against the education of apprentices or those who are trying to learn the trade. It does not appear to be for the establishment or preservation of a monopoly, and this is not indicated by the framework of the bill. It is not directed against piecework as distinguished from day work, nor against any other method of employment where superior skill, dexterity, or swiftness secure commensurately higher rewards than inefficiency, carelessness, or slothfulness. It does not directly or immediately affect the general convenience, necessities, or safety of the public. Its ostensible object is not used as a mask for any ulterior design. The direct and main purpose is to secure a change in a system of work which is asserted to be unjust in its practical operation.

37 L.R.A.(N.S.)

It is contended that this system in its final analysis resulted in an unequal distribution of the work of lasting in slack times, and thus affected the wages of the strikers, although it did not so operate when there was work enough to keep all the employees busy all the time. The finding of the superior court was in substance to this effect, and it is supported by evidence. There is nothing to indicate that the strike was not undertaken in good faith against this system. An honest effort to better conditions of employment by laborers is lawful. The right of the plaintiffs to work upon such terms as they chose is incident to the freedom of the individual. That "right of his could not be taken away from him or interfered with by the defendants, unless it came into conflict with an equal or superior right of theirs." *De Minico v. Craig*, 207 Mass. 593 at 599, — L.R.A.(N.S.) —, 94 N. E. 317. The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure a mitigation of these conditions, merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity, and gives an undue preference to one over another in times when there is a dearth of work. A system of giving out work which, under existing conditions, operates unjustly, is a condition of employment in which all workmen affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such a condition should be enjoined.

The right of the employer is no more absolute in respect of a condition of employment like this than it is as to hours of labor or rate of wages. It is not a subject as to which he is entitled to special protection against an orderly and otherwise lawful strike. *Pickett v. Walsh*, 192 Mass. 572, 6 L.R.A.(N.S.) 1067, 116 Am. St. Rep. 272, 78 N. E. 753, 7 A. & E. Ann. Cas. 638. The conduct of these defendants, although directly affecting to their detriment the labor habits of the plaintiffs, appears to have sufficient justification in the fact that it is of a kind and for a purpose which has a direct relation to the benefits of a more uniform distribution of work, and thus of wages among equally skilled or competent workmen during dull seasons. This was the object which the defendants were trying to obtain.

While the plaintiffs' contractual rights to labor, although terminable at will, were entitled to protection against wanton interference (*Citizens' Loan Assn. v. Boston & M. R. Co.* 196 Mass. 528, 14 L.R.A. (N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 A. & E. Ann. Cas. 365, and cases cited), they were not so assured or valuable in their nature as are valid contracts for continued service for a definite period. It may well be that a stronger reason might be needed to justify interference with such contracts than with those here in question. We do not go beyond what is necessary to this decision. The decision of this case depends upon a somewhat narrow interpretation of the findings of the trial court. Construing them as we do, this seems to be a clash of equal rights between fellow laborers, where each could use any lawful means to enforce those rights. No question is presented as to the unlawfulness of the means employed. This is not a case in its facts like those presented for adjudication in *Plant v. Woods*, 176 Mass. 492, 51 L.R.A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L.R.A. 722, 57 Am. St. Rep. 443, 44 N. E. 1077; *Walker v. Cronin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A. (N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 A. & E. Ann. Cas. 738; *Reynolds v. Davis*, 198 Mass. 294, 17 L.R.A. (N.S.) 162, 84 N. E. 457; *Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 23 L.R.A. (N.S.) 1236, 85 N. E. 897; *De Minico v. Craig*, 207 Mass. 593, — L.R.A. (N.S.) —, 94 N. E. 317; *Folsom v. Lewis*, 208 Mass. 336, 35 L.R.A. (N.S.) 787, 94 N. E. 316. But it comes within principles recognized and stated in several of those cases and applied in *Pickett v. Walsh*, 192 Mass. 572, at 579 et sequitur. In the opinion of a majority of the court the entry in each case must be decreed reversed.

Bill dismissed.

Petition for rehearing denied.

# MINNESOTA SUPREME COURT.

MICHAEL MOONEY, Respt.,

v.

DAILY NEWS COMPANY OF MINNEAPOLIS, Appt.

(116 Minn. 212, 133 N. W. 573.)

Contract — voting contest — acceptance of offer.

1. An offer of specified compensation to

Headnotes by SIMPSON, J.

37 L.R.A. (N.S.)

the person obtaining the highest vote, based on paid subscriptions to a newspaper, after acceptance and part performance of the terms of the offer, becomes an executory contract between the person making and the person so accepting the terms of the offer.

Same — withdrawal.

2. The person making such offer is bound by its terms after such acceptance, and cannot, without the consent of the other party, either change the terms of the offer or give to them an interpretation contrary to their true meaning.

Evidence — sufficiency.

3. The plaintiff is shown by the evidence to have fully complied with the terms and conditions of an offer made by the defendant, and to have become entitled to the agreed compensation.

(December 8, 1911.)

**A**PPEAL by defendant from an order of the District Court for Hennepin County, denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover the value of an automobile claimed by plaintiff as winner in a contest. Affirmed.

The facts are stated in the opinion.

Messrs Collins & Eaton, for appellant:

The provisions for this contract being written, they cannot be contradicted, added to, or varied by parol evidence.

Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Lewis v. Traders' Bank, 30 Minn. 134, 14 N. W. 597; Bell v. Mendenhall, 78 Minn. 57, 80 N. W. 843; Bradford v. Neill, 46 Minn. 347, 49 N. W. 193; Seitz v. Brewers' Refrigerating Mach. Co. 141 U.

*Note. — Changing terms of offer of prize after efforts to secure it have begun.*

For cases involving the right to maintain an action for a prize offered in a prize contest, see *Minton v. F. G. Smith Piano Co.* 33 L.R.A. (N.S.) 305, and the note appended thereto.

And as to guessing contests as lotteries, see *Waite v. Press Pub. Co.* 11 L.R.A. (N.S.) 609, and note.

The only case found involving the right of one offering a prize to alter the terms of the contest after efforts to secure it have been made is *Holt v. Wood*, 14 Pa. Co. Ct. 499, in which it appears that a real estate firm offered, by advertisement, a house and lot to anyone sending in a name which should be chosen by a committee as the most appropriate for a new suburb, no provision being made for the contingency of several sending in the same name; and it was held that they had no right to award the prize to the one first sending in the name selected, to the exclusion of others who submitted the same name later, but within the time fixed for closing the contest.

R. L. S.



S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

The conditions precedent were not complied with, and the plaintiff had no right of recovery.

9 Cyc. 615; *Salbadore v. Crescent Mut. Ins. Co.* 22 La. Ann. 338; *Hawes v. Humble*, 2 Campb. 327, note, 11 Revised Rep. 722, note; *New York Exch. Co. v. De Wolf*, 31 N. Y. 273; *Story*, Contr. 39-46; *Staunton v. Wood*, 16 Q. B. 638, 15 Jur. 1123; *Gjerness v. Mathews*, 27 Minn. 320, 7 N. W. 355; *State ex rel. Minneapolis & N. W. R. Co. v. Minneapolis*, 32 Minn. 501, 21 N. W. 722; *Wright v. Wilcox*, 52 Minn. 438, 54 N. W. 483; *Root v. Childs*, 68 Minn. 142, 70 N. W. 1087; *Seymour v. Bennet*, 14 Mass. 286; *Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457; *Shaw v. Lewiston & K. Turnp. Co.* 2 Penr. & W. 454; *Johnson v. Jacobs*, 42 Minn. 168, 44 N. W. 6; *Stensgaard v. Smith*, 43 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669; *Anson*, Contr. 135.

Messrs. **Wright & Matchan** for respondent.

**Simpson, J.**, delivered the opinion of the court:

The defendant publishes at the city of Minneapolis the *Daily News*, a newspaper of general circulation throughout the northwest. About the 1st of June, 1910, it instituted what it termed a contest, and offered and agreed to give an automobile costing \$1,250 to the contestant having, on July 30, 1910, the largest number of votes based upon paid subscriptions for the *Daily News*. It published, together with this offer, rules governing the contest. So far as here material, these rules provide: "Ten votes will be allowed for every cent paid in advance on subscriptions to the *Daily News*. . . . Anyone can take subscriptions, . . . and votes will be credited to the contestant for whom they are taken. . . . Votes are not transferable from one contestant to another. . . . During the last week of the contest subscriptions, with remittances for same, must be mailed or deposited in contestant's local bank, to be mailed by the bank officers. . . . Contestants who want the *Daily News* started to subscribers at once may receive vote ballots for them, which can be counted at any time. A bonus of 5,000 votes will be given every contestant entering the contest before June 15, 1910."

The plaintiff, in compliance with the rules governing the same, became a contestant before June 15, 1910, and was thereafter so recognized and treated by the defend-

ant. There were a number of other contestants. Some additional offers or proposals were afterwards made by the defendant. It is not necessary to consider whether these subsequent proposals varied the contract existing between an individual contestant and the defendant, for the votes received thereunder by the plaintiff are not necessary to the determination of the case presented. The plaintiff, by himself and through friends, thereafter received subscriptions and remitted payments in advance therefor to the defendant company, aggregating \$793.10. Of this amount \$435.60 was deposited by plaintiff in his local bank on July 30, 1910, the defendant notified thereof, and the amount by the bank officers promptly remitted to the defendant. The other remittances were made directly to the defendant, and received by it on or before July 30th. The form of these remittances was as follows: "Enclosed find \$——— in payment of the following subscriptions. Credit votes to M. Mooney, contestant." All the money so sent by and to the credit of the plaintiff was received and retained by the defendant in payment of subscriptions for the *Daily News*. Giving the plaintiff a credit of 10 votes for each cent of such subscription money gives to him 793,100 votes,—a higher number than that to which any other contestant was entitled. Adding to this number the votes credited by defendant to plaintiff through prizes and special offers makes an aggregate of 1,043,860. One O. J. Lund received 783,900 votes; this being the total number of votes to which he was entitled on account of subscriptions, prizes, and special offers. The defendant gave Lund the described automobile, disallowing the claim of the plaintiff thereto, and refusing his demand therefor. The plaintiff thereupon brought this action to recover \$1,250, the value of the automobile, claiming in substance a breach of a contract between himself and the defendant by the terms of which the defendant agreed to give such automobile to him, he having obtained the highest amount of paid subscriptions, or, as stated in the proposition, the highest number of votes. A trial resulted in a verdict for the plaintiff. The defendant appeals from an order denying its alternative motions for judgment or a new trial.

There is no controversy over the facts above stated. The refusal of the defendant to recognize the plaintiff's claim to the automobile was based on the plaintiff's failure to deliver at the defendant's office, before the close of the contest, certain vote coupons. The defendant company published from time to time during the contest the votes to the credit of the different contest-

ants. Instead of publishing the actual amount to the credit of each contestant, in some cases only a part of the remittance of a contestant, or the vote credit therefor, or the vote credit otherwise obtained, was published in the paper, and for the balance a vote coupon was sent the contestant. This was done in the plaintiff's case without any request by him not to publish the full amount of his credit. Three vote coupons, in amounts 248,000, 20,000, and 80,000, were so sent to the plaintiff,—one July 1st and two July 18th. The amounts of these coupons, together with the amounts published in the Daily News, represented the "vote" credit of the plaintiff up to those dates for subscription remittances and under special offers or prizes. Without including a part of the remittances represented by these coupons, the plaintiff would not have a higher credit than the contestant Lund. The plaintiff deposited these three vote coupons, together with his final subscription remittance, July 30th in his local bank. The bank promptly forwarded them by mail to the defendant company, but they were not received at Minneapolis until a day or two after the close of the contest. The defendant considered that these vote coupons were ballots which might be voted by the contestant before the close of the contest, that they took the place of the credit to the contestant for the remittances on account of which they were issued, and that therefore the credit on account of such remittances would be wholly lost to the contestant if the vote coupons were not sent in before the close of the contest. The defendant company refused to credit the plaintiff with any of the votes represented by such coupons, or with the subscription remittances theretofore received by the defendant, included in such coupons.

While not conceding the claim of the defendant as to the nature of these vote coupons, the plaintiff, upon the trial, testified: That on the morning of July 30th he had a telephone conversation with Mr. Burgess, the general manager of the defendant company. That he said to Mr. Burgess: "Now, I have those receipts and account for what I had sent in. Will I leave those with the bank?" That Mr. Burgess, in answer, stated: "Yes, I will guarantee that will be all right." Mr. Burgess testified that no conversation was had with the plaintiff concerning the deposit of any receipts or coupons. The trial court submitted the case to the jury on the theory that, if this conversation did occur, the defendant was bound to recognize and credit to the plaintiff the subscription remittances and votes covered by these vote coupons, but that it

was not bound to give such credit unless so notified and consenting to the deposit of the coupons in the bank. The jury determined that such notification and consent were given. We have examined all the rules, publications, and correspondence contained in the record bearing thereon, and find nothing that prevented the defendant from making a valid agreement with the plaintiff to credit the votes represented by such coupons without the coupons being returned to its office on or before July 30th. There was no error in receiving the testimony of this conversation over the defendant's objection.

We think the case was thus submitted upon a theory more favorable to the defendant than the facts warranted. The defendant received and retained subscription remittances sent to it to be credited to the plaintiff. Under its published rules it agreed to give the plaintiff credit at the specified rate for each such remittance. It had the original subscription orders accompanying the remittances, requesting that such remittances be credited to the plaintiff. We find nothing in the record from which it could be inferred that the plaintiff waived or lost his right to such credits by receiving and retaining vote coupons, or in any other manner whatever. The obtaining of subscriptions paid in advance was the substantial benefit received by the defendant in return for the automobile. Obtaining such subscriptions was the substantial service performed by the contestants, including the plaintiff. The plaintiff having obtained subscriptions and remitted payments therefor entitling him to a greater credit than that to which the next highest contestant was entitled, crediting such other contestant with all prize and special-offer credits, clearly the plaintiff had fully complied with the conditions of the offer made by the defendant company and became entitled to the compensation under the offer. The defendant company, after making and publishing the rules governing its so-called contest, was bound thereby as to the contestants who sent subscription remittances in compliance therewith. After a contract was thus made between defendant and the individual contestants, including the plaintiff, the defendant could not change the rights of the contestants thereunder through its misinterpretation of the rules as published, nor did it have the right to change or give to the rules its own interpretation.

We have considered the various assignments of error relating to the charge of the court and the admission of evidence, and find in them no ground for reversing the action of the trial court.

WASHINGTON SUPREME COURT.  
(In Banc.)

ELIZA W. P. GUYE, Appt.,  
v.

JOHN W. GUYE et al., Respts.  
(63 Wash. 340, 115 Pac. 731.)

**Husband and wife—separate property—trust for community.**

1. Separate property is not impressed with a trust in favor of the community by a statutory provision that all the rents, profits, interest, or proceeds of separate property, accruing during marriage, shall be common property, where the statute also provides that the spouse having separate property shall have sole control of it, and shall be liable for his or her debts, whether contracted before or after marriage.

**Same—repeal of statute—effect on future income.**

2. The existence at the time of marriage of a statute providing that the rents, profits, interest, or proceeds of separate property, accruing during marriage, shall be common property, does not prevent the legislature from restoring all increments of separate property accruing after the passage of the repealing statute, to separate use.

**Note. — Power of legislature to change increment or income of separate property from community property to separate property, or vice versa.**

A search discloses but little authority upon the question under consideration.

In *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490, where the property in question was dividends due on stock owned by the wife, a statute providing that the rents and profits of the separate estate of either husband or wife should be deemed common property was held to be a violation of the constitutional provision that property of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or bequest, should be her separate property. The court said: "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors. If the constitutional provision be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist of a right of property in one, divested of all beneficial use,—the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in the contingency of her surviving her husband. It has been seen that the provision of the Constitution is, that the property acquired by the wife by devise, bequest, etc., shall be her separate property." 37 L.R.A. (N.S.)

**Same—increase in value—community interest.**

3. A statutory declaration that property acquired during marriage shall be community does not make the natural increase in the value of separate real estate community, where the statute also declares that the owner of separate property shall be entitled to the rents, issues, and profits thereof.

**Same—property purchased before, but conveyed after, marriage.**

4. That a deed for real estate is not executed to a man until after his marriage does not make the land community property if he had contracted for, taken possession of, improved, and paid a portion of the purchase money for it prior to the marriage.

**Same—tax money—presumption as to source.**

5. The funds for paying taxes on separate property cannot be presumed to have belonged to the community, for the purpose of impressing the property with a community interest, where the owner of the property had a separate source of income.

**Evidence — mortgaging property — community character.**

6. That husband and wife have joined in mortgaging property is not of itself sufficient to show that it belonged to the community.

property. This term 'separate property' has a fixed meaning in the common law, and had in the minds of those who framed the Constitution, the large majority of whom were familiar with, and had lived under, that system. By the common law, the idea attached to separate property in the wife, and which forms a portion of its definition, is, that it is an estate, held as well in its use as in its title, for the exclusive benefit and advantage of the wife. The common law recognized no such soleism as a right in the wife to the estate, and a right in someone else to use it as he pleased, and to enjoy all the advantages of its use. It is not perceived that property can be in one, in full and separate ownership, with a right in another to control it, and enjoy all of its benefits. The sole value of property is in its use; to dissociate the right of property from the use in this class of cases would be to preserve the name—the mere shadow—and destroy the thing itself, the substance. It would be to make the wife the trustee for the husband, holding the legal title, while he held the fruits of that title. This could no more be done, in consistency with our ideas of property, during the lifetime of the wife, than for all time."

And this decision was followed in *Lewis v. Johns*, 24 Cal. 99, 85 Am. Dec. 49, where the products of the wife's lands were in question.

As to profits accruing during marriage in connection with property belonging to the separate estate of either spouse as community property, see note to *Re Pepper*, 31 L.R.A. (N.S.) 1093.

J. T. W.

**Husband and wife—community—coal and mining claims.**

7. Coal and mining claims acquired from the government during marriage are separate, and not community property.

(May 10, 1911.)

**A**PPPEAL by plaintiff from a judgment of the Superior Court for King County in defendants' favor in an action brought to quiet title to property of Francis M. Guye, deceased, and for an adjustment of plaintiff's rights therein. Affirmed.

The facts are stated in the opinion.

Messrs. Blaine, Tucker, & Hyland, for appellant:

Inasmuch as § 2 of the act of 1871 provides that all property acquired during marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest, or proceeds of the separate property of both accruing during marriage, shall be common property, the real property of the husband and wife, when taken in consideration of § 22, becomes partnership assets, and the husband and wife each become partners, and the capitalization is what each person puts into the property, and any increase or unearned increment becomes partnership or common property.

Cooley, Const. Lim. 7th ed. 513; Rose v. Rose, 104 Ky. 48, 41 L.R.A. 353, 84 Am. St. Rep. 430, 46 S. W. 525; Rose v. Sanderson, 38 Ill. 250; McNeer v. McNeer, 142 Ill. 388, 19 L.R.A. 256, 32 N. W. 683; Jenney v. Gray, 5 Ohio St. 47; White v. White, 5 Barb. 480; Holmes v. Holmes, 4 Barb. 295; Hershizer v. Florence, 39 Ohio St. 531; Thompson v. Green, 4 Ohio St. 231; Clark v. Clark, 20 Ohio St. 136; Lemon v. Waterman, 2 Wash. Terr. 492, 7 Pac. 899; Criscoe v. Hambrick, 47 Ark. 235, 1 S. W. 150; Bachman v. Chrisman, 23 Pa. 162; Burson's Appeal, 22 Pa. 166; Dunn v. Sargent, 101 Mass. 337; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Junction R. Co. v. Harris, 9 Ind. 184, 68 Am. Dec. 618; Mitchell v. Violet, 104 Ky. 77, 47 S. W. 195; 3 Washb. Real Prop. 4th ed. 382; Hunt v. Williams, 126 Ind. 493, 26 N. E. 177; Reed v. Reed, 9 Mass. 372; Johnston v. Ballard, 83 Tex. 486, 18 S. W. 686; Woldenberg v. Berg, 45 Or. 291, 77 Pac. 873; Washburn v. Goodman, 17 Pick. 519; Kauffman v. Baillie, 46 Wash. 248, 89 Pac. 548.

Initiation of title does not govern in this case, and inasmuch as deed passed and the consideration was presumably paid after marriage, it fixes the status of the property as common property.

Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; United States v. 37 L.R.A.(N.S.)

Detroit Timber & Lumber Co. 200 U. S. 320, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; Curry v. Wilson, 57 Wash. 509, 107 Pac. 367; Woodward v. Davidson, 150 Fed. 846, 84 C. C. A. 495, 156 Fed. 915.

The coal land is community property. Curry v. Wilson, 57 Wash. 509, 107 Pac. 367.

The possessory right to a mining claim is community property.

Jacobson v. Bunker Hill & S. Min. & Concentrating Co. 3 Idaho, 126, 28 Pac. 396; Kromer v. Friday, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229; 1 Lindley, Mines, 2d ed. § 543; Krieg v. Lewis, 56 Wash. 198, 26 L.R.A.(N.S.) 1117, 105 Pac. 483; Curry v. Wilson, supra.

Messrs. Higgins, Hall, & Halverstadt and Morris, Southard, & Shiple, for respondents:

If either spouse, prior to marriage, acquires an equitable interest in real estate, the property is separate, irrespective of the date of acquisition of the legal title.

6 Am. & Eng. Enc. Law, 2d ed 325; McKay, Community Prop. pp. 60-114; McDougal v. Bradford, 80 Tex. 558, 16 S. W. 619; Gardner v. Burkhardt, 4 Tex. Civ. App. 590, 23 S. W. 709; Welder v. Lambert, 91 Tex. 510, 44 S. W. 281; Texas & N. O. R. Co. v. Speights, — Tex. Civ. App. —, 59 S. W. 573; Hillen v. Williams, 25 Tex. Civ. App. 268, 60 S. W. 997; Alford Bros. v. Williams, 41 Tex. Civ. App. 436, 91 S. W. 639; Lake v. Lake, 52 Cal. 428; Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. 641; Morgan v. Lones, 80 Cal. 317, 22 Pac. 253; Re Boody, 119 Cal. 402, 51 Pac. 635; Re Pepper, 158 Cal. 619, 31 L.R.A.(N.S.) 1092, 112 Pac. 64; Barbet v. Langlois, 5 La. Ann. 212; Woodward v. Davidson, 150 Fed. 846, 84 C. C. A. 495, 156 Fed. 917; Landes v. Brant, 10 How. 348, 372, 13 L. ed. 449, 460; Stark v. Starr, 6 Wall. 402, 415, 18 L. ed. 925, 929; United States v. Detroit Timber & Lumber Co. 200 U. S. 320, 332, 337, 50 L. ed. 499, 504, 505, 26 Sup. Ct. Rep. 296; Forker v. Henry, 21 Wash. 351, 57 Pac. 811; Ahern v. Ahern, 31 Wash. 334, 96 Am. St. Rep. 912, 71 Pac. 1023; Rogers v. Minneapolis Mach. Co. 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014.

The act of 1871 gave to neither spouse title to or interest in real estate owned by the other prior to and at the time of a marriage contracted while the act was in effect. It merely made income therefrom common; and the legislature could at any time change the law, and by such change make such income, thereafter to accrue, separate.

21 Cyc. 1367; Merrill v. Parker, 112 Mass. 250; Brummet v. Weaver, 2 Or. 168; Ballinger, Community Prop. § 53; Allen v.

Hanks, 136 U. S. 300, 34 L. ed. 414, 10 Sup. Ct. Rep. 961; *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109; *Alexander v. Alexander*, 85 Va. 353, 1 L.R.A. 125, 7 S. E. 342; *Hart v. Leete*, 104 Mo. 315, 15 S. W. 979; *Percy v. Cockrill*, 4 C. C. A. 73, 10 U. S. App. 574, 53 Fed. 881; *Rugh v. Ottenheimer*, 6 Or. 231, 25 Am. Rep. 513; *Niles v. Hall*, 64 Vt. 453, 25 Atl. 479; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124; *Stevens v. Cherokee Nation*, 174 U. S. 445, 477, 43 L. ed. 1041, 1053, 19 Sup. Ct. Rep. 722; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 168, 36 L. ed. 925, 929, 13 Sup. Ct. Rep. 54; *Taylor v. Taylor*, 12 Lea, 490; *Baker v. Kilgore* (*Nielson v. Kilgore*) 145 U. S. 487, 36 L. ed. 786, 12 Sup. Ct. Rep. 943; *Spring Water Co. v. Monroe*, 55 Wash. 200, 104 Pac. 202; *Ettor v. Tacoma*, 57 Wash. 57, 106 Pac. 478, 107 Pac. 1061.

Coal claims acquired under acts of Congress providing for sale of land containing coal constitute separate property of patentee.

*Lindley, Mines*, § 472; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *Gardner v. Port Blakely Mill Co.* 8 Wash. 1, 35 Pac. 402; *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115; *Caha v. United States*, 152 U. S. 212, 38 L. ed. 416, 14 Sup. Ct. Rep. 513.

Mining claims are, by force of Federal statutes, separate property of the locator perfecting title thereto.

*McCune v. Essig*, 199 U. S. 383, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; *O'Connell v. Pinnacle Gold Mines Co.* 4 L.R.A.(N.S.) 919, 72 C. C. A. 645, 140 Fed. 854; *Morrison, Mining Rights*, 12th ed. 124; *Barringer & A. Mines & Mining*, 388; 420 Min. Co. v. *Bullion Min. Co.* 3 Sawy. 634, Fed. Cas. No. 4,989, 11 Mor. Min. Rep. 608; *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548, 9 Mor. Min. Rep. 578; *Talbott v. King*, 6 Mont. 76, 9 Pac. 434; *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174, 11 Mor. Min. Rep. 645; *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; *Forbes v. Gracy*, 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; *Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 196 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 366; *Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777; *Bradford v. Morrison*, 212 U. S. 389, 53 L. ed. 564, 29 Sup. Ct. Rep. 349, 37 L.R.A.(N.S.)

*Fullerton, J.*, delivered the opinion of the court:

*Francis M. Guye and Eliza W. P. Guye* intermarried at the city of Seattle on March 21, 1872, and thereafter, until the death of Francis M. Guye on May 25, 1908, lived together as husband and wife. There was no issue of their marriage. Francis M. Guye had been formerly married, and was the father of children born of such marriage. At the time of his death, he left estate in the state of Washington, consisting of real property of great value, which he specifically devised by will to the different members of his family as if the property, one tract excepted, was his separate property. The will was in form a nonintervention will, and was duly entered for probate as such. In the will he named his son John W. Guye and one Rolland H. Denny as executors. The executors named accepted the trust, and proceeded with the due administration of the estate. The widow, Eliza W. P. Guye, claimed that the entire property was community property, and, on her claim being disallowed by the executors, brought this action to have the status of the property determined and her rights therein adjusted. In the final decree the trial judge found somewhat more of the property to be community property than the deviser or the executors recognized as such, but did not allow the claim of Mrs. Guye to its fullest extent. From so much of the decree as is adverse to her interests, she appeals.

Based on differences between the time and manner of its acquisition, counsel have divided the land left by the deceased into five distinct classes: First, certain tracts of land acquired by the deceased by purchase, and for which deeds had passed prior to his marriage with the appellant; second, a tract of land acquired by the deceased by purchase prior to his marriage with the appellant, but for which the deed passed after such marriage; third, a tract of land acquired from the United States by the deceased after his marriage, under a coal-land entry; fourth, certain tracts acquired from the United States by the deceased after his marriage, under the mining laws; and, fifth, certain tracts acquired by the deceased by purchase from private holders subsequent to his marriage.

The claim that the land first described is community property is based principally upon the somewhat peculiar common property statute of 1871. Laws 1871, p. 67. By § 1 of that act, it was provided that all property owned by the husband or wife at the time of the marriage, and all property acquired by either of them during the marriage by gift, devise, descent, bequest,

or inheritance, and all property purchased or acquired with the separate funds of either during marriage, and designated as separate property as per deed or inventory, in accordance with the provisions of the act, should be the separate property of the spouse acquiring it, the same as though no marriage existed. Section 2 provided that all property acquired during the marriage by the joint labors of the husband and wife or by their individual labors, together with all "rents, profits, interest, or proceeds of the separate property of both, accruing during the marriage," should be common property. Sections 8, 9, 10, and 11 defined the class of debts for which the common and separate property might be sold. Section 14 provided that the husband should have the sole control and management of his own separate property, and need not be joined by the wife in any sale, transfer, or encumbrance thereof. Section 15 provided that the wife should have the sole control and management of her own separate property, and need not be joined by the husband in any sale, transfer, or encumbrance thereof, unless the property be that acquired by gift from the husband. Section 22 provided that, the "common property being partnership property," the wife's share should be one half thereof, and should be hers and her heirs forever. Section 23 provided that neither dower nor courtesy should thereafter accrue. Section 26 provided that the husband should not by will deprive the widow of any rights under the act. This statute remained upon the statute book but two years. At the next session of the legislative assembly it was repealed, and a new law enacted. It is not necessary to point out all the differences between the new law and the one cited, but the radical changes were that the new law failed to provide that the rents, profits, issues, or proceeds of the separate property of the spouses should be common property, and it eliminated § 22, which declared the common property to be partnership property. This act remained in force until 1879 (Laws 1879, p. 77), when the present community-property law was enacted. By the terms of the latter act, the rents, issues, and profits of separate property are expressly declared to be separate property. By the latter act also the name "common property" was changed to "community property," and it was expressly provided that the property rights of the spouses were thereafter to be governed by the act in the absence of a marriage settlement or postnuptial agreement. "any act to the contrary notwithstanding."

By reference to the dates above given, it will be observed that Francis M. Guye and the appellant intermarried while the act of 37 L.R.A.(N.S.)

1871 was in force. Based on this fact, the appellant argues that the act of 1871 fixed the rights of property between the appellant and her husband, "and that any subsequent law could in no way alter or change it;" and "that inasmuch as § 2 of that act provides that all property acquired during marriage by the joint labors of the husband and wife, or by their individual labors, together with all rents, profits, interest, or proceeds of the separate property of both, accruing during marriage, shall be common property, it means nothing else than that real property of the husband and wife, when taken in consideration of § 22, becomes partnership assets, and the husband and wife each become partners, and the capitalization is what each person puts into the property, and any increase or unearned increment becomes partnership or common property." In other words, it is contended that a marriage during the existence of the act of 1871 impressed the separate property with which each of the contracting parties was then seised with a trust to pay the income thereof to the common use of both spouses during the continuance of the marital relation, or until such time as they could mutually agree on some other disposition of it. We are not able to agree with this contention. That such was not the intent of the statute is plain from the very statute itself. The statute does not in express words devote the income of the separate property of each of the spouses to the common use of both, nor does it in express words charge such separate property with a trust to that effect. In so far as the intent is expressed, it does nothing more than provide that the income of separate property when it comes into existence shall be common property. And that no such intention is implied is clear from the fact that such a construction is inconsistent with other express provisions of the statute. It is provided, it will be observed, that the spouse owning or acquiring separate property during the marriage relation shall have the sole control and management thereof, and need not be joined by the other spouse "in any sale, transfer, or encumbrance thereof." It is provided, also, in the act, that the separate property of a spouse shall be liable for the separate debts of that spouse, whether contracted before or subsequent to the marriage. These provisions are wholly inconsistent with the idea that the separate property of one spouse is, in virtue of the marital relation, impressed with a charge or trust of any kind in favor of the other, or in favor of the common use of both, and to our minds conclusively determines the contrary.

There can be no trust in property for

the common benefit of two persons where one of them has power at any time to destroy the trust by disposing of the property, or by putting it to another use. In so far as the rents, profits, interest, or proceeds of the separate property of either came into being during the existence of this statute, we have no doubt that they belonged to the husband and wife in common, and that it was not competent for the legislature, by subsequent enactment, to declare such property to be the property of the one or the other; but, as to rents, issues, and profits of such property accruing subsequently to the passage of the act, we have no doubt that the power existed.

Counsel, however, call attention to the word "interest" in the phrase, "rents, profits, interest, and proceeds," and argue therefrom that something more than the mere income from the real property was meant thereby. But it must be remembered that the framers of the act used the phrase with reference to personal property as well as real property, and could possibly have had reference to a very common source of income from that character of personal property known as money. Be this as it may, however, even a causal perusal of the act will show that its framers had no very accurate conception of the meaning of words or very great skill in their use; at least, there is nothing in the wording of the act elsewhere that would imply that they had any such nicety in their use as this construction would imply. We rather think from the context that this phrase was the somewhat labored effort of the draughtsman of the law to convey the idea that the entire income of the property described should become common property. As this act stood on the statute books but two years, and as we hold that it was within the power of the legislature to say that the future income and proceeds of the separate property of the spouses should be the property of the spouse owning the separate property, it is not necessary that we discuss the effect of § 22 of the act, which declared common property to be the partnership property of the spouses; there being no showing in the record that any of the income of the property now under discussion was put back onto the property in the way of permanent fixtures or improvements which enhanced its value.

Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically \$350,000 since the marriage of the appellant and Francis M. Guye, 37 L.R.A. (N.S.)

and contend that it is property acquired during marriage, within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues, and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So, also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased, it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part community. And so, again, property that is separate property to-day might be mixed property to-morrow, and on the next day again be separate property, owing to its fluctuation in value. We cannot think this the meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in value, remains so unless, by the voluntary act of the spouse owning it, its nature is changed.

The cases relied upon by counsel to support this contention we shall not notice specifically. They call special attention, however, to the case of *White v. White*, 5 Barb. 474, and, as that case is illustrative of the others, we will point out wherein we think the question at bar differs from the question there determined. The case cited was a suit by the wife against the husband. It appears that subsequent to the marriage between the parties the wife inherited from her father's estate a considerable tract of land situated in the state of New York; that, after she had thus acquired the title, the legislative assembly of that state passed an act, the 2d section of which reads as follows: "The real and personal property, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of the husband heretofore contracted." N. Y. Laws 1848, p. 307. The suit was based upon this provision of the statute. The complaint set forth that the wife took possession of the inherited land soon after it was set apart to her by the commission appointed to make partition, and that she had continued to reside thereon until the last few weeks prior to the filing of the complaint, during which time she had been prevented from occupying the premises by

her husband. It was further alleged that since she had acquired the property her husband had had the management and control of the same, and had enjoyed the rents, issues, and profits thereof; that he was a man of idle habits and addicted to the use of spirituous liquors; that he had been careless and improvident in the management and cultivation of the farm, and had greatly neglected it; that, after the passage of the act above named, he had avowed his determination to exercise the exclusive control of the land, and had prevented the plaintiff from exercising any control thereof, and had finally by personal force and violence expelled her therefrom. A demurrer was interposed to the complaint, and the court held that it did not state facts sufficient to constitute a cause of action, basing its decision on the ground that by the common law and the law in force in the state of New York prior to the passage of the act in question, the husband, by virtue of the marriage contract, became seised of a freehold estate in the real property of his wife, and was entitled to take the rents, issues, and profits of the land during their joint lives; and, further, since children had been born alive to them, he had a freehold estate during his natural life as tenant by curtesy in the property, which right was a vested right, and could not be taken away by any subsequent enactment of the legislature. This case, it is at once apparent, has no analogy to the case at bar, unless we are to hold that the statute of 1871 gave the wife at the time of the marriage a vested interest of some sort in the separate property of the husband. But this, as we have said, we are unable to do. Had the husband in the case at bar attempted to claim as his separate property by virtue of the subsequent statutes rents, issues, and profits of his separate property which had come into being during the time the act of 1871 was in force, the case cited would have bearing, but no such question, as we have said, is pointed out by the record. The case furnishes no aid by which to determine the proper construction of the statute of 1871. We conclude, therefore, that the property of the first class cited was rightly adjudged to be the separate property of the husband.

The tract of land forming the second class, as classified by counsel, was purchased from the executors of the estate of Charles C. Terry. The record shows that Charles C. Terry died February 17, 1867; that he left a will in which he named Franklin Mathias and Erasmus Smithers as executors, with power to sell and convey the real estate of which he died seised, at such times, at such prices, and on such

terms, as the executors should deem wise; that, pursuant to the power conferred by the will, the executors sold the lot of which the tract now in question is a part to Francis M. Guye and one Charles Burnett on March 20, 1870, some two years prior to the marriage of Francis M. Guye to the appellant; that thereafter the lot was divided between the purchasers, Francis M. Guye taking the west half; that Guye took possession of the land awarded him, erected buildings thereon, and otherwise improved the same; that he subsequently rented the same to tenants and collected rents therefrom, all prior to his marriage with the appellant; that a deed to the property was made by the executors January 7, 1873, nearly one year after the marriage of Francis M. Guye and the appellant; that some two years later a return to the probate court was made by the executors of the sale, reciting that a sale of the property was had on March 20, 1870, to Guye and Burnett for \$500, and asking that the sale be confirmed. The record made by the executors does not show when the purchase price of the lot was paid. Burnett, however, testified that the negotiations leading up to the purchase of the lot were transacted by Guye, and that some part of the purchase price was paid at the time of the purchase, but whether all or not he did not remember. There was no evidence of any other payment. The appellant bases her claim of a community interest in this tract on the fact that the deed to the same passed after her marriage with Guye, and the presumption arising from the manner in which business is ordinarily conducted that the purchase price was paid at the time the deed was delivered. But we cannot think this a just deduction from the facts shown. Clearly Guye had a valid subsisting interest in this property at the time of his marriage. He had taken possession of it and improved it, and paid a part, at least, of the purchase price. Had it been shown that the balance of the purchase price had been paid with community funds after the marriage, it might well be that, under the doctrine of *Heintz v. Brown*, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211, the property would have been community property "to the extent and in the proportion that the consideration is furnished by the community, the spouse supplying the separate funds having a separate interest in the property in proportion to the amount of his or her investment;" but clearly the entire property could not be community property. But there is no evidence in the record that community funds entered into the purchase price of the property. Therefore, for the want of some rule with which to measure



such interest, if for no other, the court cannot hold that the community had any interest in this property.

The appellant calls attention to the fact that during the forty years of her married life with Francis M. Guye large sums were paid in taxes on this separate property, and she asks the court to presume that the money with which they were paid was community funds, and to charge the land with one half thereof for her benefit. But we cannot presume that the funds used to pay the taxes were community funds. What would have been the rule had it been shown that the husband had no separate income with which to pay these taxes we do not need to discuss; but where, as here, it is shown that he did have such separate income, there can be no presumption that he used community funds for the purpose of paying his separate debts. The presumption is always in favor of honesty and fair dealing rather than to the contrary. Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property, and, when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear.

Nor do we think the fact that the spouses have joined in mortgaging property sufficient evidence on which to found a claim that the property mortgaged is community property. While the statute allows a husband or wife to sell and encumber his or her separate property, yet no prudent purchaser or mortgagee will ever take the separate deed or mortgage of a married man or married woman even when the other spouse sits by and disclaims interest. Such a deed or mortgage always requires explanation in subsequent dealings with the property whenever either of them forms a part of the chain of title, rendering the property less easy of disposition than it otherwise would be. The fact that both spouses joined in the encumbrances put on the property in this instance is therefore little or no evidence that the property was community rather than separate property.

The third class of lands claimed by the appellant to be community property are the lands acquired under coal-land entries made by the husband during the existence of the marital relation, and patented to him while the relation existed. In *Kromer v. Friday*, 10 Wash. 621, 32 L.R.A. 671, 39 Pac. 229, we held that land acquired by the husband under the homestead laws of the United States, where the entry was made, the necessary residence had, and the final proof made, during the existence of the

marital relation, was community property. In subsequent cases we have applied the rule to pre-emption entries. On the other hand, we have held that land acquired under the stone and timber acts from the United States by the husband, during the marital relation, was his separate property. *Gardner v. Port Blakely Mill Co.* 8 Wash. 1, 35 Pac. 402; *James v. James*, 51 Wash. 60, 97 Pac. 1113, 98 Pac. 1115. The decisions were based on distinctions existing between the several acts providing the manner of entry, and the persons entitled to enter. Under the homestead and pre-emption acts but one entry was allowed to a family, which must be made by the head of the family; and it was required that the family live on the land and make a certain amount of improvements thereon before final proof could be made. The land was granted ostensibly for the benefit of the family, and the intent of Congress in passing the act was to induce men with families to settle upon and make their homes upon the public lands. Under the timber-land acts, no settlement upon or living upon the lands was required. The entryman was required to take an oath that he had made no other application under the act; that he did not apply to purchase the land for speculation, but for his own use and benefit; and that he had not made any agreement, directly or indirectly, in any way or manner, with any person or persons whomsoever by which the title he should acquire would inure to the benefit of any person other than himself. Each of the spouses could make such an entry, and there was nothing in the act itself which indicated a purpose to grant the land as a place of residence of the individual making the entry. True, after title was acquired, the entryman could make such use of it as he pleased, but it was not the primary purpose of the grant, as it was under the homestead and pre-emption acts, to furnish a home for the entryman and his family. These differences we thought and still think are fundamental, and justify the distinction made with reference to the character of the property on its acquisition.

The method of acquiring land under the coal-land acts in analogous to that of the timber and stone acts, and not that of the homestead and pre-emption acts. Each of the spouses can make an entry and acquire title under it. No residence on the land is required. The entryman must take and subscribe to an oath to the effect that the entry is made for his own benefit, and not directly or indirectly for the benefit of any other person. By analogy, therefore, the property should be held to be separate property rather than community property. But the appellant argues that this court has

expressed its dissatisfaction with the decisions under the timber and stone act, holding property so acquired to be separate property, and has adhered to the rule on the doctrine of *stare decisis* rather than on principle, thinking that to disturb the earlier rule would disturb property rights acquired under it, that here there is no precedent to interfere, as this is a case of first impression in this court, and the court is at liberty to adopt such rule as it thinks most agreeable with the community system of property adopted in this state. But while it is true that the first decision under the timber and stone act was by a divided court, and it may be that individual members of the court have expressed doubt as to whether the correct rule was adopted in that case, the majority of the court has always felt that the case was correct in principle, and should be adhered to on that ground rather than on the ground of *stare decisis*. By analogy, therefore, we hold that the land here in question was the separate property of the husband, and not the community property of the husband and wife.

The fourth class involves the mining claims. The laws relating to the acquisition of mines containing the precious metals are similar to those relating to the acquisition of timber and coal lands. Either spouse can make entry under them, and acquire a full title from the United States without the aid or intervention of the other, and that such property is the separate property of the locator, and not the community property of the husband and wife, we held in *Phoenix Min. & Mill. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777.

The fifth class was adjudged by the trial court to be community property, and no question concerning the correctness of the decision is suggested on the appeal.

These conclusions require an affirmance of the judgment of the court below, and such affirmance will be ordered.

Dunbar, Ch. J., and Chadwick, Mount, Parker, Crow, Morris, and Gose, JJ., concur.

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appt.,

v.

MARGARET J. JONES.

(37 App. D. C. 511.)

Water — percolating — withdrawal — interference with surface support — liability.

No action lies for withdrawing percolating water from under the surface of a parcel of real estate in the construction of a tunnel of a railroad under an adjoining street, the fee of which is in the public, although the result is a consolidation of the earth which causes a settlement and cracking of the walls of buildings thereon.

(November 6, 1911.)

**A**PPPEAL by defendant from a judgment of the Supreme Court in favor of plaintiff in an action brought to recover damages alleged to have been sustained by

*Note. — Correlative rights in percolating waters.*

The earlier cases involving rights in percolating water were discussed in the note to *Meeker v. East Orange*, 25 L.R.A. (N.S.) 465, and earlier L.R.A. notes therein cited, which show that, whereas the earlier decisions laid down the general rule of absolute rights in such water, the great majority of the recent cases have receded from that view, and favor the doctrine of confining each landowner to a reasonable use of the water. This being so, it is clear that *NEW YORK CONTINENTAL JEWELL FILTRATION Co. v. JONES* is out of line with the modern authorities in invoking, as it does, the doctrine of absolute rights.

The case of *Burr v. MacLay Rancho Water Co.* — Cal. —, 116 Pac. 715, a former appeal of which is reported in 154 Cal. 428, 98 Pac. 260, and commented upon in the note in 23 L.R.A. (N.S.) 331, follows *Katz v. Walkinshaw*, 141 Cal. 116, 64 L.R.A. 236, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, and holds that the existence of a common supply of water in a state of percolation, of such character that the taking from one overlying tract will subsequently diminish the quantity available in another overlying tract, gives correlative rights in the common supply, and creates a right in one such landowner to prevent another from taking the water to distant lands not overlying the common supply, if such taking is injurious to him. It was further held that one who acquires adjoining property after the appropriation has begun takes subject to the right which the appropriator then had, but that the appropriator does not, because of his first taking, have any right to take an additional quantity thereafter. And it is also held that water taken solely to fulfil the private contractual obligation of the appropriator to deliver water to such lots, which it has sold with a water right, is a private use, and not a public use, so as to render applicable the rule of *Katz v. Walkinshaw*, supra, in regard to an estoppel upon him who, without protest, knowingly allows his property to be taken for public use, sees expensive works installed and the public service begun, and stating the rule to be that in such case he will be limited to the remedy of an action for damages.

L. A. W.

plaintiff in consequence of the construction of a tunnel by defendant. Reversed.

The facts are stated in the opinion.

Messrs. James H. Hayden and George W. Dalzell, for appellant:

The defendant's acts of which the plaintiff complains were duly authorized and required by legislative authority, and plaintiff's damage, if sustained as alleged, was *damnum absque injuria*.

Millard v. Roberts, 202 U. S. 429, 50 L. ed. 1090, 26 Sup. Ct. Rep. 674; Richards v. Washington Terminal Co. 37 App. D. C. 289; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; Benner v. Atlantic Dredging Co. 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

Where an owner of land makes an excavation into which subterranean water drains from other land, the owner making the excavation is not liable for damages resulting from such drainage.

Popplewell v. Hodkinson, L. R. 4 Exch. 248, 38 L. J. Exch. N. S. 126, 20 L. T. N. S. 578, 17 Week. Rep. 806; Elliot v. North Eastern R. Co. 10 H. L. Cas. 333, 2 New Reports, 87, 32 L. J. Ch. N. S. 402, 9 Jur. N. S. 555, 8 L. T. N. S. 337, 11 Week. Rep. 604; Frazier v. Brown, 12 Ohio St. 294; Angell, Watercourses, §§ 109, 110; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721, 13 Mor. Min. Rep. 374.

Mr. Burton T. Doyle, with Messrs. Charles A. Douglas, Gibbs L. Baker, Thomas Ruffin, and Hugh H. Obear, for appellee:

Defendant could not withdraw the subterranean water and impair the lateral support of plaintiff's property where the work which caused the draining of the subterranean water was not exclusively for street purposes.

United States v. Alexander, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529.

Mr. Justice Van Orsdel delivered the opinion of the court:

This is an action on the case brought by Margaret J. Jones, plaintiff below, against the New York Continental Jewell Filtration Company, a corporation, defendant, to recover damages alleged to have been sustained by plaintiff in consequence of the construction of the railroad tunnel of the Washington Terminal Company under the west side of First street, Northeast, in the city of Washington.

Plaintiff alleged in her declaration that she was the owner of a house and lot abutting the parking on the easterly side

of First street, between East Capitol and A streets; that while the defendant company, under contract with the Washington Terminal Company for the construction of the tunnel, was excavating and constructing the tunnel under the street opposite her property, the land began to settle, causing the foundations and walls of her house to crack, and that this settlement and cracking, which plaintiff alleges began March 1, 1903, continued up to the time this action was brought.

The declaration is in four counts. In the first two plaintiff charged that the settlement was caused by the excavating and other work done by the defendant in constructing the tunnel, the effect of which had been to destroy the lateral support of her land. In the third count it was charged that the building of the tunnel had caused a permanent impairment of the property and diminution of its value. The fourth count charged negligence. The third and fourth counts were withdrawn from the jury, and a verdict for damages rendered in favor of the plaintiff upon the first two counts of the declaration.

It appears from the testimony that the tunnel is 48 feet wide and 24 feet in height; that from the top of the tunnel to the surface of the street opposite plaintiff's premises is a distance of 27½ feet; that the distance on the surface of the street from a point perpendicular to the east side of said tunnel to the west line of plaintiff's lot, or the west wall of her house, is 69 feet, and that a direct line between the nearest adjacent points of the house and the tunnel is about 90 feet.

A plat showing the settlement of the ground as it appeared on the surface of the street in front of plaintiff's property was admitted in evidence, and is conceded to show the exact condition after the construction of the tunnel. It appears that directly in front of plaintiff's house the settlement in the street at the center line of the tunnel in February, 1908, was 1 foot, 3 inches, and that the settlement, as it appeared on the surface, gradually decreased in an easterly direction until it entirely disappeared at a point 20 feet, 3 inches west of the west line of plaintiff's premises, the west wall of the house being on the west line of the lot. Photographs, taken before work on the tunnel was begun, showing cracks in the outside walls of plaintiff's house, are in evidence.

Attention is called to these established facts in order that we may approach more intelligently the point upon which this appeal must turn. There is considerable evidence in the record to the effect that the upper stratum of soil in the vicinity

of plaintiff's property is composed of sand and gravel heavily charged with water, and that to meet this contingency drain pipes were laid in each side of the tunnel to carry away the percolating subterranean waters. The chief engineer of the defendant company testified: "The tunnel could not have been constructed without provision for drainage. The plans called for a system of waterproofing and drainage, and the tunnel was constructed accordingly. The withdrawal of water from subterranean soil tends to decrease the voids between the individual particles of soil and allow gradual consolidation. After the water is withdrawn, the soil will occupy less volume than it did originally when the water was present. The stratum of sand and gravel overlying the clay was heavily charged with water. Some springs were encountered, but the water was continuous throughout the stratum of sand and gravel. The soil was practically uniform along square 728." A number of witnesses, both for plaintiff and defendant, testified that the withdrawal of underground water would cause a consolidation of the earth and admit of settlement.

While the lot on which the house stood, and for a considerable distance west of the house, showed no surface settlement, according to the exhibited plat, it may well be that the superior weight of the house caused its walls to settle, due to the withdrawal of subterranean waters. This theory, considering the physical conditions shown to exist at and surrounding plaintiff's premises before and after the construction of the tunnel, is certainly more plausible than that the construction of a tunnel at a distance of 90 feet from the house, without negligence to cause an unnecessary movement of the earth, withdrew the lateral support of earth from its foundations and caused the settlement of the walls.

At the conclusion of the case, counsel for defendant offered the following instruction, which the court refused to submit to the jury: "The jury is instructed that if they find that the injury, if any, to plaintiff's premises, was due to the withdrawal of subterranean waters from beneath the surface of plaintiff's land, caused by the excavation of the tunnels, plaintiff cannot recover, and their verdict must be for the defendant." This was error. Clearly, if the damage was caused by the withdrawal of subterranean waters in consequence of the construction of the tunnel, it is *damnum absque injuria*, and there can be no recovery.

The common-law right of a landowner, or those holding under him, if essential to

the full enjoyment of his estate, to drain percolating subterranean water from beneath the land of his neighbor, is too well settled to admit of division of opinion. The exception is found in the familiar rule that where one grants land to another for a particular purpose, if the withdrawal of the water by the grantor on adjacent land would destroy the use for which the grantee purchased, the grantor would be estopped from doing an act in derogation of his own grant. But the exception has no application to this case. When plaintiff purchased the lot she was charged with notice of the uses to which the adjacent land might be subjected, both by public and private structures, such as are common in great cities.

The controlling case on this subject, and one generally cited in support of the common-law rule, is *Popplewell v. Hodgkinson*, L. R. 4 Exch. 248. Cockburn, Ch. J., announcing the opinion of the court said: "Although there is no doubt that a man has no right to withdraw from his neighbor the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason, it becomes necessary or convenient for him to do so. It may be, indeed, that where one grants land to another for some special purpose, for building purposes, for example, then, since, according to the old maxim, a man cannot derogate from his own grant, the grantor could not do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been. . . . Indeed, when we remember that the land was close to an important and populous town, and that there was, therefore, every probability of its being built upon, the plaintiff, we may infer, must have had strong reasons for supposing that it would be so built upon, and, consequently, would be effectually drained, if the nature of the erections proposed to be put upon it should render that operation necessary. It so happens that a church has been built there, and it was essential, the buildings being large and heavy, to drain the land deeply to get a secure foundation. Now, the plaintiff cannot complain of this, for he had no right to suppose that the adjacent land would be used for the erection of such cottages as he had himself erected, or of other buildings requiring equally little support. Seeing, then, that there was no implied condition that the grantor in this case would not drain, there was no obligation on him or those who claim through him not to drain, to such an extent as the na-

ture of the building to be erected rendered safe and desirable."

The reason for the rule is that percolating subterranean water is a wandering thing, which, like the air, is not subject to any fixed rules of law. The existence, origin, course, and movement of such waters, and the causes which govern and direct their movements, are so involved in mystery, secrecy, and uncertainty as to render any attempt to establish or administer any set of legal rules with respect to them practically impossible.

One of the best-considered cases which has come to our notice is *Chatfield v. Wilson*, 28 Vt. 49. It is there held that "there are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable." This case, based upon the strongest reason, goes to the full extent in holding that the act of detaining or diverting subsurface percolating waters from an adjoining proprietor gives no right of action.

It is not different that the drainage here was caused by the construction of a railroad in a public street. The use of the street for this purpose was proper. The railroad company acquired its right of way from the government, in which was the fee and control of the street. We can see no distinction between the right of the railway company through its agent, the defendant, to intercept the percolating waters findings their way to the tunnel, and that of the government itself, had it caused similar drainage by the construction of sewerage or other public work under the street. In *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60, where the railroad, in excavating on its right of way, drained a well on neighboring land, not touched by the right of way, it was said: "The railroad company, for the purpose of constructing their road, had the same right to excavate, within the limits of their right of way, that a private individual would have to dig upon his land for any purpose; and we know of no statute or principle which would hold them liable for an injury, such as that complained of, beyond the liability of a natural person for a like injury."

The case of *United States v. Alexander*, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529, relied upon by counsel for plaintiff, is not in point. There the government, under the authority of an act of Congress, 37 L.R.A. (N.S.)

condemned a right of way for a tunnel through which to convey water to supply the city of Washington. In its construction, appellee's well, situated a distance of 500 feet from the tunnel, and not within the right of way condemned, was destroyed. The act of Congress authorizing the condemnation of the right of way provided for the adjustment of "all claims for value or damages on account of ownership of any interest in said premises, or on account of injury to a property right by the construction of said works." The case turned upon the statutory right of action granted. The court held that water collected in appellee's well constituted a property right, and that, under the provisions of the statute, the government was liable for damages incurred by reason of its destruction. The court, referring to the common-law rule as laid down in *Acton v. Blundell*, 12 Mees. & W. 324, 13 L. J. Exch. N. S. 289, 15 Mor. Min. Rep. 168, and similar cases, said: "The doctrine of those cases substantially is, that the owner of land may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action. We recognize this as sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case like the present, where the injury complained of is inflicted by the construction of a public work under authority of a statute, over land upon which the public authority has acquired a right of way only, and where the statute itself provides a remedy for such injury, the law has been held to be otherwise in cases whose reasoning demands our assent." The court then refers at length to a number of decisions by the supreme court of Massachusetts.

In Massachusetts it has been held that the common law does not apply where damage to an adjacent property owner was caused by the drainage of underground waters by a railroad company in the course of constructing its road within the limits of its own right of way. *Parker v. Boston & M. R. Co.* 3 Cush. 107, 50 Am. Dec. 709. But the common law has been superseded by statute in Massachusetts in respect of damages caused by the construction and maintenance of railroads. The statute provides that "every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their

road, or by taking any land or materials." A similar statute in Massachusetts also holds a municipal corporation liable for damages occasioned by the making or maintaining of a street in a condemned right of way. It provides that in estimating damage "regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner." *Marsden v. Cambridge*, 114 Mass. 490. Under these statutory provisions damages can be recovered for injuring land, whether it abut upon the right of way or not.

There is no statute in this District abrogating the common-law rule. Hence, if the damage to plaintiff's property was occasioned by the withdrawal of the percolating subsurface waters from underneath her premises, there can be no recovery, and defendant company was entitled to have the jury so instructed.

The judgment is reversed, with costs, and the cause is remanded for a new trial.

#### KENTUCKY COURT OF APPEALS.

W. E. GLENN et al., Appts.,

v.

CRESCENT COAL COMPANY.

(145 Ky. 137, 140 S. W. 43.)

#### Nuisance — purchaser — notice.

1. No action will lie against a purchaser of an abandoned mine who merely maintains it in the condition in which it came into his possession, for injuries caused to the property of others by mineral water coming from the mine, until notice has been given him of the nuisance and an opportunity afforded him to correct it.

#### Damages — aggravation of injury — liability.

2. A riparian owner who, in order to gain the benefit of water from a stream, turns it out of its course over his land, knowing that it is impregnated with mineral matter from a mine, cannot hold the mine owner liable for the injury caused to his land and vegetation by such mineral matter.

#### Injunction — injury to land by mine water — contribution.

3. Injunction will not lie to restrain the casting of mine water into a stream to the injury of lower riparian land, where the land is not injured except when the water is turned out of its course by the complainant, or the channel is permitted by him to

fill up so as to cause the water to spread over the adjoining land.

(October 26, 1911.)

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Muhlenberg County dismissing an action brought to recover damages for injuries to plaintiffs' land by water permitted to flow from defendant's mines. Affirmed.

The facts are stated in the opinion.

Mr. Robert Hardison, Jr., for appellants:

A coal mining company that has upon its land a mine in which there is a breakthrough, out of which copperas water habitually escapes and damages the land of another, is liable for such damage, whether it actually knows the water is escaping and causing the damage or not.

*Nebo Consol. Coal & Coking Co. v. Lynch*, 141 Ky. 711, 133 S. W. 763; *Kinnaird v. Standard Oil Co.* 89 Ky. 468, 7 L.R.A. 451, 25 Am. St. Rep. 545, 12 S. W. 938.

The owner of lands damaged by copperas water cast upon them from a coal mine is entitled to recover for such damages, although such lands have, since such copperas water was turned upon them, increased in value.

*Covington v. Berry*, 120 Ky. 582, 87 S. W. 317.

Messrs. ~~Sparks & Belcher~~ and Newton Belcher for appellee.

Lassing, J., delivered the opinion of the court:

In this litigation the appellants, W. E. Glenn and others, the owners of a small tract of land in Muhlenberg county, Kentucky, sought to recover damages of the Crescent Coal Company for suffering and permitting copperas water to flow from its mines over their property. They alleged that some of this copperas water was suffered and permitted to flow from an unused mine owned by appellee, while still other water was pumped from one of its mines, and that this water, flowing from the unused mine and pumped from the mine in use, ran down upon their land and destroyed the vegetation thereon, damaging it in the sum of \$800.

The defendant in its answer denied that it had damaged the plaintiffs in any sum whatever. It further pleaded that the unused mine had not been worked for many years, that they had only recently come in possession of the property, *i. e.*, within the last few years, and that they were not aware that any copperas water flowed therefrom, or had flowed therefrom, over on plaintiffs' land. They admitted pumping

**Note.** — The necessity of notice to make the owner of premises liable for continuing nuisance created by his predecessor is considered in the note to *Chicago, R. I. & P. R. Co. v. Martin*, 27 L.R.A. (N.S.) 164. 37 L.R.A. (N.S.)

copperas water from the other mine, but alleged that it flowed down the natural water way through plaintiffs' land, and that, if any damage was done by said copperas water, it was due to the fact that plaintiffs had caused the water way to become closed by the accumulation of dead timber or other waste material from their farm, thus diverting the water from its channel, and causing it at times to flow upon plaintiffs' land.

The affirmative matter in the answer was traversed, and upon a trial of the issues thus formed a verdict was returned in favor of the defendant. The suit was in equity, and an injunction was sought prohibiting the defendant company from permitting the copperas water to flow from its unused mine, and also prohibiting it from pumping copperas water from its other mine, so that it could flow over plaintiffs' land. The jury having found against plaintiffs, the chancellor dismissed their petition, and from that judgment this appeal is prosecuted.

A reversal is sought principally upon the ground that the court did not properly instruct the jury. Upon the question of damage, the evidence was conflicting, and it cannot be said that the verdict of the jury is against the weight of the evidence; and unless the court erred in instructing the jury, its finding of fact must be affirmed. The instructions to which appellants object are Nos. 6, 7, and 8.

In instruction No. 6 the court in substance told the jury that, unless the defendants operated the old mine or caused the opening thereof to be in such condition that the copperas water flowed therefrom upon and over plaintiffs' land, defendants were not liable for any damage resulting therefrom, unless they had notice that said water was flowing from said opening upon their land and injuring it. This old mine had been opened some thirty years before the trial, and such copperas water as escaped therefrom flowed down a natural water way, which was a small ditch or branch, through the lands owned by appellants. The pumping station from which the water was pumped out was established some twenty years or more before the litigation, and the water as pumped from it had likewise flowed down the natural water way through appellants' land. The property was in this identical condition when bought by appellee company. They at no time worked the old mine, or did anything to it or with it, and made no change of any sort in its opening or mouth, from which the water flowed. After their purchase, they did continue to pump water from the pumping station, until some time in the year 1905. During all of this time, no complaint

37 L.R.A. (N.S.)

was made to them by anyone owning this land of any damage whatever from any source, until three or four years after the pumping station had been abandoned, and no water had been thrown by appellee into this natural water way. The proof shows that copperas water from other openings passed through ditches and natural water ways over the lands of other persons, until it reached the stream flowing over appellants' land. All of the evidence shows that no damage resulted to appellants from the copperas water after it reached the stream, although there is some evidence supporting appellants' claim that during periods of heavy rainfall the water way or ditch was not sufficient to carry the flow, and that its banks overflowed, and that the water ran into a field near and below the ditch or water way, and it is this land which appellants claim was damaged. It is not shown that there was any deposit of copperas on this land, or that mineral water was standing on any of the land, although there is testimony that some of the lower portions of this land produced no vegetation. The ground upon which appellants rest their right to recover is that appellee was maintaining a nuisance. If so, before appellants would have any just cause of complaint, they should have brought notice of this fact home to appellee, and given it an opportunity to abate it, or correct the evil. When appellee purchased this property, the old mine was there in the same condition that it had been for many years, and as no complaint, so far as the evidence shows, had been made that the water discharged therefrom was injuring the property of anyone, and particularly appellants, it would be manifestly unjust to hold that appellee was liable for damage resulting from this flow of water, in the absence of some notice to it that injury or damage was being caused thereby.

In the case of *West v. Louisville, C. & L. R. Co.* 8 Bush, 404, this court had under consideration the right of a distillery company to recover damages from a railroad company, for injury to its property resulting from the flooding of the distillery, on account of an obstruction which the railroad company had put in a stream running near by. The bed of the road was built in 1833. When built, culverts were placed thereunder, and it appears that these culverts were never sufficient for the free and natural passage of the water in rainy seasons, and at different times it had caused the water to accumulate above it and overflow the adjacent lands. Some years after the construction of the railroad, the distillery property was bought by *West & Brother*, and the flooding thereof occurred

after its purchase. After stating the facts, the court said: "With reference to the imputed liability of the appellee for continuing in 1870 a private nuisance created as early as 1833, it must be borne in mind that the parties are in the position of grantees since the erection of the nuisance. But, although when one who erects a nuisance conveys the land, he does not transfer the liability for the erection to the grantee, it is nevertheless true that an alienee may become responsible for the continuance of a nuisance, either to a party originally affected by it or another deriving title from him. We consider the principle, however, as sustained, at least by a preponderance of authority, that in such a case the alienee or grantee does not become responsible unless, after reasonable notice, request, or remonstrance, he shall refuse to reform or abate the nuisance." And, continuing, the court cited with approval the following from *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405: "The purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured. A plaintiff ought not to rest in silence, and finally surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance."

We are of opinion that, under these authorities, instruction No. 6 was authorized; and we are further of opinion that in the form in which it was given, it was even more favorable to appellants than they were entitled to have it.

Complaint is likewise made of instructions Nos. 7 and 8. In instruction No. 7 the court told the jury that it was the duty of plaintiffs, after receiving notice that their land was being injured by copperas water from defendant's pumping station or mine, to exercise reasonable care to protect themselves from further injury, and if they failed to do so, they cannot now recover for any injury which, by the exercise of reasonable care, they might have avoided. This instruction was given because it was made to appear in the evidence that the plaintiffs had deadened a lot of trees and timber along the banks of the water way, and had suffered and permitted this deadened timber to fall into and obstruct the free flow of the stream, causing the water to flow over their land.

In instruction No. 8 the court told the jury that if they believed from the evidence that the plaintiffs had failed to make a reasonable effort to prevent the natural

water ways across their lands, through which copperas water from defendant's mine was flowing, from becoming obstructed and filled up, and thereby said water was caused to flow upon their land and injure it, they should find for the defendant as to such injury.

These instructions, while not strictly accurate in defining the rights of the respective parties, were evidently not prejudicial to appellants, for it is clear from the evidence that they knew that these deadened trees were falling into and across the water way, and that the *débris* and trash which the heavy rains brought down from the uplands would lodge against these timbers and cause the stream to overflow. It seems this is what plaintiffs desired should be done. Their lands at that point were low and swampy. They knew that much silt and detritus was brought down from the higher lands above them, and that, if the water carrying this was caused to overflow their land, this silt and soil would be deposited thereon, and the land would be rendered more valuable. This is doubtless true; but they knew, or must have known, that the copperas water from these mines above them flowed down this natural water way, and that, if the water was diverted from its channel and caused to flow over their land, the copperas water would to some extent be deposited thereon. If they desired that their lowlands should be built up by deposits brought down by the stream from above, and with a view to this end they suffered and permitted the bed of the stream to become closed, so that the water flowed over their land, they must take it as they find it,—the burden with the benefits. It is well settled that the owner of land through which a stream flows may make any reasonable use he desires of the stream, so long as such use does not interfere with the rights of others. It was perfectly right for plaintiffs to cause the water from this stream to flow over their land, provided they again caused it to enter its channel before leaving their property. But they could not, after causing the water to leave the banks of the stream and flow over their land, hold appellee responsible for their resulting damage. This would be an improper use of the water on their part.

It is the enunciation of no new principle to state that it is the duty of one whose property is injured, or about to be injured, by the wrong of another, to exercise reasonable diligence to avoid or minimize the resulting injury. If he fails to do so, he cannot recover for any damage which he could, by the exercise of reasonable care, have avoided. This principle is admirably stated by Mr. Inompsen in his work on



Negligence, vol. 1, p. 195, where, after discussing various phases of this subject, he says: "In short, the law imposes upon every person who has been injured, either in his person or his property, by the negligence or misconduct of another, to do what he reasonably may in order to keep down the damages or to prevent their enhancement. But the obligation is not absolute; it is relative; it extends no further than to require him to do what a reasonable man, guided by considerations of obligations which rest upon every member of a civilized society, might be expected to do under the circumstances." This is, in substance, what the court told the jury it was the duty of plaintiffs to do in regard to this water way.

In *Raleigh v. Clark*, 114 Ky. 732, 71 S. W. 857, it was held that, where one whose duty it was to clean out a ditch failed to do so, by reason of which another's land was overflowed and his crop damaged, he could only recover the reasonable cost of opening the ditch and keeping it open. And in *Chicago & E. R. Co. v. Chestnut Bros.* 28 Ky. L. Rep. 404, 89 S. W. 298, the plaintiff sought to recover damages from the railroad company for failure to deliver to them a carload of fowls with reasonable despatch, by reason of which delay a number of the fowls were frozen and damaged. It appeared in the evidence that, although there was delay in forwarding the car to its destination in Chicago, the consignees, the agents of plaintiff, failed to unload the fowls therefrom promptly upon its arrival, and because of such failure an additional loss was sustained. In passing upon the rights of the respective parties, the court said: "From these facts it must be seen that appellants were not liable at all for fowls which died because of diseased condition when shipped; nor for those which died from exposure or other cause before they reached Chicago; nor for any that died or were damaged by reason of any negligence of Brown & Son in failing to remove them from the car after having had it so placed that they reasonably could have removed them before damage or death to them." It will be observed that the court here held that there could be no recovery for any damage which might have been prevented by the exercise of reasonable care upon the part of the plaintiff's agent in unloading the fowls. So, in the case at bar, appellants could have avoided any injury whatever to their land by keeping the water way or ditch through it free from the falling timber, which obstructed the stream and caused the water to overflow their land.

In *Cain v. Louisville & N. R. Co.* 27 Ky. L.R.A. (N.S.)

L. Rep. 201, 84 S. W. 583, it was held that a passenger put off a train at a wrong station was not entitled to recover for damages which she could reasonably have avoided, or to enhance her damages by her own imprudent conduct. In other words, she should exercise reasonable care not to enhance or increase her damage.

In *New York L. Ins. Co. v. Pope*, 139 Ky. 567, 68 S. W. 851, it was held that one holding a policy of insurance which entitled him to borrow money thereon from the insurance company at a specified rate was not entitled to recover damages from the company because of its failure to loan him money thereon, in the absence of a showing that he was unable to borrow money elsewhere at as favorable a rate.

In *Louisville & N. R. Co. v. Sullivan Timber Co.* 138 Ala. 379, 35 So. 327, it was held that where the property of the appellee was set fire to by sparks from an engine of the appellant company, it was the duty of appellee to exercise reasonable care to extinguish the fire and prevent its spread, and that they were only entitled to recover for such damage as they could not have avoided by the exercise of reasonable care.

In *Ft. Smith Suburban R. Co. v. Maledon*, 78 Ark. 366, 95 S. W. 472, it was held that where one had wrongfully entered another's land and left his fences down, so that cattle entered the premises and destroyed the crops, a recovery could be had only for such damages as the owner of the crops could not have avoided by the exercise of reasonable care.

In *Macon v. Dannenberg*, 113 Ga. 1111, 39 S. E. 446, it was held that where a city had negligently permitted a drain to be so obstructed as not to carry away the water from a lot, the owner of this lot must exercise reasonable care to prevent his lot from being injured by an overflow, and that he could not recover from the city for any damages which he might have, by the exercise of ordinary care in this particular, avoided. To the same effect are *Hartford Deposit Co. v. Calkins*, 186 Ill. 104, 57 N. E. 863, and *Scherrer v. Baltzer*, 84 Ill. App. 126.

In *Harrison v. Missouri*, P. R. Co. 88 Mo. 625, it is held to be the duty of a person whose property has been injured by the negligence of another, to put forth reasonable exertion and expense to prevent its injury, and if he fails to do so, he cannot recover as for a total loss.

Clearly, upon principle and in the exercise of common justice, it was the duty of appellants, when they knew their land was being injured by the flow of copperas water over it, to exercise reasonable care to pre-

vent this injury by the removal of the fallen trees from the water way. Had this been done, they would have suffered practically no damage at all. The jury evidently regarded this failure on their part as the proximate cause of any damage which they had sustained.

The substance of the instruction asked for by appellants and refused was embodied in the instruction on the measure of damages given by the court.

Lastly, it is urged for appellants, that the chancellor should have, notwithstanding the verdict of the jury, enjoined the appellee company from permitting the copperas water to flow from its mine down upon their land. Clearly he should not have done so, unless he believed from the evidence before him that the appellants were damaged thereby. While it is true that the verdict of the jury need not exercise a controlling influence over the mind of the chancellor in determining the rights of the parties, it is entirely proper that it should have been given some weight and consideration by him. We are of opinion, after having read the record with great care, that he gave this verdict of the jury no more weight than it was entitled to. Plaintiffs' damage, if any, was not caused by the running of this copperas water into the natural water way that flowed through their place. So long as the water way remained open, they suffered no damage to their land, but it was only when they permitted it to become closed or stopped up that any damage resulted to them. If the timber which they deadened along the banks of this water way fell into it, and was permitted by them to remain in it, and thus cause the stream to overflow, plaintiffs might not rightfully complain of any resulting damage. This is not a suit for damages arising from a pollution of the stream, but for injury to land caused by the overflow of the stream, and, the jury having found that plaintiffs have not sustained any damage on this account, the chancellor did not err in refusing the injunction.

Judgment affirmed.

#### MINNESOTA SUPREME COURT.

M. J. McFADDEN, Appt.,

v.

FRANK FOLLRATH, Respt.

(114 Minn. 85, 130 N. W. 542.)

Principal and agent — authority to indorse.

1. Authority of an agent to collect bills

Headnotes by SIMPSON, J.

37 L.R.A.(N.S.)

and receipt therefor carries no implication of authority to indorse negotiable paper.

**Payment — check — condition.**

2. When a debtor has given his check for the amount of his indebtedness, in the absence of a contrary agreement, such check is given and received as a conditional, not an absolute, payment of the debt.

**Bank — unauthorized indorsement — liability to owner.**

3. A bank, paying a check upon the unauthorized indorsement of the payee, and charging the amount thereof to the drawer's account, becomes liable to the payee for the amount of such check, unless the conduct of the payee excuses such payment, or prevents him from asserting such liability.

**Check — indorsement by agent — effect.**

4. Under such circumstances, a check given by the debtor to pay an account, and wrongfully indorsed by the agent authorized to receive it, discharges the liability on the original account.

**Payment — check — collection by agent.**

5. To pay an existing indebtedness, the defendant gave his check payable to plaintiff's order, to an agent of plaintiff authorized to receive the same. The agent, having no authority so to do, indorsed the plaintiff's name by himself as agent, and cashed the check at the bank on which it was drawn. The bank charged the defendant's account with the amount of the check, and returned the check to defendant, stamped "Paid." Held, such facts are a defense to an action by the plaintiff against the defendant on the account to pay which the check was given.

(March 3, 1911.)

**A**PPEAL by plaintiff from a judgment of the District Court for Sibley County from an order denying a new trial in an action brought to recover the price of goods sold and delivered. Affirmed.

The facts are stated in the opinion.

Mr. Joseph T. Avery, for appellant:

The account upon which said action was brought was not paid.

Thompson v. Bank of British N. A. 82 N. Y. 1; Bernheimer v. Herrman, 44 Hun, 110; First Nat. Bank v. McConnell, 103 Minn. 341, 14 L.R.A.(N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 A. & E. Ann. Cas. 396; First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; Brennan v. Merchants' & Mfrs. Nat. Bank, 62 Mich. 343, 28 N. W. 881; William Deering & Co. v. Kelso, 74 Minn. 41, 73 Am.

**Note.** — Check as payment of debt where drawee pays it to unauthorized person.

As to payment by commercial paper generally, see the note to A. Leschen & Sons Rope Co. v. Mayflower Gold Min. & Reduction Co. 35 L.R.A.(N.S.) 1.

St. Rep. 324, 76 N. W. 792; Dispatch Printing Co. v. National Bank, 109 Minn. 440, — L.R.A. —, 124 N. W. 236.

The agent had no authority to indorse checks.

1 Am. & Eng. Enc. Law, 130; Thomson v. Bank of British N. A. 82 N. Y. 1; Graham v. United States Sav. Inst. 46 Mo. 186; Jackson v. National Bank, 92 Tenn. 154, 18 L.R.A. 663, 36 Am. St. Rep. 81, 20 S. W. 802.

Mr. W. F. Odell, for respondent:

The account was paid.

William Deering & Co. v. Kelso, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; Dispatch Printing Co. v. National Bank, 109 Minn. 440, — L.R.A.(N.S.) —, 124 N. W. 236; Columbia Mill Co. v. National

Bank, 52 Minn. 224, 53 N. W. 1061; 20 Am. & Eng. Enc. Law, 2d ed. 582; Morris v. St. Paul & C. R. Co. 21 Minn. 91; Capps v. Wiedemann, 86 Minn. 156, 90 N. E. 368.

Payment to an agent authorized to receive payment is payment to the principal, even though the agent misappropriates the money.

22 Am. & Eng. Enc. Law, 2d ed. 518.

Simpson, J., delivered the opinion of the court:

The plaintiff is engaged in a wholesale business, and the defendant is a retail merchant at Arlington. The defendant had bought goods from the plaintiff, and paid therefor, for several years. These payments had been made from time to time to travel-

The exact point here annotated, as stated in *McFadden v. Follrath*, does not seem to have been often decided in reported cases.

In *Burstein v. Sullivan*, 134 App. Div. 623, 119 N. Y. Supp. 317, motion for re-argument denied in 136 App. Div. 920, 120 N. Y. Supp. 1116, where a debtor drew his check for work done, to the order of his creditors, and handed it to the general manager of the latter's business, who had authority to render bills and receive payments, but no express authority to sign checks, it was held that the account was paid, notwithstanding the fact that the general manager indorsed the check and appropriated it to his own use. Miller, J., said: "A payment to . . . [the general manager] in cash would have been a payment to the plaintiffs, though he had stolen the money; and the defendant should not be compelled to pay twice, or [be] subjected to the hazard of a lawsuit with the bank, for having taken the precaution to protect the plaintiffs by making a check payable to their order. It is true that the delivery of a check or of a note does not of itself discharge the indebtedness. If the check or the note is not paid, the creditor may sue on the original indebtedness. But the cases dealing with that subject have no application whatever to the question in hand. If this check had not been paid by the funds of the defendant on deposit in the bank upon which it was drawn, the plaintiffs could sue, either upon the check or the original indebtedness; and, of course, the defense of payment could not successfully be pleaded to a suit on the original indebtedness." Then, after saying what is quoted in *McFadden v. Follrath*, the learned justice continued: "No doubt, the rule is that express authority, or power involving such authority, must be conferred upon an agent to sign negotiable paper, and that authority merely to collect a debt does not involve authority to indorse checks given in payment of it; but those propositions and the authorities in support of them are aside from the point now involved. Upon the delivery of the check to . . . [the general manager], in payment of the bill rendered 37 L.R.A.(N.S.)

by him, it became the plaintiffs' property; and if their agent by a forged indorsement, or one made without sufficient authority, obtained the cash and appropriated it to his own use, they should settle the question with the bank."

And in *Sage v. Burton*, 84 Hun. 267, 32 N. Y. Supp. 1122, which is set out in *McFadden v. Follrath*, it was further said: "The plaintiffs, having authorized the agent to receive the check, and thus removing it beyond the control of the defendant, took, as between them and the defendant, the risk of the acts of their own agent; all the risk that the defendant took in the matter was that of establishing that the agent had power and authority to take the check in settlement, and that the drawer had funds in the bank with which to pay it on presentment. He did not even take the risk of a forged indorsement. That, probably, was the risk of the bank. The jury, under the charge of the court, have, we think, found, upon sufficient evidence, that the agent in this matter was authorized by the principal to receive this check, and that, coupled with its finding of payment of the check, operated to discharge the defendant from liability. . . . If it be held that . . . [the agent], in this transaction, was not the *alter ego* of the plaintiffs, and had no authority to indorse this check, yet, if he was authorized by the plaintiffs to receive this check from the defendant, any misappropriation of its proceeds by him is at the risk of the party who set him in motion and put it in his power to perpetrate the wrong; such party must suffer rather than the party who is no wise accountable for, and has no control of, the perpetration of the wrong."

So, in *Allen v. Tarrant & Co.* 7 App. Div. 172, 40 N. Y. Supp. 114, it is said that the case cannot be distinguished from *Sage v. Burton*, supra. Here it appeared that, prior to the giving of the checks in dispute, the creditor, through its agent, received a check of the debtor's, which was deposited in the creditor's account in bank, and paid by the defendant without any disapproval of the debtor's procedure. After consider-

ing salesmen of plaintiff, who presented statements of account to defendant. Payment was usually made by checks payable to plaintiff's order, and delivered to such agents. These checks were, by the agents, sent in to plaintiff, by plaintiff indorsed, and through the usual channels were paid and returned to defendant. On the 8th of February defendant was indebted to plaintiff for goods sold in the sum of \$77.03. Plaintiff then had in his employ as a traveling salesman one Henry J. Good. Good was instructed to call on the defendant and collect this bill. He was authorized to receive payment in cash or by check. Upon presentation of the account, defendant made and delivered to Good his check drawn on the First State Bank of Arling-

ton, dated February 15th, payable to plaintiff's order, for the amount of the bill, and received from Good a receipt acknowledging payment. Good indorsed the check, "McFadden Candy Company, by Henry J. Good, Agent," presented it to the First State Bank of Arlington, and received from the bank, in money, the amount of the check. The bank charged defendant's account with the amount, and returned the check to defendant in the regular course of business, stamped, "Paid Feb. 8." Good did not account to plaintiff for the proceeds of the check. He was not authorized to indorse for plaintiff and receive money on checks payable to plaintiff. Plaintiff brings this action against the defendant for goods sold, and seeks to recover the same

ing that the silence of the creditor to some extent justified the debtor's belief that the agent was authorized to accept checks, and considering other circumstances in the case, the court held that there was evidence to justify a finding that the money received on the checks was lawfully in the possession of the creditor's agent at the time the latter converted it to his own use, and that the debtor was entitled to go to the jury upon this question of payment.

Where an agent who was authorized to sell certain cattle accepted as part payment a check payable to the order of his principal, and the agent indorsed it in the name of his principal for collection, got the cash and deposited it to the credit of the principal, it was held in *Case v. Kramer*, 34 Mont. 142, 85 Pac. 878, that the payment was good, and that it was of no importance that the check made payable to the order of the principal was indorsed in his name for collection by the agent without special authority, since the principal actually received the proceeds.

The extinguishment of a debt is not effected by the debtor's drawing his check to the order of his creditor, and handing it to the latter's bookkeeper, who is "in the habit of receiving checks and cash paid at the office," and who indorses it without authority to another, who deposits it in his own bank, by which it is collected of the drawee bank and charged by such bank to the account of the debtor, and returned by it to the debtor with other vouchers, since the check was not actually paid in due course. *Bernheimer v. Herrman*, 44 Hun, 110, wherein it was said: "A check in and of itself is not payment, but it may become so when accepted as such, and in due course actually paid; that is, in order that a check may operate as payment, two things must concur. The check must be accepted as payment, and in due course be actually paid. In the case at bar only one of these necessary elements exists. The check in question was accepted as payment, but it has not in due course been paid. The payment of a check drawn payable to order, and unindorsed, to a party who has received the

same from a person who has stolen the check, cannot be held to be payment in due course."

So, a like decision was reached in *Dowdall v. Borgfeldt & Co.* 113 N. Y. Supp. 1089, where an employee of the plaintiff opened the latter's mail, forged the indorsement of the plaintiff on the checks, indorsed his own name thereon, and misappropriated the proceeds.

No written opinion appears in *Falk v. Starr*, 31 Misc. 756, 64 N. Y. Supp. 1135, where the judgment was for the plaintiff, the court merely saying: "We think this case was correctly disposed of by the court below on the authority of *Bernheimer v. Herrman*, supra, decided in this department [appellate division of supreme court, first department], and which, for that reason, we should follow, rather than *Sage v. Burton*, supra, elsewhere decided [appellate division of supreme court, third department] by a divided court."

Both *Bernheimer v. Herrman* and *Dowdall v. Borgfeldt & Co.* supra, are distinguished in *Burstein v. Sullivan*, supra, from the latter case, on the ground that in the former cases neither of the agents who made the indorsement on the check was a general manager, having the sole charge of the business.

In *Morris v. Hofferberth*, 81 App. Div. 512, 81 N. Y. Supp. 403, affirmed in 183 N. Y. 545, 73 N. E. 1127, where the action was brought to compel the defendant to pay again for lumber purchased from the plaintiff through the latter's agent, and paid for with check drawn to the order of the plaintiff, which the agent indorsed and converted to his own use, although the plaintiff's testimony to the effect that his agent had no express authority to indorse checks made payable to the order of the plaintiff was not contradicted specifically, the court held that, since the entire charge and management of the business was in the hands of the agent, it was proper to leave it to the jury to say whether the agent had authority to indorse the checks in question by writing plaintiff's name upon their back, and they so found.

E. M. S.

balance for which the check was given by defendant to plaintiff's agent. The defendant pleads payment, and relies on the facts above stated to establish his defense. The trial court determined the issue in favor of the defendant, and plaintiff appeals from an order denying a new trial.

When a debtor has given his check for the amount of his indebtedness, in the absence of a contrary agreement, such check is given and received as a conditional, not an absolute, payment of the debt. In case the check is not honored upon presentation, the original indebtedness for which it was given is not discharged, and the creditor may recover on such indebtedness, and need not rely on the liability on the check. 22 Am. & Eng. Enc. Law, 569; Good v. Singleton, 39 Minn. 340, 40 N. W. 359; First Nat. Bank v. McConnell, 103 Minn. 340, 14 L.R.A.(N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 A. & E. Ann. Cas. 396. Giving a receipt acknowledging payment of the debt at the time the check is delivered does not evidence an agreement to accept the check as absolute payment. Weddigen v. Boston Elastic Fabric Co. 100 Mass. 422; Bradford v. Fox, 38 N. Y. 289. Payment by check becomes absolute payment of the debt when the check is paid upon presentation. Upon such payment of the check, the debt is deemed to have been discharged from the time the check was given. Downey v. Hicks, 14 How. 240, 14 L. ed. 404; Strong v. Ten Cent Tutor Bldg. & L. Asso. 189 Pa. 406, 42 Atl. 46. While payment by check usually becomes absolute payment of the debt through payment of the check, it may become so by the certification of the check by the bank for the payee, or through the laches of the payee in not presenting the check to the bank. 30 Cyc. 1209; Brown v. Schintz, 202 Ill. 509, 67 N. E. 172; Taylor v. Willson, 11 Met. 44, 45 Am. Dec. 180. In Taylor v. Willson, supra, it is stated: "A check is merely evidence of a debt due from the drawer. Whether it shall operate as payment, or not, depends on two facts: First, that the drawer has funds to his credit in the bank upon which it is drawn; and, second, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand." In case a check given to pay a debt is lost, and has not been presented for payment to the bank on which it is drawn, an action may be maintained by the payee against the drawer on the check. Rev. Laws 1905, § 4717; First Nat. Bank v. McConnell, supra.

Authority given an agent to collect accounts does not, by implication, give such agent authority to indorse and present for

payment checks received by him payable to his principal's order. In this case, Good had no authority, express or implied, to indorse plaintiff's name and cash the check he received from the defendant. The bank on which the check was drawn was bound to pay it to the payee therein named or his order. When the check was presented, therefore, indorsed "by Henry J. Good, Agent," the bank was bound to determine, at its peril, that he had authority, as agent, to make such indorsement and receive payment on the check. Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635. Under the facts appearing in this case, the bank, without authority, accepted and paid to Good the check given by defendant. When it so paid such check, and charged the sum so paid to the account of the defendant, such charge being acquiesced in by the defendant, a right of action against the bank accrued in favor of the plaintiff, in the absence of any act or omission on his part which would excuse such payment by the bank, or deprive him of such right of action. William Deering & Co. v. Kelso, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; Dispatch Printing Co. v. National Bank, 109 Minn. 440, — L.R.A.(N.S.) —, 124 N. W. 236; Columbia Mill Co. v. National Bank, 52 Minn. 224, 53 N. W. 1061.

The reason for this rule is apparent in jurisdictions in which the payee may sue the bank upon its refusal, on presentation, to pay a check drawn on it by one having funds in the bank available for payment. The payee, once having the right to present the check and collect the amount from the bank, does not lose his right of action by the bank's unauthorized payment of the check. In some cases where it is held that, on the refusal of the bank to pay the check, there is no such privity between the payee and the bank as would give the payee a right to sue the bank upon the check, such privity is deemed established by payment on an unauthorized indorsement, and by charging the amount to the account of the drawer; the reason assigned being that the bank, by charging the check to the account of the drawer, thereby accepts the check, or undertakes to apply to the payment of the check the funds so withdrawn from the account of the drawer. Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751; Saylor v. Bushong, 100 Pa. 23, 45 Am. Rep. 353. In this state the right of a payee to maintain suit against the bank on its wrongful refusal to pay a check when presented does not seem to have been determined. Northern Trust Co. v. Rogers, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W.

273; Varley v. Sims, 100 Minn. 331, 8 L.R.A.(N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 A. & E. Ann. Cas. 473; First Nat. Bank v. McConnell, 103 Minn. 340, 14 L.R.A.(N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 A. & E. Ann. Cas. 396. But, whatever the exact reason to be assigned therefor, it is the settled rule in this state that, under the circumstances of this case, an unauthorized payment and subsequent charge to the account of the drawer is a sufficient basis for a liability of the bank to the payee.

Under these same circumstances, the liability of the drawer of the check upon the original account, to pay which the check is drawn, should be held discharged, having regard to the general rules of law governing the correlated duties and rights of the parties, and to commercial usage and custom. The defendant gave his check to pay his account owing plaintiff. He delivered the check to the agent to whom the plaintiff had requested him to make delivery. When the check was given, and thereafter, the defendant had money to meet it on deposit in a solvent bank. In the usual course of business, he would not be called upon to do any other act for the benefit or protection of the payee, and the check would serve to pay the account. It does not seem that the defendant, in allowing his account to be charged with the amount of the check given the authorized agent of plaintiff, violated any commercial usage or legal duty. It would be a novel burden if the drawer of a check, given in the usual course of business, to the authorized agent of the payee, upon such check being indorsed by such agent, were charged with the duty of determining that the indorsement on the check was authorized. To establish such a rule would make payment by check a matter of uncertainty and some risk. Under the usual method of transacting business, the drawer of a check has no means of determining when the check is returned to him, stamped "Paid," whether the indorsement of the payee thereon was authorized or not. Whether a check is delivered to an agent or sent by mail, it usually comes into the hands of employees of the payee, who are not given the right, but are given the opportunity, by the payee, to indorse the check and receive the money, provided the bank neglects its duty to see that payment is made to the payee or his order. If the check is improperly paid, because of the dishonesty of the agent that the payee intrusts with the check, and the negligence of the bank, there would seem to be no sufficient reason for placing the responsibility therefor on the drawer of the check. The drawer of the check parted with

\$7 L.R.A.(N.S.)

control over it in the usual course of business, and in this case in the exact manner the payee requested. If either the drawer or payee must suffer because of the dishonesty of the agent, the one who designated him to receive the check, and intrusted him with it, should suffer, rather than the drawer, who had no voice in the selection of such agent, and who is in no way responsible for his acts.

It is urged that under the facts herein the defendant, if he is obliged to pay this account, can recover from the bank the amount of the check cashed without authority and charged by the bank to defendant's account. But the liability of the defendant on the account must be determined by a constant rule. In this case the only question involved may perhaps be whether the payee or the drawer shall proceed against the bank. If, however, the bank, paying a check under circumstances such as here exist, and charging it to the account of the drawer, should thereafter become insolvent, either the drawer or payee of the check would suffer loss. Such loss should fall on the party more directly responsible for, and having control of, the agent whose dishonest use of the check made the loss possible.

This exact question does not seem to have been often decided in reported cases. In Sage v. Burton, 84 Hun, 267, 32 N. Y. Supp. 1122, the question here involved was decided, and the rule stated: "While a check of the debtor does not, until paid, ordinarily amount to payment of the debt, it does, after payment of the check, extinguish the debtor's liability, if the same is paid to the creditor, or to the agent of the creditor authorized to receive the check of the debtor, for the reason that, after he has parted with the check to the creditor or his agent, he has no further duty in the matter, except to see that funds are in the bank on which it is drawn for its payment." Again, in Burstein v. Sullivan, 134 App. Div. 623, 119 N. Y. Supp. 317, in a similar case, it was said: "But where a debtor delivers his check to the creditor or his agent duly authorized to receive it, and has funds in the bank to meet the check, the transaction as between the debtor and the creditor should be treated as a payment precisely as though cash had been paid, even though the agent forges an indorsement and steals the money." Thomson v. Bank of British N. A. 82 N. Y. 1, and Kansas City, M. & B. R. Co. v. Ivy Leaf Coal Co. 97 Ala. 705, 12 So. 395, are cases where suit was brought by the creditor upon the original debt after a check had been given in payment thereof, and the same had been cashed upon an unauthorized

indorsement of the payee; but, because of the grounds assigned in those cases for the decisions reached, neither is an authority under the conditions here existing.

The order appealed from is affirmed.

### SOUTH DAKOTA SUPREME COURT.

SIOUX K. GRIGSBY, Respt.,

v.

CARL G. WOPSCHALL et al., Appts.,

(25 S. D. 564, 127 N. W. 605.)

#### Process — publication — affidavit — sufficiency.

1. An affidavit is insufficient to support

*Note. — Character of inquiry as to whereabouts of party necessary to sustain constructive service of process.*

#### General principles.

In GRIGSBY v. WOPSCHALL it is said that all reasonable means to ascertain the whereabouts of a party should be taken, and then the court endeavors to state just what sort of inquiry the law requires before an order of publication will be granted. No unvarying rule can be laid down as to just what extent, and of whom, the inquiry should be made, for that is a matter depending very largely upon the circumstances of each case, to be resolved by the different judges as the question arises from time to time. About all that can be said is that it is agreed that all reasonable inquiry should be made.

In Bixby v. Smith, 3 Hun, 60, 5 Thomp. & C. 279, it was said: "Due diligence means some effort or attempt to find the party, which the court or judge shall be satisfied is reasonable under the circumstances, and the phrase, 'after due diligence,' can have no other just signification than would be given if it read, 'after due diligence has been used.' What the diligence used has been, should be shown, and the court or judge is to determine whether, under the circumstances, it is or is not 'due,' within the intent of the statute. Of course, the judge or court will determine the question whether the diligence shown is due or not, in view of the other fact that the defendant resides out of the state; for less effort to ascertain that a nonresident cannot be found within the state would be satisfactory proof of due diligence, than would be required to show that a resident cannot be so found."

"It is generally held that a mere statement in affidavits to be used as a basis for orders of publication, that due diligence was used to find the defendant, is not alone a statement of fact authorizing a publication. Such statements are deemed conclusions. The facts must be stated, and the court draws the inference therefrom 37 L.R.A.(N.S.)

a service of process by publication, which merely shows inquiry of a few persons as to the whereabouts of defendant, without getting information concerning him, and placing the summons for service in the hands of two sheriffs whose returns show inability to find him after inquiry of certain public officials, without showing any attempt to find relatives or neighbors of defendant from whom information might be obtained.

#### Judgment — insufficient service — vacation.

2. The court should on motion vacate a judgment founded on publication of summons, which is not supported by a sufficient affidavit showing diligence to ascertain the location of defendant and make personal service upon him.

whether due diligence has been exercised or not. What constitutes due diligence is therefore generally held to be a question of law. . . . The means by which due diligence is shown is not confined to any particular method of procedure. It is the fact that due diligence of some kind is shown that gives validity to the order of publication." Pillsbury v. J. B. Streeter, Jr. Co. 15 N. D. 174, 107 N. W. 40.

It is not sufficient in an affidavit for an order of publication, to state generally that after due diligence the defendant cannot be found within the state, but the acts constituting due diligence should be stated. Ricketson v. Richardson, 26 Cal. 149, wherein it was said: "To hold that a bald repetition of the statute is sufficient is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine in his own way the existence of jurisdictional facts,—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts stated in the affidavit, before the order for publication can be legally entered."

"What constitutes reasonable diligence in any case of this character must depend upon its particular facts and circumstances. Whether in any case every reasonable effort has been exhausted is a question upon which equally qualified persons may honestly differ. A showing satisfactory to one trial judge might be deemed inadequate by another, and wholly insufficient by an appellate tribunal. . . . The law required an honest and reasonable effort to ascertain defendant's whereabouts." Coughran v. Markley, 15 S. D. 37, 87 N. W. 2.

"What and how much evidence the court shall require to satisfy it of the existence of this ultimate fact rests largely with the court granting the order; but proof by affidavit of the probative facts must be produced before the court granting the order, substantiating the ultimate fact sought to be established, before the court can grant the order. . . . No unvarying rule can

**Appeal — amending abstract — presenting new questions.**

3. A respondent in the appellate court who serves an additional abstract for the purpose of bringing matters to the attention of the court, from which he intentionally omits certain matters which might have been included, will not, after argument, be permitted to file an amendment to such additional abstract, for the purpose of raising new questions which he then thinks necessary to his success.

**Same — altering record.**

4. The appellate court will not permit a party to alter the record which he made in the lower court, for the purpose of making contentions before it which are opposed to the record as made.

(June 4, 1910.)

be laid down by this court as to what the proof shall be, as that will depend very largely upon the circumstances of each case. It will suffice to say that the proof must be such as to satisfy the court making the order, that due diligence has in good faith been used, and which this court, upon review, can say is sufficient to support the finding of the lower court." Woods v. Pollard, 14 S. D. 44, 84 N. W. 214.

An affidavit for publication of summons which states "that due and diligent search has been made for the defendants, and that said defendants cannot be found within the state of Idaho," without stating the facts which constitute such "due and diligent search," is insufficient to authorize the making of an order for publication, and an order and publication made thereon is without jurisdiction and void. Mills v. Smiley, 9 Idaho, 325, 76 Pac. 786, wherein it was said: "If, then, the affidavit submitted only states the ultimate, and not the probative, facts, the plaintiff, instead of the judge, would be determining what constitutes 'due diligence' and the other facts required, and there would be no reason or necessity for an order at all, but the affidavit alone might serve that purpose. This is neither the purpose nor intention of the statute. The law requires the plaintiff to make a showing by affidavit as to what he has done in order to obtain personal service, and what effort he has made to find the party to be served, and where such party resides, etc.; and upon such showing of facts, the judge to whom it is presented will determine judicially whether or not the probative facts thus shown are sufficient to bring the plaintiff within the provisions of § 4145, supra, and entitle him to the order. The conclusion as to 'due diligence,' etc., cannot be left to the affidavit-making judgment and discretion of the plaintiff, but must be reserved to the judge. It is a legal conclusion to be derived from the facts as presented by the evidence, viz., the affidavit."

An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably, the statute can-

**A** PPEAL by defendants from an order of the Circuit Court for Minnehaha County denying a motion to vacate a default judgment quieting title to real estate. Reversed.

The facts are stated in the opinion.

Messrs. W. G. Porter and Fuller & Fuller, for appellants:

The affidavit for publication was not sufficient to give the court jurisdiction to enter the default judgment.

Coughran v. Markley, 15 S. D. 37, 87 N. W. 2; Murphy v. Jack, 76 Hun, 356, 27 N. Y. Supp. 802; 2 Am. & Eng. Enc. Law, 688; Whaley v. Carter, 1 Dak. 504; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436.

The inquiries as to defendant's residence

not go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit, from the facts and circumstances of the particular case. Between the statute and the affidavit, there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probative facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. Palmer v. McMaster, 13 Mont. 184, 40 Am. St. Rep. 434, 33 Pac. 132.

The affidavit for an order of publication must recite the particular facts tending to show what due and reasonable diligence has been used in order to find the defendant. Whaley v. Carter, 1 Dak. 504.

**Extraordinary or unusual steps.**

Extraordinary steps to ascertain the whereabouts of a party are not required. Thus, in Warner v. Miner, 41 Wash. 98, 82 Pac. 1033, it was contended that the plaintiff should have shown in his affidavit for an order of publication, that he had inquired of officers of the counties wherein certain notaries public had taken the acknowledgments to a deed, as to the whereabouts of the notaries, and then that he had written the notaries to learn just where the parties he wished to subpoena were. The court held that such a course was not required of the plaintiff. Mount, Ch. J., said "It is probable that the residences of the defendants might have been discovered in that way, but it does not follow that the county officers would have known the addresses of the notaries, or that the notaries would have known the addresses of the defendants at the time the suit was brought, because all may have changed their residences from the places where they resided when the deed was acknowledged. At any rate, it would have required more than ordinary diligence to



were not pursued down to the time of application for the order of publication, which is fatal to the validity of the order.

Cohn v. Kember, 47 Cal. 144; Forbes v. Hyde, 31 Cal. 350; New York Baptist Union v. Atwell, 95 Mich. 239, 54 N. W. 760; Rockman v. Ackerman, 109 Wis. 642, 85 N. W. 491; Roosevelt v. Land & River Co. 108 Wis. 653, 84 N.W. 157; Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708; Abbott, Practice & Forms, 2d ed. 654, 669.

Messrs. Grigsby & Grigsby, for respondent:

The affidavit for publication was sufficient to give the court jurisdiction to enter the judgment.

Coughran v. Markley, 15 S. D. 37, 87 N.

W. 2; Coughran v. Germain, 17 S. D. 529, 97 N. W. 743, Woods v. Pollard, 14 S. D. 44, 84 N. W. 214; Peterson v. Peterson, 15 S. D. 462, 90 N. W. 136.

McCoy, J., delivered the opinion of the court:

This suit was commenced on the 8th day of December, 1908, in the circuit court of Minnehaha county by respondent, as plaintiff, against appellants, as defendants, to quiet title to certain real estate situated in Roberts county, this state. The summons was served by publication. No appearance or answer was made by defendants, and judgment was therefore entered in favor of plaintiff and against defendants, quieting

have found the addresses of defendants in this roundabout way; and since no duty was imposed by statute upon the plaintiff to inquire, he was not bound to make such extraordinary inquiry."

The law does not demand the use of every possible means to find the defendants. It requires only that an honest and reasonable effort be made to ascertain their whereabouts. Coughran v. Markley, 15 S. D. 37, 87 N. W. 2, wherein it appeared that the plaintiff's attorney made an affidavit in which he stated that he had inquired of the plaintiff and of certain persons, including the sheriff of the county in which the action was pending, who were acquainted with the defendants when they resided in that county, concerning their whereabouts, and was informed that they had removed from the county more than five years preceding the time of the inquiries, and that they did not know where they were. The court held that the affidavit was sufficient. It was said: "The showing would have been more satisfactory had the affiant stated in detail what his inquiries were and what replies he received, or, what would have been better still, he might have secured the affidavits of the persons of whom he inquired; but, as heretofore suggested, the methods of making the inquiry and of proving diligence in these cases are without limit. The fact to be ascertained was the whereabouts of the defendants. The most natural and reasonable method of ascertaining that fact was inquiry of persons acquainted with them at their last known residence. Assuming the affidavit to be true, the conclusion cannot be escaped that the affiant was convinced that the defendants had removed from Lincoln county, and that they could not be found. Presuming that affiant acted in good faith, mindful of his duty as an officer of the court, the only fair inference is that he heard of nothing demanding further inquiry, and that further inquiry would not have resulted in finding defendants. It now appearing that defendants were living at the time, of course, as successful search was possible. But the law did not demand 37 L.R.A. (N.S.)

the use of every possible means to find them. The trial judge was satisfied that a reasonable effort had resulted in failure. Doubtless, a more satisfactory showing might have been made, but certainly sufficient facts were stated to call into exercise the judicial mind of the judge, and his judicial determination cannot be questioned in this proceeding."

In Cohen v. Portland Lodge No. 142 B. P. O. E. 81 C. C. A. 483, 152 Fed. 357, affirming 144 Fed. 266, it appeared that inquiry was made of one of the executors of the will as to the whereabouts of the minor child of the testator, who was a party to the action, and, that affiant having been told by such person, who was in charge of the education of the child, that he was then residing at a particular orphan asylum in another state, made no further inquiry as to its whereabouts. It was held that sufficient inquiry had been made. The court said: "Suppose a person cannot be found within a state after the exercise of ordinary and honest diligence to learn of his whereabouts. Suppose he is not at his usual abiding place, nor is he seen upon the streets of the city where he lives, nor is he doing business where he is ordinarily accustomed to. What is so natural in looking for him as to inquire of his relatives concerning his whereabouts; or if he be a minor, to inquire of the one who has care of his person, his education, or his property, or both? And if one makes such diligent search to find, and swears positively to its having been made, is he not in a position to accept and rely upon the information he has obtained, by adopting a conclusion, necessarily a belief, that the person looked for is in fact absent from the state? We think he is, and that when he gives the source of his information, and then declares that, because of the information, a summons or paper cannot be handed to the person sought within the state, he adopts the information, and, by adopting it, makes an averment of his own that the person is absent from the state."

In Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, it was held that although

title in said real estate in plaintiff. Thereafter, immediately upon discovering the entry of said judgment, defendants, appearing specially, and not otherwise, moved the court to set aside and vacate said judgment, upon the ground that the court had no jurisdiction over the parties to the action or the subject-matter thereof, and that the court had no jurisdiction to render said judgment. Upon the hearing of said motion the court made the following order: "Ordered that said motion be, and the same hereby is, in all things overruled and denied, without prejudice, however, to the defendants moving to open the judgment and for leave to answer, should they be so advised." To the making and entry of said order, the defendants duly excepted. Defendants appeal,

and assign as error the making and entry of said order overruling said motion to vacate said judgment. The order for publication of summons was based upon the affidavit of plaintiff, and the return certificates of the sheriffs of Roberts and Minnehaha counties, which are as follows:

I, J. L. Minder, sheriff in and for the county of Roberts and state of South Dakota, do hereby certify and return that the summons in the above-entitled action came into my hands for service on the 15th day of December, 1908, and that I immediately began diligent search and inquiry for the above-named defendants and each of them, within said county of Roberts, and that I inquired of L. M. Foss, clerk of courts, and

the facts stated in the affidavit for the order of publication were only hearsay, and that the inquiries of the affiant as to the whereabouts of the party were limited to persons in the county wherein the action was pending, they were nevertheless proper to be considered by the judge when the application for the order was made, for the purpose of determining whether sufficient diligence had been employed to ascertain if the defendant could be found within the state. The court said: "From the nature of the question to be determined, the evidence thereon must to a very great extent be hearsay, and the number and character of the persons inquired of must in each case be determined by the judge. Diligence is in all cases a relative term, and what is due diligence must be determined by the circumstances of each case. If it should be held as an invariable rule that inquiries should be extended beyond the county in which the suit is pending, it might be difficult to say which counties of the state could be safely omitted, and unless the judge is at liberty to determine whether the person from whom inquiries have been made sufficiently shows the requisite diligence, it might be necessary for the plaintiff to question all the citizens of the county before obtaining the order."

*Weis v. Cain*, — Cal. —, 73 Pac. 980, was exactly like the case of *Rue v. Quinn*, supra, except that the latter case contained a statement to the effect that inquiry was made of all other persons from whom it could be expected that information might be given as to the residence or whereabouts of the defendants, and since the court in the former case did not think the added statement was one of importance, it decided the case upon the authority of the latter case.

So, in *Jacob v. Roberts*, 223 U. S. 261, 56 L. ed. —, 32 Sup. Ct. Rep. 303, affirming 154 Cal. 307, 97 Pac. 671, and order for the substituted service of a summons, made conformably to the California Code of Civil Procedure, § 412, was held to be supported by a sufficient showing of diligent inquiry to satisfy the due process of law 37 L.R.A. (N.S.)

clause of the Constitution of the United States (14th Amendment), where it was made upon an affidavit which, after reciting the proceedings, including the issue of the summons and the certificate of the sheriff that, "after diligent search and inquiry," he was unable to find the "defendants or either or any of them in this, San Diego, county," further stated that unsuccessful inquiries as to the whereabouts of defendants were made of their former neighbors and other residents of San Diego, and of certain county and state officers, and that the plaintiff himself made diligent inquiry, and had no knowledge of their residence or postoffice address, or where they could be found.

And in *Jacob v. Roberts*, supra, in answer to the contention that other parts of the state were not searched for the parties, and that this was necessary, since the process of the court could run to every county in the state, the court said: "The requirement is extreme, and we are cited to no cases in which it is decided to be necessary."

Where the affidavit showed that the plaintiff placed the summons in the hands of the sheriff of the city and county of New York, and received from him an official return that he had used due diligence to find the defendants in his county, but was unable to do so, and further showed that the plaintiff's attorney had himself made inquiries to find the defendants, which resulted in information from a reliable source that they resided in another state, it was held to be sufficient to enable the judge to be satisfied intelligently that after due diligence the defendants could not be found within the state, and to authorize him to grant the order of publication. *Belmont v. Cornen*, 82 N. Y. 256, wherein it was said: "The fanciful suggestion that the defendants might have been found transiently here is not sufficient to deprive the judge of jurisdiction to determine that the case was a proper one for service by publication. Neither can we sanction the criticism that the evidence of an effort to serve the defendants was insufficient because the

of W. C. Oliver, county auditor, and also of Casper Kennedy, postmaster, all of Roberts county, South Dakota, all of whom are well acquainted throughout the county of Roberts, state of South Dakota, as to the whereabouts of the said defendants and each of them, and that all of said parties stated that to the best of their knowledge, information, and belief, none of the said defendants were residents of the state of South Dakota, or could be found therein. That I was informed by the said L. M. Foss, aforesaid, that to the best of his knowledge, information, and belief, the said defendants, Carl G. Wopschall, Otto H. Wopschall, and Gustav Wopschall, were residents of the state of Wisconsin, but was unable to give their residence or postoffice

address, and that I could find no trace of the defendant W. H. Hartzell whatever. That I am personally well acquainted throughout the county of Roberts and state of South Dakota, and that to the best of my knowledge, information, and belief, none of the said defendants are residents of or can be served with the summons herein in the state of South Dakota. After diligent search and inquiry in the county of Roberts and state of South Dakota, and being unable to find the said defendants or either of them, I therefore return said summons not served.

Dated this 15th day of December, 1908.

J. L. Minder, Sheriff,  
Roberts county, South Dakota.

summons was placed in the hands of the sheriff of the county of New York only, and that his certificate was merely that the defendants could not be found within that county. We think it would have been unreasonable to require that the plaintiff's attorney should have issued a summons to the sheriff of every other county in the state. Such an extreme degree of diligence was not necessary to satisfy the judge, in view of the fact, not denied, that they resided out of it."

Although in *Belmont v. Cornen*, supra, the idea of placing a summons in the hands of the sheriffs of the other counties in the state, in order to find the defendant, was characterized as "an extreme degree of diligence," and not necessary to satisfy the judge that he resided out of it, there are decisions which apparently do require that such a course should be taken.

Thus, in *Wheeler v. Cobb*, 75 N. C. 21, an affidavit for an order of publication, which did not state that "the person on whom the summons is to be served cannot, after due diligence, be found within the state," was held not to be sufficient to justify an order of publication, since everything necessary to dispense with personal service of the summons must appear by affidavit. It was said: "The mere issuing of a summons to the sheriff of the county of Pasquotank, and his indorsement upon it the same day after it came to hand, that 'the defendant is not found in my county,' is no compliance whatever with the law; for it might well be that the defendant was at that time in some other county in the state, and that the plaintiff knew it, or by due diligence could have known it, and made upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence."

And an affidavit for an order of publication, which states that the defendants are nonresidents and reside out of the territory of Oklahoma, and that the plaintiff is unable, with due diligence, to make service of summons upon them, although it is

otherwise sufficient, is defective on direct attack in that it does not state that service cannot be had upon said defendants within the state. *Spaulding v. Polley*, 28 Okla. 769, 115 Pac. 864. The court said that the affidavit in question did not state that service could not be had upon the defendants within the state, and that it might very well be that service could not be made upon the defendants within the county, although due diligence to that extent had been exercised.

And it seems that unusual efforts to find a party have been held to be necessary in order to support an order of publication.

Where the affidavit for order of publication was not in the language of the statute, and no facts were given which showed that any inquiry whatever was made by the affiant to ascertain the residence of her husband (the single facts stated being that at one time one person had informed her that her husband had informed him that he had gone to Hot Springs, in Arkansas), it was held that the affidavit was not sufficient. *Hartung v. Hartung*, 8 Ill. App. 156, wherein it was said: "The facts stated to show diligent inquiry should clearly show on the face of the affidavit that the inquiry was diligently made, and that the residence of the defendant could not be ascertained. In this case, the 'diligent inquiry' contemplated by the statute would require the defendant in error to make inquiries of her neighbors and others who would probably be informed as to where her husband resided or could be found, and if, on such inquiries, she learned that on leaving Illinois he had gone to Hot Springs, she should have prosecuted her inquiries in that direction, and if she then learned that he had left that place for some other place unknown, or had never lived there, she could truly make the affidavit required, 'that upon diligent inquiry his place of residence could not be ascertained.'"

Statement of conclusion that party cannot be found.

Where the affidavit states that the de-

I, C. M. Nelson, sheriff in and for the county of Minnehaha and state of South Dakota, do hereby certify and return that the summons in the above-entitled action came into my hands for service on the 25th day of January, 1909; that I have inquired of W. C. McConnell, clerk of courts, James Monroe, register of deeds, Charles E. Hill, county auditor, and other parties regarding the whereabouts of the said defendants and each of them; that all of said parties inquired of informed me that to the best of their knowledge, information, and belief, the said defendants or either of them, are not residents of the county of Minnehaha, state of South Dakota, and cannot be found therein; that I am well acquainted through out the county of Minnehaha and state of South

Dakota, and do not know the said defendants, and have been unable to find them or either of them, after due and diligent search and inquiry, and that to the best of knowledge, information, and belief, they are not residents of or now within the state, and cannot be found therein. I therefore return said summons not served.

Dated this 26th day of January, 1909.

C. M. Nelson, Sheriff of Minnehaha county, State of South Dakota.

Affidavit for publication: "Sioux K. Grigsby, being first duly sworn, deposes and says that he is a member of the firm of Grigsby & Grigsby, attorneys for the plaintiff in the above-entitled action, which has

the means of knowledge possessed by such persons in relation to the residence of those defendants, and of the practicability of a personal service on them in this state; so that the court or judge might be better able to determine whether in fact due diligence had been used, and it may be conceded that no order ought to be made without proof of that character; but it cannot be said such specification is absolutely necessary, nor can we say that the affidavit in question is of no legal effect."

fendant cannot "with due diligence be found within the state," and that he resides in another state, and is not a resident of the state in which his presence is desired, it has been held that the affidavit need not show what diligence was used to find the defendant, but that the general statement that he cannot after due diligence be found is sufficient. *Sueterlee v. Sir*, 25 Wis. 357; *Farmers' & M. Bank v. Eldred*, 20 Wis. 197; *Young v. Schneek*, 22 Wis. 556; *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; *Furnish v. Mullan*, 76 Cal. 646, 18 Pac. 854; *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007; *Washburn v. Buchanan*, 52 Kan. 417, 34 Pac. 1049; *Roberts v. Fagan*, 76 Kan. 536, 92 Pac. 559; *Torrans v. Hicks*, 32 Mich. 307.

Thus, in *Ballew v. Young*, 24 Okla. 182, 23 L.R.A.(N.S.) 1084, 103 Pac. 623, where the plaintiff stated positively that the defendant was not a resident of the territory, and that service could not be had upon him therein, it was said: "If such statement is true, no amount of diligence would have enabled plaintiff to obtain service upon him; and if service could have been had by due diligence, then affiant could not have stated in his affidavit that it could not be made within the territory." To the same effect, see *Cochran v. Germain*, 15 S. D. 77, 87 N. W. 527, affirmed on rehearing in 17 S. D. 529, 97 N. W. 743.

An order of publication is properly granted on an affidavit which states on information and belief that the defendants are residents of certain places in a distant state, and cannot be found after due and diligent search. *Van Wyck v. Hardy*, 4 Abb. App. Dec. 496, affirming 11 Abb. Pr. 473, wherein the court said of the affidavit: "It shows substantially that the information of the deponent as to those facts was obtained on inquiry, and that his belief was founded on such inquiry and a diligent search. It would unquestionably have afforded more satisfactory proof of those facts, if it had been shown what measures had been taken, and what acts of diligence had been used, and, particularly, what inquiries had been made, and of whom, and 37 L.R.A.(N.S.)

the means of knowledge possessed by such persons in relation to the residence of those defendants, and of the practicability of a personal service on them in this state; so that the court or judge might be better able to determine whether in fact due diligence had been used, and it may be conceded that no order ought to be made without proof of that character; but it cannot be said such specification is absolutely necessary, nor can we say that the affidavit in question is of no legal effect."

It has been held that where the "proof of nonresidence is clear and conclusive, and that the defendant is living out of the state and in a distant state, there may be strong reasons for holding that proof of due diligence is not required." *Kennedy v. New York L. Ins. & T. Co.* 101 N. Y. 487, 5 N. E. 774. In this case the affidavit stated that the defendants "cannot after due diligence be found within this state" (they being residents of other states as therein named), and "that the summons herein was duly issued for said defendants, but could not be served personally upon them by reason of such nonresidence." There was no allegation in the affidavit of any effort to ascertain the whereabouts of the defendants, and the court held that it conferred jurisdiction to grant the order.

On the other hand, in by far the greater number of cases, it is held that the mere statement in the affidavit for the order of publication, to the effect that the party is a nonresident of the state, is not in itself sufficient, but the affidavit must state that after due diligence the party cannot be found within the state, and the facts constituting the diligence must be set forth so that the court may judge. It was a compliance with the foregoing principle that sustained the order in the following cases:

Thus, an affidavit for publication which states that the defendant after due diligence cannot be found within the state, and that personal service of the summons cannot be made upon him; that the summons was placed in the hands of the sheriff for service, and the return made that, after making diligent search and inquiry of various

been commenced by the filing of a complaint in this court, the recording of a notice of *lis pendens*, and the issuance of a summons herein, which summons and complaint are hereto attached and specifically made a part thereof; that this action is brought by the plaintiff against said defendants, to quiet the title of plaintiff in and to certain lands in the said complaint more particularly described, and that the said defendants and each of them are necessary parties hereto, and that a cause of action exists in favor of the plaintiff, and against the said defendants and each of them, and that this court has jurisdiction of the said action, as more fully appears by the said complaint. That the said defendants or either of them, after due diligence, cannot be

found within the state of South Dakota, and that personal service of the summons in this action cannot be made upon the said defendants or either of them, within said state of South Dakota, and that to the best of this deponent's knowledge, information, and belief, the said defendants are not residents of, and do not reside in, and are not now within, the said state of South Dakota. That due and diligent effort has been made by affiant to find the above-named defendants and each of them, within the state of South Dakota, and to serve upon them the summons in this action, to wit: "That for the purpose of ascertaining the defendant's whereabouts and of making personal service of the summons herein upon them and each of them, affiant, on the 5th day of December,

persons who would be likely to know of the whereabouts of the defendant, he was not able to find him, and could not make personal service; that the affiant had personally known the defendant for a number of years, and that the defendant had sold his residence, severed his business connections, and removed with his family to a named place in another state, and affiant had seen a letter he had written from such place, exhibits sufficient diligence to authorize the order of publication. *Woods v. Pollard*, 14 S. D. 44, 84 N. W. 214.

In *Howe Mach Co. v. Pettibone*, 74 N. Y. 68, it was held that the sheriff's return to the summons to the effect that from his best information the defendant was a nonresident and had left the state and gone to California, taken in connection with other facts presented in the affidavit, to the effect that the person sought had become very much involved in his business, and had appropriated money of his employer to his own use, and left his employer without any explanation or excuse, with other suspicious circumstances, was enough to establish the fact of his nonresidence, and to authorize the publication of summons.

Where the affidavit contained the positive statement that the defendant could not after due diligence be found in the state, that the summons was duly issued in the action and placed in the hands of the sheriff, and was returned by him with the indorsement that the defendant could not be found within the county, and the affiant further stated that he had been in correspondence with the defendant, and had received letters from him from a distant state, it was held that sufficient probative facts appeared to authorize the order. *Allen v. Richardson*, 16 S. D. 390, 92 N. W. 1075.

An affidavit for an order of publication was held to be sufficient in *Andrews v. Borland*, 10 N. Y. S. R. 396, where it was stated "that the defendant is not a resident of the state, but resides in the city of Portland, in the state of Oregon, as deponent is informed upon making inquiries of one . . . a friend or relative of" the 27 L.R.A. (N.S.)

defendant, and that the defendant cannot after due diligence and inquiry be found within the state.

Sufficient proof to justify an order for service of summons by a publication is made by evidence that the defendants did not reside in the jurisdiction, and that one of them, which was a corporation, had no managing agent therein, but that its president resided in another jurisdiction, while the proper officer has returned the summons with the statement that after due and diligent search he has been unable to find the defendants or either of them, or their authorized agents, within this district. *Marx v. Ebner*, 180 U. S. 314, 45 L. ed. 547, 21 Sup. Ct. Rep. 376, wherein it was held that the presumption that a public officer who has received process for service has done his duty, and has made the reasonable and diligent search that is required, though not alone sufficient to justify an order for service by publication, may add some weight, when there is other proof of the necessary facts.

An affidavit stating that the deponent knows the defendants personally, and knows that they are not residents of New York state, but reside at Lynn, in Massachusetts, and have engaged in business there under a certain firm name, and that the plaintiff will be unable with due diligence to make personal service of the summons within the state, has been held sufficient to warrant an order of publication. *Smith v. Mahon*, 27 Hun, 40, 63 How. Pr. 382. In this case it was said that it could be stated with very great propriety that when it appears that the defendants are nonresidents of the state and engaged in business at their residences, a statement of such facts would warrant an inference that no personal service of papers could be made upon them in this state by due diligence.

Where the affidavit for an order of publication stated that one of the defendants had been away from the United States for more than two years without having communicated with his brother, who was a defendant in the action, and that his

1908, placed the said summons in the hands of J. L. Minder, sheriff in and for the county of Roberts and state of South Dakota, and instructed the said sheriff to forthwith serve the said summons upon the said defendants and each of them; and that on the 15th day of December, 1908, the said sheriff of Roberts county made his return to this court hereto attached and made a part hereof, that after diligent search and inquiry, and being unable to find the said defendants or either of them, or to serve said summons upon the said defendants or either of them, that said summons was returned not served, and this affiant makes a part of this affidavit the sworn return of the said sheriff as hereto attached. That for the purpose of ascertaining the defendants where-

abouts and of making personal service of the summons herein upon them and each of them, affiant, on the 25th day of January, 1909, placed said summons in the hands of C. N. Nelson, sheriff of Minnehaha county, state of South Dakota, with instructions to forthwith serve the same upon the said defendants and each of them; and that on the 26th day of January, 1909, the said sheriff made his return to this court, which return is specifically referred to and made a part hereof, that after due and diligent search and inquiry, the said defendants or either of them could not be found by him, the said sheriff, and that said summons was returned not served, and this affiant makes a part of this affidavit the sworn return of the said sheriff hereto attached. That for the pur-

brother believed him to be in the Klondyke region; that his sisters were in communication with him, and that a letter addressed to his sisters at a certain address would be forwarded to him; and that the affiant did not believe that the person sought was a resident of the state, and that he had been unable with due diligence to make any service of summons upon him, it was held that the affidavit, while not as satisfactory as it might be wished, particularly as to the efforts to ascertain the whereabouts of the person to be served, from which diligence might appear, yet it was more satisfactory than a great many other affidavits which had been upheld by the courts, and was therefore sufficient to confer jurisdiction upon the court to make the order. *Union Trust Co. v. Driggs*, 62 App. Div. 213, 70 N. Y. Supp. 947.

In *Handley v. Quick*, 47 How. Pr. 233, where the affidavit stated on the plaintiff's personal knowledge, that the defendant was a nonresident, giving his actual place of residence abroad, and that he could not be found after due diligence within the state; and another affidavit filed by the attorney for the plaintiff stated that a copy of the summons and complaint in the action had been sent to the sheriff of the county adjoining the county of the defendant's residence, to be served upon the defendant if he could be found, and that the attorney had received a telegram from the sheriff stating that he had been unable to serve said summons, the affidavits were sufficient to authorize an order of publication.

Where the affidavit for the order of publication shows that no diligence will be able to secure a personal service by reason of the absence of the party, the affidavit is sufficient. *Hudson v. Kowinz*, 4 N. Y. S. R. 866, wherein it appeared that the affidavit stated, upon information derived from a receiver of the defendant in New York, who was in frequent correspondence with the defendant, that the defendant was a resident of the state, and the affidavit further stated that the defendant had been

a resident of the state, but was then at a certain named place in New Jersey.

In *Murphy v. Franklin Sav. Bank*, 131 App. Div. 759, 116 N. Y. Supp. 228, affidavits from which it appeared that the person sought had gone to a distant country, and that several letters had been received from him some three or four years before the trial, and at that time he was in one of two named places, and that another letter had been received from a third party stating that he was at one of the places in the same country, were held to show sufficient inquiry as to the whereabouts of the person, but the affidavit for the order was held insufficient on another ground.

An affidavit for an order, stating "that said defendants reside at Walla Walla, in the territory of Washington, which is their postoffice address. . . . That personal service cannot be made upon said defendants or either of them for the reason that said defendants have departed from this state, and remained absent therefrom for more than six consecutive weeks, and now reside at Walla Walla," is sufficient, because, although nonresidence is not of itself sufficient to authorize the order for publication, because that alone is not inconsistent with the idea that the defendant may be in the state doing business although his residence is in another state, and hence does not relieve the necessity or requirement for due diligence, still, when the allegation of nonresidence is taken in connection with the fact additionally alleged, that he was actually living in the resident state, it is a ground for claiming that due diligence would be unavailing. *Pike v. Kennedy*, 15 Or. 420, 15 Pac. 637. To the same effect, see *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359, where the allegations in the affidavit were quite similar.

Where the affidavit was made by the plaintiff, who stated that the defendant was his son-in-law; that he had left the state several years before and removed to a distant state, where he was residing with

pose of ascertaining the defendants' whereabouts and of making personal services of this summons herein upon them and each of them, this affiant of William H. Lyon, of George T. Blackman, and H. E. Judge, all of Sioux Falls, South Dakota, for more than ten years last past, and are well acquainted throughout this state, and each of whom informed this affiant that they did not know the said defendants or either of them, and that to the best of their knowledge, information, and belief, the said defendants are not residents of, and cannot be served with the summons in this action within, the state of South Dakota. This affiant further says that he is a resident of the state of South Dakota, and has been engaged in the practice of law at Sioux Falls, South Dakota,

for more than ten years last past, and is well acquainted throughout the said state, and that affiant does not know the said defendants or either of them, and that to the best of affiant's knowledge, information, and belief, the said defendants or either of them are not residents of or now within the state of South Dakota, and cannot be served with the summons in this action therein. This affiant further says that he has made inquiry of the said J. L. Minder, sheriff of Roberts county, and of C. N. Nelson, sheriff of Minnehaha county, and of said William H. Lyon, George T. Blackman, and of H. E. Judge, of Sioux Falls, South Dakota, as to the residence and postoffice of the said defendants and each of them, and that affiant is informed by each of

his family; that the summons issued could not be served by reason of the defendant's absence, and that the plaintiff himself had searched for the defendant and endeavored to find him without results, and had seen letters from his son-in-law in the distant state, it was held that the affidavit was sufficient. *Waffle v. Goble*, 53 Barb. 517.

And where the affidavit stated that the defendant could not be found within the state after due diligence to find him had been used, and then recited that inquiry was made of three persons as to the defendant's whereabouts, who stated that his last known residence was in the city of New York, and that his postoffice address was the general delivery in that city, from which address each had received letters from him within a year, it was held that the affidavit showed the exercise of reasonable or due diligence to find the defendant within the state, and that it fully authorized an order of publication. *Pillsbury v. J. B. Streeter, Jr.* Co. 15 N. D. 174, 107 N. W. 40.

So, where the affidavit stated that the defendant, to the knowledge of the affiant, had moved from the state two or three years prior to the date of the affidavit, and, upon information and belief, that he was not a resident of the state, but was a resident of a city in another state, where he was engaged in business, and the affiant was informed by others that the defendant was in the other state, it was held that the affidavit was sufficient to authorize an order of publication. *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 66 N. W. 453.

And an affidavit for an order of publication, which states that the defendant is not a resident of the state, but resides at a place in another state, as the affiant is informed by people living there, and whom he names, is sufficient to show that the defendant cannot be served within the state by the exercise of due diligence, and justifies the order of publication. *Davis v. Cook*, 9 S. D. 319, 69 N. W. 18.

In *Peterson v. Peterson*, 15 S. D. 462, 90 N. W. 136, where the affidavit stated that the defendant was not a resident of 37 L.R.A. (N.S.)

the state, but was a resident of another state, naming her postoffice address therein, and that the affiant's means of knowledge as to the residence and postoffice address was derived from letters received within the last three days from said place, stating that such was her residence and postoffice address, it was held sufficient to authorize an order of publication. The court thought that the affidavit would have been much more satisfactory had the letters referred to been attached to and made a part of the affidavit, but that it could not be said that there was a total absence of evidence tending to prove that the defendant was in the distant state, since the court was justified in assuming that the affiant was truthful, and that he had truthfully stated the only information conveyed by the letters.

In *Barnard v. Heydrick*, 49 Barb. 62, 2 Abb. Pr. N. S. 47, an affidavit properly made and forming a part of the records of the state, although not in the action at bar, in which the order is asked, and which stated that the persons sought, as the affiant was informed and believed, were nonresidents of the state, and could not with due diligence be served with a summons in the state, and that they are residents of certain named points in other states, is sufficient to warrant an order of publication in the case at bar.

In *Jerome v. Flagg*, 48 Hun, 351, 15 N. Y. Civ. Proc. Rep. 79, 1 N. Y. Supp. 101, where the affidavit of plaintiff's attorney stated that the defendant could not with due diligence be served within New York state, and the proof was clear and conclusive that the defendant was a resident of a distant state, and absolutely located there, and that no amount of diligence would avail to effect a personal service in this state, it was held that the affidavit justified the order for service of summons by publication.

An affidavit which states that the defendants are nonresidents of the state, and not to be found therein, and that upon due inquiry and diligent search their address is at a designated number in a street

said parties named that they do not know the residence or postoffice address of either of the said defendants, and affiant further states that he does not know the residence or postoffice address of either of said defendants and that said residence and postoffice address cannot, after due diligence, be ascertained by him. Wherefore deponent prays an order of this court in accordance with the statutes in such cases made and provided, that the summons in this action may be served upon the said defendants by due and legal publication thereof. Dated January 30, 1909."

We are of the opinion that there was not a sufficient showing of diligence to give the court jurisdiction to order publication, and render judgment against defendants. While,

in a city of another state, fully, complies with all the requirements of the statute, and is sufficient to justify the court in making the order of publication. *Bower v. Stein*, 101 C. C. A. 299, 177 Fed. 673, affirming 165 Fed. 232.

In *Yates v. Gridley*, 16 S. C. 496, an affidavit which stated that the defendants were not residents of South Carolina, but were residents of the city of New York, and that their postoffice was unknown to deponent, and could not be ascertained although due diligence had been employed, and that they could not be found in South Carolina after due search for them, was sufficient in order to authorize the order of publication, since the only requirement was that the officer granting the order should be satisfied that it was a proper case therefor.

And so, where the party was a nonresident, and that fact was merely stated, with no evidence of that ultimate fact appearing, so that the judicial mind could act intelligently, it was held in the following cases that the affidavit for an order of publication was not sufficient:

Thus, a statute providing for the publication of summons after it has appeared to the satisfaction of the court or judge that the person desired cannot, after due diligence, be found within the state, is not satisfied by an affidavit which states that the defendant is a nonresident of the state, and cannot be found therein, but has a place of residence at a point in a neighboring state, and entirely omits the words "after due diligence," or to state that any degree of diligence whatever has been used to find the defendant. *McCracken v. Flanagan*, 127 N. Y. 493, 24 Am. St. Rep. 481, 28 N. E. 385, reversing 52 Hun. 614, 24 N. Y. S. R. 439, 5 N. Y. Supp. 338, wherein it was said: "It is, from an examination of this statute and the decisions in relation to it, pretty evident that some degree of diligence must be exercised to find the party, and what is a due degree depends upon circumstances surrounding each case, and that the simple averments in the affidavit that the defendant is a non-

resident, and cannot be found within the state, are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence. Hence, the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state."

resident, and cannot be found within the state, are not alone sufficient to support an order for the service of a summons by publication. Those facts do not imply that any diligence has been exercised to find and serve the defendant personally with process. It needs no argument to show that the averment in the affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find the defendant, for the statute in question not only requires that it be stated in the affidavit that the defendant cannot be found, but expressly requires the averment that he cannot be found after due diligence. Hence, the statute forbids that due diligence may be implied from the statement that the defendant cannot be found within the state."

In *Carleton v. Carleton*, 85 N. Y. 313, where the affidavit upon which the order was granted stated that the defendant had not resided within the state of New York since a certain named date, and deponent was informed and believed that defendant was a resident of a city in a distant state, without reciting that due diligence had been used to find the defendant in New York state, and that after such diligence he could not be found therein, it was held insufficient to authorize the order. In this case the court said that it was such a well-known fact that many persons who are residents of one state have places of business, and transact such business, in a state different than that in which their residence is located, and are so frequently in the latter state and pass most of their time there, that the affidavit should set forth what effort had been made personally to serve the summons.

Where the affidavit for the order of publication stated that certain of the defendants were nonresidents of the state of New York, but there was no suggestion that any effort had been made to serve them in that state, and therefore that there was nothing to indicate that they could not have been found with due diligence in New York state, it was held that the affidavit was clearly insufficient to authorize the order



effort to give it. The statute contemplates, and trial judges should invariably require, that the party who institutes the suit shall in good faith make every reasonable effort to not only ascertain that the defendant cannot be served in the state, but to ascertain his whereabouts, in order that copies of the summons and complaint may reach him through the mails or otherwise." Where a defendant on whom service by publication is sought has recently left the state, plaintiff should ascertain the place where he last resided, and it is also incumbent upon plaintiff to ascertain whether such defendant left any relatives or agents or other business associates in such vicinity, and, if so, inquiry should be made of them, as persons presumed to be most likely to

know the present whereabouts of such defendant. Failing to find such relatives, agents, or business associates, inquiry should be made of the nearest and most immediate neighbors of such defendant, as persons also presumed to be likely to know the whereabouts of such defendant. Inquiry of the postmaster at the last-known postoffice address of such defendant might readily lead to the discovery of his whereabouts. The affidavit for publication should show that all reasonable inquiry has been made of persons likely or presumed to know the whereabouts of the person sought to be notified by publication. Near neighbors might know of near relatives of defendant, who resided in some other locality, who could furnish the desired in-

formation for publication. *Seidenburg v. Pesce*, 140 App. Div. 232, 125 N. Y. Supp. 107. In this case the court said that the bare fact that a person was known to be a resident of another state did not exclude the idea that, by the display of ordinary diligence, he could not be found within that state where his presence was desired, and particularly was this true where the state of his residence was a neighboring state.

In *Peck v. Cook*, 41 Barb. 549, the decision would no doubt have been to the effect that the affidavit for the order of publication justified the order if the affidavit, after showing the defendant's nonresidence, had not stated that "he frequently visited the county of Livingston" in the state. This fact was held to impose on the plaintiff greater effort to find him, and to require more evidence that he could not be found than would otherwise have been necessary.

Where the affidavit presented for the order of publication recited that the defendants resided in a neighboring state, and that "the plaintiff will be unable with due diligence to make personal service of the summons within the state," but contained nothing whatever upon the subject of diligence, disclosed no effort to serve the summons in this state, and gave no reasons for not making an effort, aside from the bare fact of nonresidence, it was held that the affidavit was insufficient to support the order asked for. *Kennedy v. Lamb*, 182 N. Y. 228, 108 Am. St. Rep. 800, 74 N. E. 834, reversing 102 App. Div. 429, 92 N. Y. Supp. 385, wherein it was said: "Even if residence in a distant state or in a foreign country permits the inference that the person to be served cannot be found in this state, residence in an adjoining state, just across the line, with no evidence that the nonresident is not in business in this state, or that he does not sojourn here, and no explanation whatever for not trying to serve him here, is not sufficient."

An affidavit which shows that the defendants "cannot be found in the state of Oregon, but both reside in San José, California, and that is their postoffice address,"

is not sufficient, for the facts stated must show beyond a peradventure that the diligence required by the statute would have been unavailing. *McDonald v. Cooper*, 32 Fed. 745, wherein it was said: "San José is in the immediate vicinity of San Francisco, the commercial metropolis of an adjoining, not a 'distant,' state, between which and this city there was then constant and frequent communication and intimate business and social relations. No summons was attempted to be served; nor is it stated that the defendants or either of them had departed from this state, or were then 'actually living' at San José."

Section 439 of the Code of Civil Procedure, providing that where an order of publication is applied for on the ground of nonresidence, proof by affidavit must be exhibited to the court, "that plaintiff has been or will be unable, with due diligence, to make personal service of the summons," is not complied with where the affidavits upon which the order was granted did not recite the return of the sheriff on the summons, to the effect that he had used due diligence to find the defendant so as to serve him with the summons and complaint, and, from the best information that he could obtain, had learned that he was a resident of a certain named place in Ontario; and did not state that the plaintiff had been or would be unable, in the exercise of due diligence, to serve the summons personally. *Empire City Sav. Bank v. Silleck*, 180 N. Y. 541, 73 N. E. 1123, affirming 98 App. Div. 139, 90 N. Y. Supp. 561, wherein it was said: "It would probably be sufficient to show that Watson was a nonresident and resided in Hamilton, Ontario, if that fact were averred by the affiant, upon information and belief based upon the information set forth; but in the absence of such an averment, the mere declarations of third parties have no probative force. For aught that appears, the affiant may have known or had reason to believe from other information obtained, that Watson did not reside in Hamilton, Ontario, and may have known or had reason to believe that Watson was within the

formation. It is the use of all such reasonable means of this character that constitutes "due diligence." The affidavit should show that such sources of inquiry have been reasonably pursued and exhausted. Inquiries made of persons in a distant part of the county or state, 20, 50, 100, or more miles from the locality where defendant last resided, who are not personally acquainted with and did not know defendant, are wholly worthless and wholly immaterial to establish "due diligence." Such persons are not likely or presumed to know the whereabouts of defendant. It has been heretofore held that the showing of "due diligence" can only be made by affidavit. The return of the sheriff will not answer, that not being the kind of evidence required by

the statute. Code Civ. Proc. § 112. *Soderberg v. Soderberg*, 1 Dak. 503; *Coughran v. Markley*, supra. The sheriff's return is not sworn to, and a prosecution for perjury could not be based thereon, in case the same was made knowingly and intentionally false. When we eliminate the sheriff's returns from the showing in this case, nothing remains, other than conclusions and immaterial statements, bearing upon the question of "due diligence," and appellant's motion to vacate the judgment should have been granted.

Since the argument and submission of this cause in this court, respondent has made application for an order to show cause why he should not be permitted to file a further and amended additional abstract,

state or was coming to the state or entered the state before the order was obtained many weeks later, so that personal service could have been made upon him. If the affidavit alleged the principal facts upon information and belief derived from the sources and based upon the grounds stated, and had shown that the summons had been issued to the sheriff and returned unserved by him, the proof of the nonresidence, and the inability to make personal service in the exercise of due diligence, would sufficiently appear."

Where the affidavit for the order recited that the defendants were not residents of New York state, but resided in the state of Texas in a named city, as the deponent was informed by the defendants themselves in letters received from them at that place, and that the deponent had caused a summons and complaint to be issued in the action against the defendants, to the sheriff of the city and county of New York, but that the defendants could not be found after due diligence within the state, and that the deponent "is informed and believes that said defendants are now in the city of Laredo, state of Texas," but the letters relied on to establish the nonresidence of the defendants were not attached to the affidavits, nor even their dates given, it was held that the reference to them furnished no proof that the defendants could not with due diligence be personally served with the summons, and that the affidavit was not sufficient to support the order. *Greenbaum v. Dwyer*, 66 How. Pr. 266.

In *Bothell v. Hoellwarth*, 10 S. D. 491, 74 N. W. 231, where no probative facts whatever as to the diligence used to find the defendant were stated, but the affidavit contained simply the bald and naked statement that the defendant could not, after due diligence, be found within the state, it was held that the affidavit was insufficient to justify an order of publication.

An affidavit reciting that the summons was placed in the hands of the sheriff of the county for service upon the defendants, and was returned with the indorse-

ment that, after due and diligent search and inquiry, he was unable to find the defendants, and containing a statement of the affiant that he had made inquiry of the different county officers and of other named persons as well as of the sheriff of the county, to whom the summons was directed; and further reciting a conversation had with one of the defendants only a few days prior to the issuance of the summons, in which the defendant stated that his residence and postoffice address was in another state, is not sufficient to authorize an order of publication. *Plummer v. Bair*, 12 S. D. 23, 80 N. W. 139, wherein it was said: "Not being apprised of what the sheriff actually did in the way of an effort to find the defendants and obtain personal service of the summons, affiant's opinion that the return shows 'due and diligent search and inquiry' amounts to a gratuitous assumption, without probative substance. In the absence of any facts tending to show that personal service could not be had notwithstanding defendants are nonresidents, the reasonable inference deducible from affiant's conversation had with one of them about the time he placed the summons in the hands of the sheriff of Beadle county is that the meeting was had in this state, and the postoffice address of defendant ascertained to be Memphis, Tennessee. The affidavit fails to contain any of the essential details from which the trial court could judicially determine the ultimate statutory fact that 'the persons on whom the service of the summons is to be made cannot, after due diligence, be found within the state.'"

An affidavit made by the plaintiff's attorney upon information and belief, merely stating that the defendants are nonresidents of the territory, and that service of summons cannot be had upon them within said territory, is wholly insufficient to authorize an order for publication of summons; the court being of the opinion that the affidavit should set forth facts showing that the defendants are nonresidents of the territory so that the court might see that due service of the process cannot

which would tend to show that appellants in the circuit court made a general, instead of a special, appearance, as shown by the abstracts now on file. It is contended by respondent that because in some of the affidavits presented on the hearing to vacate the judgment in the circuit court on the part of appellants, there was a prayer that appellants be permitted to make answer to the complaint, that appellants were seeking other and further relief in the court below than the vacation of the judgment for want of jurisdiction, and that there was, in effect, a general appearance in the action. We are of the opinion that this application to amend the additional abstract comes too late. Respondent served an additional abstract in which all this matter now sought

to be included was carefully omitted. After discovering on the argument of the cause in this court that his former position was doubtful, he should not now be permitted to raise entirely new questions by an amended additional abstract. Again, it appears from the record now before this court that the circuit court found and held that the appearance of the appellants in the court below was a special one, and the order appealed from indicates the same effect. The order appealed from and the recitals and findings therein were no doubt prepared by respondent or his counsel. Under any circumstances, it would be hardly proper for this court to permit respondent to now change front and be permitted to oppose that which he procured in the lower court.

be made. *Romig v. Gillett*, 10 Okla. 186, 62 Pac. 805, reversed on another point in 187 U. S. 111, 47 L. ed. 97, 23 Sup. Ct. Rep. 40.

In *Flint v. Coffin*, 100 C. C. A. 342, 176 Fed. 872, where the affidavit simply stated that the defendants were all nonresidents, residing in the state of New York, and could not be found in the state of North Carolina, and that the summons could not be served on them or either of them, but no fact relating to the "due diligence" on the part of the party whose duty it was to make diligent search in the state was set forth in the affidavit, it was held that it was not sufficient.

Where it appeared by the affidavits upon which the order was obtained, that the defendant had left the state, and that the plaintiff had been unable with due diligence to make personal service of the summons upon him, but they did not make it appear whether the defendant was or was not a resident of the state, and there was no statement of fact which tended to prove that the defendant had left the state with the intent to defraud his creditors or to avoid the service of a summons, the mere statement of those things in the language of the statute was held to be no proof of them, and insufficient to support an order of publication. *Blute v. Fellows*, 143 App. Div. 825, 128 N. Y. Supp. 18, rehearing denied in 129 N. Y. Supp. 1113.

Where the affidavit merely stated that the defendant was a resident of another state, and that the plaintiff would be unable with due diligence to make personal service of the summons, it was held that it was insufficient because, while it might be true that the defendant resided elsewhere, yet he might at that time have been in the state where he was wanted, and the plaintiff have had knowledge of the fact. *McLeod v. Moore*, 15 N. Y. Civ. Proc. Rep. 77, 3 N. Y. Supp. 792.

An affidavit which merely states that the defendant is a nonresident of the state, without proof where he actually is at the time, is not sufficient to give the court jurisdiction to make the order; some evi-

dence must be shown from which the court can find that the defendant is not at the time within the state, and personal service of the summons therein cannot with due diligence be made. *Hyatt v. Swivel*, 20 Jones & S. 1.

Where the affidavit recited that the defendant was a nonresident of the state of New York, but resided at a named address at Elizabeth, New Jersey, and that the plaintiff was unable to make personal service of the summons upon the defendant, and that the source of his information and the grounds of his belief were correspondence had with the defendant from her residence in New Jersey, and from conversations with the son and representative of the defendant, but what was written and what was said did not appear, and the court was without the slightest information of the facts themselves, upon which to determine whether service could or could not be had with the exercise of due diligence, it was held that the affidavit was insufficient. *Orr v. Currie*, 14 Misc. 74, 35 N. Y. Supp. 198, 25 N. Y. Civ. Proc. Rep. 16, 2 N. Y. Anno. Cas. 24.

An affidavit which states the names of the persons sought, and that they cannot be found in the state after due diligence, since they are residents of a named city in another state, is held to be insufficient in *Kennedy v. New York L. Ins. & T. Co.* 32 Hun, 35, to support an order of publication, since it contains no fact from which the judge to whom it was presented might infer that an attempt had been made to serve the summons within the state, and it did not even state that any attempt was made.

In *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708, where the affidavit showed that summons was placed in the hands of the sheriff of the county in which the action was pending, and returned by him with the statement that the defendant did not reside within the county nor within the state, as he was informed by certain former neighbors and acquaintances of the defendant, and that he was informed by

The appellants' motion to vacate the judgment on the ground of want of jurisdiction, and the motion paper itself, recited that the appearance was special for that purpose and none other. The hearing in the circuit court was on that theory. The circuit court found that the appearance of defendant was special, and respondent should not now complain that the findings and order in the circuit court procured by

himself are not correct. In the lower court appellants were not permitted to make answer, evidently on the ground that their motion only included an objection to the jurisdiction of the court. There was no proposed answer made or submitted by defendants.

The order appealed from is reversed, with directions to vacate and set aside the judgment heretofore entered in this action.

the same persons that the defendant had removed from the state and resided at a certain named place in Wisconsin, as he verily believes, but did not show that the sheriff returned that he was unable to make personal service within the state, or that he had used any diligence to find the defendant, it was held that the affidavit was not sufficient to support an order, since the record in the case shows that the return of the sheriff was made nearly five months before the order of publication was granted, and the court was of the opinion that it was no proof that personal service might not have been made upon the defendant during that intervening time.

An affidavit for an order of publication, which stated that one of the defendants could not after due diligence be found within the state, and that the deponent was informed and believes that he is or was last residing in a town in another state, and disclosed no effort to find the defendant to serve him within the state, nor stated any reason why such effort, if made, would be useless, is insufficient to support an order of publication. *Reid v. Johnson*, 121 N. Y. Supp. 750.

**Inquiry of people presumed to know of whereabouts.**

In *Bradford v. McAvoy*, 99 Cal. 324, 33 Pac. 1091, where the affidavit for publication was made by one of the plaintiffs, and stated that about the time of the commencement of the action, the defendant resided in a certain named city, and had an office at a certain named place, but about the same time disappeared from his office and could not be found; that affiant thereafter made inquiries for the defendant at various places, including his old office, and of various persons who knew him and would be likely to know of his whereabouts, but was unable to find him; that eight new summonses had been issued in the action, and that since the issuance of the first summons, four different competent persons had been employed to obtain service upon defendant, but without success; and that ever since the first issuance, a continued and constant effort had been made to procure personal service of the summons upon defendant; that "since the commencement of this suit, defendant . . . has not been in his accustomed places and resorts, but has left an agent in this city who is using persistent efforts to continue to collect the rents of the premises sought to be

recovered herein;" and that affiant does not know the whereabouts of the defendant,—it was held that it was sufficient to support the order for publication, although it did not state that the affiant had made inquiries of the defendant's agent.

In *Seaver v. Fitzgerald*, 23 Cal. 85, where the affidavit for the order recited that the defendant was a resident of a certain township in the county; that he had occupied a house on a tract of land claimed by him to be his own, and which he had cultivated up to the commencement of the suit, and for a long time previous, but that on the day before the commencement of the suit he left his residence, informing his servants that he would be back that evening or the next day, and that the summons in the suit was put in the hands of the proper constable, who made diligent search and was unable to serve it, and that the defendant had not returned to his residence and was concealing himself for the purpose of avoiding service of the summons, it was held that the affidavit was sufficient to entitle the plaintiff to the order of publication.

Where the affidavit upon which the order for publication of summons was based showed that search had been made for the defendant at and about his last place of residence; that members of his family had informed persons who were attempting to secure service of a summons that the defendant was not at home, and that he was not in the state; and that the informants refused to tell where the defendant was; and the affidavit was further accompanied by the affidavits of four deputy constables who had attempted to make personal service of the summons upon the defendant, it was held that the facts shown in the affidavits for publication of summons were sufficient to justify the court in finding that the defendant could not after due diligence be found within the state, and to support the order that the service of summons be made upon him by publication. *Merchants' Nat. Union v. Buisseret*, 15 Cal. App. 444, 115 Pac. 58.

Where the affidavit for an order directing the publication of the summons was made by the attorney for the plaintiff, and stated that the summons was placed in the hands of the sheriff of the county for service, and was returned with the indorsement that the defendant could not be found in the county; that the affiant did not know the residence of the defendant, and that since the summons was issued he

had made due and diligent search and inquiry for the defendant of several prominent county officers, whom he named, and of all other persons from whom he could expect to obtain information as to the residence or whereabouts of the defendant, it was held that the affidavit was sufficient to warrant the order of publication. *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. To the same effect, is *Weis v. Cain*, — Cal. —, 73 Pac. 980.

Where the affidavit for publication recited that the summons had been placed in the hands of the sheriff for service, and that inquiry had been made of the treasurer of the county, who, under the law, was to receive the money which had been, or was yet to be, paid on the land in controversy, and therefore the most likely officer in the county to have the postoffice address and know of the residence of the defendant, and that inquiry had been made of other persons, it shows the taking of such diligence as is necessary to confer jurisdiction upon the court to make the order. *People v. Wrin*, 143 Cal. 11, 76 Pac. 646.

*People v. McAllister*, — Cal. —, 76 Pac. 1127, is exactly similar to the case of *People v. Wrin*, supra, and upon the authority of that case was decided.

A statute providing for service of process by publication, where the person on whom it is to be made cannot after due diligence be found within the state, is satisfactorily complied with where the affidavit states that the defendant cannot be found within the state after diligent search made therein for him by the affiant; that such diligent search consisted of making inquiries of each and every person from whom he had reason to believe he would receive knowledge of the whereabouts of the person, and contains a statement of the persons of whom he made inquiries, and the reason why he expected them to know of his whereabouts, although it fails to state expressly the result of the inquiries. *Chapman v. Moore*, 151 Cal. 509, 121 Am. St. Rep. 130, 91 Pac. 324. To the same effect, see *Ligare v. California Southern R. Co.* 76 Cal. 610, 18 Pac. 777.

In *Towsley v. McDonald*, 32 Barb. 604, an affidavit for an order of publication which stated that the person sought was a resident of a certain county during certain years, but had disappeared from the neighborhood, leaving his family, and had not since returned; that the affiant had made inquiry for him and had been informed that he had been in a distant state, but had left there for the West, and that the affiant was further informed by the wife of the defendant that she did not know where he was, and that he took his clothes; that he was a hard drinker, and she did not believe he would return, was sufficient to show that the defendant could not after due effort and diligence be found within the state. In this case, however, certain other facts had to be shown in order to

warrant the issuance of the order, and the case turned on another point.

In *Brenen v. North*, 7 App. Div. 79, 39 N. Y. Supp. 975, where one of the affidavits for an order of publication was made by the attorney for the plaintiff, and stated that the person sought could not after due diligence be found in the state, and that the deponent had inquired from people who knew him, and was informed that he left New York seven years ago and never returned to their knowledge, and another affidavit filed in the same matter by a sister of the defendant stated that her brother had left New York seven years before the time she made her affidavit, and that she had never heard from him, and although she had made diligent inquiries as to his whereabouts, she was unable to get any information concerning him, and that therefore she believed he was not a resident of this state, it was held that the affidavits together were sufficient to authorize the order of publication.

But an affidavit for an order of publication which states that the affiant had inquired of all persons whom he thought likely to know the defendant, to ascertain where he might be found, but had been unable to find anyone who had seen him or had heard positively from him for the past eight years, is clearly insufficient to authorize the publication of the summons, since it does not show that the affiant did not obtain from anyone of whom he made inquiries any information as to where the defendant was. *Brady v. Seaman*, 30 Cal. 610.

Where the statements in the affidavit as to the whereabouts of the defendant were made upon information and belief, and were to the effect that the defendant had absconded from the state, and that inquiry among his former neighbors had not disclosed his present whereabouts, but that the deponent had been informed that the defendant had been in a certain named state, it was held that the affidavit was insufficient. *Hafern v. Davis*, 10 Wis. 501.

A statute providing that whenever any complainant shall file in the office of the clerk of the court in which his suit is pending an affidavit showing that any defendant resides or is gone out of the state, or on due inquiry cannot be found, publication of the summons may be made in some newspaper printed in the defendant's county, is complied with when the affidavit avers in the language of the statute that upon diligent inquiry the place of residence of the defendant could not be ascertained, or where it gives the facts connected with the inquiry has been made by the affiant, and that upon such inquiry the residence of the defendant could not be ascertained. *Hartung v. Hartung*, 8 Ill. App. 156.

A statute which authorizes service by a publication when the party to be served resides out of the state or has departed from the state, or cannot after due dili-

gence be found within the state, is not complied with by an affidavit which merely states that the defendant cannot after due diligence be found in the county, and that the affiant has inquired of a certain named person, who was an intimate friend of the defendant, as to his whereabouts. *Swaine v. Chase*, 12 Cal. 283.

In *Kahn v. Matthai*, 115 Cal. 689, 47 Pac. 698, the affidavit for order of publication was held to be fatally defective in failing to show with accuracy the efforts made to serve defendant with summons. In this case the affidavit stated that the plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them with the information that they could not find the defendant nor see her, and that she cannot be found in the city or county. The court said: "This statement is but hearsay and may be wholly untrue in fact, without any impeachment of the truthfulness of the affiant. Where service of process upon a defendant within the county is attempted to be made by a person other than the sheriff, his affidavit should, as a rule, be required, showing the nature of the effort made to serve the party, and, where practicable, the reasons why such service cannot be had."

#### Miscellaneous.

Where the affidavit for the order stated that the efforts made to obtain service of the summons upon the defendants within the state were confined to delivering the summons to the sheriff, with directions to serve the same, and that he returned that he was unable to make such service, the return being stated fifteen days before the making of the affidavit, and the plaintiffs themselves stated that they were unable with due diligence to make the required service, and from the return of the sheriff it appeared that the defendants could not be found within the state, it was held that the affidavit was sufficient. *Gallun v. Weil*, 116 Wis. 236, 92 N. W. 1091.

Where it appeared from the affidavit for the order of publication that the defendant was a man with a wife, and owned real estate in New York, and had been indicted for a criminal offense; that the plaintiff had become his bondsman to appear for trial, and he did not appear, and that the police had searched for him vainly, and that he had never communicated with his bondsman, and had not demanded payment of rents due him, and could not be found at his house, and that there were other facts of like significance, it was held that the affidavit was sufficient. *Wichman v. Aschpurwis*, 23 Jones & S. 218.

In *Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278, it does not appear just what steps were taken in order personally to serve the summons, before the order of publication was asked for, the court merely stating that the affidavits submitted

were sufficient for the purpose; they showed that efforts were made to serve the summons upon the person sought, and to ascertain his place of residence, and that his residence and whereabouts were unknown.

Where the affidavit upon which the application for the order of publication was made stated the nonresidence of the defendant; that he had no place of business in New York; that plaintiff believed that the summons could not with due diligence be served personally within the state; that he had present knowledge of defendant's movements, and was satisfied that he frequented no place in the state, it was held that, while it was not as full as might be desired, it stated sufficient facts to uphold the finding of the judge to whom it was presented, that the plaintiff would be unable with due diligence to make personal service within the state, and authorized an order of publication. *Crouter v. Crouter*, 133 N. Y. 55, 30 N. E. 726, affirming 63 Hun, 630, 43 N. Y. S. R. 438, 17 N. Y. Supp. 758.

But an affidavit for publication in a chancery cause, which states merely that the affiant cannot find the defendant in the state by reason of his absence therefrom, or of his concealment within it, is not sufficient. The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts. *Thompson v. Circuit Judge*, 54 Mich. 236, 19 N. W. 967.

In *Palmer v. McMaster*, 13 Mont. 184, 40 Am. St. Rep. 434, 33 Pac. 132, where the affidavit did not state that due or any diligence had been used to ascertain the whereabouts of the defendant, or that any effort had been made to obtain personal service of the summons upon him, and his residence was not stated, and no reason given for not stating it, and there was not a single probatory fact stated in the affidavit, the court held that it was an attempt to state the words of the statute without stating any probatory facts that would enable the court judicially to determine whether or not it was sufficient to authorize the issuance of the order for publication of summons, and that it was not sufficient in law to support an order of publication of summons.

An affidavit which recites merely that the defendant cannot be found after due diligence is insufficient to warrant an order of publication, because it is a mere conclusion of law, and does not state the facts upon which is predicated the conclusion of due diligence, which must appear by affidavit in order to justify the judge or other officer in granting the order. *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576.

Where an order of publication is sought against a foreign corporation, a mere affidavit that the constable had returned the summons not served, and that due diligence had been made to find the defendant,

is not sufficient, but the affidavit must go further and state that the corporation had no officer in the state upon whom service might have been made, setting out the facts showing what diligence had been used, and what he had done in attempting to ascertain the required information. *Victor Mill. & Min. Co. v. Justice Ct.* 18 Nev. 21, 1 Pac. 831.

An affidavit for an order of publication ought to state the facts from which the judge would be able to find that the persons sought are nonresidents of the state; or that the plaintiff is unable to ascertain whether they are residents or nonresidents, and that she had been and would be unable with due diligence to make personal service on them within the state; and a mere statement in the language of the statute without setting forth just what inquiry was made is not sufficient. *McLaughlin v. McCann*, 123 App. Div. 67, 107 N. Y. Supp. 762.

In *Nicoll v. Midlands Sav. & L. Co.* 21 Okla. 591, 96 Pac. 744, where the publication was sought against a foreign corporation, which, among other statutory requirements, was required to have an agent within the state upon whom service could be had, and the affidavit filed for the order stated that with the exercise of due diligence the plaintiff was unable to procure service of summons upon the defendant within the territory, but did not state the facts tending to show just what diligence the party had taken in order to serve the summons, it was held that it was not sufficient.

In *Cordray v. Cordray*, 19 Okla. 36, 91 Pac. 781, where the affidavit for the order did not say that service could not be had within the territory, the court held that it was insufficient, for it was incumbent upon the affiant then to show what diligence he had used to ascertain whether service could be had upon the defendant within the territory at the time the affiant made the affidavit.

And the decision in the preceding case was followed in *Harrington v. Loomis*, 10 Minn. 366, Gil. 293, wherein it appeared that the affidavit for publication recited merely that the defendants could not be found, after due diligence, within the state, and that diligent inquiry had been made for them, and information obtained that they lived in a certain named distant place.

An affidavit to procure an order for the publication of a summons must set out all the facts and circumstances to show that the defendant cannot be found, and a mere statement that he cannot after due diligence be found is insufficient. *Mackubin v. Smith*, 5 Minn. 367, Gil. 296, wherein it was said: "This statement does not even show that a single effort had been made to find him, either by injury or otherwise. The deponent says that the defendant could not be found even if he should look for him. This is the fair mean-

ing of the words used; but even if they should be understood as stating that the deponent had used due diligence, they present nothing save his opinion for the officer to decide the fact upon. What the deponent might consider due diligence in a given case might fail entirely to satisfy the officer of the fact, should the acts constituting the diligence have been made to appear."

"To obtain an order for publication against a defendant who resides in the state, but who is absent therefrom or concealed within the same, the affidavit should state the place of residence of the defendant, the particular circumstances of his absence, and probable duration thereof, and the names and residences, or other descriptions, of the persons from whom the information of such absence or concealment was obtained,—to enable the court to judge of the necessity or propriety of proceeding against the defendant by a publication of the notice, instead of a personal service of the subpoena." *Evarts v. Becker*, 8 Paige, 506, wherein it was held that an affidavit which states merely that the deponent believes that the defendant resides in the state, and that the subpoena could not be served on him by reason of his concealment within the state, or of his continued absence from the place of his residence, is not sufficient to authorize the court to grant an order of publication.

E. M. S.

#### WASHINGTON SUPREME COURT. (Department 1.)

H. S. EMERSON COMPANY, Appt.,  
v.  
CHARGEURS REUNIS, Resp.

(65 Wash. 513, 118 Pac. 631.)

#### Shipping — duty to follow short route.

An ocean carrier is not liable for injury to freight due to the steamer to which the property is delivered for transportation following its usual route to the port of destination, although there is a short route, by following which the injury might have been prevented.

(November 4, 1911.)

(Gose, J., dissents.)

#### Note. — Duty of carrier as to route.

This note assumes to discuss only the general question of a carrier's duty with respect to the route to be followed, without dealing specifically with what conduct may or may not constitute an infraction of such duty.

"It is well-settled elementary law," says *Sharswood, J.*, in *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178, "that, in the absence of any special con-

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for injury to a shipment of oranges. Affirmed.

The facts are stated in the opinion.

Messrs. Bogle, Merritt, & Bogle, for appellant:

Under the bill of lading, where the termini of the voyage alone are given, and no particular route between the termini designated, the carrier is bound to take the northern route, being the most usual, shortest, and most direct sea route for steam vessels between these points.

tract, the obligation of a carrier of goods is to transport them by the usual route proposed by him to the public."

"The obligation of the carrier to carry depends on his public profession . . . and therefore he is bound to carry only according to the route which he holds out to the public. . . . It is no breach of his duty that he does not carry by a shorter route than that which he professes. If the carrier wishes his goods to be sent by a shorter route than the accustomed one, he should ask for it; and if refused, he should exercise his choice of sending by another carrier." Per Blackburn, J., in *Hales v. London & N. W. R. Co.* 4 Best & S. 66.

The duty of a carrier to transport the goods intrusted to it by the usual or customary route is also adverted to in *The Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41; *The Indrapura*, 171 Fed. 929; *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302; *American Merchants' Union Exp. Co. v. Schier*, 55 Ill. 140; *Steidl v. Minneapolis & St. L. R. Co.* 94 Minn. 233, 102 N. W. 701; *Hoffman v. Delaware, L. & W. R. Co.* 39 Pa. Super. Ct. 47.

The law implies a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. *Davis v. Garrett*, 6 Bing. 716, 4 Moore & P. 540, 8 L. J. C. P. 253, 5 Eng. Rul. Cas. 273.

In every contract of affreightment, unless otherwise expressly provided therein, the shipowner's undertaking is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly, without any unnecessary deviation. *Globe Nav. Co. v. Russ Lumber & Mill Co.* 167 Fed. 228.

But a departure from the regular and usual course of the voyage, which is a customary incident of the voyage, and according to the known usage of trade, is not a deviation which will subject the carrier to the responsibility of an insurer. *Constable v. National S. S. Co.* 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062.

This is true even though the usage is not known to the particular shipper, if it is established as a general usage. *Hostetter v. 37 L.R.A. (N.S.)*

*Carver, Carr. at Sea*, § 285; 36 Cyc. 232; *Hutchinson, Carr.* § 613; 7 Am. & Eng. Enc. Law, 207; *Angell, Carr.* 5th ed. §§ 164, 175-178; 9 Am. & Eng. Enc. Law, 421; *The Indrapura*, 171 Fed. 929; *Globe Nav. Co. v. Russ Lumber & Mill Co.* 167 Fed. 228; *The Niagara v. Cordes*, 21 How. 7, 24, 16 L. ed. 41, 46; *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 304; *Glynn v. Margetson* [1893] A. C. 351, 62 L. J. Q. B. N. S. 466, 1 Reports, 193, 69 L. T. N. S. 1, 7 Asp. Mar. L. Cas. 366; *Swift & Co. v. Furness, W. & Co.* 87 Fed. 345; *Pacific Coast Co. v. Yukon Independent Transp. Co.* 83 C. C. A.

*Park*, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1.

A direct voyage to the destination indicated by the bill of lading is prima facie intended; but this may be controlled by usage, or by personal knowledge of the shipper. *Lowry v. Russell*, 8 Pick. 360; *Thatcher v. McCulloh, Olcott*, 365, Fed. Cas. No. 13,862; *Wright v. Holcombe*, 6 U. C. C. P. 531.

The usage of trade will warrant a carrier in departing from the direct course of the voyage (*Bentaloe v. Pratt*, Wall. Sr. 58, Fed. Cas. No. 1,330; *Bulkley v. Protection Ins. Co.* 2 Paine, 82, Fed. Cas. No. 2,118; *Folsom v. Merchants' Mut. M. Ins. Co.* 38 Me. 421; *Parsons v. Manufacturers' Ins. Co.* 16 Gray, 463); but such usage ought to be so certain and uniform as to warrant the presumption that it is generally known as the law of that trade (*Bulkley v. Protection Ins. Co.* and *Folsom v. Merchants' Mut. M. Ins. Co.* supra).

In the absence of any stipulation as to the route to be taken, a carrier may take either of several customary and usual routes. *White v. Ashton*, 51 N. Y. 280; *Commonwealth Ins. Co. v. Cropper*, 21 Md. 311.

Where there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. *Pierce v. Southern P. Co.* 120 Cal. 156, 40 L.R.A. 350, 47 Pac. 874, 52 Pac. 302.

A carrier must, in selecting the route, have due regard to the right and interests of the shipper; as, for example, if it is known to a carrier that a shipment will be more liable to loss or injury on one route than it would on another, he must select the safer route, or be liable for the consequences; especially where instructions to that effect are given. *Chartrand v. Southern R. Co.* 85 S. C. 479, 67 S. E. 741.

It is a deviation to forward goods by the more hazardous of two routes, where it is practicable to obey the instruction given by the shipper to forward by the safer route. *United States Exp. Co. v. Kountze Bros.* 8 Wall. 342, 19 L. ed. 457.

E. S. O.



625, 155 Fed. 29; New York Firemen Ins. Co. v. Lawrence, 14 Johns. 57, 9 Am. & Eng. Enc. Law, 419; Hurlbut v. Turnure, 76 Fed. 587.

Messrs. Hughes, McMicken, Dovell, & Ramsey, for respondent:

If there are two customary or usual routes, and the carrier is left free by his bill of lading to choose between them, he will not be responsible for any loss occurring on the route chosen, even though such loss might not have taken place if the other route had been chosen.

Hutchinson, Carr. § 613; White v. Ashton, 51 N. Y. 280; Empire Transp. Co. v. Wallace, 68 Pa. 302, 8 Am. Rep. 178; Lowry v. Russell, 8 Pick. 360.

The agreement need not have been for the quickest or most direct mode of transportation.

The Citta Di Messina, 169 Fed. 476; Evans v. Cunard S. S. Co. 18 Times L. R. 374.

Mount, J., delivered the opinion of the court:

The plaintiff brought this action to recover damages on account of a shipment of oranges from Yokohama to Seattle. Upon a trial of the cause, the trial court made the following findings of fact:

"(3) That on or about the 22d day of November, 1906, the said defendant was the owner of and then operated the steamship Amiral-Hamelin, then plying between the port of Yokohama, Japan, and the port of Seattle, state of Washington.

"(4) That heretofore, and on, to wit, the 22d day of November, 1906, Yutaka & Company, at the port of Yokohama, Japan, delivered to the defendant, on board of its said steamship Amiral-Hamelin, 500 packages of oranges, each package containing two boxes, the property of said Yutaka & Company, and all then and there in good order and condition, to be carried by said defendant on board its said steamship Amiral-Hamelin, from said port of Yokohama, Japan, to said port of Seattle, Washington, and there delivered in like good order and condition to the order of said Yutaka & Company, that said Yutaka & Company, paid to said defendant the sum of \$26.22 as freight on said oranges.

"(5) That on the said 22d day of November, 1906, at said port of Yokohama, upon receipt of said 500 packages of oranges on board said steamship Amiral-Hamelin, as aforesaid, the master of said steamship, one Debonnaire, caused to be signed and delivered to said Yutaka & Company, a bill of lading in writing therefor, a true copy of which bill of lading is at-

tached to said complaint, marked 'Exhibit A,' and made a part thereof."

The bill of lading contained the following statement: "Shipped by M. Yutaka Shokai on board the French steamer Amiral-Hamelin, Capt. Debonnaire, to be conveyed to Seattle and delivered, after safe arrival of the boat, unto order."

The court further found:

"(6) That thereafter and before the delivery of said oranges at Seattle, the said Yutaka & Company, duly sold, assigned, and transferred the said bill of lading unto said plaintiff, and thereby said plaintiff became the owner of and entitled to the said 500 packages of oranges.

"(7) That the most usual, shortest, and most direct route for steam vessels between the port of Yokohama, Japan, and the port of Seattle, Washington, was what was and is well known in the commercial world as the northern route; the same passing through cool water and a cool climate at said time of year.

"(8) That about six months prior to the receipt by said defendant of the said shipment of oranges, the said defendant commenced to operate steamers from Yokohama, Japan, to Honolulu, Hawaiian Islands; thence to San Francisco, California, thence to Seattle, Washington; and thence returning to San Francisco, and thence to South America; that said defendant operated a steamship upon such route from Yokohama about once every sixty days thereafter; that said steamship Amiral-Hamelin was one of the vessels then owned by said defendant company, and at the time of the receipt of said goods on said steamship the same was about to proceed from Yokohama on a voyage to Honolulu; thence to San Francisco; and thence to Seattle; and was the third or fourth steamship to be operated by the defendant company on said route; and that said route was then the usual and customary and only route of defendant's steam vessels between Yokohama and Seattle.

"(9) That after such receipt of said oranges by said defendant it did not cause its said steamship Amiral-Hamelin to proceed from Yokohama to Seattle by said northern route; but did cause said steamship to thereupon proceed from said port of Yokohama to Honolulu, Hawaiian Islands, and thence to San Francisco, California, and thence to Seattle, Washington, and did carry said oranges from Yokohama to Seattle on said route, via Honolulu and San Francisco, and delivered said oranges at Seattle, Wash., on January 16, 1907, and more than 30 days later than the same could have been carried between Yokohama and Seattle and delivered, if said steamship

had proceeded or said oranges had been carried and transported via said northern route.

"(10) That such route from Yokohama to Seattle, *via* Honolulu and San Francisco, was different from and very much longer than the said northern route, and the same passed through water and a climate very much warmer at said time of the year than the said northern route."

Upon these findings the trial court concluded that the defendant was not liable, and dismissed the action. The plaintiff has appealed.

The evidence is not before us. The appellant rests its case upon the findings made by the trial court, and argues that the bill of lading issued by the respondent, providing for the transportation of the oranges in question from Yokohama to Seattle, without specially designating on which route the goods were to be carried, required the respondent company to carry the oranges by the most usual, shortest, and most direct sea route followed by steam vessels between Yokohama and Seattle; and it being found that the vessel did not follow that route, but followed a more distant route, by reason of which the goods were damaged, the defendant is liable. It is, no doubt, the general rule that "a bill of lading for the transportation of goods from one port to another *prima facie* imports a direct voyage, unless there is a known usage of trade to touch at intermediate ports, or deviation is permitted in the contract of affreightment." 36 Cyc. 232; 2 Hutchinson, Carr. § 613; 7 Am. & Eng. Enc. Law, 207. "Where, however, there are two customary routes, and the carrier is left free to choose between them, he may make his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe." 2 Hutchinson, Carr. § 613; Hostetter v. Park, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1; White v. Ashton, 51 N. Y. 280; Empire Transp. Co. v. Wallace, 68 Pa. 302, 8 Am. Rep. 178; Thatcher v. McCulloh, Olcott, 365, Fed. Cas. No. 13,862; Lowry v. Russell, 8 Pick. 360.

In the last case cited, the court said: "The bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and these contracts are supposed to be made with reference to it. There is nothing in the evidence in the present case contradicting the express terms of the bill of lading, which are that the goods shall be carried from New York to Georgetown. A direct voyage is *prima facie* intended, but this may be controlled

by usage, or by personal knowledge of the shipper. There was competent evidence of the usage in relation to vessels, like this; and there was also evidence that this voyage was known to be by the way of Norfolk."

In Hostetter v. Park, *supra*, Justice Blatchford said: "But it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade. . . . The same doctrine is applicable in the case of the bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. . . . It is well settled that parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary."

In White v. Ashton, *supra*, the court said: "This contract, however, contained no limitation as to the route to be taken by the vessel. It was simply a contract that the barley was to be 'delivered at the port of Baltimore in good order, the dangers of the seas excepted.' This authorized the carrier to take either of several customary and usual routes. Such is the legal effect of the contract (Angell, Carr. §§ 179, 226). Its effect was the same as if the provision had been inserted in the contract that the carrier was at liberty to take any customary or usual route, in his discretion."

In this case, the effect of the court's findings is that there are two usual and customary routes between Yokohama and Seattle; one "well known in the commercial world as the northern route," and the other "to Honolulu; thence to San Francisco; and thence to Seattle." That this last-named route was "the usual and customary and only route of defendant's steam vessels." Under the rules as stated in the authorities above cited, the defendant was free to choose either of these routes. Furthermore, the court found that the route taken by the vessel was the usual and customary route, and also that it was the only route of defendant's vessels. If usage of the trade is to be presumed within the knowledge of the parties, as stated in Lowry v. Russell, *supra*, and if there is no deviation where the vessel touches points out of her course, if such departure is within the usage of the trade, even though such usage be not known to the particular shipper, as it is stated in Hostetter v. Park, *supra*, in either event, it necessarily follows that there can be no recovery in this case. The court here found, upon evidence which was no doubt

sufficient, that the vessel upon which the oranges were shipped pursued the usual and customary and only route of its steam vessels. There was no evidence, or rather there was no finding, that the shipper did not know this fact. The presumption must therefore be that he did know the fact, and made the shipment with reference to it.

Judgment affirmed.

Dunbar, Ch. J., and Parker and Fullerton, J., concur.

Gose, J., dissents.

# WASHINGTON SUPREME COURT. (Department No. 1.)

HUMPTULIPS DRIVING COMPANY,  
Respt.,  
v.

O. P. BURROWS et al.  
and

J. C. CROSS et al., Appts.

(65 Wash. 636, 118 Pac. 827.)

**Injunction — against attempted enforcement of attorneys' lien.**

1. Injunction will lie in favor of one who took an assignment of a judgment free from

*Note. — Assignment of judgment as affecting attorneys' lien thereon.*

This note includes only cases where judgment had been obtained, and thereafter assigned by the judgment creditor; and cases like the following, where interest in the result of an action was assigned before judgment, are not within its scope: Frink v. McComb, 60 Fed. 486; McCain v. Portis, 42 Ark. 402; Bendheim v. Pickford, 31 App. D. C. 488; Fry v. Calder, 74 Ga. 7; Lovett v. Moore, 98 Ga. 158, 26 S. E. 498; La Framboise v. Grow, 56 Ill. 197; Maloney v. Douglas County, 2 Neb. (Unof.) 396, 89 N. W. 248; Ward v. Lee, 13 Wend. 41; Niagara F. Ins. Co. v. Hart, 13 Wash. 651, 43 Pac. 937.

The weight of opinion seems to be that a lien for services of an attorney on a judgment obtained by his labor and skill will not be defeated by a subsequent assignment of the judgment, though in some jurisdictions his right thereto is dependent upon compliance with statutory provisions as to entry on record, or filing of notice with the clerk.

An attorney's lien on a fund recovered by his exertions cannot be affected by an assignment of the fund by the client to one with notice of the lien. Haymes v. Cooper, 33 Beav. 431, 33 L. J. Ch. N. S. 488, 10 Jur. N. S. 303, 10 L. T. N. S. 87, 12 Week. Rep. 539.

Where, after execution is issued, the judgment is assigned, attorneys may assert thereon a lien for services as against assignee, and, upon giving the sheriff notice of the lien, require him to withhold the amount from the owner of the judgment and pay it to them. Gill v. Truelsen, 39 Minn. 373, 40 N. W. 254.

any attorneys' lien thereon, to prevent the attempted enforcement of such lien against the judgment.

**Appeal — dismissal — without knowledge of counsel.**

2. Parties to an appeal may stipulate for its dismissal without the aid or intervention of their counsel.

**Attorney — lien on judgment — effect of assignment.**

3. Under a statute giving an attorney a lien on the judgment from the time of filing notice thereof, an assignment of the judgment in good faith and without collusion, before the lien is filed, frees the judgment from liability to the lien.

(November 16, 1911.)

**A**PPEAL by defendants Cross et al. from a judgment of the Superior Court for Chehalis County enjoining them from selling plaintiff's property upon an alias execution for the enforcement of a lien claimed by the defendant attorney upon a judgment. Affirmed.

The facts are stated in the opinion.

Mr. A. Emerson Cross, with Mr. J. C. Cross, for appellants:

The mere assignment of the judgment did not operate to deprive the defendant attorney, by whose industry such judgment had been secured, of any lien upon such judgment for his services.

Transfer of judgment for value, without notice of lien, and bona fide satisfaction of judgment, will not defeat attorneys' lien for services. Guliano v. Whitenack, 9 Misc. 562, 30 N. Y. Supp. 415.

Assignee of judgments takes equitable title subject to attorneys' lien for compensation. Cunningham v. McGrady, 2 Baxt. 141.

In Parker v. Parker, 71 Vt. 387, 45 Atl. 756, a judgment authorized by stipulation of parties was subsequently assigned, and it was held that the attorneys had a lien thereon as against the assignees.

But in Potter v. Mayo, 3 Me. 34, 14 Am. Dec. 211, it was held that an attorneys' lien was defeated where, after opinion was announced and before judgment was actually entered, the judgment was assigned and the amount paid to the assignee.

**Filing of notice of lien.**

In Taylor v. Stall, 79 Neb. 295, 112 N. W. 577, it was held that a judgment in favor of prosecutrix in bastardy proceedings was subject to an attorneys' statutory lien for services, and that an assignee of

Niagara F. Ins. Co. v. Hart, 13 Wash. 652, 43 Pac. 937; Henry v. Traynor, 42 Minn. 234, 44 N. W. 11; Maloney v. Douglas County, 2 Neb. (Unof.) 396, 89 N. W. 248; Sayre v. Thompson, 18 Neb. 33, 24 N. W. 383; Porter v. Hanson, 36 Ark. 591; Hobbs v. Duff, 23 Cal. 625; Renick v. Ludington, 16 W. Va. 397; Sexton v. Pike, 13 Ark. 193; Heartt v. Chipman, 2 Aik. (Vt.) 166; Tyler v. Slemp, 124 Ky. 209, 90 S. W. 1041; Bent v. Lipscomb, 45 W. Va. 183, 72 Am. St. Rep. 815, 31 S. E. 907; Cunningham v. McGrady, 6 Baxt. 141; McCain v. Portis, 42 Ark. 409; Mahone v. Southern Teleg. Co. 33 Fed. 704; Frink v. McComb, 60 Fed. 491; Taylor v. Badoux, — Tenn. —, 58 S. W. 927; 4 Cyc. 1005; 3 Am. & Eng. Enc. Law, 472.

Messrs. Bridges & Bruener for respondent.

such judgment after the filing of such lien takes judgment subject thereto, and especially where the assignment was made subject to such lien.

Assignment of judgment will not defeat an attorneys' lien for services, where prior to such assignment the lien has been duly filed. Yates v. Kinney, 33 Neb. 853, 51 N. W. 230.

But statutory provisions that notice of lien must be given by entry upon docket, or by filing with clerk, must be strictly complied with. 4 Cyc. 1009.

In Peterson v. Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599, the judgment was assigned without consideration, and afterwards satisfied of record, though no part of the judgment had been paid to assignor by judgment debtor, and the court held that an attorneys' lien filed in compliance with the statute was neither destroyed nor affected by the assignment of judgment, but, as there was no consideration for the assignment, nor any for the release of the judgment, the assignee was not personally liable.

In Alderman v. Nelson, 111 Ind. 255, 12 N. E. 394, it was held that the assignee of a judgment is protected against an attorneys' lien where notice of the intention to hold the lien is not entered, as required by the statute, at the time the judgment of the trial court is rendered. The court, in rendering its decision, said that "while it may be true that some latitude as to the time of filing the notice may be allowed, since it is apparent that the notice could not well be entered at the same instant that judgment is recorded, still we think that . . . [an intervening period of several months] is far longer than the statute allows. To permit such a long delay would defeat one of the chief purposes of the statute, and no reasonable construction of its words will permit the conclusion that a delay of many months will not impair the lien unless rights have been acquired in the meantime."

57 L.R.A. (N.S.)

Gose, J., delivered the opinion of the court:

This is a suit to enjoin the sale of property upon an alias execution for the enforcement of an attorneys' lien claimed upon a judgment. From a judgment granting a permanent injunction, the attorney claiming the lien and the sheriff who was executing the writ have appealed.

Two questions are presented: (1) Does the writ lie in cases of this character? (2) Is an assignment of a judgment, made in good faith and without collusion, subject to an attorneys' lien upon the judgment, filed subsequent to the assignment? The facts are as follows: The Humptulips Driving Company brought a condemnation suit against Burrows and wife to condemn certain property owned by the latter. Upon the trial of the case to the jury, for

And it has also been held that an assignee of a judgment is protected against the lien of an attorney for services, where entry of notice of claim of lien, required by statute, is made upon the judgment docket after the assignment. Jennings v. Bacon, 84 Iowa, 403, 51 N. W. 15.

But in Davidson v. La Plata County, 28 Colo. 549, 59 Pac. 46, it was held that while the filing of notice of lien with the clerk, and entry thereof on the margin of the record of judgment, is not constructive notice of the lien, there being no statutory authority for such entry, yet where the attorney of assignee of the judgment, acting for assignee in the matter of assignment, read such notice, it was actual notice to assignee, and he was liable to the attorneys for their fees.

Necessity for personal notice to assignee of judgment.

If notice is required, it must be given to the adverse party, in order to protect the attorneys' lien, but need not be given to the purchaser of the judgment. 4 Cyc. 1009.

Assignment of judgment will not defeat an attorneys' lien, even though the assignee had no notice of the lien. Bent v. Lipscomb, 45 W. Va. 183, 72 Am. St. Rep. 815, 31 S. E. 907; Renick v. Ludington, 16 W. Va. 378; Orford v. Fleming, 18 Can. Law Times Occ. N. 142; Cole v. Eley [1894] 2 Q. B. 350, 63 L. J. Q. B. N. S. 682, 9 Reports, 552, 70 L. T. N. S. 892, 42 Week. Rep. 561.

Under statute, a notice of an attorneys' lien upon a judgment, duly acquired, is notice to all the world, and therefore personal notice to an assignee is not required. Peterson v. Struby, 25 Ind. App. 19, 56 N. E. 733, 57 N. E. 599.

In Sexton v. Pike, 13 Ark. 193, in holding that an attorney may, without previous notice to assignee, enforce a lien for his fees against an assignee of the judgment who has received avails and discharged the same,

the purpose of ascertaining the value of the property, there was a verdict for the defendants for \$4,500, and a judgment was entered in their favor for that sum with costs. The condemner appealed. Pending the appeal in this court, the Burrows, without the intervention of counsel, assigned the judgment. Upon a stipulation between the appellant, the condemner, and the assignee of the judgment, the appeal was dismissed, and the remittitur was transmitted to the trial court. The assignment was filed in the office of the clerk of the trial court May 17, 1907. The appellant attorney filed his claim of lien in the same office on May 27th following. He was the attorney for the judgment creditors, both in the trial of the cause where the judgment was entered and upon appeal. The assignment was made for a

valuable consideration, and without notice of a claim of lien upon the part of the attorney. The assignee knew the relation of the appellant attorney to the case when he took the assignment. There is no claim that the assignment was collusive. Upon these facts the right of lien is asserted by the appellants, and denied by the respondent.

The respondent had a right to injunctive relief if the assignee took the judgment freed from the claim of lien. *Cline Piano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742; *Grant v. Cole*, 23 Wash. 542, 63 Pac. 263; *Heintz v. Brown*, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211.

The parties had a right to stipulate for the dismissal of the appeal without the aid or intervention of their counsel. *Cline Piano Company v. Sherwood*, *supra*.

the court said: "As against the assignee of the judgment, his equity is in no way created, nor is it easy to conceive why it should be necessary to enhance it by notice to him, either express or implied, to say nothing of the impracticability of such a duty in general, even when he might suspect that his client designed to assign the judgment. It already exists and adheres in, and is interwoven with, his clients' legal rights, and is asserted as against the defendant under their auspices, and needs not be enhanced as against the assignee of the judgment, because, being prior, it is already paramount to his equity,—the assignee's rights being equitable only, and not legal."

And in *Heartt v. Chapman*, 2 Aik. (Vt.) 102, the courts, in holding that an attorney is protected in his lien for services as against an assignee of the judgment, though the assignee is without notice of the claim, said: "If it is necessary for the security of the attorney as against the debtor, to give notice to him of his lien, this may be done with convenience, as the attorney must know who the debtor is, but it is apparent in case the debt is assigned, he may not, and most likely cannot, know who the assignee is. It is more reasonable to require the assignee, who takes the demand subject to the same equity, and in no better condition that it was in the assignor's hands, and who knows, or is presumed to know, the law as to the attorneys' lien, to make the necessary inquiry before he takes the assignment of a judgment; and notice to him from the attorney, which must frequently be impracticable, is not necessary."

In *Marvin v. Marvin*, 22 N. Y. Civ. Proc. Rep. 274, 19 N. Y. Supp. 371, in holding that personal notice to the assignee is unnecessary, the court said: "No claim can be made that the attorney should have given notice to these respondents. They were not parties to the action, nor interested in it until after judgment, execution, and levy had been made. They were perfect stran-

gers to the record and to the plaintiff's attorney. . . . The judgment, its entry, and docketing the execution in the hands of the sheriff, all must have contained the name of the plaintiff's attorney, and thus, even after the assignment, put the respondents on the inquiry. If they proceeded before assignment, or after without doing this, they took at their peril and subject to all its imperfections." This case, although in accordance with the weight of opinion, was reversed in 21 N. Y. Supp. 1129, but as the reversal was a memorandum opinion, it is impossible to state the grounds therefor.

#### Assignments for creditors.

In *Re Gates*, 51 App. Div. 350, 64 N. Y. Supp. 1050, it was held that upon the assignment of a judgment for the benefit of creditors, the attorneys' lien attaches to the proceeds of such judgment on sale by assignee, though such sale was made subject to such lien.

And in *Bruce v. Anderson*, 176 Mass. 161, 57 N. E. 354, there is a *dictum* to the effect that an attorneys' lien on a judgment is not defeated by the judgment creditor's assignment for creditors.

#### Acquiescence of attorney in assignment.

Where judgment is assigned upon agreement by assignee to pay attorneys' fees out of the proceeds of the judgment, an attorneys' lien is not lost by his acquiescence in the assignment. *Hutchinson v. Worthington*, 7 App. D. C. 548.

#### Effect of attorney's taking assignment.

Where an attorney takes an assignment of the judgment, his lien for costs is merged. *Dodd v. Brott*, 1 Minn. 270, Gil. 205, 66 Am. Dec. 541; *Bishop v. Garcia*, 14 Abb. Pr. N. S. 69. J. H. B.

The second question must receive a negative answer. The statute (Rem. & Bal. Code, § 136), so far as pertinent here, provides that an attorney has a lien for his compensation upon the judgment to the extent of the value of his services, "from the time of filing notice of such lien or claim with the clerk of the court where the judgment is entered." The lien does not become effective as against a settlement between the parties, or a sale of the judgment made in good faith prior to the filing of the lien. In other words, there is no attorneys' lien until the claim is properly filed. The right to claim the lien exists before the filing, but the lien only exists from the time of filing. *Cline Piano Co. v. Sherwood*, supra; *Wooding v. Crain*, 11 Wash. 207, 39 Pac. 442; *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924. In the case last cited it was said that the statute "provides a specific manner for an attorney to assert a lien upon the subject-matter of an action." It is true that in the cases cited the parties to the action had settled the subject-matter of the litigation before the filing of the claim of lien. The fact that the case at bar involves the assignment of the judgment by the judgment creditors cannot change the rule. The cases necessarily proceed upon the assumption that the right to an attorneys' lien in this state rests upon the statute, and that there is no common-law or equitable right of lien. *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153, is in point. In that case, in construing the words in the homestead statute, "from and after the declaration is filed," it was held that the declaration has no retroactive force, and that a mortgage executed by the husband upon his separate real estate took precedence of a homestead declaration thereafter filed by the wife. This view is supported by the following cases from other jurisdictions: *Alderman v. Nelson*, 111 Ind. 255, 12 N. E. 394; *Ward v. Sherbondy*, 96 Iowa, 477, 65 N. W. 413; *Wagner v. Goldschmidt*, 51 Or. 63, 93 Pac. 689; *Elliott v. Atkins*, 28 Neb. 403, 42 N. W. 403; *Pirie v. Harkness*, 3 S. D. 178, 52 N. W. 581. In the *Alderman* Case the right of an assignee of the judgment was upheld against a claim of lien upon the part of the attorney for the judgment creditor, which had not been perfected when the assignment was made. In considering the case, the court said: "It is not necessary to inquire whether an attorney had a lien

37 L.R.A.(N.S.)

on his client's judgment at common law; for the statute covers the entire subject, and creates the lien, and that is the only one that can be enforced. It was undoubtedly within the power of the legislature to abrogate a rule of the common law, so that, if it were conceded that the lien existed at common law, it would not avail the appellees. The statute is now the source from which the lien is derived, and it can only exist as the statute creates it." In the *Ward* Case it was held that a lien of a garnishing creditor is effective as against the lien of an attorney entered in the judgment docket subsequent to the garnishment; that the statute is not extended by the provisions of the common law, "but is in lieu of them;" that the attorney has no equitable lien; and that the statute provides for the only lien to which an attorney is entitled, and that, to obtain it, he must comply with its requirements.

The appellants argue, and cite authorities from other jurisdictions to the effect that the only purpose of filing the claim of lien is to protect the judgment debtor. *Frink v. McComb* (C. C.) 60 Fed. 486, is typical of a number of the cases relied upon for a reversal. It says, in substance, that the cases proceed upon three several theories: (1) That the attorney has a common-law lien upon a judgment recovered by him for his proper charges; (2) that he has a lien upon the theory of an equitable assignment of the judgment; and (3) that it is the duty of the court to protect its officers against the deprivation of their just reward. None of these grounds are applicable in this state. Other cases are cited by the appellants upon statutes somewhat similar to ours, which announce the rule that an attorneys' lien takes precedence of an assignment filed or a garnishment served prior to the filing of the attorneys' lien. We do not deem it necessary to point out the difference in the wording of the statutes, or to discuss the cases. Our statute is plain, and the interpretation heretofore given it is not in harmony with the cases relied upon by the appellants. If it be suggested that this interpretation works a hardship upon deserving counsel we answer: *Ita lex scripta est*.

The judgment is affirmed.

*Dunbar, Ch. J., and Fullerton, Mount, and Parker, JJ., concur.*

## MONTANA SUPREME COURT.

MARY A. KYLE, Admr., etc., of D. C.  
 Kyle, Deceased, Appt.,  
 v.  
 J. D. CHESTER, Respt.

(42 Mont. 522, 113 Pac. 749.)

**Attachment — implied contract — destruction of property.**

No contract to pay for animals negligently driven in the way of a railroad train and killed can be implied so as to bring a demand for compensation within a statute allowing attachments in case of breach of contract, express or implied.

(February 2, 1911.)

**A**PPEAL by plaintiff from an order of the District Court for Valley County discharging an attachment filed in an action brought to recover the value of certain cattle alleged to have been negligently driven by defendant in the way of a railroad train and killed. Affirmed.

The facts are stated in the opinion.

Messrs. Hurd & Lewis, for appellant:

The act of the defendant was a conversion.

Tuttle v. Hardenberg, 15 Mont. 219, 38 Pac. 1070; Cooley, Torts, 2d ed. 524; Tobin

**Note.** — *Right to waive tort and sue upon implied contract, where property is negligently destroyed.*

The rule that one may waive a tort and sue on an implied contract only where the tortfeasor has derived some benefit from the tort seems to have been adhered to in the few cases found where it was sought to waive the tort and maintain an action on implied contract for damages resulting from negligent destruction of property.

Where damages have been committed by one's cattle to the crops or personal property of another, without the owner's participation in the trespass, or benefit therefrom, and in the absence of any promise, the party injured in his property cannot waive the tort and recover his damages in an action on contract. Tightmeyer v. Mongold, 20 Kan. 90.

And in Reynolds Bros. v. Padgett, 94 Ga. 347, 21 S. E. 570, where the defendant found a wagon in the street, and hitched his horses to it for the purpose of going upon a fishing excursion for one day, and upon starting to go the tongue of the wagon was broken by one of the horses, and he unhitched the horses and left the wagon in the street, and it was finally carried to his lot and left there; but there is no evidence that he ever made any claim to the wagon or any further use of it, nor was anything further proved tending to show that he intended to convert it permanently to his

v. Deal, 60 Wis. 87, 50 Am. Rep. 345, 18 N. W. 634.

The plaintiff may waive the tort and sue in assumpsit.

Cooley, Torts, 2d ed. 107; Mackel v. Rochester, 135 Fed. 904; New York Market Gardeners' Assn. v. Adams Dry Goods Co. 115 App. Div. 42, 100 N. Y. Supp. 596; Tidewater Quarry Co. v. Scott, 105 Va. 160, 115 Am. St. Rep. 864, 52 S. E. 835, 8 A. & E. Ann. Cas. 736; 21 Enc. Pl. & Pr. 1023; Monroe v. Cannon, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863; Pomeroy, Code Remedies, 4th ed. § 459; Galvin v. Mac Min. & Mill. Co. 14 Mont. 508, 37 Pac. 366. The contract sued upon is for the direct payment of money. Ancient Order, H. Div. No. 1, v. Sparrow, 29 Mont. 132, 64 L.R.A. 128, 101 Am. St. Rep. 563, 74 Pac. 197, 1 A. & E. Ann. Cas. 144.

Mr. John L. Slattery, for respondent:

If no benefit accrues to the tortfeasor by reason of the tort committed, assumpsit will not lie.

15 Am. & Eng. Enc. Law, 1115; Greer v. Newland, 70 Kan. 310, 70 L.R.A. 554, 109 Am. St. Rep. 424, 77 Pac. 98, 78 Pac. 835; Keener, Quasi Contr. 160; Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367; National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503; Tightmeyer v. Mongold, 20 Kan. 90; Fan-

own use, but on the contrary, the indications were that he was holding it for the use of the owner,—it was held that an action upon implied contract for damages to the wagon would not lie, but that the plaintiff must sue in tort for the damages to his property.

In Eads v. Pitkin, 3 G. Greene, 77, a barge was taken without authority or permission, for the purpose of conveying freight from one point to another, and after using same it was left in a place different from that from which it had been taken, and exposed in such careless and negligent manner that it was carried away by the current of the river and ice, and sunk and wholly lost; and it was held that an action of debt for damages resulting from the negligence could not be maintained either at common law, or by virtue of the provision of statute "to prevent and punish the owners and masters of steamboats committing trespass upon the property of persons living in the state, and for other purposes."

And in Page v. Babbit, 21 N. H. 389, there is a *dictum* to the effect that assumpsit will not lie for damages done to land by trespassing cattle.

This note has intended to include only cases where damage or loss of property was the result of negligence of one sustaining no contractual relation, either express or implied, with the owner of property.

J. H. B.

son v. Linsley, 20 Kan. 235; Osborn v. Bell, 5 Denio, 370, 49 Am. Dec. 275; Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238; 2 Greenl. Ev. 14th ed. § 108.

The remedy by attachment is not given in tort actions, but only in case of indebtedness arising upon contracts.

Griswold v. Sharpe, 2 Cal. 17; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Walker v. McCusker, 65 Cal. 360, 4 Pac. 206, 77 Cal. 208, 19 Pac. 382; Tabor v. Big Pittsburg Consol. S. Min. Co. 4 McCreary, 299, 14 Fed. 636; 4 Cyc. 446; 3 Am. & Eng. Enc. Law, 191.

Smith, J., delivered the opinion of the court:

After this action was begun the plaintiff, D. C. Kyle, died, and Mary A. Kyle, as administratrix, was substituted.

It is alleged in the complaint that the defendant negligently drove eight steers belonging to the plaintiff onto the inclosed right of way of the Great Northern Railway, where they were killed by a passing train. The last paragraph alleges that the defendant thereby became indebted to the plaintiff for the value of the steers. With his complaint the plaintiff filed an affidavit for attachment in the form required by statute, wherein he also alleged that he had sold and delivered the steers to the defendant at the latter's request. The writ was issued by the clerk, but the district court of Valley county afterwards, on defendant's motion, entered an order discharging the attachment. From that order an appeal has been taken.

We think the order was properly made. This is not a case wherein the plaintiff may sue as upon an implied contract, waiving the tort, as is the familiar expression. As long ago as 1810, in the case of Whiting v. Sullivan, 7 Mass. 107, Chief Justice Parsons said: "The law will not imply a promise of any person against his own express declaration because such declaration is repugnant to any implication of a promise." In Webster v. Drinkwater, 5 Me. 319, 17 Am. Dec. 238, the court said: "It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it. . . . And where one is implied, it is because the party intended it should be, or because natural justice requires it, in consideration of some benefit received." Chief Justice Beardsley said in Osborn v. Bell, 5 Denio, 370, 49 Am. Dec. 275: "It was not shown on the trial of this case that the defendant had received any benefit from the seizure and sale of the property in question. No express promise to pay for the goods was pretended, and every feature of the transaction repels the idea that the defendant intended to have one

implied from what he did. He may have been a trespasser, but I see no ground on which he can be held liable for these goods as sold to him. If he can be, such an action is, in almost every imaginable case, a concurrent remedy with trover, replevin, and trespass for personal property. It may be a concurrent remedy where the property has been appropriated by a wrongdoer to his own use, but unless that fact is shown, I think no case will be found in which it has been held that a promise to pay for the goods is implied by law." The supreme court of Wisconsin, in Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782, held that the rule laid down in Webster v. Drinkwater, supra, correctly embodies the governing principle upon which the law raises a promise to pay. In the case of Tightmeyer v. Mongold, 20 Kan. 90, the court held that where one's cattle, had damaged the crops of another, and there was no testimony showing that the owner of the cattle had benefited thereby, the owner of the crops had no right of election but must bring his action *ex delicto*. The court in the course of the opinion said: "The whole discussion of waiving the tort and suing on the contract is reduced to the single question, When is a promise implied by the law?" The case of Webster v. Drinkwater, supra, is then cited with approval. The same court in Fanson v. Linsley, 20 Kan. 235, said: "We do not think that the cause of action stated in defendant's third defense is a proper subject of either set-off or counterclaim. It does not appear from such defense that the plaintiff received or expected to receive any benefit from his wrongdoing, and the relief asked for by the defendant is not for the value of any benefit resulting to the plaintiff, but for damages sustained by the defendant. The cause of action therefore does not arise from any contract, express or implied." See also National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; New York Guaranty & Indemnity Co. v. Gleason, 78 N. Y. 503. The rule is well stated in Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, as follows: "The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that sense he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." Ordinarily when the conduct of a person is such as to raise a clear presumption that he does not intend to do a certain act, he will not thereafter be charged with such intention by implication. State Bank v. For-



syth, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914. In the light of the foregoing authorities it is clear that the district court correctly held that the complaint did not state a cause of action in contract, either express or implied.

The case of *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863, is illustrative of that class of cases in which the defendant derived a benefit from his wrongful act; but we find nothing in the record of this case to indicate that defendant received any benefit from his act.

The affidavit for attachment does not set forth the same cause of action found in the complaint. This affidavit may have been sufficient on its face to warrant the clerk in issuing the writ (see *Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866), but the court must look to the complaint to ascertain whether it states a cause of action in contract, express or implied. The fundamental question is whether the complaint states such a cause of action. As this complaint does not, the attachment was properly discharged. Rev. Codes, §§ 6656, 6681, 6683.

The order is affirmed.

Brantly, Ch. J., and Holloway, J., concur.

#### NORTH DAKOTA SUPREME COURT.

J. L. OWENS COMPANY, Appt.,

v.

VERN C. BEMIS et al., Respds.,

(— N. D. —, 133 N. W. 59.)

**Evidence — paper in possession of adversary — notice to produce.**

1. There is a well-recognized exception to the general rule that notice to produce must be given before secondary evidence will be received as to the contents of a letter or other written document in the possession of the adverse party. Where the pleadings clearly disclose that proof of such document will be necessary at the trial, notice to produce it is unnecessary.

**Sale — order — countermand.**

2. Until there has been an acceptance of a written order for machinery to be shipped to the purchaser at a future date, the latter is at liberty to countermand such order, as the same, until acceptance, does not constitute a contract, but merely an offer or proposal to purchase.

Headnotes by FISK, J.

Note. — As to right to withdraw order given agent before acceptance by principal, see *Bauman v. McManus*, 10 L.R.A.(N.S.) 1138, and note. 37 L.R.A.(N.S.)

**Same — sufficiency.**

3. Defendants' letter to plaintiff, countermanding such order, was as follows: "Cummings, N. Dak. 1/4, 1908. J. L. Owens Co., Mpls., Minn. Gentlemen:—Please cancel our order of Aug. 10-07. Resp. yours, Bemis & Wilsie." Held a sufficient cancellation of such order, and withdrawal of the offer or proposal to purchase therein contained.

(October 26, 1911.)

**A**PPEAL by plaintiff from a judgment of the District Court for Traill County in defendants' favor and from orders denying motions for judgments notwithstanding the verdict or for new trial in an action brought to recover the purchase price of certain machinery alleged to have been sold by plaintiff to defendants. Affirmed.

The facts are stated in the opinion.

Messrs. Turner & Murphy, for appellant.

Mr. P. G. Swenson, for respondents:

The contention of counsel for respondents, and the authorities cited, are fully set out in the opinion.

Fisk, J., delivered the opinion of the court:

Action to recover the purchase price of certain grain-cleaning machinery claimed by plaintiff to have been sold by it to defendants in the fall of 1907. Such sale is expressly denied in the answer, and defendants' contention is that they merely gave to plaintiff's agent an order for such machinery amounting to a proposal to purchase, and that before the same was accepted by plaintiff they countermanded such order.

At the conclusion of all the testimony, both parties moved for a directed verdict, whereupon the trial court granted defendants' motion, and judgment was entered pursuant to the verdict directed by the court. In due time plaintiff caused a statement of the case to be settled, embracing proper specifications, and thereafter moved for judgment notwithstanding the verdict, or for a new trial, which motions were denied, and this appeal is from the judgment and also from the orders denying such motions.

Appellant's assignments of error all relate to the correctness of the rulings aforesaid, and the pivotal question in the case is as to whether the order for such machinery constituted a complete contract of sale and purchase, or merely, as claimed by defendants, an offer on their part to purchase the same upon the terms therein stated. Appellant also claims that there was prejudicial error committed by the trial court in the admission in evidence, over its objection, of Exhibit 1, being a copy of a purported

letter claimed to have been sent by defendants to plaintiff on January 4, 1908, countermanding the order for such machinery.

Before noticing appellant's contentions, a brief statement of the facts will be made. In the fall of 1907, defendants, dealers in hardware, etc., at Cummings, gave to one Kuhnley, plaintiff's traveling salesman, the following order:

Order No. .... Date, Aug. 10—07.  
 J. L. Owens Co., Mpls., Minn.  
 Ship to Bemis & Wilsie.  
 At Cummings, N. D.  
 How ship: Freight. When: Feb. 1—1908.  
 Terms: 60 days from invoice 3 per cent 10 days.  
 3 No. 1 Men. Sup. ....\$14 50 each...\$43 50  
 3 No. 2 " " .... 18 50..... 55 50  
 1 No. 2 Bagger ..... 4 00..... 4 00  
 Complete with  
 1 No. 1 Macaroni ..... 2 00  
 1 No. 2 " ..... 3 00  
 Wheat, oats, barley, flax, timothy,  
 clover attachments.  
 Screen, sieves, 8x8—9x9—2x11.  
 Total .....\$108 00  
 By S. M. Kuhnley.  
 Bemis & Wilsie, per V. C. B.

Such order was solicited from defendants by the said Kuhnley, and the same was signed by him and by defendants at the time the order was given. Thereafter, and until January 4, 1908, no communications took place between the parties regarding such order, but on the latter date defendants claim that they mailed to plaintiff a letter as follows:

Cummings, N. Dak. 1/4, 1908.  
 J. L. Owens Co.,  
 Mpls., Minn.  
 Gentlemen:—  
 Please cancel our order of Aug. 10—07.  
 Resp. yours,  
 Bemis & Wilsie, R. M. W.

It is conceded that on January 8th plaintiff wrote defendants as follows:

Minneapolis, Minn., Jan. 8, 1908.  
 Messrs. Bemis & Wilsie,  
 Cummings, N. D.  
 Gentlemen:—

We have yours of the 4th, desiring us to cancel your order of Aug. 10th, 1907, and will say, gentlemen, in answer that we have investigated this order and find that the order is a signed order, without any provision or condition under which you could cancel same, and we fail to see in what light we would be justified in doing so. Of course, we wish it understood that we desire to do all that is proper and right, and meet our

customers in their demands where we can possibly do so, but in this case we think it would be detrimental to yourselves as well as us, for we surely can prove to you that we have the goods that will do what we claim for them, and will get the business in spite of any competition that you might have. We know that we have a machine that can be sold at the right price, and that no machine, no matter what it is, can compete with it when it comes to doing the work in all kinds of grain and seed. And under the circumstances we cannot consent to cancel the order, but will consent to give you such help, with one of our travelers, as you desire in starting the machines and the trade in your territory, and proving to you what we claim above, which we believe you yourselves will agree is entirely fair, and that our stand in consequence of same is not more than what you could ask or would do were you in our position.

We beg to remain,

Yours truly,  
 J. L. Owens Company.

Notwithstanding defendant's attempt to countermand such order, plaintiff shipped such machinery to defendants from Minneapolis, on January 24, 1908, but, defendants refusing to receive the same, it was later sold by the common carrier to satisfy its lien for freight and storage charges.

In the light of the above facts, we are required to determine the correctness of the trial court's rulings complained of.

Appellant's first contention is that it was error to admit in evidence the copy of the letter claimed to have been written by defendants to plaintiff on January 4th, countermanding the order; the point being that no proper foundation was laid for the introduction of such secondary evidence. A notice to produce the original of such letter was not served on plaintiff's counsel until the afternoon of the day preceding the trial, and appellant's counsel contend that this was insufficient notice. We are agreed that there was no error in the ruling of the trial court. A notice to produce such letter was unnecessary. Defendants had a right to assume that plaintiff would have such letter at the trial. The answer furnished plaintiff with sufficient notice that the same would or might be required at the trial. Nichols & S. Co. v. Charlebois, 10 N. D. 446, 88 N. W. 80. In disposing of a similar question, this court there said: "The general rule is that notice to produce must be given before secondary evidence can be received as to the contents of a written document in the possession of the adverse party, but there is a well-settled exception to this rule. Where the issues framed by the pleadings

necessarily disclose to the adverse party that proof of the document will be necessary at the trial, it is well settled that notice to produce the document is not necessary in order to admit secondary evidence of the contents of such document, in case the original is not produced. The adverse party is bound to take notice from the pleadings that the production of the document at the trial is required, and in case it is not produced secondary evidence must be resorted to. The answer in this case necessarily informed the plaintiff that the defense relied upon was a breach of the warranty, and therefore the plaintiff was bound to know that in proving such defense the defendant would necessarily be required to prove the contents of the notice sent in this registered letter. The reason for the rule requiring a notice to produce the original, therefore, did not apply. See 1 Jones, Ev. ¶ 24; Kellar v. Savage, 20 Me. 199." See 2 Wigmore, Ev. § 1205.

Appellant's next contention is that the order for this machinery constituted a contract of sale between the parties, but we think such contention unsound. The fact that plaintiff's soliciting agent, as well as defendants signed their names at the bottom of the order, in no manner tends to lend support to appellant's theory. It is, we think, entirely clear that such instrument constituted a mere offer or proposal on defendant's part to purchase such machinery, and that, until accepted by plaintiff, the same would not become a binding contract. The plaintiff was in no manner obligated to accept such order, and until it did so in fact, and notified defendants thereof, the latter were at liberty to countermand the same. It is not contended that plaintiff, prior to January 8, 1908, notified defendants of its acceptance of such order, and it is conceded that such machinery was not delivered to the common carrier for shipment until long after defendants' letter had been received by plaintiff, countermanding the order. That defendants had the right to cancel or countermand such order at any time prior to its acceptance by plaintiff is abundantly supported by authority. See 1 Mechem, Sales, 252. McCormick Harvesting Mach. Co. v. Richardson, 89 Iowa, 525, 56 N. W. 682; Reeves & Co. v. Bruening, 13 N. D. 157, 100 N. W. 241; Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614; Hallwood Cash Register Co. v. Finnegan (Sup.) 84 N. Y. Supp. 154; P. J. Bowlin Liquor Co. v. Beaudoin, 15 N. D. 557, 108 N. W. 545; McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485; Merchants' Exch. Co. v. Sanders, 74 Ark. 16, 84 S. W. 786, 4 A. & E. Ann. Cas. 955; Bauman v. McManus, 75 Kan. 106, 10 L.R.A.(N.S.) 1138, 89 Pac. 37 L.R.A.(N.S.)

15; John Matthews Apparatus Co. v. Renz, 22 Ky. L. Rep. 1528, 61 S. W. 9.

In McCormick Harvesting Mach. Co. v. Richardson, supra, action was brought upon a written order for twine given to plaintiff's agent. The court says: "It does not purport to be a contract between the parties. By it, the plaintiff was not obligated to do anything on its part. The plaintiff does not undertake, by the terms of the writing, to ship the twine on the proposed conditions. It is merely a request or a proposition from the defendant to the plaintiff that if the latter will ship certain goods he will pay a certain sum therefor at a fixed time. It may be said to be an order, but it lacks an essential element of a contract,—mutual assent. Being only a request or order, which required acceptance by the plaintiff to give it the force of a contract, it follows that it might be withdrawn or countermanded at any time prior to its being so accepted."

In McKindly v. Dunham, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485, the court said: "But the agent did not sell the goods, nor even contract to sell them. When the defendant had completed his transaction with Kilbourn, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiffs could have refused to accept the order. Neither party had become bound by anything then done. The order of the defendant was a mere proposal, to be accepted or not as the plaintiffs might see fit, and he could have withdrawn it before its acceptance."

In speaking of the character of such an order as established by custom, the Kentucky supreme court, in John Matthews' Apparatus Co. v. Renz, supra, used the following language: "The custom of so doing business is of such long standing, so extensive, and so important in the commercial world, especially in the United States, that the courts will take notice of it. They have done so, and this court has. In the Charles Brown Grocery Co. v. Becket, 22 Ky. L. Rep. 394, 57 S. W. 458, we recognized in this state what appears to be the general rule in most or all of the states, quoting it in this language: 'In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become completed until the order is accepted by his principal.' Any other construction of these transactions would tend to so materially hamper and cripple this important means of conducting mercantile business as to well-nigh destroy its effectiveness, now so generally understood, employed, and recognized."

We are entirely satisfied with the reasoning and conclusions announced in the foregoing authorities, and applying such rules to the case at bar requires us to overrule appellant's contention to the contrary.

But one other point remains to be considered. Appellant's last contention is, in effect, that defendants' letter of January 4th "does not show a distinct, unequivocal, and unconditional withdrawal of the offer." It is true, no doubt, that such letter must meet these requirements, but we are entirely clear that it does; and plaintiff's letter in reply thereto clearly discloses that its officers thus interpreted it.

Finding no error in the record, the judgment and orders appealed from are affirmed.

**CALIFORNIA SUPREME COURT.**  
(Department No. 1.)

CARRIE E. WALTHER, Resp't.,  
v.  
SOUTHERN PACIFIC COMPANY, Appt.  
(159 Cal. 769, 116 Pac. 51.)

**Carrier — exemption from liability — statutory prohibition.**

1. A statute providing that a common carrier cannot be exonerated by an agreement made in anticipation thereof, from liability for gross negligence, applies in

**Note. — Validity of stipulation in pass limiting carrier's liability.**

- I. In general, 235.
- II. Degree or nature of negligence.
  - a. Degree, 238.
  - b. Carrier's and servant's negligence distinguished, 242.
- III. Relation and status of parties.
  - a. In case of gratuity, 243.
  - b. As affected by presence of consideration.
    1. Generally, 249.
    2. Employee's pass, 250.

It is not intended to discuss in this note the question of the sufficiency of notice of conditions printed upon passes or free tickets to bind the recipient, and it includes only the cases in which it was held or assumed that the stipulation, if valid, was binding upon the person transported.

A general discussion of the rights of a person riding on a pass, or contract for free passage, is contained in the note in 22 L.R.A. 794.

As to the right of a passenger carrier to stipulate against liability in consideration of reduced fare, see the note in 4 L.R.A. (N.S.) 1081.

**I. In general.**

Where the transportation of a person is 37 L.R.A. (N.S.)

favor of passengers who are carried without consideration.

**Same — gross negligence — open switch.**

2. The leaving open of a switch leading to a side track at a time when a passenger train may be expected momentarily, without ascertaining the location of the train, is gross negligence, where the statute defines such negligence to be the want of slight care and diligence.

(May 18, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for San Bernardino County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. W. R. Miller, with Mr. J. W. McKinley, for appellant.

Messrs. L. M. Sprecher and Frank T. Bates for respondent.

Messrs. Warren Olney, Jr., and Alexander R. Baldwin, *amici curiae*, on petition for hearing in banc.

Angellotti, J., delivered the opinion of the court:

The plaintiff is the widow of one Henry F. Walther, who, while being carried on a passenger train of defendant on March 28, 1907, was killed by reason of the derailment of

undertaken, not for a consideration, but as a mere gratuity, the courts are not agreed as to the validity and effect of a stipulation against liability. Some hold that in such circumstances the carrier may properly stipulate against liability for injuries resulting from negligence, at least where the negligence is such as is commonly denominated "ordinary." Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Boering v. Chesapeake Beach R. Co. 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515; Duncan v. Maine C. R. Co. 113 Fed. 508; Holly v. Southern R. Co. 119 Ga. 767, 47 S. E. 188; Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 280; Toledo W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Jacksonville Southeastern R. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093 (point conceded); Illinois C. R. Co. v. O'Keefe, 63 Ill. App. 102, reversed on other grounds in 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294; Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 742; Indianapolis Traction & Terminal Co. v. Klentschy, 167 Ind. 598, 79 N. E. 908, 10 A. & E. Ann. Cas. 869; Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L.R.A. 491, 20 Atl. 1069; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 22 N. E. 205; Dugan v. Blue Hill Street R. Co. 193 Mass. 431, 79 N. E. 748; Wells v. New York C. R. Co.

such train and the consequent wrecking and demolition of the car in which he was being carried. The accident occurred in defendant's yard at Colton, in San Bernardino county, and was caused by the train on which deceased was riding running from the main track into an open switch at a high rate of speed, estimated by the trial court to be between 45 and 55 miles an hour, when, being unable to traverse the curve of the side track, it was derailed. The switch had been left open by the switch foreman, who, with his crew, was working on the siding at the time, and who had neglected to keep himself advised of the whereabouts of the train, which was long overdue, and had left the switch open in violation of the rules of the defendant. Deceased was an employee of

defendant, but at the time of the accident, and for some months next preceding the same, was absent on leave. At the time of the accident he was returning from a journey to an eastern state to his home in California. He was riding on a pass, good until March 31, 1907, which had been issued to him by defendant for the purposes of his journey. It was found by the trial court, in accord with a stipulation of the parties, that the pass was issued to him as an employee, "in accordance with the long-established practice of the company, and one well known to its employees, to furnish passes from time to time to its employees." There was no other consideration for such pass. It contained the following statements, subscribed by the deceased: "This is a free pass

24 N. Y. 181; Perkins v. New York C. R. Co. 24 N. Y. 190, 82 Am. Dec. 281; Ulrich v. New York C. & H. R. R. Co. 108 N. Y. 80, 2 Am. St. Rep. 369, 15 N. E. 60; Marshall v. Nashville R. & Light Co. 118 Tenn. 254, 9 L.R.A. (N.S.) 1246, 101 S. W. 419, 12 A. & E. Ann. Cas. 675; Muldoon v. Seattle City R. Co. 7 Wash. 528, 22 L.R.A. 794, 38 Am. St. Rep. 901, 35 Pac. 422 (subsequent appeal 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995); Peterson v. Seattle Traction Co. 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543; Annas v. Milwaukee & N. R. Co. 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282; Central Vermont R. Co. v. Franchère, 35 Can. S. C. 68; Sutherland v. Great Northern R. Co. 7 U. C. C. P. 409.

In Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, supra, holding that a condition in a free pass that the passenger will assume all risks of personal injury is not against public policy, the court said: "In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded, by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly, and it would seem sufficiently, reminded of his obligations to the public, in the most forcible and effectual manner, by the numerous claims and large verdicts in favor of those injured who travel for hire. Nor is the number of passes likely to be so great as to involve the public interest by an increase in the rates of fare."

In Knowlton v. Erie R. Co. 19 Ohio St. 260, 2 Am. Rep. 395, involving personal injury, 7 L.R.A. (N.S.)

juries to a person riding on a free pass, it was held that, while the rule was established in Ohio that a common carrier cannot, even by express contract, relieve itself from liability for injuries caused by his own negligence, or that of his servants in the discharge of the duties incident to their employment, the case must, in the circumstances, be determined by the laws of New York, which uphold such a stipulation.

And some cases uphold such a stipulation, at least so far as regards negligence on the part of the railroad company's servants. Kinney v. Central R. Co. 34 N. J. L. 513, 3 Am. Rep. 265, affirming 32 N. J. L. 407, 40 Am. Dec. 675; Wells v. New York C. R. Co. 24 N. Y. 181; Perkins v. New York C. R. Co. 24 N. Y. 190, 82 Am. Dec. 281.

In other jurisdictions it is held that, even where the pass is a mere gratuity, the carrier cannot stipulate against liability for negligence, or at least that a stipulation in general terms does not embrace injuries resulting from negligence. Mobile & O. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; St. Louis, I. M. & S. R. Co. v. Pitcock, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582; Griswold v. New York & N. E. R. Co. 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 Am. Rep. 360 (intimation); Bryan v. Missouri P. R. Co. 32 Mo. App. 228; Chicago, R. I. & P. R. Co. v. Collier, 1 Neb. (Unof.) 278, 95 N. W. 472; Pennsylvania R. Co. v. Butler, 57 Pa. 335; Camden & A. R. Co. v. Bausch, 4 Sadler (Pa.) 518, 7 Atl. 731 (*dictum*); Gulf, C. & S. F. R. Co. v. McGown, 65 Tex. 640; Missouri, K. & T. R. Co. v. Flood, — Tex. Civ. App. —, 70 S. W. 331; White v. St. Louis Southwestern R. Co. — Tex. Civ. App. —, 86 S. W. 962; Galveston, H. & S. A. R. Co. v. Bean, 45 Tex. Civ. App. 52, 99 S. W. 721; Williams v. Oregon Short Line R. Co. 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991 (intimation); Norfolk & W. R. Co. v. Tanner, 100 Va. 379, 41 S. E. 721.

This principle, as announced in Gulf, C. &

based upon no consideration whatever. The person accepting and using this pass, in consideration of receiving the same, agrees that the Southern Pacific Company shall not be liable under any circumstances, whether of negligence—criminal or otherwise—of its agents or others, for any injury to the person, or for any loss or damage to the property, of the individual using this pass; and that as to such person the company shall not be considered as a common carrier, or liable as such." This action was brought by plaintiff to recover the damage caused her by the death of her husband, being based upon § 377 of the Code of Civil Procedure, which provides that, when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs

or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such person. In her complaint she alleged that the accident and the consequent death of deceased were caused by the "gross negligence" of defendant, and these allegations were found by the trial court, which tried the case without a jury, to be true. Damages were assessed at the sum of \$8,000, and judgment was given in favor of plaintiff for that amount. This is an appeal by defendant from such judgment. The record on appeal was filed in this court on March, 29, 1910.

The ultimate question presented by this

*S. F. R. Co. v. McGown*, *infra*, III. a and II. b, was held to govern in the case of a private carrier, in *Sullivan-Sanford Lumber Co. v. Watson*, — *Tex. Civ. App.* —, 135 S. W. 635, involving a stipulation in a free permit to ride on a logging road.

Where the pass is deemed not to be a gratuity, as for instance when it is issued as a part of a contract, to an employee or other person in a similar relation, it is agreed among the cases coming within the scope of this note, that the carrier cannot, or by a general stipulation does not, relieve itself from liability for negligent injuries. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Whitney v. New York, N. H. & H. R. Co.* 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; *Dugan v. Blue Hill Street R. Co.* 193 Mass. 431, 71 N. E. 748; *Eberts v. Detroit, Mt. C. & M. C. R. Co.* 151 Mich. 260, 115 N. W. 43; *Dow v. Syracuse, L. & B. R. Co.* 81 App. Div. 362, 80 N. Y. Supp. 941 (holding stipulation not so plain and unequivocal as to embrace negligence); *Camden & A. R. Co. v. Bausch*, 4 *Sadler* (Pa.) 518, 7 *Atl.* 731 (decided according to law of New Jersey); *Buffalo, P. & W. R. Co. v. O'Hara*, 3 *Pennyp.* 190; *Nickles v. Seaboard Air Line R. Co.* 74 S. C. 102, 54 S. E. 255 (gross negligence); *Williams v. Oregon Short Line R. Co.* 18 *Utah*, 210, 72 *Am. St. Rep.* 777, 54 *Pac.* 991; *Peterson v. Seattle Traction Co.* 23 *Wash.* 615, 53 L.R.A. 586, 63 *Pac.* 539, 65 *Pac.* 543; *Harris v. Puget Sound Electric R. Co.* 52 *Wash.* 289, 100 *Pac.* 838; *Central Vermont R. Co. v. Franchère*, 35 *Can. S. C.* 68.

It is also held that a provision in a pass exempting the railroad company from liability for injuries resulting from the negligence of its agents and servants is of no effect as against a statute by which damages are given to the widow and next of kin of a passenger whose death results from the negligence of the company or its servants, at least where the recipient is to be regarded as a passenger for the reason that the pass was not a mere gratuity, but was furnished as a part of the consideration by which he was induced to enter the employ-

ment of the company. *Tingley v. Long Island R. Co.* 109 *App. Div.* 793, 96 *N. Y. Supp.* 865, citing with approval *Doyle v. Fitchburg R. Co. infra*.

And it was held in *Doyle v. Fitchburg R. Co.* 162 *Mass.* 66, 25 L.R.A. 157, 44 *Am. St. Rep.* 335, 37 *N. E.* 770, that conditions on the back of a ticket did not release the railroad company from liability for the penalty given by statute to the widow and children and next of kin of a passenger or employee injured by the gross negligence or carelessness of the servants of the company. In this case the ticket was being used by a railroad employee to whom was issued monthly a ticket good for more rides than necessary in attending to his work, and containing the express privilege of using them for his own private interest or pleasure, and at the time of the accident he was riding entirely for his own pleasure; and it was held that he was not at that time an employee, but a passenger within the meaning of the statute, the court giving as one reason why he should be regarded as a passenger that the ticket furnished a part of the consideration by which he was induced to enter the employment of the defendant. In *Doyle v. Fitchburg R. Co.* 166 *Mass.* 492, 33 L.R.A. 844, 55 *Am. St. Rep.* 417, 44 *N. E.* 611, involving an action for personal injuries, based on the same state of facts, the court declared that in view of the former decision, the deceased must be regarded as having been a passenger, and held that therefore the condition on the ticket was ineffectual to exempt the railroad company from liability for the negligence of its servants.

It has been held that conditions on the back of a void pass are without effect upon the rights of the person attempting to use it for transportation. *McNeill v. Durham & C. R. Co.* 135 *N. C.* 682, 67 L.R.A. 230, 47 *S. E.* 765 (forbidden by statute). And see *Buffalo, P. & W. R. Co. v. O'Hara, infra*, III. a.

While, on the contrary, it has been held that a person who is bound by a stipulation on a free pass that the carrier shall not be liable for injury to him through the negli-

appeal is whether the provision in the pass purporting to exempt defendant from liability for the negligence of its agents precludes a recovery under the circumstances of this case.

Independent of statutory provisions, it is almost universally held that any contract purporting to exempt a common carrier of persons from liability for negligence of himself or his servants to a passenger carried for compensation is void, as being against public policy; and it is immaterial in such cases that the attempted limitation on such liability is agreed to by the passenger in consideration of special concessions in the matter of rate of fare or other departure from the rules applicable to passengers pay-

ing full fare. It is enough that there is any consideration for the carriage.

The person admitted to his vehicle by a common carrier, for the purpose of carriage, for any compensation, is a passenger, with all the rights possessed by any passenger so far as the exercise of care for his safe carriage is concerned. By the great weight of authority, however, in the absence of provision to the contrary, such a contract of exemption from liability for negligence is upheld, at least so far as any except what is called in the opinions wanton or wilful or gross negligence is concerned, in the case of a passenger who is carried solely as a matter of favor, and without any compensation, or advantage whatever to the carrier. See *Northern P. R. Co. v. Adams*,

gence of its servants or otherwise is estopped to assert that the pass was issued to him in violation of law, as a means of escaping the effect of the stipulation. *Muldoon v. Seattle City R. Co.* 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995.

As to the liability of a carrier to passengers traveling on passes or contracts contrary to statutory or constitutional provisions, see the note to *Bradburn v. Whatcom County R. & Light Co.* 14 L.R.A. (N.S.) 526.

As to whether a pass issued as a part of the consideration for a contract is within a statute prohibiting free transportation of passengers, or discrimination in passenger rates, see the note in 23 L.R.A. (N.S.) 217.

As to refusal to give effect to foreign contract exempting carrier from liability, see the note in 5 L.R.A. (N.S.) 425.

## II. Degree or nature of negligence.

### a. Degree.

In this connection, see also *Doyle v. Fitchburg R. Co.* supra, I.; *Rose v. Des Moines Valley R. Co.* and *Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co.* infra, III. a.

As to the degree of care owed to a free passenger in the absence of a stipulation upon the subject, see the note to *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A. (N.S.) 721.

In *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260, it is held that an agreement that the recipient of the gratuitous pass assumed all risk of accident, and that the company should not be liable in any circumstances, while not exempting the railroad company from the gross negligence of its employees, did exempt it from all other species or degrees of negligence not denominated gross, or partaking of the character of recklessness. This case was cited as controlling in *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613.

And in *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 360, it is held that a stipulation in a free pass that the recipient assumes all risk of accident, and agrees that the company shall not

be liable for any injury whether through negligence of its agents or otherwise, does not protect the railroad company in case of gross negligence. The court in effect points out that since, in the absence of such a stipulation, a carrier owes the same care to a gratuitous passenger as to a passenger for hire, the rule that a carrier cannot exempt itself by contract from liability for injury to a passenger should with equal force apply to a gratuitous passenger. And although it appears in the case that the accident was caused through gross negligence, the court seems inclined to repudiate any distinction between different degrees of negligence, so far as regards the relation of carrier and passenger.

Likewise, in *Pennsylvania R. Co. v. Butler*, 57 Pa. 335, it appeared that the lower court charged the jury that even if the deceased was riding on a free pass and had signed the release on the back of it, the company would not be excused if the death occurred from the gross negligence of any of the employees of the road; but the supreme court contented itself with merely saying that a stipulation by a common carrier that he shall not be liable for damages does not relieve him from responsibility for actual negligence of himself or servants, and cited, among other cases, *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315, which, as elsewhere noted, involved the right of one riding upon a drover's pass.

In *Nickles v. Seaboard Air Line R. Co.* 74 S. C. 102, 54 S. E. 255, the court upheld a charge to the jury that a railway cannot make a binding contract with a free or gratuitous passenger to relieve itself from liability for injuries received by such passenger on account of gross negligence, as against the objection by the railway company that it could make a valid contract which would relieve it of liability for injuries resulting from negligence, gross negligence, and all other acts except such as were wilful or wanton in their nature. In upholding this charge, the supreme court cites a provision of the state Constitution that it shall be unlawful for any railway company to make any contract relieving it

192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069; Quimby v. Boston & M. R. Co. 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; Kinney v. Central R. Co. 32 N. J. L. 407, 90 Am. Dec. 675; Muldoon v. Seattle City R. Co. 7 Wash. 528, 22 L.R.A. 794, 38 Am. St. Rep. 901, 35 Pac. 422; Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472.

We think that the question of public policy in regard to such contracts of exemption, even as to passengers carried gratuitously, has been settled in this state by legislative enactment. Section 2175 of the Civil Code provides: "A common carrier cannot be exonerated by any agreement made in anticipation thereof, from liability for the

gross negligence, fraud, or wilful wrong of himself or his servants." Aside from the question of the meaning of the term "gross negligence" as used in this section, it is earnestly contended that the section has no application in the case of one carried without consideration of any kind, and that as to such a passenger the carrier is not a common carrier at all. We are of the opinion that the question of consideration cuts no figure in determining the applicability of the section. Section 2168 of the Civil Code contained in the same chapter, which is entitled "Common Carriers in General," declares that "every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to

of its common-law liability or limiting the same in reference to the carriage of passengers. But whereas the lower court in its charge seemed to regard the pass as gratuitous, the supreme court based its position principally upon the ground that the pass was not a free pass, but issued upon a consideration, it having been exacted from the company by the husband of the person injured, who was an employee of the company, as a condition of his going to the destination named in the pass to testify in an action in which the company was interested. So really this case holds only that a railway company cannot stipulate against liability for injury through gross negligence to a person whom it transports for a consideration.

It is held in *Marshall v. Nashville R. & Light Co.* 118 Tenn. 254, 9 L.R.A. (N.S.) 1246, 101 S. W. 419, 12 A. & E. Ann. Cas. 675, that wilful, reckless, or wanton neglect is necessary to render a carrier liable for injuries to a person riding upon a gratuitous pass in which he assumes the risk of injury.

In *Jacksonville Southeastern R. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093, it was conceded that under a provision in a pass that the person accepting it assumed all risk of accident, the user could recover only by proving that he received his injury through the gross negligence of the defendant.

The last case was cited with approval in *Illinois C. R. Co. v. O'Keefe*, 63 Ill. App. 102, which was reversed on other grounds in 168 Ill. 115, 39 L.R.A. 148, 61 Am. St. Rep. 68, 48 N. E. 294, the case involving a stipulation in a free pass providing that the recipient assumed all risk of accident, and agreed that the company should not be liable for injury in any circumstances.

And it is held in Wisconsin that a stipulation in a gratuitous pass that the user assumes all risk of accident, and agrees that the company shall not be liable in any circumstances whether of negligence of their agents or otherwise, relieves the company from liability occasioned by the negligence of its servants, unless such negligence

amounts to recklessness which is dangerous to human life, or is punishable by law, or inconsistent with good morals. *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282. And the court further declared in this case that the carrier cannot stipulate against any negligence of its servants or agents which is expressly made a crime, even though such negligence may not be of that degree which is denominated gross carelessness or recklessness.

On the other hand, the Connecticut court takes the view in *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261, that public policy does not forbid a carrier from stipulating in a gratuitous pass that the person accepting it shall assume all the risk, and that the company shall not be liable in any circumstances, whether the accident occurs by the negligence of its agents or otherwise, and that such a stipulation includes gross negligence on the part of the servant, at least where the company is guilty of no actual fault. The court pointed out that this was not a case in which a party had stipulated for exemption from the legal consequences of his own negligence, but only one in which he stipulated against a liability for imputed negligence, when there was no actual fault on its part, or in other words, that, so far as the application to that case was concerned, the stipulation was merely for a waiver of the rule of *respondent superior*, which was not forbidden by public policy, and that, of course, the waiver of this rule applied as well to gross negligence on the part of the servant, as to the failure to exercise ordinary care. It may be well to note that in this case the person injured was the employee of the railway restaurant keeper, to whom the railway company issued a pass for the purpose of selling provisions on the train, but at the time of the injury, the person using the pass was not engaged in his business, but was riding for private purposes, and the court held that under the circumstances the pass should be regarded as a gratuity.

So, in *Holly v. Southern R. Co.* 119 Ga. 767, 47 S. E. 188, which upholds a stipula-



carry," and, of course, the defendant was under this definition a common carrier of persons. As such, under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration.

But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding

tion in a gratuitous pass that it issued only on condition that the person accepting it assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, the stipulation is apparently regarded as relieving the company from liability even for gross negligence, for the court says that if, as has been held by other Georgia cases, a railroad company, acting in its public capacity as a common carrier, may, by special contract, relieve itself from liability for any but gross negligence, it may, as a consideration for doing something which it is under no obligation to do, and in the performance of which it would in no circumstances be liable for anything less than gross negligence, require that it shall in the event of loss or damage be held liable under no circumstances whatever.

In some jurisdictions the courts are inclined to deny that there is any distinction between "ordinary" and "gross" negligence, at least so far as the delinquency of the carrier's servant is concerned.

This distinction has been repudiated in England. Thus, it is to be observed that in *McCawley v. Furness R. Co.* L. R. 8 Q. B. 57, 42 L. J. Q. B. N. S. 4, 27 L. T. N. S. 485, 21 Week. Rep. 140, 4 Moak, Eng. Rep. 218, involving a drover's pass, it was held that a provision that the recipient should travel at his own risk included all negligence for which the railroad company would be liable in the absence of a stipulation, it being said that negligence, even gross, was the very thing which the contract stipulated that the company should not be liable for. It was added that wilful negligence, whatever that might mean, could not carry the case any further, especially since the company would not be liable for a wilful act of commission by a servant, though it would be liable for his gross negligence, meaning doubtless in the absence of a stipulation.

Some of the American cases which look askance at this distinction uphold the stipulations in the passes, and therefore inferentially, at least, lean toward the position

the exemption from liability for negligence provision in the case of a passenger carried gratuitously. See *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in *Sessions v. Southern P. Co.* 159 Cal. 599, 114 Pac. 982, a mere trespasser on the vehicle.

The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would

that the stipulation relieves the carrier from all negligence of servants.

Thus, in *Wells v. New York C. R. Co.* 24 N. Y. 181, the court said that the terms "negligence," "ordinary negligence," and "gross negligence" had their origin in the rules of law as fixed in regard to bailments generally, and not in regard merely to the duty of common carriers, since they were held responsible for any and every degree of negligence. It was stated that a naked depositary without reward was responsible only for gross negligence, and that gross negligence in that use of the terms was considered as evidence of fraud. So, the court goes on to argue that the term "gross negligence" as used in the law has a technical meaning which is not properly applicable to those acts of servants of a corporation for which the corporation is responsible, though, as between their acts which are slightly negligent and those which are very negligent, there is no different rule of responsibility, and that it is the fact of negligence (mere negligence), and not its degree, which incurs the liability. In short, the view of the court is that a stipulation in a gratuitous pass, relieving a carrier from liability for injuries occasioned by the negligence of its servants, has reference to all negligence of servants, and that gross negligence means some delinquency of the master. Whether the stipulation against liability for negligence embraces gross negligence, as the term is thus used, is not decided. *Perkins v. New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281, which also upholds a similar provision relieving the railroad company from liability for injuries through the negligence of its servants, holds that the term "negligence" is used in its generic sense, and that it embraces all negligence of employees. The court evidently takes a different view as to what the terms "ordinary negligence" and "gross negligence" as applied to this situation really mean, than that expressed in the *Wells Case*, for it is declared in the *Perkins Case* that the term "negligence" in the provision in the stipulation embraces gross negligence

a special reduction in the amount of compensation charged, or a special concession as to some other authorized requirement, accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law. Other sections of our Civil Code permit such limitations as to certain matters not here involved, but § 2175 expressly prohibits limitations of liability for gross negligence on the part of the common carrier or his servants, whatever, as we read the various sections bearing upon this matter, may be the terms upon which it receives and undertakes to carry a passenger.

This brings us to a consideration of the

question of the meaning of the term "gross negligence," as used in § 2175 of the Civil Code, for under the views already stated the exemption provision in the pass of deceased was not effectual to free defendant from liability for damages resulting from "gross negligence" of the defendant or its servants, within the meaning of the term "gross negligence" as used in said section. The contention of learned counsel for defendant is that these words, in the connection in which they are used, imply something in the nature of wilful wrong, and do not include anything in the nature of a mere omission to exercise care, without knowledge that such omission will probably result in injury to others. Section 2175 was, as it now stands, a part of the original Civil Code adopted in the year

as well as inferior negligence, the court assuming the propriety of making such a distinction, which at a later point in the decision is denied, the court saying that where negligence, as in this case, is expressly mentioned and stipulated against in the contract, no exemption can be made to the force and effect of the contract, based upon a distinction in the degrees of negligence. "The difficulty of defining gross negligence," says the court, "and the intrinsic uncertainty pertaining to the question as one of law, and the other impracticability of establishing any precise rule on the subject, renders it unsafe to base any legal decision on distinction of the degrees of negligence. Certainly before cases are made to turn by the verdict of juries, upon any such distinction, the judges should be able to define, with some precision, what they mean by gross negligence, slight negligence, and ordinary negligence." It should be noted that the court was discussing the negligence of servants, and it therefore, like the Wells Case, leaves open the question whether the stipulation would relieve the company from liability for its own negligence as distinguished from that of its servant.

In *Kinney v. Central R. Co.* 34 N. J. L. 513, 3 Am. Rep. 265, affirming 32 N. J. L. 407, 90 Am. Dec. 675, it is said that the case was not burdened with any consideration of degrees of negligence, inasmuch as the jury found negligence upon the part of the servants of the company, as distinguished from that of the company itself, and that, in the absence of proof to the contrary, the negligence of the servants must be presumed to be ordinary negligence; but nevertheless the court took occasion to express its doubt whether the matter of degrees of negligence was important in its legal effect, except so far as it might be evidence of bad faith. The holding of this case, as elsewhere shown, is that a stipulation in a gratuitous pass by which the recipient assumed the risk of accident, and agreed that the company should not be liable in any circumstances, whether by reason of the negligence of its servants or otherwise, was valid and binding, at least so

far as concerned the ordinary negligence of servants. As shown by a quotation from the opinion of the lower court in this case in 32 N. J. L. 407, 90 Am. Dec. 675, set out *infra*, II. b, that court goes more fully into the discussion, and sees a possible distinction, so far as this question is concerned, between negligence of the company proper and negligence of its servants.

In *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205, the court called attention to the fact that in some cases it has been held that while a carrier cannot limit his liability for gross negligence, which is said to have been defined as the carrier's own personal negligence, he can contract for exemption from liability for the negligence of his servants; but a doubt is expressed whether any such distinction in degrees of negligence in respect of the right of a carrier to exempt himself could be profitably made or employed. And again, in this case as in others, the court is careful to point out that the injury complained of occurred through the negligence of servants, and not through any failure on the part of the corporation to prescribe proper rules or to furnish proper appliances for the conduct of its business.

In a similar manner, other cases which also repudiate the distinction, but deny that the stipulation against liability is binding are to be regarded as actually or essentially supporting the position that the carrier cannot stipulate against liability for negligence of any kind or degree.

Thus, in *Bryan v. Missouri P. R. Co.* 32 Mo. App. 228, in which the court apparently deemed a free pass providing that the recipient assumed all risk of accident, as broad enough, if valid, to embrace negligence, the court held that it was against public policy for a carrier so to limit its liability for negligence even in the case of a free passenger, and said that whatever might be the rulings in other jurisdictions, it was settled in Missouri that any negligence of a carrier in respect of the transportation of a passenger was gross negligence, or in other words, that there were

1872. This Code contained two sections declaring that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that "which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance," and "gross negligence" was defined as that "which consists in the want of slight care, and diligence." Sections 16 and 17. These sections were repealed outright in 1874, but such repeal cannot affect the question of the construction of the words "gross negligence" in § 2175 of the Civil Code, as it is the intention of the legislature at the time of the adoption of the latter section that must control.

We see no warrant for holding that the term "gross negligence" as used therein was intended to mean other than the "gross negligence" defined in § 17 of the same act "to Establish a Civil Code," which was simply "the want of slight care and diligence." This must necessarily have been the view of this court in *Donlon Bros. v. Southern P. Co.* 151 Cal. 763, 766, 11 L.R.A. (N.S.) 811, 91 Pac. 603, 12 A. & E. Ann. Cas. 1118, for an examination of the record shows that there could have been no other ground for the expression of opinion "that there was sufficient evidence in the case warranting the jury in finding that the defendant was guilty of gross negligence occasioning the loss and injury complained of." It was also recognized in *Merrill v. Pacific Transfer*

no degrees of negligence where the passenger was without fault.

And in *Pennsylvania Co. v. Purvis*, 128 Ill. App. 367, the court inclines to the view that no distinction should be made between gross and ordinary negligence, stating that in every case the negligence, however it be denominated, is failure to bestow the care and skill which the situation demands, and is more accurately called mere negligence; and in respect of a stipulation in a free pass providing that the recipient assumed all risk of accident, which was evidently regarded by the court as intended to relieve the company from liability for negligence, the court stated clearly, although in general terms, that a railroad company cannot by contract exempt itself from liability for negligence; and little, if any, stress is laid upon the fact that the plaintiff was transported upon a free pass. But these general statements lose some of their force by reason of the fact that the real ground of the decision was that the recipient of the pass was an infant, who was therefore entitled to disaffirm the contract.

In *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L.R.A. 491, 29 Atl. 1069, holding that a stipulation in a gratuitous pass, that the recipient will assume all risk of personal injury, is effectual to exonerate the carrier from liability for the negligence of his servant, it was stated that the negligence of the carrier in the case could not reasonably be claimed to be gross, and that therefore the court had no occasion to draw distinction between the degrees of negligence, even if such a distinction is deemed legal and practicable in any case.

#### ***b. Carrier's and servant's negligence distinguished.***

In this connection, see also *Wells v. New York C. R. Co.*; *Perkins v. New York C. R. Co.*; and *Griewold v. New York & N. E. R. Co.*,—*supra*, II. a.

In *Yazoo & M. Valley R. Co. v. Grant*, 86 Miss. 565, 109 Am. St. Rep. 723, 38 So. 502, 4 A. & E. Ann. Cas. 556, the court indicated its opinion, that a provision in § 37 L.R.A. (N.S.)

a free-trip pass issued to an employee, that the recipient agreed not to hold the company liable for injuries under any circumstances, did not relieve the carrier from liability for injuries arising in consequence of its own negligence,—by citing, and following without discussion, the case of *Illinois C. R. Co. v. Crudup*, 63 Miss. 302, as holding that a release of the carrier from liability for negligence of its servants will not affect its liability for damages arising in consequence of its own negligence, and as basing its decision upon the ground of a want of consideration for the waiver of the damages, and the violation of public policy. It should be noted, however, that the latter case involved a pass issued to a mail clerk, and therefore does not come within the scope of this note.

In *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675, which is affirmed in 34 N. J. L. 513, 3 Am. Rep. 265, and holds that a stipulation in a gratuitous pass by which the recipient assumes all risk of accident, and agrees that the company shall not be liable in any circumstances, whether by reason of the negligence of the company's servants or otherwise, is valid and binding, at least so far as concerns negligence of employees, the court indicates the possibility of a distinction between negligence of the company and that of its servants, in the following language: "Nor does the objection that this contract is not consistent with good morals or sound policy appear to me of much weight. This consideration was urged on the argument in rather a wider form than the facts will warrant, for the proposition was that it is pernicious and immoral to allow a person to contract for a discharge from the effects of his own negligence. But the question to be decided is narrower, the case showing merely the presence of negligence in the servants of the defendants, but none whatever in the defendants themselves. Consequently, we have to do simply with the more limited proposition. Does the law prevent a person, in a matter not connected with any public employment, to stipulate for an immunity from the results of the

Co. 131 Cal. 582, 589, 63 Pac. 915, upon evidence that was utterly destitute of anything in the nature of a showing of wilful or wanton wrong, that the question whether or not the common carrier was guilty of gross negligence was one for the jury to pass upon under proper instructions. But regardless of these expressions of opinion, both of which were made under such circumstances that they may reasonably be claimed not to constitute binding authority on the question, we are satisfied that the definition of the "gross negligence" of § 2175 of the Civil Code must be found in §§ 16 and

17 of the Civil Code, as the same were adopted in 1872.

Accepting this definition of gross negligence, it cannot reasonably be contended that the evidence was not legally sufficient to support the finding of the trial court that the deceased was killed by the gross negligence of defendant's servants. The question of the existence of such gross negligence was one for the trial court, and, the facts being legally sufficient to warrant the inference drawn, an appellate court cannot properly disturb the conclusion reached by that tribunal.

omissions or oversights of his own agents. Now I think it will be plain to anyone who will survey this ground, that there is nothing in natural justice which would hold the master responsible for the negligence of his servant. With relation to the moral code, a man performs, in this particular, his whole duty when he exercises proper prudence and care in the selection of competent agents to conduct his affairs. The rule of *respondent superior* is one of great severity, and has been adopted, not from its intrinsic equity, but from its general convenience. It subsists, incontestably, as an established legal technicality. Can it not be waived, and another rule adopted on any special occasion, between party and party? I confess to an entire inability to comprehend the force of the objections to this being done. The fallibility of all human agency is an imperfection not to be eliminated from any transaction dependent on the employment of such means. In the absence of an express contract, the law, in order to lay down a fixed rule, throws the liability on him who employed the agent; but what, in the nature of the transaction, is there, which should prevent any party contracting with such principal to take on himself the risk of the servant's misconduct. It was suggested that the tendency of any exemption of the principal would be to remove from common carriers one of their motives to exercise care in their business; but the two-fold answer is, first, that the present discussion does not, as has been already shown, relate to the contract of a common carrier; nor, second, does it involve any consideration of the misconduct of the principal. The whole question being whether the master may not avoid the consequences, not of his own, but of his servant's, omissions. The contract before us, so far as its terms are at present involved, did not contemplate the introduction into the affair of any element of danger which was not necessarily inherent in it,—that is, the fallibility of human conduct, over which the carrier had no control. The transaction is virtually this: The carrier says to the passenger, 'I have employed careful and skilful men to manage my locomotive and cars; but they are human, and they may fail in their duty, to your danger.' The passenger says: 'In consideration of a free passage, I will run that risk.' The 37 L.R.A. (N.S.)

bargain is struck on these grounds, and I am clear that it would be a great refinement to impeach it as being prejudicial to public interests."

But in *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, involving a pass providing that free passengers assume all risk of accident to their persons and property, and invoking the principle that a carrier cannot so contract as to relieve itself from liability for injuries from its negligence or that of its servants in the course of their employment, the court declares that the distinction made in the New York and New Jersey cases, between negligence of the corporation and negligence of employees, has no solid foundation in reason or public policy, and argues that since, in the nature of things, every corporation must act solely through agents, and since, therefore, the negligence of the agent as to matters within the scope of his employment is the negligence of the corporation itself, it should make no difference in so far as duties and liabilities to persons transported is concerned, whether such person was transported free or for a consideration.

In *Duncan v. Maine C. R. Co.* 113 Fed. 508, holding that one cannot recover for injuries received while riding on a free pass issued to him upon the condition that he assume all risk of accident, and that the railway company should not be liable under any circumstances whether by negligence of its servants or otherwise, where he assented to such conditions, and the injury was due to the negligence of the railway company's servants, the court refused to state its opinion as to whether the condition would have covered negligence of the railroad company as distinguished from that of its servants.

### III. Relation and status of parties.

#### a. In case of gratuity.

In this connection, see also *Central Vermont R. Co. v. Franchère*, *infra*, III. b, 1; *Williams v. Oregon Short Line R. Co.* *infra*, III. b, 2; and *Holly v. Southern R. Co.* *supra*, II. a.

One line of reasoning in the determination of this question involves the inquiry whether the relation of carrier and passengers exists in the transportation of persons

The conclusion we have arrived at upon the points already discussed renders it unnecessary to consider other questions argued in the briefs, and compels an affirmance of the judgment.

The judgment is affirmed.

Sloss, J., and Shaw, J., concur.

A petition for rehearing in banc was denied.

Beatty, Ch. J., dissenting (June 21, 1911):

I think this case deserves further consideration, not because I am convinced that

the judgment of the superior court is erroneous, but because the decision here is based upon a ground which will include cases affected by considerations different from those which may properly be deemed controlling in this case. It is held in the opinion of the court that, no matter how entirely gratuitous the transportation of a passenger may be, he can never bind himself, in consideration of such transportation, to waive any claim for damages based upon the gross negligence of a common carrier or his servants. It is in my opinion unnecessary to lay down so broad a rule in order to sustain this

upon passes containing stipulations against liability for injuries. There are numerous cases which expressly or essentially discuss this matter, and they are about evenly divided on the question.

On the one hand, it is held that the rule forbidding carriers to limit their liability for injuries caused by the negligence of their employees applies as well to free passengers as to passengers for hire. *White v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 86 S. W. 962, citing *Gulf, C. & S. F. R. Co. v. McGown*, *infra*, this subdivision.

In a comparatively early Alabama case, it was held against public policy for a carrier to contract for exemption from liability by reason of the negligence of itself or its servants. *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607. The court said that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well after it is once entered upon, for it has been regarded a sound law that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it, and that, in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence or wilful default or tort of itself or its servants, than he can when he receives a reward for the service, both alike being prohibited by a sound public policy which also forbids a gratuitous bailee, who is not bound by the consideration of public duty attached to the office of a common carrier, to stipulate that he may be fraudulently negligent or safely dishonest.

And in *St. Louis, I. M. & S. R. Co. v. Pitcock*, 82 Ark. 441, 118 Am. St. Rep. 84, 101 S. W. 725, 12 A. & E. Ann. Cas. 582, the court construed a provision in a free pass, that the person transported should assume all risk of accident and damage without claim upon the company, to have been intended to exempt the company from liability for accidents caused by the negligence of its servants or otherwise, and, as so construed, it was held to be against public policy. From the decision it is fairly clear that the court preferred to place its decision expressly upon the ground of

public policy, rather than upon the ground that such a provision violated a clause of the state Constitution providing that all railroads operated in the state should be responsible for all damages to persons and property under such regulations as might be prescribed by the general assembly, and a statute providing that all railroads operated in the state should be responsible for all damages to persons and property done or caused by the running of its trains. In reaching this conclusion, the court disapproved of decisions of the United States Supreme Court in the following language: "We cannot agree with the court and the learned justice who wrote its opinions in *Northern P. R. Co. v. Adams*, and *Boering v. Chesapeake Beach R. Co.* [see *infra*, this subdivision], that 'no public policy was violated' by a contract like the one under consideration, and that to so rule but conforms the law 'to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.' That view ignores the duty to the public which railroad corporations virtually undertake to perform when they receive their charters. By virtue of these, they have vast privileges of monopoly in transportation, and the absolute right of eminent domain. They owe in turn the duty to exercise ordinary care which, in the case of passengers, is the highest degree of care that a person of ordinary prudence would exercise, consistent with the mode of conveyance and the proper conduct and management of the business, to see that their passengers are furnished safe and comfortable transportation. They cannot escape this duty. They cannot buy immunity from liability for a failure to discharge it by reduced fare or free transportation. The passenger cannot relinquish the rights which the law gives him, in consideration of gratuitous passage. It is not a question of benevolence and hospitality on the part of the carrier in giving, nor the violation of moral obligation on the part of the passenger in receiving, without being bound by the terms of the agreement upon which the gratuity was

judgment. The fact that the pass in question here was issued to an employee of the defendant, in accordance with its long-established and well understood practice, would warrant the conclusion that his transportation was not purely gratuitous; for it is reasonable to suppose that the privilege of free transportation to employees would in many, if not in all, instances, affect the terms upon which men would be willing to enter, or to continue in, the service of a railway corporation, and would in the long run result in a considerable pecuniary advantage to the company,—an advantage imposing a corresponding obligation to issue the pass when requested.

In this view the issuance of a free pass to a railway employee rests upon a valuable

consideration. But there are many other classes of persons, as for example sick, destitute, or homeless, but deserving, persons, to whom railway companies and other common carriers are permitted to issue free passes, and for whom they do provide transportation for no consideration except the promptings of common humanity. Certainly there is no justice or sound policy in a law which sets a premium on inhumanity by warning a person otherwise disposed to extend relief to one in dire need of it, that he can only obey the promptings of compassion at the risk of serious pecuniary loss. But that is what our law of common carriers does if it has been correctly construed in the broad declaration that "on whatever terms a common carrier of persons voluntarily receives

offered and accepted. The question is one of public duty, which the state as *parens patriæ*, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens, to see that they are protected from injuries resulting through the negligence of the public carrier or his servants, is the same whether such citizen be a gratuitous passenger or a passenger for hire."

And in *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246, it is held that a carrier cannot stipulate against liability for injuries, at least where they are caused by gross negligence, and the statute provides that every railroad company shall be liable for all damages sustained by any person in consequence of any neglect of the agents or other employees of the corporation, to a person sustaining such damage, "all contracts to the contrary notwithstanding." While the court does not expressly discuss the applicability of this statute to persons riding on free passes, the result indicated was nevertheless attained, although in a roundabout way. In the first place, it was contended that inasmuch as the statute provided that the company should be liable for all damages sustained by any person, "including employees of the company," it must be deemed to have been intended to place employees on the same basis as persons who were not employees of the company, and to protect employees from the effect of contracts exacted of them when they entered the employment. But the court held that passengers were entitled to the protection of the statute as well as employees; and it was declared that even if this were not so, the same result was demanded under another statute providing that in the transportation of persons by any railroad company, no contract should exempt the railroad from the full liabilities of a common carrier which would exist in the absence of contract. Then the railroad company made the point that the relation of carrier and passenger did not exist, but the court held that the payment of fare

was not essential to create that relation, and that, as a matter of fact, such relation did exist. In support of this position the court cited *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, holding that one who was injured while riding on a passenger train, through the negligence of the railway company's servant, was entitled to recover notwithstanding the plaintiff was a stockholder in the company, riding by invitation of the president, paying no fare, and not in the usual passenger car. The case cited did not involve any stipulation against negligence, but was cited merely in support of the proposition that the payment of fare is not necessary to the relation of carrier and passenger; but it cannot fairly be said that this position was taken by the United States Supreme Court, for it declared in that case that the liability of the defendant for the negligent and injurious act of its servant was not necessarily founded on a contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other, and that, on the other hand, the maxim of *respondent superior*, which makes the master liable for the act of his servant, applies entirely irrespective of contract, express or implied, or any other relation between the party injured and the master. And when the fact, as elsewhere shown in this note, is noted that the United States Supreme Court in a later case (*Northern P. R. Co. v. Adams*, *infra*, this subdivision) declared that where the recipient of a gratuitous pass assents to the conditions therein described, the relation of carrier and passenger does not exist, the defection in *Rose v. Des Moines Valley R. Co.* is sufficient to warrant the statement that the question is still an open one in Iowa so far as that case is concerned.

In *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, Gil. 110, 18 Am. Rep. 360, the court, in holding that a stipulation in a free pass, relieving the railroad company from liability for injuries through negligence or otherwise, does not protect the railroad company in case of gross negligence, points out in effect that since, in

and carries a person, the relation of common carrier and passenger exists." This proposition is only partly true, and the particular in which it falls short of the truth is precisely that element in the ordinary relation of carrier and passenger which takes the case of purely gratuitous transportation out of the operation of § 2175 of the Civil Code. The definition of common carrier found in § 2168 of the Civil Code comes no nearer defining the relation of carrier and passenger than the definition of lawyer would to defining the relation of attorney and client. What the true relation is in either case is to be gathered from those provisions of the statute which prescribe the mutual rights and duties of the parties. It is the duty of a common carrier to provide

transportation for passengers, and the right of the passenger to be transported, but only on condition that the passenger pays the regular fare. Civil Code, §§ 2169-2173. If the person desiring transportation cannot pay, and stands in no relation to the carrier which gives him a right to demand free transportation, the carrier owes him no duty, and in granting him free transportation as a mere bounty, he steps out of his character as a common carrier, and deals with him in a relation essentially different from the legal relation of common carrier and passenger. If, in such case, the carrier requires a waiver of claims for damage, it is absurd to suppose that he is craftily bargaining for exemption from any claim based upon his wilful torts or meditated fraud.

the absence of stipulation, a carrier owes the same duty to a gratuitous passenger as to a passenger for hire, the rule forbidding the company to exempt itself from liability for negligence should likewise apply to free passengers as well as passengers for hire.

And following the *Jacobus Case*, the court in *Bryan v. Missouri P. R. Co.* 32 Mo. App. 228, holds that, notwithstanding a provision in a free pass that the recipient assumed all risk of accident, the relation of carrier and passenger existed.

In *Camden & A. R. Co. v. Bausch*, 4 Sadler (Pa.) 518, 7 Atl. 731, which in the circumstances is controlled by the laws of New Jersey, and holds that a railroad company cannot stipulate against liability for injury to one whom it transports on a pass issued under a contract in connection with the maintenance, by the recipient of the pass, of a pleasure resort on the line of the railway company, since the pass, in such circumstances, is founded on a valid consideration,—the court takes occasion to say that in the circumstances of the case the stipulation would not relieve the railroad company from liability for negligence in Pennsylvania, even though the pass used was free in its fullest sense; and cites *Bufalo, P. & W. R. Co. v. O'Hara*, 3 Pennyp. 190, as holding that a stipulation in a pass providing that the recipient assume all risk of accident would not relieve a railway company from liability from negligence in Pennsylvania, though the pass was free in its fullest sense. As a matter of fact, the lower court in the *O'Hara Case* did instruct the jury that such a provision did not exempt the defendant from liability for injuries sustained in consequence of negligence of the defendant's servants, and the jury were also told, in respect of the fact that the recipient of the pass was the wife of an employee, that she herself was not an employee, but a passenger. In affirming the lower court, the supreme court used the following language, which is the entire opinion: "A common carrier cannot protect itself by special contract from liability for negligence. Against his extraordinary liability as a common carrier, he may pro-

tect himself by such a contract, but not from his liability as a simple bailee. Such is the well-settled law of this commonwealth. It may be well doubted whether the proviso in this pass, being against accidents, can be held applicable to all cases where the injury has resulted from negligence. If the free pass in this case was unlawful, the conductor should not have demanded the regular fare, and his not doing so did not make *O'Hara* or his wife trespassers, or destroy their rights as passengers." So it is not clear whether this case bases its decision upon the ground that, although the pass may have been invalid, it was too late for the railroad company to object, and that the plaintiff should be regarded as a passenger on a valid pass stipulating against liability for accident, and that the stipulation was void, or at least did not apply to negligence; or that, notwithstanding the invalidity of the pass, the plaintiff was rightfully on the train, and was to be regarded as a passenger, unaffected by any stipulation.

In *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, involving a free pass providing that the recipient assumed all risk of accident, and holding that a public carrier cannot so contract as to relieve itself from liability for injury to a passenger by reason of its own negligence or that of its servants, it is declared that public policy forbids a railway company to lay down its character as a passenger carrier, which the law, as well as the nature of the employment in which it engages, fixes upon it, and become a mere private carrier. It is argued that while the relation of passenger and carrier is created by contract, express or implied, it does not follow that the extent of liability or responsibility of the carrier is in any respect dependent upon contract. "In reference to matters indifferent to the public," says the court, "parties may contract as they please; but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established by statute or the common law, whereby certain duties have been attached to given

No agreement would shield him from such claims, and, since he could make no profit out of the free transportation of a passenger, a motive for such an elaborate contrivance is hard to imagine. But that he should desire to be exempt from claims based

upon the mere forgetfulness, ignorance, or unskillfulness of himself or his servants, is natural and entirely justifiable. To say that a common carrier, merely because he is a common carrier, cannot in such circumstances stipulate as freely for exemption

relations and employments. These duties attach as a matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him in the course thereof; and this is so for the public good. . . . They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern."

And it is declared in *Norfolk & W. R. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721, that a common carrier is such by virtue of his occupation, and not by reason of his responsibility growing out of his occupation; that when a common carrier undertakes the carriage of a passenger, whether gratuitously or for hire, the contract involves not only their duties and obligations to each other, but such as are imposed upon them by the public policy of the state; that the recipient of a free pass is clothed with every right appertaining to a passenger for hire; and that the carrier, having undertaken to carry the passenger, becomes bound to transport her safely, and cannot escape that duty by contract.

The case of *Chicago, R. I. & P. R. Co. v. Collier*, 1 Neb. (Unof.) 278, 95 N. W. 472 (involving a free pass) was, so far as the question in this note is concerned, disposed of with the mere statement that it was conceded settled in Nebraska, that a stipulation relieving the road from liability for personal injuries to one whom it transported was void, and the court cites in support of the statement, earlier Nebraska decisions, which, as a matter of fact, involved drovers or passengers in the strict sense, but made no distinction between such cases and the one before the court. In *Chicago, R. I. & P. R. Co. v. Hambel*, 2 Neb. (Unof.) 607, 89 N. W. 643, declaring that in an action against a railroad company for injuries sustained while being transported by it, the company cannot introduce evidence that the person killed was riding upon a free pass by the terms of which he assumed all risk of accident and agreed that the company should not be liable for injuries to his person, the court simply makes a statement to that effect upon the authority of *Chicago, R. I. & P. R. Co. v. Collier*, supra, which is stated to hold that a statute declaring that every railroad company shall be liable for all damages inflicted upon the person of passengers while being trans-

ported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of shall be in violation of some express rule or regulation of said road actually brought to his or her notice, prevents any limitation on the liability of a railroad company for a passenger's safety, unless within the exceptions provided in the section. Thus, it seems that the Nebraska court either regards a person being carried gratuitously as a passenger, at least within the meaning of such statute, or else the question of the status of a person being transported free was not raised, for the court makes no distinction between drovers and passengers in the strict sense, on the one hand, and persons being transported gratuitously on the other.

And *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627 (involving a drover's pass), was followed in *Farmers' Loan & T. Co. v. Baltimore & O. S. W. R. Co.* 102 Fed. 17, holding that the fact that a person riding on a train was being transported on a free pass, by which he assumed all risks of accident whether occurring from negligence or otherwise, did not relieve the company from liability for injury to such person through its negligence. The argument of the court was that the company should not be permitted to contract against its own gross negligence, and that any negligence in the operation of such a dangerous agency as a railroad should be regarded as gross. It should be noted that the pass in this case was gratuitous, and therefore the case is no longer supportable since the decision by the United States Supreme Court in *Northern P. R. Co. v. Adams*, infra, which permits a railroad company to stipulate against liability for negligence where the pass is a gratuity. Of course, there are cases which hold that a stipulation against liability for negligence has no application in a case of gross negligence, but the case of the *Farmers' Loan & T. Co.* cannot be differentiated on this ground, since the case does not declare that there was gross negligence in the particular circumstances of the case, but said that all negligence in the operation of a train was gross negligence.

In *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282, holding that a carrier may stipulate against liability for negligence of its servants where such negligence is not gross or made punishable by law, the court, although not expressly saying whether the relation of carrier and passenger exists, declares that a railroad company when carrying a passenger gratuitously is in a condition analogous to that of bailee for the sole benefit of the



from claims for damages as any other person, is to ignore the fact that for the sole benefit of the passenger he has waived the rights, and in so doing divested himself *pro hac vice* of the character of a common carrier.

bailor, who is usually held responsible only for gross negligence.

In *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, the court said: "The railway company was not, as to Adams, a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge, if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common-law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and, having accepted that privilege, cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit, and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby." To the same effect is *Boering v. Chesapeake Beach R. Co.* 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. Rep. 515.

And it is held in *Sutherland v. Great Western R. Co.* 7 U. C. C. P. 409, that a stipulation in a gratuitous pass that the acceptor assumed the risk of accident operated to relieve the company from liability for injury to him, at least where the injury was caused by ordinary negligence. Draper, Ch. J., in his opinion, said: "There is no obligation on the defendants to carry passengers free; and if they do so, it cannot be said they incur a greater obligation than the agreement to carry free expressed. I am therefore at a loss to understand the principle upon which it is contended that they are precluded from entering into a special contract with a party from whom they claim and receive no payment, as to the liabilities to him which they will or will not undertake. Admitting that if nothing more appeared than that they carried him free, they might still be liable to recompense him for an injury arising from their negligence, it does not follow that they may not stipulate with him that, in consideration [*sic*] they gave him a free passage, he shall assume all risks of accident without recourse against them. If he pays, or offers to pay, the usual fare, he has the right to compel them as common carriers to convey him, and to be responsible for any injury he sustains by their default, but he can have no right to be carried free but by agreement, and 37 L.R.A.(N.S.)

The decision of the court in my opinion goes too far in putting upon the same plane with employees of a railway company traveling upon passes issued in accordance with its general custom, those who are carried out of simple compassion.

then they have a right to say on what terms they will agree with him. The argument founded on defendants' liability as common carriers is therefore, I think, completely answered when it is shown that the passenger traveled by virtue of [such] a ticket."

In this connection it was said in *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 22 N. E. 205; "The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to put off his public employment, and to do that which it does not impose upon him. The plaintiff was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be, under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him."

In reaching the conclusion that a stipulation releasing the carrier from liability for negligent injuries was not against public policy, the court in *Payne v. Terre Haute & I. R. Co.* 157 Ind. 616, 56 L.R.A. 472, 62 N. E. 472, said: "If express messengers and Pullman porters, who are on the trains in pursuance of their regular vocations, and whose transportation is paid for, cannot require railroad companies to carry them as a public duty, much less can holders of gratuitous passes. They are creatures of

favoritism. They voluntarily separate themselves from the general public. They do not approach the companies as part of the general public, to be carried on the usual terms of service and compensation; and they are certainly under no compulsion to enter into the contract of exemption. The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the general public gratuitously." It should be noted that the court referred to earlier Indiana decisions involving stipulations in drover's passes and the like, but all statements in those cases to the effect that such a stipulation in a free pass was invalid were repudiated in the later decision as unnecessary to the decision of those cases.

In *Kinney v. Central R. Co.* 32 N. J. L. 407, 40 Am. Dec. 875, which is affirmed in 34 N. J. L. 513, 3 Am. Rep. 265, and holds that a stipulation in a gratuitous pass by which the recipient assumes all risk of accident, and agrees that the company shall not be liable in any circumstances, whether by reason of the negligence of the company's servants or otherwise, is valid and binding, at least so far as concerns negligence on the part of the company's employees, the view is taken that the relation of carrier and passenger does not exist in such circumstance. In this connection the court had this to say: "The question whether a common carrier can or cannot exempt himself by express agreement from the obligation which he takes from the law to conduct his business without negligence cannot have a controlling effect upon the present subject of inquiry. This conclusion is founded in the fact that I do not regard the contract now in controversy as one which the defendants have made in their character of common carriers. I think it plain they must, in this respect, be placed on the footing of gratuitous bailees. Every test which can be applied to the case will show that the defendants on this occasion, in this particular matter, were not common carriers. The deceased did not bargain with them on the basis of any such employment. If he had seen fit, he had a right to deal with them in their general character, but he did not do so. As a member of society, it was his right, upon paying his fare, to require of these defendants to carry him upon the terms which the law imposed upon them; but instead of exacting this right, he solicited a mere benevolence, the discharge of which it would not be reasonable to consider as any part of the business of the carrier. The legal existence of this contract, therefore, cannot be impugned on the ground so often advanced where common carriers are concerned, that it is unwise to permit those public employees to throw off any given part of their common-law liability. The question ventilated must be settled by such rules of law as are applicable to the ordinary class of gratuitous bailments, or of persons rendering an unbought courtesy."

37 L.R.A. (N.S.)

In *Washington*, it is held that a carrier may properly stipulate in a gratuitous pass that it shall not be liable for injuries to the user of the pass through the negligence of its servants, the court saying that while the duty which the carrier owes to the public and to the individual is to perform the service faithfully without any limiting conditions, and while such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss when an intending passenger proposes that it do something for him which it is not under any conceivable circumstances required by law or duty to do, that is, to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not. *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L.R.A. 794, 38 Am. St. Rep. 901, 35 Pac. 422, subsequent appeal, 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995.

One case goes a step farther, and holds that the relief from liability for personal injuries through the negligence of servants, secured to a railroad company by the provisions of a free pass, is not affected by the fact that the recipient of the pass had bought a ticket for a drawing-room car in which he was riding when injured. *Ulrich v. New York C. & H. R. R. Co.* 108 N. Y. 80, 2 Am. St. Rep. 369, 15 N. E. 60.

And it is held that the possibility that the presence of police officers on street cars may tend to preserve peace and good order is not sufficient to constitute a valuable consideration for a pass given by the carrier to such officer, so as to render invalid or inapplicable a stipulation by which the recipient of the pass assumed the risk of injury. *Marshall v. Nashville R. & Light Co.* 118 Tenn. 254, 9 L.R.A. (N.S.) 1246, 101 S. W. 419, 12 A. & E. Ann. Cas. 675. The court declares that in such circumstances the railroad does not occupy the position of a common carrier, but rather that of a mandatary so far as its liability for negligence is concerned.

#### *b. As affected by presence of consideration.*

##### *1. Generally.*

See also *Marshall v. Nashville R. & Light Co.* supra, III. a; and *Griswold v. New York & N. E. R. Co.* supra, II. a.

In this connection it is to be observed that this note is confined to cases involving passes or free transportation in the stricter and more limited sense, and therefore excludes cases involving the right of the carrier to limit its liability to drovers or other persons accompanying freight without extra charge for their transportation, mail clerks, express messengers, news agents, and sleeping-car porters, and the like.

As to contracts exempting a railroad company from liability for negligent injury to

sleeping-car employees or others sustaining a similar relation to the company, see the note in 11 L.R.A.(N.S.) 432.

In a comparatively early case, the United States Supreme Court held that a common carrier of passengers cannot lawfully stipulate for exemption from liability for personal injuries caused by the negligence of its servants, where the transportation of the person injured, although not paid for by him in money, was not a matter of charity or gratuity. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535. In this case, the plaintiff was the owner of a patented coupling, and was seeking to have it adopted for use by the defendant company, and he was summoned to visit the headquarters of the company at its expense, and it was for this that the pass was issued. The court treated the case as precisely similar to that of a drover's pass, and held that therefore the plaintiff was a passenger for hire. The case also contains an express declaration of a want of an intent to intimate whether a different conclusion would have been reached, had the plaintiff been a free passenger instead of a passenger for hire. See, as to this, *Northern P. R. Co. v. Adams*, supra, III. a.

In *Camden & A. R. Co. v. Bausch*, 4 Sadler (Pa.) 518, 7 Atl. 731, in which a divided court affirmed a judgment for the plaintiff in an action for injuries to one who was riding on a gratuitous pass, notwithstanding a provision thereon that the recipient assumed all risk of accident, the circumstances of the case required that it be decided according to the laws of New Jersey, and the case of *Kinney v. Central R. Co.* 34 N. J. L. 513, 3 Am. Rep. 265 (see supra, III. a, and II. a), was cited as indicating the law in that state. The *Bausch* Case said that the New Jersey case was based not so much on the fact that the pass contained the stipulation, as on the fact that the recipient accepted and used the pass as a mere gratuity or accommodation; and that there was nothing to indicate that the stipulation would be regarded as binding by the New Jersey law if the pass were not a gratuity. One justification for the last statement is found in the fact that the *Kinney* Case distinguishes *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315 (which is cited with approval in the *Bausch* Case), upon the ground that in that case the passenger was carried on what is called a drovers' pass, which the court held not to be a gratuitous pass, and to create the relation of carrier and passenger. It appeared in the *Bausch* Case that the pass was issued by the company in connection with the maintenance, by the recipient of the pass, of a pleasure resort on the line of the railway company, and it was held therefore to be founded upon an actual consideration. So, it is stated in the opinion, although as before noted the court is divided, that even by the laws of New Jersey as announced in the *Kinney* Case, the carrier cannot contract against immunity from liability for 37 L.R.A.(N.S.)

injury to one whom it undertakes to transport for a valuable consideration.

In *Central Vermont R. Co. v. Franchère*, 35 Can. S. C. 68, it is at least intimated that where a life pass is issued in pursuance of a deed granting the recipients the right to free transportation for life in consideration of a sale, they are not gratuitous passengers so as to be precluded from recovering for negligent injury by reason of a provision of the pass that they assume all risk of accident, and agree that the company shall not be liable in any circumstances, whether of negligence of the company's agents or otherwise; that persons to whom the recipients were empowered by the deed to assign the privilege of free transportation would be bound by the condition, since as to them the pass would be gratuitous; and that the persons first named had a right to agree with the company that if it would carry the other persons also free, all of them would agree to make no claim against the company for negligence.

In *Dow v. Syracuse, L. & B. R. Co.* 81 App. Div. 362, 80 N. Y. Supp. 941, holding that a provision in a pass book releasing the carrier from liability for injuries was not binding, since it was without consideration, and that the acceptance of the book did not indicate an intention to consent to the terms; and intimating that the language of the stipulation that the defendant should be released "from all claims for damages for personal injuries from whatever cause" was not so plain and unequivocal as to embrace injuries caused by negligent acts,—the pass book involved was issued to the plaintiff in consideration of a right of way given to the railway company, and the plaintiff was regarded as an ordinary passenger.

## 2. *Employee's pass.*

In this connection, see also *Doyle v. Fitchburg R. Co.* and *Tingley v. Long Island R. Co.* supra, I.; *Nickles v. Seaboard Air Line R. Co.* supra, II. a; *Yazoo & M. Valley R. Co. v. Grant*, supra, II. b.

As to the more general question whether an employee being transported without charge is a passenger, see the note in 31 L.R.A. 321, and also subdivision IV. c, in 50 L.R.A. 417, dealing with the question as to what servants are deemed to be in the same common employment apart from the statutes, where no question as to vice principalship arises.

As to whether an employee of a railroad or street railway is a passenger while being transported to and from work, see the note in 19 L.R.A.(N.S.) 717.

It is held in *Dugan v. Blue Hill Street R. Co.* 193 Mass. 431, 79 N. E. 748, that if the pass is issued to the employee as a gratuity, the clause providing that the holder assume all risk of accident is binding; but that where such a pass is issued to an employee as one of the terms of his employment, it is not binding.

And it is held in *Peterson v. Seattle Traction Co.* 23 Wash. 615, 53 L.R.A. 586, 63 Pac. 539, 65 Pac. 543, that an employee of a passenger railway company who accepts as a mere gratuity, and not in consideration for his services, a free ticket conditioned that the user shall assume all risk of injury, stands like anyone else traveling on a free pass containing such a condition, notwithstanding the transportation would probably not be bestowed in the absence of the employment; the court saying that under the rule of *Muldoon v. Seattle City R. Co.* supra, III. a, the plaintiff's transportation constituted a portion of the consideration for his services, he became a passenger for hire just the same as anyone else who gives a consideration, but that, if the consideration for his services was independent of his transportation, and the carriage was a mere gratuity, the condition was binding.

In *Harris v. Puget Sound Electric R. Co.* 52 Wash. 289, 100 Pac. 838, it is held, by the application of the rule of the last case, that where the transportation of an employee is not a gratuity, but constitutes a part consideration for his services, he is a passenger for hire, and entitled to protection as such, which public policy does not permit him to waive.

It was held in *Williams v. Oregon Short Line R. Co.* 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991, that a pass issued to a person, who had been employed to begin work for the company at the place named as the destination was not a matter of charity or gratuity, but was issued upon a good and sufficient consideration, and that therefore a stipulation on the back of the pass that the recipient assumed all risk of accident, and agreed that the railroad should not be regarded as a common carrier nor liable to him for injury whether caused by the negligence of the company's agents or otherwise, could not be introduced into evidence by the railroad company for the purpose of escaping liability for injury to the person so transported. While this is the precise ground of the decision, the court goes on to indicate its belief that even if the ticket had been a gratuitous pass with the conditions printed thereon, still the defendant could not escape liability for negligent injury.

And expressly refusing to decide whether a carrier of passengers may lawfully contract that it shall not be liable for the negligent injury of a passenger carried gratuitously, the court in *Eberts v. Detroit, Mt. C. & M. C. R. Co.* 151 Mich. 260, 115 N. W. 43, held that where an employee of a railroad company in a town in which he resided was ordered to work in another town at the same wages, and was given a pass book which enabled him to ride upon

the defendant's railway between his home and the place of work, it was to be inferred that the pass book was a part of the consideration for the plaintiff's services, and that therefore a stipulation exempting the company from liability for negligent injuries was not binding.

And it is held that conditions indorsed on an employee's pass, to the effect that he assumes all risks arising from the negligence of agents of the carrier or otherwise while using it, are invalid on grounds of public policy, where he is riding not in the course of his employment, or in going to or from his work, but is making a trip for his own convenience, and the pass is given him not as a gratuity, but in pursuance of an agreement in his contract of employment that he shall have such free transportation, and is therefore based on a valuable consideration. *Whitney v. New York, N. H. & H. R. Co.* 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850. In this case the court followed the decision in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, involving a drover's pass.

The case of *Gulf, C. & S. F. R. Co. v. McGown*, set out supra, III. a, and II. b, was referred to, and followed without discussion as holding that the provision in a pass that the person accepting it assumes all risk of accident was against public policy, in *Missouri, K. & T. R. Co. v. Flood*, — Tex. Civ. App. —, 70 S. W. 331, which was followed on subsequent appeal without discussion in 35 Tex. Civ. App. 197, 79 S. W. 1106. The impression is to be gathered from the *Flood Case* that the pass was an employee's pass, but no particular reference is made to this fact in either opinion.

In *Galveston, H. & S. A. R. Co. v. Bean*, 45 Tex. Civ. App. 52, 99 S. W. 721, holding void a stipulation in a pass that the company should not be liable under any circumstances for injuries, whether by negligence of its agents or otherwise, the court follows *Gulf, C. & S. F. R. Co. v. McGown*, set out in subdivisions III. a, and II. b, and *Missouri, K. & T. R. Co. v. Flood*, supra, this subdivision, without discussion further than to say that the fact that the pass was issued to the plaintiff by reason of services which he rendered the company as a state ranger was unimportant.

In *Buffalo, P. & W. R. Co. v. O'Hara*, supra, III. a, the recipient of the pass was, without any discussion of the matter, treated as a passenger, while the pass, which was issued to the wife of an employee, was apparently regarded as gratuitous, and was referred to in *Camden & A. R. Co. v. Bausch*, 4 Sadler (Pa.) 518, 7 Atl. 731, as free in its fullest sense.

L. A. W.

**COLORADO SUPREME COURT.**  
(In Banc.)

FLORENCIO SALAS, Plff. in Err.,  
v.  
PEOPLE OF STATE OF COLORADO.

(— Colo.—, 118 Pac. 992.)

**Evidence — res gestæ — recital of past events.**

1. Statements by one injured in a quarrel, made some hours after the injuries were received and purporting to detail what occurred, are not admissible as *res gestæ* in a prosecution of the one who inflicted the injuries.

**Same — dying declaration — impeachment.**

2. Evidence of inconsistent statements made by one after receiving a mortal wound is admissible to impeach his dying declaration in a prosecution of one who is alleged to have inflicted the wound, although no foundation has been laid for it.

(Garrigues, J., dissents.)

(November 6, 1911.)

**ERROR** to the District Court for Bent County to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.

**Note. — Admissibility of contradictory statements by declarant to impeach dying declarations.**

The earlier cases on the point here annotated may be found in the note to *Worthington v. State*, 56 L.R.A. 441.

Ordinarily where a witness testifies to a fact it cannot be shown that he has on another occasion made statements inconsistent with his testimony, unless he is at first interrogated as to these statements and allowed to explain them; but when the declarant is dead, as in the case of a dying declaration, this cannot be done. And while there is some little conflict of authority on the question of the admissibility of such evidence, as appears in the earlier note, *supra*, the great weight of authority is in favor of its admissibility. *Parker v. State*, 165 Ala. 1, 51 So. 260; *State v. Uzzo*, 6 Penn. (Del.) 212, 65 Atl. 775; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540; *State v. Fuller*, 52 Or. 42, 96 Pac. 456; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881. And there is a *dictum* to this effect in *Coyle v. Com.* 122 Ky. 781, 93 S. W. 584.

Nor is it essential that such contradictory statements shall have been themselves dying declarations (*Gregory v. State*, 140 Ala. 16, 37 So. 259; *State v. Charles*, 111 La. 933, 36 So. 29); or part of the *res gestæ* (*State v. Charles*, *supra*).

The admission of a dying declaration is an exception to the general rule of 57 L.R.A. (N.S.)

Messrs. H. L. Lubers and C. E. Sydnor, for plaintiff in error:

The testimony offered and tendered was admissible either as a part of the *res gestæ*, or as a statement contradicting and impeaching the dying declaration.

24 Am. & Eng. Enc. Law, 680; *Bishop*, *Crim. Proc.* § 1086; *Graves v. People*, 18 Colo. 170, 32 Pac. 63; *Wharton*, *Crim. Ev.* §§ 262, 263; *Freeman v. State*, — *Tex. Crim. Rep.* —, 51 S. W. 230; *Lewis v. State*, 29 *Tex. App.* 201, 25 *Am. St. Rep.* 720, 15 S. W. 642; *Wilson v. State*, 49 *Tex. Crim. Rep.* 50, 90 S. W. 312; *Walker v. State*, 146 Ala. 45, 41 So. 879; *Hargis v. Com.* 135 Ky. 578, 123 S. W. 239; *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761, 13 *Am. Crim. Rep.* 374; *New York & C. Mining Syndicate & Co. v. Rogers*, 11 Colo. 6, 7 *Am. St. Rep.* 198, 16 Pac. 720, 17 *Mor. Min. Rep.* 123; *T. & H. Pueblo Bldg. Co. v. Klein*, 5 Colo. App. 355, 38 Pac. 610; *State v. Davidson*, 44 Mo. App. 513, *State v. Martin*, 124 Mo. 514, 28 S. W. 12; *Com. v. M'Pike*, 3 *Cush.* 181, 50 *Am. Dec.* 727; *State v. Ellington*, 4 Idaho, 529, 43 Pac. 62; *Healy v. People*, 163 Ill. 372, 45 N. E. 231; *State v. Horan*, 32 Minn. 394, 50 *Am. Rep.* 583, 20 N. W. 905; *Travelers' Ins. Co. v. Mosely*, 8 Wall. 403, 17 L. ed. 437; *Hanover R. Co. v. Coyle*, 55

evidence, and, where the declarant has made other statements inconsistent with the dying declaration, this fact may be shown the jury, for it may enable them to put a juster estimate upon the proof before them. We therefore conclude that where a dying declaration is admitted in evidence, other statements of the declarant inconsistent with the declaration may be shown to impeach it. The deceased may have intended on both occasions to state the truth, and when all his statements are put together, the jury may better judge what he really meant by the dying declaration introduced on behalf of the commonwealth. *Allen v. Com.* 134 Ky. 110, 119 S. W. 795, 20 A. & E. Ann. Cas. 884, wherein the court seemed to think that the fact that the persons testifying to the dying declaration were relatives of the deceased accentuated the justness of the rule admitting the inconsistent statements.

In *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540, it was said: "The rule is general that a witness may be impeached by proof that he has made statements contrary to what he has testified. It is true there is a condition to the application of this rule, which requires that the attention of the witness be previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to give him an opportunity of making any explanation of the matter which he may have. This preliminary condition cannot be complied with where the

Pa. 396; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; Ohio & M. R. Co. v. Stein, 133 Ind. 243, 19 L.R.A. 733, 31 N. E. 180, 32 N. E. 831; Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 791; Armil v. Chicago, B. & Q. R. Co. 70 Iowa, 130, 30 N. W. 42; Durkee v. Central P. R. Co. — Cal. —, 9 Pac. 99; Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. 1021; 1 Greenl. Ev. § 108; Davis v. Franke, 33 Gratt. 416; Rawson v. Haig, 2 Bing. 104, 9 J. B. Moore, 217, 1 Car. & P. 77; Nutting v. Page, 4 Gray, 584; Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475.

Dying declarations may be impeached by proof of contradictory statements.

People v. Lawrence, 21 Cal. 368; Battle v. State, 74 Ga. 101; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 886; Carver v. United States, 164 U. S. 697, 698, 41 L. ed. 603, 604, 17 Sup. Ct. Rep. 228; Dunn v. People, 72 Ill. 582, 50 N. E. 139, 11 Am. Crim. Rep. 447; Green v. State, 154 Ind. 655, 57 N. E. 637; People v. Amaya, 134 Cal. 531, 66 Pac. 704; State v. Shaffer, 23 Or. 555, 32 Pac.

545; Com. v. Silcox, 161 Pa. 484, 29 Atl. 105; McPherson v. State, 9 Yerg. 279; Morelock v. State, 90 Tenn. 528, 18 S. W. 258; McCorquodale v. State, 54 Tex. Crim. Rep. 344, 98 S. W. 879.

Messrs. Benjamin Griffith, Attorney General, and Theodore M. Stuart, Jr., Assistant Attorney General, for the People:

The evidence is clearly not admissible as part of the *res gestæ*.

Pool v. Warren County, 123 Ga. 205, 51 S. E. 328; State v. Pugh, 16 Mont. 345, 40 Pac. 861; Territory v. Armijo, 7 N. M. 436, 37 Pac. 1113; Dodson v. State, 44 Tex. Crim. Rep. 204, 70 S. W. 969; Cahn v. State, 27 Tex. App. 737, 11 S. W. 723; State v. Williams, 108 La. 222, 32 So. 402; Vickery v. State, 50 Fla. 149, 38 So. 907; Ford v. State, 40 Tex. Crim. Rep. 280, 50 S. W. 350; Bradberry v. State, 22 Tex. App. 273, 2 S. W. 592; State v. Gianfala, 113 La. 463, 37 So. 35; Graves v. People, 18 Colo. 170, 32 Pac. 63; Herren v. People, 28 Colo. 23, 62 Pac. 833; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 400, 71 Pac. 677; T. & H. Pueblo Bldg. Co. v. Klein, 5 Colo. App. 354, 38 Pac. 608; People v. Wong Ark. 96 Cal.

contradictory statements offered are for the purpose of discrediting the testimony as to a dying declaration." After observing that the dying declarations of the deceased are admitted in evidence, *ex parte*, in the interest of public justice, the court asks why statements, made by the deceased, to other persons and at other times, that are contradictory of the dying declarations, should not also be admissible in favor of life and liberty, and says: "If, in the one case, the witness who is to be impeached cannot be given an opportunity to explain, in the other case neither can the accused have the benefit of the invaluable privilege of cross-examination, and the deprivation of the latter right probably works greater injustice than the deprivation of the former; for while the loss of the one may destroy the character of the witness for veracity, the loss of the other may, in many instances, deprive the accused of his life or liberty. That public justice which treats every man alike, the living as well as the dead, and which has as much concern for the protection of the innocent as it has for the punishment of the guilty, demands that where proof of a dying declaration has been allowed against the accused, proof of a contradictory statement made by the declarant should be allowed in his favor. There can be no justice, therefore, in any rule which would deprive the accused, under such circumstances, of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause."

In State v. Fleetwood, 6 Penn. (Del.) 153, 65 Atl. 772, where the counsel for the de-

fendant proposed to prove that the deceased had made statements to other witnesses which were contradictory of her dying declarations, the attorney general conceded the point, and the evidence was introduced without further discussion.

A statute prescribing the manner of laying a foundation to discredit the testimony of a witness can have no application to dying declarations, for no opportunity is afforded the party accused of the commission of a homicide to interrogate the deceased in respect to such controversial narratives. State v. Fuller, 52 Or. 42, 96 Pac. 456.

In People v. Amaya, 134 Cal. 531, 66 Pac. 704, the defendant's counsel, in cross-examining one of the witnesses who testified to what occurred at the bedside of the deceased, asked him in relation to some previous statements made at the time when the deceased was first discovered in his wounded condition,—statements which it is claimed would have contradicted or qualified the accusations he made in defendant's presence. Objections to these questions were interposed upon the ground, among others, that it was not proper cross-examination, and upon this ground the objections were properly sustained. But the court did say: "If the defendant had offered this evidence as part of his own case, to contradict the dying declarations of . . . it would have been clearly admissible, on the authority of People v. Lawrence, 21 Cal. 371 [set out in the earlier note in 56 L.R.A. 441], but the ruling of the court on the offer as made was correct."

Where dying declarations are reduced to writing, and the defendant introduces such

129, 30 Pac. 1115; *Western & A. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Jones v. State*, 71 Ind. 66; *Hall v. State*, 132 Ind. 317, 31 N. E. 536; *Wright v. State*, 88 Md. 705, 41 Atl. 1060; *State v. Smith*, 43 Or. 111, 71 Pac. 973; *State v. McDaniel*, 68 S. C. 309, 102 Am. St. Rep. 661, 47 S. E. 384; *State v. Taylor*, 56 S. C. 369, 34 S. E. 939; *State v. Maddox*, 92 Me. 352, 42 Atl. 788; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514.

The evidence was not admissible as contradictory of deceased's dying declaration.

*Nutter v. O'Donnell*, 6 Colo. 253; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 A. & E. Ann. Cas. 787; *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *Stacy v. Graham*, 14 N. Y. 492; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Wroe v. State*, 20 Ohio St. 460; *State*

*v. Taylor*, 56 S. C. 360, 34 S. E. 939; *Craft v. Com.* 81 Ky. 250, 50 Am. Rep. 160.

*Garrigues, J.*, delivered the opinion of the court:

1. Plaintiff in error, Florencio Salas, was convicted of murder of the first degree for shooting and killing Domingo Balles, and sentenced to life imprisonment in the penitentiary. People's evidence shows: That, on July 24, 1909, deceased was floor manager at a dance in Las Animas. Shortly before midnight, Jayo, brother of the defendant, was very abusive and quarrelsome, and started to pick a fight with one Pedro, outside the dance hall. Deceased tried quietly to get him to go home, and in so doing placed his hand on Jayo's shoulder. Defendant said, "No son of a bitch can take my brother," and immediately fired, striking deceased in the abdomen; deceased grabbed the gun. In the struggle which ensued, defendant was overpowered by the assistance of others, and the pistol taken from him. Deceased went back into the hall, and he received medical attention, and stayed there until the next morn-

ing. written declarations in evidence, he is entitled to prove by parol evidence other declarations made contemporaneously, and not reduced to writing, notwithstanding they may contradict the writing. *Hunter v. State*, 59 Tex. Crim. Rep. 439, 129 S. W. 125.

In *State v. Hendricks*, 172 Mo. 654, 73 S. W. 194, the state, after the defendant had introduced statements of the deceased that were contradictory of his dying declarations, was not permitted to corroborate the dying declarations by showing further conversations of the deceased that were consistent therewith. Mr. Justice Fox said: "If these conversations are admissible as being corroborative, . . . they are just as competent in chief as they are in rebuttal. When once admitted, they have the same force and influence as though they were made under such circumstances as would in fact make them dying declarations."

Rather interesting is *McCorquodale v. State*, 54 Tex. Crim. Rep. 344, 98 S. W. 879, where the court recognized the rule that "where dying declarations are admissible in evidence, other statements of deceased contradictory of the dying statements are usually admissible; that is, if they tend to impeach or contradict or depreciate the value of the dying declaration." It was night and the evidence circumstantial as to who fired the fatal shot. The dying declaration of the deceased was to the effect that he looked over his shoulder, and, as the pistol fired, he recognized the defendant as the one who fired it. Other evidence disclosed that a light was shining through a window of the deceased's home on the

spot where the defendant is supposed to have stood when he fired. But since the deceased had not stated that he recognized the defendant by the light from the window or any other light, it was held that the court committed no error in not permitting a witness for the defendant to testify that the deceased told him he recognized the defendant by the flash of his pistol as it fired.

Where, in *Wright v. Com.* 109 Va. 847, 65 S. E. 19, the dying declaration of the deceased, that he did not know of any motive on the part of the prisoner for shooting him, except that he was angry because the deceased had refused to rent him a certain piece of land, was held to be admissible, though not conclusive evidence of the fact alleged, it was held competent for the accused to contradict it by showing that he was not informed of the purpose of the deceased with respect to the land, until after the homicide had been committed.

But in *South Carolina* the rule has always been against the admissibility of contradictory statements by the declarant, to impeach his dying declarations. Thus in *State v. Mills*, 79 S. C. 187, 60 S. E. 664, it was held that no error was committed, when the court refused to permit the defendant to introduce witnesses whose testimony would show that the deceased made statements to them that were contradictory of his dying declarations. The opinion expressly states that it follows *State v. Taylor*, 56 S. C. 360, 34 S. E. 939, and *State v. Stuckey*, 56 S. C. 576, 35 S. E. 263, both of which are fully set out in the note in 56 L.R.A. 441.

E. M. S.

ing, when he was taken home, and died about 4 o'clock on the afternoon of the 25th.

Defendant's evidence showed that he was a musician, playing for the dance, and, going out during the disturbance, found his brother intoxicated, and in a quarrel or fight with Pedro. At deceased's request, he intended to take his brother home, but went back in the hall first, to get a pistol he had secreted there early in the evening. This he put on the inside of his trousers; and while standing by deceased and his brother, deceased put his hand on Jayo's shoulder, and asked him to go home. About this time, the pistol slipped down the inside of the leg of his trousers, and was coming out at the bottom; he reached down and pulled it out, when deceased grabbed it, and in the struggle which ensued over its possession it was accidentally discharged, killing deceased, but that he did not know who did it; in any event, the shot was unintentional.

People introduced, without objection, the dying statement of deceased, in which he said that Jayo and Pedro were fighting outside; that he went out and tried to quiet Jayo, when the defendant said he had something for any son of a bitch who wanted to take his brother, and immediately drew his revolver and shot him; that a scuffle followed over the possession of the weapon.

Defendant offered to prove by witness Taylor that, on the morning of the 25th, witness had a conversation with deceased in the dance hall before he was taken home, in which he said, in the presence of two other witnesses, that Florencio Salas shot him; that there were three or four persons scuffling for the pistol, and during the scuffle it went off, and he was shot. The people objected to this offer, on the ground that it was hearsay. The objection was sustained, and to the ruling error is assigned. Defendant claims the offered testimony was admissible upon two grounds: First, as a part of the *res gestæ* of the litigated fact; second, that it was a statement, made out of court by the deceased, inconsistent with his dying declaration, and tended to impeach him.

2. The record fails to show the time; also the events transpiring during the interval between the fatal shot and the alleged statement. While these do not determine the competency of a statement, made out of court, offered as a part of the *res gestæ*, still they should be shown, before the statement is admitted. One offering an oral statement, made out of court, as a part of the *res gestæ* of a litigated fact, must first prove the things necessary to

qualify the statement as evidence; until this is done, it is hearsay, and not *res gestæ*. The statement itself is no proof that it is a part of the *res gestæ*. State v. Williams, 108 La. 222, 32 So. 402; Bradberry v. State, 22 Tex. App. 273, 2 S. W. 592; Ford v. State, 40 Tex. Crim. Rep. 280, 50 S. W. 350; Pool v. Warren County, 123 Ga. 205, 51 S. E. 328; State v. Pugh, 16 Mont. 345, 40 Pac. 861; Territory v. Armijo, 7 N. M. 436, 37 Pac. 1113; Vickery v. State, 50 Fla. 149, 38 So. 907.

3. Instinctive, voluntary, spontaneous words, said under the impulse of an event of which they form a part, are not hearsay. They are incident to or a part of the transaction litigated, and admissible in evidence as a part of the *res gestæ*; that is, as a part of all the circumstances making up the whole case. In the case at bar, the offered testimony is but a narrative of what had occurred. It and the fatal shooting are distinct, with no connection between them, and the statement is not an incident of the transaction. The court did not err in excluding the statement as a part of the *res gestæ*. Graves v. People, 18 Colo. 170, 32 Pac. 63; Herren v. People, 28 Colo. 23, 62 Pac. 833; T. & H. Pueblo Bldg. Co. v. Klein, 5 Colo. App. 348, 38 Pac. 608.

4. The people's evidence, without the dying declaration, showed that when deceased put his hand quietly on Jayo's shoulder, and tried to get him to go home, defendant shot him in the abdomen; that deceased grabbed the gun after he was shot, and there was a struggle over the weapon. Deceased's dying declaration is that when he placed his hand on Jayo's shoulder, defendant, with an ugly remark, instantly shot him, and that the scuffle for the possession of the weapon was after the shooting. Defendant testified that, when he took the pistol from the bottom of his trouser's leg, the deceased grabbed it, and during the struggle it was unintentionally discharged, striking the deceased. There is a sharp conflict in the evidence whether deceased was shot before the struggle over the gun, or whether it was unintentionally discharged by someone during the struggle. The offered testimony was that the deceased, in the dance hall, after the shooting, before he was taken home, and before his dying declaration, in a conversation with witness Taylor, said that there were three or four persons scuffling for the possession of the revolver, and during the scuffle it went off and shot him. This offered testimony is in conflict with and tends to impeach the dying declaration of the deceased. The district attorney objected to it, upon the ground that



it was hearsay, and that the proper foundation had not been laid, and the objection was sustained. In this ruling, the majority of the court are of the opinion that the district court committed reversible error. It was competent for the defendant to introduce evidence tending to show that the deceased had made statements out of court, after he received the mortal wound, inconsistent with his dying declaration. That a dying declaration may be impeached, by showing that the person making it has made other statements inconsistent therewith, is held by the great weight of authority. *McPherson v. State*, 9 Yerg. 279; *People v. Lawrence*, 21 Cal. 368; *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228; *State v. Blackburn*, 80 N. C. 474; *Battle v. State*, 74 Ga. 101; *Morelock v. State*, 90 Tenn. 528, 18 S. W. 258; *Green v. State*, 154 Ind. 655, 57 N. E. 637; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881; *Hurd v. People*, 25 Mich. 405; *State v. Shaffer*, 23 Or. 555, 32 Pac. 545; *Com. v. Silcox*, 161 Pa. 484, 29 Atl. 105; *McCorquodale v. State*, 54 Tex. Crim. Rep. 344, 98 S. W. 879; *Dunn v. People*, 172 Ill. 582, 50 N. E. 137, 11 Am. Crim. Rep. 447; *Wigmore*, Ev. §§ 1033, 1446. Such is the opinion of this court upon the admissibility of oral statements, made out of court by a deceased person, contradicting or impeaching a dying declaration. The writer of this opinion, however, does not agree with the opinion of the court on this point, and I will now give my reasons for dissenting.

5. The law is thoroughly established that evidence cannot be introduced, showing that a witness, at some other time, when not under oath, made statements out of court inconsistent with his testimony, without first laying the foundation by calling the witness's attention, when on the stand, to the time and place and circumstances surrounding the making of the alleged statements, and affording an opportunity to contradict or explain the statements on re-examination of the witness. Such evidence is purely hearsay. Its admission is an exception to the general rule excluding hearsay evidence, and before it can be admitted under the exception the proper foundation, above stated, must be laid. *Nutter v. O'Donnell*, 6 Colo. 253; *Rose v. Otis*, 18 Colo. 59, 31 Pac. 493; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429; *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 A. & E. Ann. Cas. 787; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687. The majority 37 L.R.A. (N.S.)

opinion does not dispute this principle, but holds, in a dying declaration, there is an exception to it, because death has made it impossible to lay the foundation. I think the law, as well as substantial justice, does not and should not recognize such an exception; in other words, there is no such exception recognized by the best line of adjudicated cases. The death of the witness does not dispense with the general rule in such cases, requiring the foundation to be properly laid. *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Stacy v. Graham*, 14 N. Y. 492; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Wroe v. State*, 20 Ohio St. 460; *State v. Taylor*, 56 S. C. 360, 34 S. E. 939; *Craft v. Com.* 81 Ky. 250, 50 Am. Rep. 160. It necessarily follows, if there is no such exception, that such statements, not made under oath, or *in extremis*, are purely hearsay, and not admissible to impeach a dying declaration.

In the *Mattox Case*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, defendant was convicted of murder. On the first trial, a witness by the name of Whitman testified for the government, claiming to be an eyewitness to the shooting. At the second trial, he having died in the meantime, a transcribed copy of the stenographic notes of his testimony was read by the government to the jury. For the purpose of impeaching this evidence, defendant offered to show that after the first trial Whitman said his testimony was false; that he did not witness the shooting, and told why he testified falsely. The district attorney objected to this offered testimony, because the proper foundation had not been laid, and an opportunity to explain or contradict it had been cut off by the death of Whitman. The objection was sustained, and error assigned thereon. After the case had been submitted, counsel were allowed to file further briefs upon the question of the admissibility of this offered evidence, and the case was resubmitted to the full bench. It was insisted that the rule did not apply, because Whitman was dead, and the alleged contradictory statements were made subsequent to the giving of his testimony at the first trial, and consequently no foundation could be laid. The court held that the authorities recognized no such distinction or exception. The case decides that the fact that a witness cannot be produced, because he is dead, does not dispense with the necessity of laying the proper foundation, before his evidence can be impeached. The opinion of the court is summed up in this forceful language: "While the enforcement of the rule, in case of the death of the witness

subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. If it were generally understood that the death of a witness opened the door to the opposite party to prove that he had made statements conflicting with his testimony, the history of criminal trials leads one to believe that witnesses would be forthcoming with painful frequency to make the desired proof. The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages, and disadvantages of a relaxation of the rule are so problematical that courts have, with great uniformity, refused to recognize the exception."

In the Ryan Case, 21 Colo. 119, 40 Pac. 775, the people took and read to the jury the deposition of a witness named Dulin. Defendant offered to show that Dulin, since it was taken, made statements out of court, contradicting his deposition. The offer was rejected upon the ground that the proper foundation had not been laid. Defendant claimed it was impossible to lay the foundation, because the statement was made after the deposition was taken. We then said that the law recognized no such exception, and that the courts with great unanimity declared that a witness could not be so impeached, without first laying the foundation. I quote from the opinion to show that we were then in full harmony with the *Mattox* Case: "The opinion in *Mattox v. United States*, supra, contains an able and exhaustive review of the authorities upon the question. The exception there and here claimed was held to have been rightfully denied in that case, although the defendant was upon trial for a capital offense, which trial resulted in his conviction and sentence. We fully concur with the reasoning of the majority of the court in that case, and hold in this case that the evidence of the witnesses Coryell and Masterson, sought to be introduced for the purpose of showing that the witness Dulin had made statements out of court contradicting or differing from his deposition, was properly rejected, as no foundation had been laid for the introduc-

tion of such evidence." *Ryan v. People*, 21 Colo. 126, 40 Pac. 778.

It is difficult to reconcile the *Mattox* Case with *Carver v. United States*, 164 U. S. 694, 41 L. ed. 602, 17 Sup. Ct. Rep. 228. The only attempt of the court to do so is by the statement: "That case [*Mattox* Case], however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial." In the *Mattox* Case, it should be remembered Whitman was dead when his evidence was read at the second trial. The alleged statements were made after the first trial. He could not have been cross-examined upon them at the first trial, because they had not been made then. If the court in the *Carver* Case had explained how the defendant in the *Mattox* Case could, by cross-examination of the witness Whitman on the first trial, lay the foundation for impeaching him on account of contradictory statements by him after the first trial, I might understand how to distinguish the two cases. On the point involved, I think the two cases are practically the same, and cannot be distinguished in principle. We have gone on record in the *Ryan* Case, upholding the doctrine announced in the *Mattox* Case, and I do not think we should change the law there announced. I think the language of the supreme court of South Carolina very appropriate: "Counsel for appellant has cited the case of *Carver v. United States*, supra, in support of his contention that the testimony in question was competent for the purpose of contradicting and impeaching the statements made by the deceased in her dying declarations, and that case does so hold. But it seems to us, that in principle, the case is irreconcilable with the previous case of *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337, which, while not a case of an attempt to impeach dying declarations, the whole subject was fully and elaborately considered,—much more so than in the case of *Carver*. In both of these cases, the court was divided, and we are not prepared to accept either as binding authority upon us, in a case of this character, where no Federal question is involved. On the contrary, it seems to us that the conclusion reached by the Ohio court, in *Wroe v. State*, 20 Ohio St. 460, is more in accordance with reason than the contrary conclusion. To hold that it is competent to impeach the dying declarations of a deceased person by testimony tending to show that she had made statements in conflict with those contained in her dying declarations, not under the sanction of an oath, nor under the shadow of impending death, would tend not

only to afford a strong temptation to the fabrication of false testimony to save the life of the accused when death had rendered it impossible to rebut or explain such statements, but would also tend to absolutely destroy the efficiency of dying declarations as evidence. We do not think, therefore, that such testimony is competent." *State v. Taylor*, 56 S. C. 368, 34 S. E. 943.

The offered testimony is not a dying declaration, nor a part of the *res gestæ*. It is a dangerous kind of hearsay, and its admission, when the proper foundation has been laid, is an exception to the rule regarding hearsay evidence. The death of the witness does not create an exception to the exception. To admit it, without a proper foundation, on account of the death of the witness, would deprive the people of the opportunity to deny or explain, without any equivalent for the loss sustained. An exception to a general rule should never be created where it would simply shift the hardship from one party to another. If established, an impeaching witness could, with impunity, swear to any statement whatever, without fear of contradiction. Those with long practical experience in criminal trials know that to recognize such an exception will invite corruption, fraud, perjury, and subornation of perjury in our courts. The cases cited, sustaining the doctrine, present a striking example of the growth of an erroneous principle from the misconception or misapplication of some early case. The two cases universally quoted as foundational cases are *McPherson v. State*, 9 Yerg. 279, and *People v. Lawrence*, 21 Cal. 369. Every case and text I have been able to examine, sustaining this doctrine, is either based on these two cases, or on other cases based on them. I think it can be shown that these two cases are no authority for the doctrine, and that the decisions purporting to rest thereon have misconstrued or misapplied them, and are founded on a false basis.

In *Morelock v. State*, 90 Tenn. 529, 18 S. W. 259, the supreme court of that state, speaking of the *McPherson Case*, supra, says: "But in that case all the statements were made *in extremis*, and were clearly admissible as dying declarations." The case turned wholly on conflicting statements in the dying declaration itself. The point under consideration in the case at bar did not enter into that case in any way, and it is no authority for the contention.

In the *Lawrence Case*, 21 Cal. 368, is the following statement of fact: "After the evidence for the prosecution had closed, the defendant offered to prove that the deceased, after the shooting and at the primary examination of defendant before the 37 L.R.A. (N.S.)

committing magistrate, swore to facts directly contradicting his dying declarations. The court refused to admit the evidence, and the defendant excepted." It appears in this case that after the shooting, probably before it was anticipated that the deceased would die from his wounds, there was a preliminary examination of the defendant, at which the prosecuting witness was sworn and testified. He died some time after this, and made a dying declaration regarding the shooting, which was admitted in evidence against the defendant on his final trial for murder. There was a material conflict between his dying declaration and his sworn evidence at the preliminary, and this evidence was offered for the purpose of impeaching his dying declaration. Under the circumstances of that case, his evidence at the preliminary was competent evidence at the final trial. It is universally held, where a witness has been duly sworn and examined in court, and an opportunity offered for cross-examination, that upon a subsequent trial of the same transaction between the same parties, if the witness is beyond the jurisdiction of the court and cannot be produced, that his evidence at the former trial may be read to the jury. Either party may use it. Not only this, the alleged contradictory statements were evidence, given under oath, in a court proceeding between the same parties, with all the right and opportunity of cross-examination. The case is no authority for allowing one, after the opportunity for contradiction or explanation had been cut off by death, to come into court and testify to an alleged oral conversation, had with a deceased witness out of court, for the purpose of impeaching his evidence. I do not think that purported oral hearsay statements, made out of court, not made under oath, and not *in extremis*, should be admitted for the purpose of impeaching a dying declaration.

Reversed and remanded for a new trial.

Garrigues, J., dissents.

Campbell, Ch. J., not participating.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

RATHBONE, SARD, & COMPANY, Appt.,

v.

CHAMPION STEEL RANGE COMPANY.

(110 C. C. A. 596, 189 Fed. 26.)

Trade — unfair competition — copying design.

1. The placing upon the market of a stove the design of which is copied from

that of a rival manufacturer cannot be restrained as unfair competition, if the earlier design had been so recently produced that the public had not become familiar with it as designating the product of the designer, so as to be deceived into buying the copy as his, where the copyist uses his own name and trademark on his product, so that there is no attempt to palm it off as that of his rival.

**Same — copying "parts" marks.**

2. That private marks to designate "parts" of a stove are copied, together with the general design, when one manufacturer appropriates a rival's design for a product of his own, so as to give retailers an opportunity, which is embraced by some, to palm off the goods of the copyist as those of the designer, does not render the copyist liable to restraint as unfairly competing in trade, where the stove is put out under his own name and trademarks, so that no attempt is made by him to palm his product off as that of his rival.

(July 11, 1911.)

**A** PPEAL by complainant from a decree of the Circuit Court of United States for the Northern District of Ohio dismissing a bill filed to enjoin alleged unfair competition in the manufacture and sale of a stove. Affirmed.

The facts are stated in the opinion.

Argued before Severens and Knappen, Circuit Judges, and Evans, District Judge.

Messrs. Philipp, Sawyer, Rice, & Kennedy for appellant.

Messrs. E. J. Hart and Westenhaber, Boyd, Rudolph, & Brooks, for appellee:

**Note. — Right to protection against use by rival of similar design, shell or pattern not protected by patent**

This is the subject of a note to Rushmore v. Manhattan Screw & Stamping Works, in 19 L.R.A.(N.S.) 269, but few cases decided subsequently thereto have considered the question. These cases, including RATHBONE, S. & Co. v. CHAMPION STEEL RANGE Co., serve to emphasize the doctrine of that note, to the effect that "the rule of unfair competition cannot be successfully invoked to abridge the freedom of trade competition, where the similarity complained of is with reference to necessary functional characteristics of the article simulated."

Thus in Rushmore v. Saxon, 95 C. C. A. 671, 170 Fed. 1021, a case very similar, as to the facts to the Rushmore Case the court by a *per curiam* opinion said that they could see no way to distinguish that case from the Rushmore Case, hence the doctrine of that case was followed.

In Keystone Type Foundry v. Portland Pub. Co. 186 Fed. 690, it is asserted that the basis of an action for unfair competition is not merely the ownership of a manu-

Plaintiff has not established any of the conditions necessary to make out a case of unfair competition, and is not entitled to relief.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Goodyear's India Rubber Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Singer Mfg. Co. v. Bent, 163 U. S. 205, 41 L. ed. 131, 16 Sup. Ct. Rep. 1023; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 674, 45 L. ed. 365, 379, 21 Sup. Ct. Rep. 270; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Donnell v. Herring-Hall-Marvin Safe Co. 208 U. S. 267, 52 L. ed. 481, 28 Sup. Ct. Rep. 288; Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554, 52 L. ed. 616, 28 Sup. Ct. Rep. 350, 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 37; Saxlehner v. Wagner, 216 U. S. 375, 54 L. ed. 525, 30 Sup. Ct.

factured label, but also deceit or fraud on the defendant's part in the use of the label, which will deceive the purchaser or user of the article. And it is held not to constitute unfair competition, to make type similar to that manufactured by another which is not protected by patent, it appearing that the defendant had not sought to avail itself of the complainant's reputation as a founder, but of its taste and skill as a designer. This the court said it may do. "It may copy the complainant's type so long as it does not pretend that the copy is an original product of the complainant."

So, others may make and sell drawers constructed according to the design of a patent which has expired, and may make same with an elastic seam of the same color as the seam in the drawers as to which the patent has expired, where the color of the strip has not been artificially produced, but is the natural color of the undyed and unbleached yarn from which the strip is made. Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621. (Writ of certiorari denied in 214 U. S. 518, 53 L. ed. 1065, 29 Sup. Ct. Rep. 700.)

A. G. S.

Rep. 298; Gage-Downs Co. v. Featherbone Corset Co. 83 Fed. 213; Royal Baking Powder Co. v. Royal, 58 C. C. A. 490, 122 Fed. 337; Deering Harvester Co. v. Whitman & B. Mfg. Co. 33 C. C. A. 558, 62 U. S. App. 689, 91 Fed. 376; American Washboard Co. v. Saginaw Mfg. Co. 50 L.R.A. 609, 43 C. C. A. 233, 103 Fed. 281; Computing Scale Co. v. Standard Computing Scale Co. 55 C. C. A. 459, 118 Fed. 971; Globe-Wernicke Co. v. Fred Macey Co. 56 C. C. A. 304, 119 Fed. 696; Ohio Baking Co. v. National Biscuit Co. 62 C. C. A. 116, 127 Fed. 116; Diamond Match Co. v. Saginaw Match Co. 74 C. C. A. 59, 142 Fed. 727; Germer Stove Co. v. Art Stove Co. 80 C. C. A. 9, 150 Fed. 141; Bender v. Enterprise Mfg. Co. 17 L.R.A.(N.S.) 448, 84 C. C. A. 353, 156 Fed. 641, 13 A. & E. Ann. Cas. 649; Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621; Enterprise Mfg. Co. v. Landers, 65 C. C. A. 587, 131 Fed. 240; Marvel Co. v. Pearl, 66 C. C. A. 226, 133 Fed. 160; Yale & T. Mfg. Co. v. Adler, 83 C. C. A. 149, 154 Fed. 37; Rushmore v. Manhattan Screw & Stamping Works, 19 L.R.A.(N.S.) 269, 90 C. C. A. 299, 163 Fed. 939; Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N. E. 667; Dover Stamping Co. v. Fellows, 163 Mass. 191, 28 L.R.A. 448, 47 Am. St. Rep. 448, 40 N. E. 105; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85, 43 L.R.A. 826, 73 Am. St. Rep. 263, 53 N. E. 141.

**Knappen**, Circuit Judge, delivered the opinion of the court:

The appellant filed its bill of complaint against appellee, alleging unfair competition by the latter in the manufacture and sale of a certain type of natural-gas heater. The bill prayed for a permanent injunction against such manufacture and sale, and asked for certain special relief incidental to the general relief asked. Upon a final hearing on pleadings and proofs, the circuit court made a decree dismissing the bill, from which decree this appeal is taken.

The important facts are these:

Complainant is one of the largest and longest established manufacturers of stoves, ranges, and heaters (both coal burning and wood burning) in the United States. It has been in business since the year 1830. Its factories are now at Albany, New York, and Aurora, Illinois. In the year 1835 it registered the "Acorn" as its trademark, and has used the same ever since upon its product, unless in the case of a few cheap stoves. Its product enjoys an excellent popularity, being known to the public generally under the name of the "Acorn." About the year 1900, with the development of natural gas in the territory hereafter mentioned, several stove manufacturers began making natural-

gas ranges and heaters. This natural territory included western New York, western Pennsylvania, Ohio, West Virginia, and parts of Indiana, Oklahoma, Kansas, Missouri, and possibly some other territory. In 1903 the complainant began making natural-gas ranges. It made no natural-gas heaters until 1905. At that time there were upon the market and in use substantially two types of natural-gas heaters of the better class, one having a rounding and the other a tubular drum. In 1904 there was put out by another manufacturer a heater known as the "Reliable." In 1905 complainant prepared designs for a natural-gas heater called the "Solar Acorn." The appearance of complainant's "Solar Acorn" differs, generally speaking, from that of the "Reliable" only in certain features of ornamentation, the shape, style, base, foot rail, fire pot, reflector, drum, and top being substantially the same (except as hereafter stated), as well as the broad, general plan of ornamentation. Complainant made the ornamentation at the top of its "Solar Acorn" more elaborate than in the case of the "Reliable," apparently substituted a white for a black finishing rim above the drum, adopted a different design of ornamental pieces on the side of the drum, which were brought well forward, the ornamentation above the reflector being carried a little higher, and the foot rail and base ornamentation made somewhat more elaborate.

We do not intimate that complainant actually used the "Reliable" as a copy, or that it adopted features of ornamentation belonging peculiarly to that heater. The fact and extent of similarity are all that are material here. The "Solar Acorn," as exhibited in advertising cut and as manufactured, had in all cases the device of the acorn upon the scroll work above the reflector and upon the corners of the base constituting the legs, and the words "Solar Acorn" prominently upon the foot rail, the name of the manufacturer being shown upon the back side of the stove. Complainant sells its product only to dealers, not directly reaching the ultimate purchaser and user. The territory covered by its sales is divided by the Ohio river into the eastern and the western territory, respectively, headquarters for the former being at Albany and for the latter at Aurora. The method and extent of its advertising of the heater in question, and of its attempts to bring the same to the attention of the public prior to the defendant's coming into the market, are these: In September, 1905, it issued from 2,000 to 2,500 leaflets, which it distributed in approximately equal amounts through the Albany and Aurora headquarters, these leaflets being sent to dealers only, except as a very

few were given to traveling salesmen, who did not call upon the user or consumer, but only upon the dealer. The latter distributed the leaflets only by handing them out to customers calling at the store, or by leaving them upon the counter accessible to customers. In February, 1906, 1,500 circulars were issued, and before April 1st of that year 2,000 catalogues. These circulars and catalogues seem to have been distributed in substantially the same way as the leaflets. In each of these three classes of literature the Solar Acorn was shown and advertised. Complainant has never advertised this heater in the newspapers, trade journals, or magazines. In December, 1905, complainant shipped twelve of these heaters to dealers in Ohio, and in the following January two more. As a general rule but one stove was sent to each dealer, the same being apparently intended to be used as a sample. From February 1, 1906, to August 1, 1906, three more deliveries were made to dealers in Ohio. In January, 1906, four were sent to dealers in Missouri and Kansas, no more being delivered previous to August of that year. In the eastern territory deliveries were begun in November, 1905. It is not definitely shown, so far as appears by references in briefs of counsel, that more than two stoves were actually delivered to dealers in that territory in 1905. The testimony of the extent of sales to dealers during that year is not explicit, but we infer that at least eleven were so sold. Our attention is not called in briefs of counsel or in argument to any evidence of sales of complainant's heaters to actual users prior to defendant's adoption of its heater and the putting of the same upon the market.

The defendant is a general stove manufacturer at Cleveland, Ohio, having been engaged in business under its present name, either as a firm or as a corporation, since 1893. It has apparently a good business standing and does a large business, although we assume less extensive than complainant's. It has used the name "Champion" as its trademark continuously since that organization, except during the first few months. Soon after complainant began such manufacture and delivery to dealers of its "Solar Acorn," the defendant brought out a natural-gas heater called the "Champion." In so doing it copied complainant's cut, except that it removed the acorn device from the reflector and base of the stove, and put the word "Champion" prominently upon the foot rail, and placed its own name upon the back of the stove in the same location where complainant puts its name upon its stove. Its patterns were prepared directly by the use of parts of one of complainant's "Solar Acorns," the changes referred to as made

in the cut being also made in the patterns and in the stove as manufactured, except that as actually put out the letter "C" appeared conspicuously upon the reflector in place of complainant's acorn. Defendant has invariably manufactured the heater in the dress stated, except that in the case of heaters manufactured for three special dealers, who desired distinctive names, the words "Iron City," "Crown," or "Comfort," were placed upon the foot rails of the respective stoves; in each case, however, the letter "C" being prominently shown in the scrollwork of the reflector, complainant's trademark and tradename being likewise absent, and defendant's name being upon the back of the stove in the usual place therefor. The defendant completed its heater and put the same upon the market in February, 1906, publicly exhibiting the same at the Ohio Hardware Dealer's Convention at Canton, Ohio, the latter part of that month. It got out for that convention 20,000 descriptive circulars (five times as many as complainant had issued up to that time) advertising its heaters, part of which circulars were distributed at the convention, the remainder being sent out through the mail to other dealers and salesmen. Complainant had no exhibit of natural-gas heaters at the Canton convention, but had a representative thereat. Defendant exhibited this stove at the Ohio state and county fairs during the year 1906. "Right after the convention, or at the convention," defendant's salesman took orders for its heater, and immediately thereafter salesmen were sent out through the territory, deliveries being begun in July, 1906, the record showing that but a small proportion of the deliveries in the natural-gas heater trade are made in any year between January and July. Following the Hardware Dealers' Convention in February, 1906, and throughout that year, new circulars and advertising matter to the number of many thousand copies were circulated by defendant, which has since carried on its advertising in trade papers, catalogues, circulars, and to some extent in local newspapers, its advertising having been much more extensive than that of complainant. The complainant's sales in Ohio increased in 1906, dropping off after that time. In Kansas and Missouri, sales increased during 1907, over 1906. In the eastern territory sales increased through 1907, dropping off after that year. The evidence indicates that this falling off of sales of complainant's heater is due in large part to defendant's active competition. This suit was begun in January, 1909.

The late Judge Tayler, who heard this case in the circuit court, in the course of his opinion dismissing the bill, said: "It is per-

fectly apparent that these are the salient and influencing facts in this case: That late in 1905 the complainant brought out this 'Solar Acorn' stove in controversy, having previously advertised it by circulars sent to dealers. They sold a small number in the fall of that year. Some time in the winter of that year defendant took complainant's stove apart, and, except for the acorn and other marks which indicated the original, absolutely copied at least the external parts of the stove in every particular, so that, to look at it, it was an exact duplicate of the stove made and designed by complainant, with the descriptive exceptions referred to. At that time it is perfectly obvious that the 'Solar Acorn' gas heater had no reputation whatever. It had established no market. It was the expression of the idea of complainant as to the form which that type of gas stove should take. The defendant appropriated the design. Whatever may be said of the ethics of this act, the effect of this appropriation was not to deceive the public, for the public had no knowledge. It was not to affect the good will of the complainant, for the complainant had no good will established in respect to this stove. The defendant simply saw that somebody else had made something which it thought was good, and which was not protected by trademark or patent, and which the public had no general knowledge of, and proceeded to make an article like it, taking off from it the characteristic designations which complainant used, and putting on its own. Now, who could be deceived by any such operation as that? Certainly not the dealers, for they knew from whom they bought the stoves; certainly not the public, for the public did not know the stoves. In a word, the gist of the offense of unfair competition, to wit, the selling of the imitating thing as the imitated thing, does not exist in this case at all."

Judge Tayler was also of opinion that complainant's right of action was barred by laches, in failing for nearly three years to take action, while defendant was actively building up its own trade,

We do not find it necessary to pass upon the question of complainant's alleged laches, for in view of the lack of public reputation and popularity of complainant's heater, and even of any substantial knowledge, on the part of the using and purchasing public, of its existence, we agree with Judge Tayler that the copying by defendant of complainant's design of ornamentation did not deceive the public, by enabling the defendant to palm off its heater as that made by complainant. The latter has no patent upon either the method of construction or operation of the heater, nor upon its design with

respect to ornamentation or otherwise. This action is not for infringement of trademark, for no trademark is infringed. Nor is it for pirating a tradename, for complainant's tradename is not used. This action is simply and solely for alleged unfair competition in the use of the special features of ornamental dress to which attention has been called.

The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition. In *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 593, 604, 32 L. ed. 535, 537, 9 Sup. Ct. Rep. 166, 168, Justice Field said: "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Sawyer v. Horn (C. C.)* 4 Hughes, 239, 1 Fed. 24; *Perry v. Truefitt*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84."

In *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609, 614, Chief Justice Fuller said: "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and, if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *American Washboard Co. v. Saginaw Mfg. Co.* 50 L.R.A. 609, 43 C. C. A. 233, 103 Fed. 281, it was held by this court in an opinion by Judge (now Mr. Justice) Day, that the fact even that the defendant deceives the public as to his goods by fraudulent means does not give a right of action, unless it results in the sale of such goods as those of the complainant.

In *Newcomer v. Scriven*, 94 C. C. A. 77, 168 Fed. 621, in which were involved alleged infringements of trademarks and tradename, as well as unfair competition, although it appeared that a certain advertisement was calculated to mislead a customer into believing that the product of defendant was that of complainant, this court, speaking through Judge (now Mr. Justice) Lurton, held that, as it was not shown "that any customer was misled into buying garments as made or sold by the Scriven Company which were made by others," no right of action in that regard existed.

The rule we have stated is recognized by numerous authorities, but those we have

cited are sufficient for the purpose. So far as concerns the ornamental dress of the stove, it is clear that, as complainant had no patent on the design, it had no monopoly thereof, and that anyone was free to copy it so long as he did not attempt thereby to palm off his goods as those of complainant, and took due care to guard against any deception of the public into buying in the belief that it is purchasing complainant's goods. *Fairbanks v. Jacobus*, 14 Blatchf. 337, Fed. Cas. No. 4,608; *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 28 L.R.A. 448, 47 Am. St. Rep. 448, 40 N. E. 105; *Flagg Mfg. Co. v. Holloway*, 178 Mass. 83, 59 N. E. 667; *Heide v. Wallace* (3d Circuit) 68 C. C. A. 16, 135 Fed. 346; *Saxlehner v. Wagner*, 216 U. S. 375, 54 L. ed. 525, 30 Sup. Ct. Rep. 298. And it results from this principle that the adoption by one manufacturer of the characteristic features of another's product, common to articles of that class, does not of itself amount to unfair competition. *Globe-Wernicke Co. v. Fred Macey Co.* (6th Circuit) 56 C. C. A. 304, 110 Fed. 696; *Warren Featherbone Co. v. American Featherbone Co.* (7th Circuit) 72 C. C. A. 571, 141 Fed. 513; *Computing Scale Co. v. Standard Computing Scale Co.* (6th Circuit) 55 C. C. A. 459, 118 Fed. 965, 971.

Complainant insists, however, that the unnecessary imitation by one manufacturer of the nonfunctional parts of the product of a competitor, to the extent that the two articles are substantially identical in appearance to a casual observer, and retail purchasers are thus likely to mistake one for the other, is chargeable with unfair competition, although each feature taken separately may have been open to appropriation, as announced in certain authorities, including three cases decided by the United States circuit court of appeals for the second circuit. *Enterprise Mfg. Co. v. Landers*, 65 C. C. A. 587, 131 Fed. 240; *Yale & T. Mfg. Co. v. Alder*, 83 C. C. A. 149, 154 Fed. 37; *Rushmore v. Manhattan Screw & Stamping Works*, 19 L.R.A.(N.S.) 269, 90 C. C. A. 299, 163 Fed. 939. We are not called upon to determine the correctness of the rule thus stated, as applied to appropriate facts. We content ourselves with saying that in our opinion it can have no application to the facts of this case, for the reason that, upon the record before us, taking into account the lack of public knowledge and reputation of complainant's heater in question, the absence of complainant's trademark and trade-name, and the fact, as shown, we think, by the preponderance of the proof, that purchasers more often identify stoves by their

name or the name of the manufacturer, or both, than by appearance merely; that all of complainant's natural-gas heaters, including even its cheap products, have the acorn device prominently upon the front and are all advertised in catalogues under the name of "Acorn," in connection with the comparatively minor variations in the general appearance of the stove, including the style of ornamentation, from that of stoves theretofore upon the market, the retail purchaser exercising reasonable care could not well have been deceived into the belief that in buying defendant's heater he was purchasing complainant's stove.

It is further urged that in trademark cases the right to protection does not depend upon any particular period of usage, but that, once adopted in good faith and used, the right thereto will prevail against any subsequent user, although no public reputation or notoriety has been acquired; that the right of protection against infringement of trademarks and unfair competition respectively rest upon the same basis; and that therefore the rule in trademark cases, as stated, controls this case.

But, whether or not the rule in trademark cases is as stated (a question we are not now required to consider), the case before us is not a trademark or a tradename case, but one of alleged unfair competition, predicated upon the simulating of the dress of a competitor's product. And in such case it is clear that identification in the mind of the purchaser of such distinctive dress, as belonging to the complaining manufacturer, is necessary, and that such identification cannot well exist in the absence of knowledge or reputation of such characteristic dress.

In this connection it is urged that complainant's good will and reputation, connected with its general line of goods, attached to the heater in question immediately upon its being placed upon the market. But if we have correctly reached the conclusion that complainant's heater had acquired no appreciable public knowledge or reputation, and the dress of the heater was not identified in the public mind as the complainant's product, the suggestion loses point.

There is some evidence tending to show an actual deception of customers on the part of dealers by representing defendant's heater as that of complainant. It also appears that on the inside of some of the castings of defendant's heater, due to the use of parts of complainant's heater as patterns, the letters "A" and "Sol. A." are found, and that this fact would enable a dishonest dealer



to misrepresent defendant's heater as a "Solar Acorn." This last consideration does not impress us as important, and there is no evidence of actual deception thereby. So far as concerns actual misrepresentation by dealers of the identity of heaters, not only is the proof thereof not highly convincing, but defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that of complainant. *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 345; *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* 14 L.R.A.(N.S.) 1182, 76 C. C. A. 495, 146 Fed. 43.

We have no doubt that sales of complainant's heater have been materially lessened through defendant's competition. The effectiveness of this competition, in our judgment, has resulted from the activity with which defendant has pushed its heater, the publicity and extent of defendant's exhibitions and advertising, the advantage which the defendant has, especially in the large and valuable district of Ohio, in being a local manufacturer; and to complainant's advance of prices for 1907, before which time the prices of the two competing heaters were substantially the same. This competition was legitimate.

Our conclusion, then, in substance, is that complainant has failed to establish a case of unfair competition, for lack of proof that defendant has palmed off its goods upon the public as the goods of complainant. In our opinion, defendant's intent, as shown by the record, in copying complainant's cut and patterns, was not to derive a benefit from complainant's name and reputation, but to avail itself of a design which, by imitating it, defendant has confessed is attractive and desirable. Defendant's intent is, of course, not material where the necessary result of the act is to commit legal wrong. But, where neither such natural result nor such actual intent exists, unfair competition is not made out. *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 499, 122 Fed. 345; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 537, 549, 551, 34 L. ed. 997, 1004, 1005, 11 Sup. Ct. Rep. 396; *Globe-Wernicke Co. v. Fred Macey Co.* 56 C. C. A. 304, 119 Fed. 703, 704.

We do not think that the fact that defendant entered the extreme western territory after complainant's goods had been introduced there justifies a differentiating of that particular territory from the remaining portions of it, or from the territory as a whole.

For the reasons stated, the decree of the Circuit Court should be affirmed.

37 L.R.A.(N.S.)

# MISSISSIPPI SUPREME COURT.

NATCHEZ, COLUMBIA, & MOBILE RAILROAD COMPANY, Appt.,

v.

MRS. L. A. LAMBERT.

(— Miss. —, 54 So. 836.)

## Carriers — carrying passenger beyond station — damages.

1. A railroad company is liable in nominal damages for carrying a passenger beyond his station, into its yards, without giving him an opportunity to alight at the station.

## Same — duty to inform passenger of intention to return.

2. A railroad company which, for purposes of its own, runs a passenger train beyond a station where passengers are to alight, into its yards, is bound to inform them of its intention to return and give them an opportunity to alight at the station, and is liable for all damages proximately caused to them by its failure so to do.

## Proximate cause — illness of passenger — exposure to storm — failure to stop at station.

3. The carrying of a passenger beyond his station, into the railroad yards, without giving him an opportunity to alight at the station, and failure to inform him of an intention to return to the station, is not the proximate cause of illness due to his attempt to walk back in a storm, where he was not pressed for time, and by remaining in the train a short time, would have been deposited at the station platform.

(February 27, 1911.)

## Note. — Duty upon running train past station to notify passengers of intention to return.

As a general rule a carrier of passengers, upon bringing the train to a full stop for any other purpose than for passengers to alight, owes a duty to avoid injury to passengers who may be misled as to the place of stoppage being the proper one for the purpose of alighting. 6 Cyc. 614.

Accordingly it has been held in harmony with *NATCHEZ, C. & M. R. Co. v. LAMBERT* that a carrier, upon running past the station, owes the duty to notify passengers intending to alight at that point, of its intention to return and give them an opportunity to alight at the station platform, especially where the name of the station has been announced. *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168.

Thus, running a train past the regular stopping place, on a dark night, after the customary signal has been given for stopping at that point, and coming to a full stop on a dangerous trestle bridge about 400 feet distant, near the time the train was due at the regular stop, without giving warning of the dangerous place or of an in-

**A**PPEAL by defendant from a judgment of the Circuit Court for Lawrence County in plaintiff's favor in an action brought to recover damages for carrying her beyond her station. Reversed.

Plaintiff took passage on defendant's train at Topeka, Mississippi, to a junction point of the Illinois Central Railroad Company, intending to connect with the Illinois Central train due about four hours after the arrival of defendant's train. When the train reached the junction, instead of stopping, it passed the depot a distance of

about 250 yards, intending later to back in to it. It was raining, and plaintiff, without notifying the conductor, walked back to the station through the rain, which caused the injury for which she brings this action.

Messrs. T. Brady, Jr., and Herman Dean for appellant:

The original contract had been carried out in full. Under it plaintiff would have been compelled to alight where she did, but, in that event, she could not have been heard to complain.

tention to return to the regular stopping place is such negligence as to render the carrier liable for injuries sustained to a passenger by being thrown from the platform by the sudden backing of the train while attempting to alight, since there was an implied invitation to the passenger to alight. *Ibid*.

So, in *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408, it was held that a carrier was liable for an injury sustained by a passenger in alighting at a dangerous place, in the darkness, after the train had come to a full stop after passing the station, and the station had been announced either from the usual place of making such announcement, or after the stopping of the train.

And in the following cases it has been held to be a question for the jury whether the failure to so notify passengers of an intention to return to the station, after coming to a full stop, was negligence under the circumstances: *Gadsden & A. Union R. Co. v. Causler*, 97 Ala. 235, 12 So. 439; *Taber v. Delaware, L. & W. R. Co.* 71 N. Y. 489; *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 374, 46 N. W. 773; *Pennsylvania R. Co. v. White*, 88 Pa. 327; *Hemmingway v. Chicago, M. & St. P. R. Co.* 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804; *Weller v. London, B. & S. C. R. Co.* L. R. 9 C. P. 126, 43 L. J. C. P. N. S. 137, 8 Moak, Eng. Rep. 441, 29 L. T. N. S. 888, 22 Week. Rep. 302.

In *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 274, 46 N. W. 773, the court said that a carrier was bound to take notice that when a train is brought to a full stop along the station platform that passengers will attempt to alight, and if the stop is of sufficient length of time to allow it, some of them will be in the act of alighting when the train starts back, and that if the stop is of such duration it will be negligent in starting back without some warning, though the stop takes the engine past a water tank where it is customary for that particular train to take water, and it is impossible at all times to stop at the immediate point of taking water, and in the event of running past the point a short distance, the usual course is to back up immediately.

Accordingly, it was held that a request for an instruction that "the running of a railway train beyond the usual stopping

place at the station, before coming to a standstill, is not of itself negligence, or not negligence as a matter of law; nor is the pause after it is brought to a stop for a period necessary to reverse the motion so as to back it to the usual stopping place, negligence,"—was properly modified by adding the following: "Unless the stop is so made and for such a length of time as to indicate that it is an invitation to passengers to alight, and the movement backward is made without warning, while they are alighting in response to such invitation." *Ibid*.

In *Weller v. London, B. & S. C. R. Co.* L. R. 9 C. P. 126, after holding that merely calling out the name of the station before the train has come to a stop is no evidence of negligence, and that merely overshooting the station platform is not negligence, Brett, J., said: "But if the porter has called out the name of the station, and the engine driver has overshot the station, and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight. At all events, the jury may from these facts infer negligence." And in the same case, Honyman, J., said: "But the train having overshot the platform, and the name of the station having been called out, the omission of the company's servants to caution the passengers not to alight until the train had been brought up at the proper place was evidence of negligence. Speaking for myself, I should say it was not only evidence of negligence, but negligence itself." Cited with approval in *Englehaupt v. Erie R. Co.* 209 Pa. 182, 58 Atl. 154.

And in *Hemmingway v. Chicago, M. & St. P. R. Co.* 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804, it was held that the failure of a conductor to notify an infant passenger, a boy eleven years of age, that the train would not stop at the depot, but would pass by some distance and then back up so that he might get off with safety, warranted a finding of negligence by the jury, so as to render the railroad company liable for an injury sustained to the boy by jumping from the moving train.

Likewise in *Taber v. Delaware, L. & W. R. Co.* 71 N. Y. 489, it was held that the question of negligence in failing to announce to passengers desiring to alight at

Wells v. Alabama G. S. R. Co. 67 Miss. 24, 6 So. 737; Alabama & V. R. Co. v. Stacey, 68 Miss. 463, 9 So. 349.

All defendant had to do was to put plaintiff off at the depot in accordance with its custom, and appellee was in duty bound to know this custom.

Southern R. Co. v. Kendrick, 40 Miss. 387, 90 Am. Dec. 332.

Punitive or exemplary damages should have been denied to appellee, yet damages for physical discomfort and inconvenience

a station that the train had not come to a final stop, but would back up, is for the jury where, before reaching the station, it had been called out, and the night was dark, and there was no depot, nor a station light, or anything to indicate the stopping place to a person not familiar with it. The court said: "But the fact that the train overshoot the station, rendering it necessary after it came to a standstill to start it back to the usual stopping place, in connection with the other circumstances, made it a question for the jury whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station that the train had not come to a final stop, and that it would back up."

And so the question of negligence of those in charge of a train, and the implied invitation to a passenger to alight from the train, are questions for the jury where, with knowledge of a passenger's intention to alight at a particular point, the train is driven to the next stopping place, about 200 yards distant, where it is brought to a full stop, and, without notifying the passenger of an intention to return and without warning or signal, the train was moved backward while the passenger was in the act of alighting, and caused the injury complained of. Gadsden & A. Union R. Co. v. Causler, 97 Ala. 235, 12 So. 439.

But in Lewis v. London, C. & D. R. Co. L. R. 9 Q. B. 66, 43 L. J. Q. B. N. S. 8, 29 L. T. N. S. 397, 22 Week. Rep. 153, it was held that the failure of a carrier to announce its intention to back the train to the station platform, after coming to a full stop, was not negligence, when the name of the station was announced before the train reached the station platform, and the passengers were not directed to leave the train, so as to render the carrier liable for an injury sustained to a passenger by being thrown from the car by the sudden backing of the train while she was attempting to alight, since, as a reasonable person, she must have believed that the train which had passed the platform would come back again; that it would not stop to let passengers get out upon the tracks, especially where the coaches immediately in front were standing upon a bridge, and she was familiar with the station and surroundings; and consequently she had no

cannot be classed under actual or compensatory damages, but under punitive.

Memphis & C. R. Co. v. Whitfield, 44 Miss. 466, 7 Am. Rep. 699.

In every instance where a verdict for a large amount has been sustained on appeal, the verdict included punitive damages as well as compensatory, given under circumstances warranting the infliction of punitive damages, which do not obtain in this case.

Kansas City, M. & B. R. Co. v. Fite, 67 Miss. 373, 7 So. 223; Alabama & V. R.

business to attempt to alight at a point beyond the platform, unless the servants of carrier told her to do so.

As to the right of a passenger to assume that car will stop at proper place for alighting, see notes to Baltimore & O. S. W. R. Co. v. Mullen, 2 L.R.A.(N.S.) 115, and Farrell v. Chicago G. W. R. Co. 9 L.R.A.(N.S.) 1113.

Stopping passenger train at point where trains are standing or moving on parallel, adjacent tracks, see note to Smith v. North Carolina R. Co. 17 L.R.A.(N.S.) 179.

Liability of street railway company for stopping car at improper place for passenger to alight, see note to Melton v. Birmingham R. Light & P. Co. 16 L.R.A.(N.S.) 467.

#### Contributory negligence.

It has been held that where the name of the station has been called out, and the train has come to a stop, no warning being given to the contrary, a passenger is not negligent in attempting to alight, since he has a right to suppose that the train has reached the spot where it is intended that he should alight. Weller v. London, B. & S. C. R. Co. L. R. 9 C. P. 126, 43 L. J. C. P. N. S. 137, 8 Moak. Eng. Rep. 441, 29 L. T. N. S. 888, 22 Week. Rep. 302; Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Sherwood v. Chicago & W. M. R. Co. 82 Mich. 374, 46 N. W. 773.

#### Proximate cause.

The carrying of a passenger beyond his station, onto a dangerous trestle bridge, on a dark night, without giving him an opportunity to alight at the station, and failure to inform him of an intention to return to the station, is the proximate cause of death caused by thypo-malaria fever, which was then prevailing in the community, where the injury sustained by alighting at the improper place was such as to render the system of the injured person more susceptible to disease and less able to resist it. Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 158.

On the general question, what injuries may be deemed the proximate result of discharging passenger at improper place, or one not his destination, see note to Georgia R. & Electric Co. v. McAllister, 7 L.R.A.(N.S.) 1177.

A. L. R.

Co. v. Stacy, 68 Miss. 463, 9 So. 349; Alabama & V. R. Co. v. Gibbs, — Miss. —, 12 So. 545.

Messrs. Magee & McGehee for appellee.

Mayes, Ch. J., delivered the opinion of the court:

In the absence of some good reason therefor, it was the duty of this railroad company to allow Mrs. Lambert to get off of its train, at her proper depot, at the very first opportunity that was presented. In this case Mrs. Lambert should have been landed at her proper depot before the train was carried into the yards, and because this was not done she is clearly entitled to nominal damages only. If it was necessary, in any case, for a passenger train to be pulled way beyond the depot and into the yards of the company, it is certainly the duty of the company to notify the passengers of its purpose to return them to their proper landing place, and if it fail to do this it is negligence, and any damage occasioned any passenger as the direct result makes the company liable therefor.

In this case, however, the main injury complained of was not the direct, proximate result of negligence of the company in carrying Mrs. Lambert by the depot, or failing to notify her of their purpose to return the train to the proper depot. It had been raining, and was raining at the time the train pulled into the yards. Mrs. Lambert knew this, and although she had four hours to wait after she reached the depot before the train she was to take over the Illinois Central Railroad to McComb City would arrive, she got out of her coach into the rain and slush, and undertook to walk back some 200 or 300 yards to the depot. It was getting off of the train and going into the rain that made her ill and caused the damage for which she sues. When she got off, the train had only been there a few minutes, and in twenty or thirty minutes the train was carried back to the depot for the purpose of allowing passengers to get off there. She had ample time to wait, and made no effort to have the train carry her back. She was at the terminus of the road, and knew that she could not be carried further. We do not think she was entitled to recover more than nominal damages, and the court should have so instructed.

Reversed and remanded.

37 L.R.A. (N.S.)

# OKLAHOMA SUPREME COURT.

C. W. McDONALD, Plff. in Err.,  
v.

J. J. BAILEY.

(25 Okla. 849, 107 Pac. 523.)

**Replevin — undivided interest in personalty.**

Replevin will not lie for an undivided interest in personal property.

(March 8, 1910.)

Headnote by TURNER, J.

*Note. — Replevin for undivided interest in personal property.*

## General rule.

The general rule is well settled, that replevin can be maintained only for specific property capable of identification and delivery, and will not lie for an undivided interest in personal property. 34 Cyc. 1359; D'Wolf v. Harris, 4 Mason, 515, Fed. Cas. No. 4,221 (*obiter*); Hart v. Morton, 44 Ark. 447; Stanley v. Robinson, 14 Ill. App. 480 (*obiter*); Spooner v. Ross, 24 Mo. App. 509; Schwarz v. Lee Gon, 46 Or. 219, 80 Pac. 110.

Thus, it has been held that replevin will not lie for an undivided interest in, or part of:

—horses. Balch v. Jones, 61 Cal. 234; Caldwell v. Sisson, 150 Mo. App. 547, 131 S. W. 140; Sharp v. Johnson, 38 Or. 246, 84 Am. St. Rep. 788, 63 Pac. 485.

—growing crop. Read v. Middleton, 62 Iowa, 317, 17 N. W. 532.

—mature crop (corn) standing ungathered in field. Jones v. Dodge, 61 Mo. 368; McDONALD v. BAILEY.

—gathered crop. Ward v. Worthington, 33 Ark. 830 (cotton); Hart v. Morton, 44 Ark. 447 (cotton); Moseley v. Cheatham, 62 Ark. 133, 34 S. W. 543 (cotton and corn).

—wheat (threshed). Bowen v. Roach, 78 Ind. 381; Gossett v. Drydale, 48 Mo. App. 430.

—fodder in stacks. Ellis v. Culver, 2 Harr. (Del.) 129.

—hay in stacks and oats in granary. Hoeffler v. Agee, 9 Colo. App. 189, 47 Pac. 973.

—cotton in bales. Jackson v. Stockard, 9 Baxt. 260.

—bales of hops, varying in weight and not necessarily of uniform quality or grade. Schwarz v. Lee Gon, 46 Or. 219, 80 Pac. 110.

—logs. Hart v. Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Busch v. Nester, 70 Mich. 525, 38 N. W. 458.

—portable sawmill. Kindy v. Green, 32 Mich. 310.

—piles of lumber. Phipps v. Taylor, 15 Or. 484, 16 Pac. 171.

**E**RROR to the Comanche County Court to review a judgment in defendant's favor in a replevin action to recover possession of a part of a certain crop of corn. Affirmed.

The facts are stated in the opinion.

Mr. C. W. McDonald in *propria persona*.

Mr. J. A. Fain for defendant in error.

Turner, J., delivered the opinion of the court:

On November 17, 1906, C. W. McDonald, plaintiff in error, sued J. J. Bailey, defendant in error, in the county court of Coman-

che county in replevin to recover the possession of "one half a crop of corn" grown on certain land in said county, of the alleged value of \$200, claiming special ownership therein by virtue of a certain note, secured by chattel mortgage thereon, made, executed, and delivered by Chatoe-bitty and High-Weini to E. N. Joseph, and by him transferred to plaintiff for value and before maturity. For answer defendant filed a general denial. There was trial to the court. At the close of plaintiff's testimony, defendant demurred to the evidence, which was sustained, and exceptions saved, and after motion for a new trial filed and overruled, plaintiff brings the

—vessel. *Hackett v. Potter*, 131 Mass. 50 (even if the plaintiff owns a seven-eighths interest).

So, a mortgagee of a crop of cotton, consisting of 5 bales, cannot maintain a replevin action against the landlord, whose tenant raised and mortgaged the crop, for 2 bales thereof, admitting the landlord's superior title to an undivided interest in the cotton, equal in value to a certain amount, not greater than the value of 3 bales of the cotton, as the mortgagee has no superior title to any particular part of the lot of cotton, but is at most only an owner in common with the landlord, and cannot resort to replevin as a means of partitioning the property held in common. *Titsworth v. Frauenthal*, 52 Ark. 254, 12 S. W. 498.

Nor can a mortgagee of a crop of cotton "to the extent of" a specified number of bales maintain an action of replevin for such number, until after a separation or designation of the specific property,—the mortgage being uncertain in the description thereof. *Person v. Wright*, 35 Ark. 169.

Likewise, the purchaser of a certain number of barrels of flour out of a large number stored in a warehouse cannot maintain replevin for the number of barrels purchased, unless the portion claimed has been severed and designated from the bulk out of which it was sold, as otherwise there is no mode of identification. *Adams v. Gorham*, 6 Cal. 68.

And replevin cannot be maintained for an undivided interest in, or share of, corn which the plaintiff has acquired by delivering to the defendant, a warehouseman, corn, which the latter, with the consent of the former, and for convenience and saving of storage, has put in mass with other corn, owned by himself and by others, with the understanding that a like quantity and quality of corn shall be delivered to the plaintiff out of the common mass in store, when required,—the identity of the corn delivered by the plaintiff and his property in that particular corn being lost by his consent. *Low v. Martin*, 18 Ill. 286.

Where a farm tenant and his landlord are joint owners of certain live stock which the tenant is to keep until the expi-

ration of his lease, when division in kind is to occur, and the tenant sells his undivided half interest to a stranger, the latter cannot maintain an interplea, which is in the nature of a replevin for his undivided interest, in an attachment proceeding by the landlord against the tenant, before the expiration of the lease, to collect past due rent, in which proceeding a part of the live stock is attached. *Spooner v. Ross*, 24 Mo. App. 599.

But where one of two joint owners of cattle, which are to be divided equally between them, before such division, repudiates the ownership of the other, divides the cattle, and sells half of them, the other co-owner may maintain replevin for the remaining half. *Cornett v. Hall*, 103 Mo. App. 353, 77 S. W. 122.

And while the holder of a chattel mortgage upon 3 bales of cotton out of a tenant's crop of 11 bales cannot, while the crop remains on the premises where it was produced, and undivided, with the landlord's first lien upon it for rent, to the extent of one fourth of the crop, and a second mortgage on the whole crop, constituting a third lien, maintain replevin for three bales of the crop, or as much cotton as will make three bales, as he has no title to any particular part of the undivided crop; yet, after an agent of the landlord, with the assent of the tenant, has removed from the premises all of the crop except 3 bales, or enough to make 3 bales, the first mortgagee may obtain possession of such 3 bales by replevin, for the purpose of selling it under the power in his mortgage, to satisfy his debt, on refusal of the mortgagor to surrender it, and the latter cannot avoid replevin by wrongfully transferring possession to another. *Washington v. Love*, 34 Ark. 93.

In *McLaughlin v. Piatti*, 27 Cal. 452, a bill in equity to compel the specific performance of a contract to sell 500 head of cattle, to be selected and chosen by the purchaser out of a large herd, the court said: "On the facts of this case, the plaintiff had a speedy and perfect remedy at law. The plaintiff . . . had the right to the immediate possession of the whole herd for the purpose of making a selection of his 500 head. In pursuance of that right, the

case here and says that the court erred in sustaining said demurrer.

To maintain the issues on his part, plaintiff introduced in evidence said promissory note for \$225, dated April 29, 1905, signed by Chatoe-bitty and High-Weini, payable to E. N. Joseph, or bearer, providing for 12 per cent interest from date, and for an attorneys' fee of \$25. He also introduced in evidence a bill of sale, without date, from the makers of said note to himself, purporting to convey "all of one half of crops grown 1906 on the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  and on the N.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  sec. 11, Twp. 14

north, of range 9 west of the I. M., in Comanche, O. T., on Little Washita river," and indorsed as follows:

This instrument was filed for record on the 30th day of March, 1906, at 11 o'clock A. M., and duly recorded in Book 32, Mis. p. 461.

[Seal.]

J. Robert Gilliam,  
Register of Deeds.

Territory of Oklahoma, County of Comanche.

"I, J. Robert Gilliam, register of deeds in and for the county, of territory above named, do hereby certify that the fore-

defendants were requested to deliver the whole herd to the plaintiff, but refused so to do. We have here all the grounds upon which the action of detinue has been familiarly planted for ages. In that form of remedy, the plaintiff could have recovered possession of the whole herd—selected his 500 head from it, and returned the residue.

... Our action for the 'claim and delivery of personal property,' considered as a remedy, is at least commensurate with the action of detinue at common law."

And where one person has purchased from another a certain number of barrels of flour out of a larger number of storage in a warehouse, taking therefor an order on the warehouseman, and the latter has accepted the order and given the purchaser a storage receipt for the number of barrels purchased, the warehouseman is estopped from denying his liability to the purchaser, in a subsequent replevin action against himself and a sheriff who has seized the whole mass of flour under a writ of replevin in another suit against the warehouseman, although no segregation has been made of the flour claimed from the larger lot of the same brand and quality. *Adams v. Gorham*, supra.

In *Crapo v. Seybold*, 36 Mich. 444, an action of replevin for an undivided half of a crop of wheat in shocks, it was held that, as the defendant did not have or claim any interest in the other undivided half, he had no right to raise the question whether such an action could be maintained.

And so, a transferee of a farm tenant's undivided interest in unthreshed wheat in stacks on the farm may maintain replevin therefor against a constable who has levied thereon an attachment on behalf of a creditor of the tenant. *Pitman v. Baumstark*, 63 Kan. 69, 64 Pac. 968.

Exception as to divisible property of uniform kind, quality, and value.

An exception to the general rule that replevin will not lie for an undivided interest in personal property is recognized in some jurisdictions, where the property sought to be recovered consisted of an interest in, or part of, goods of the same nature, quality, and value, which can be easily divided into aliquot parts of equal value, such as the cereal grains, of which an owner

may recover, in an action of replevin, his own share of the bulk, kind for kind, and measure for measure. 34 Cyc. 1359; *Kaufmann v. Schilling*, 58 Mo. 218.

As said in *Fines v. Bolin*, 36 Neb. 621, 54 N. W. 990, while "it is well settled by the authorities that the owner of an undivided interest in a chattel cannot maintain an action against a cotenant to acquire its possession, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession thereof, and neither has the right to the immediate and exclusive possession of the same as against the others," this doctrine, "that one joint tenant cannot sustain replevin against his cotenant, applies more particularly to a single piece of property, or to things in their nature so far indivisible that the share of one is not susceptible of delivery without the whole," and "it should not obtain . . . where the property is absolutely alike in quality and value, and is readily divisible by measurement or weight, such as corn in the crib or pile. When a person is entitled to half of 100 bushels of corn in a mass, he has a right to 50 bushels in severalty, and if his cotenant refuse a division, when properly demanded, he may recover his portion of the grain by replevin."

So, in the following cases, it has been held that replevin may be maintained for an undivided interest in, or share of, the kinds of property indicated, when uniform in kind, quality, and value:

—grains (threshed). *Sutherland v. Carter*, 52 Mich. 471, 18 N. W. 223 (wheat and oats, of which it was the defendant's duty to deliver one half to the plaintiff upon demand); *Freese v. Arnold*, 99 Mich. 13, 57 N. W. 1038 (wheat, of which the defendant unlawfully withheld the plaintiff's share); *Johnson v. Stone*, 111 Minn. 228, 126 N. W. 720 (small grains); *Kaufmann v. Schilling*, supra (oats raised by the plaintiff, a farm tenant, where he was entitled to the possession of the crop till a separation or measurement had taken place and he had delivered one half to the defendant, and the latter has taken possession of the whole crop);

—railroad ties. *Halpin v. Stone*, 78 Wis. 183, 47 N. W. 177.

And where two tenants in common are

going is a true and correct copy of a like instrument now on file in my office.

Dated this 30th day of March, 1906.

J. Robert Gilliam,  
Register of Deeds.

He testified, in substance, that as agent for said Joseph on or about that date he took said note, and afterwards bought it from said Joseph for value and before maturity, and that no part of it had been paid; that a chattel mortgage was given at the same time, and later superseded by said bill of sale to secure said debt; that before suit demand was made on defendant for the

corn in question, at which time defendant was feeding the same to some seventy five head of cattle and about as many hogs; that the same was standing in the field, which he drove and walked through, and found that it would make some 40 or 50 bushels per acre, and that there was some 120 acres of it; that at that time corn was selling in Fletcher, the closest market, at from 25 to 27 cents per bushel, and that one half of said crop was of the value of \$500; that at the time the writ was served defendant said he had bought part of the corn from High-Weini and his squaw, mak-

equally entitled to the possession of certain corn in a single pile or crib, which is in the exclusive possession of one of them, who refuses a division when properly demanded, the other may recover his portion by an action of replevin. *Fines v. Bolin*, supra.

Similarly, a statutory action of "claim and delivery" for the recovery of specific property may be maintained for a certain undivided fractional part of a certain specified quantity of wheat, oats, and barley, uniform in quality and value, and susceptible of a fair and equal division by measurement or weight,—the description and proof of the property sought to be recovered, as such undivided fractional part, being sufficiently specific. *Ellingboe v. Brakken*, 36 Minn. 156, 30 N. W. 659.

And replevin may be maintained for an undivided half of certain wheat in the stack, ready to be threshed, to the immediate possession of which the plaintiff is entitled,—and the wheat may be divided and one half thereof seized under the writ, as it is threshed. *Wattles v. Dubois*, 67 Mich. 313, 34 N. W. 672.

In *Huff v. Henry*, 57 Mo. App. 341, it was held that replevin may also be maintained for an undivided one-sixth interest in certain corn, matured and standing in the field,—especially where the defendant sets off to the sheriff when he goes to execute the writ, the plaintiff's one sixth of the corn, and the parties agree that the part so set off was the plaintiff's vendor's due and proper proportion of the crop.

And in *Gardner v. Dutch*, 9 Mass. 427, it was held that while a tenant in common of chattels cannot maintain replevin for his undivided share, an owner of a certain number of bags of coffee containing a certain amount may maintain replevin therefor against an officer who has attached it, under a writ against another person, as a part of a larger mass of coffee in the possession of the latter, although the bags belonging to the plaintiff have no distinguishing marks and have never been separated in any manner from the rest of the coffee.

As appears from some of the cases cited above, under the general rule, however, this exception is not recognized in all jurisdictions, or under all circumstances. And see, also, cases cited below, as to commingled goods of this class.

37 L.R.A. (N.S.)

#### Commingled goods—in general.

Where the distinct and separate goods of two or more persons have been so intermingled as to be indistinguishable, the right of one of them to maintain replevin for his own share of the mass may depend upon either the circumstances of the intermingling, or the nature of the goods, or both. 34 Cyc. 1359, et seq.

#### —plaintiff's fault.

If the intermingling occurred through the fault of the plaintiff, it seems clear that he cannot maintain replevin. Thus, one who voluntarily marks logs of his own like those of another person, and piles them with the latter so that he cannot identify his own logs, cannot maintain replevin for a proportional part of the whole number of logs thus piled together. *Dillingham v. Smith*, 30 Me. 370.

So, in *The Idaho*, 93 U. S. 575, 23 L. ed. 913, a libel against a steamer for damages for the nondelivery of 165 bales of cotton which it had delivered to the true owner of 140 bales thereof, with which the other 25 bales had previously been intermingled, the court said: "All the authorities agree that if a man wilfully and wrongfully mixes his own goods with those of another owner so as to render them indistinguishable, he will not be entitled to his proportion or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value."

And under the general rule that if a man wrongfully mixes his own goods with like goods of another person, so that they cannot be distinguished, the wrongdoer must lose his property, if a person having a license to quarry granite blocks has mixed and mingled blocks which he has taken out after a certain date with other blocks then at the quarry, the title to which is involved and can be determined only in an action pending in a state court, so that the two lots cannot be distinguished, he can recover none of the blocks in a replevin action in a Federal court. *Williams v. Morrison*, 32 Fed. 177.

#### —defendant's fault.

If the intermingling occurred through the fault of the defendant, it is equally clear

ing the checks payable to the latter, and part of it from a white man, paying the Indian \$80 and the white man \$120 therefor.

The deputy recorded of deeds of Canadian county testified that the bill of sale, when brought to that office by plaintiff, was first indexed as a chattel mortgage, and when such was seen to be a mistake was, with his consent, on the same day, withdrawn from the chattel mortgage file and recorded in Miscellaneous Book No. 32, as a bill of sale; that such error is evidenced by an entry in the chattel mortgage record as follows: "Error C. 8220, Chatoe-bitty and High-Weini to C. W. McDonald, March 30, 1906 (.....) Error (Bill of Sale)." The reception book in said office evidenced the same to have been withdrawn from the files by plaintiff May 2, 1906. He stated that it had been in his possession ever since. The instrument itself appears to be without file mark of any kind. Plaintiff in his brief admits that the entire crop of corn in question was purchased by defendant some two or three weeks before this suit.

The most obvious ground on which the demurrer was properly sustained was that, assuming, but not deciding, that plaintiff was the owner of an undivided interest

that the plaintiff may maintain replevin for at least his share of the mixed mass,—especially if it is all of the same kind, quality, and value. Thus, one upon whose land logs have been unlawfully cut and intentionally intermixed by the trespasser with logs of his own, so as to be indistinguishable therefrom, may maintain replevin for the amount of his logs out of the common mass. *Stearns v. Raymond*, 26 Wis. 74.

And replevin may be maintained for a quantity of staves made from timber wrongfully cut on the plaintiff's land, which staves the defendant has mingled with other staves of like character, so that it is impossible to identify and separate them (*Peterson v. Polk*, 67 Miss. 163, 6 So. 615),—especially if the mingled staves are all of the same kind, quality, and value, and if no advantage would result to either party by getting the identical staves owned by him (*Rust Land & Lumber Co. v. Isom*, 70 Ark. 99, 91 Am. St. Rep. 68, 66 S. W. 334),—and the plaintiff may recover from the whole lot a number of staves equal to the number so taken from his land.

Likewise, replevin may be maintained for a quantity of lumber manufactured from trees cut without authority on land belonging to the plaintiff, which the defendant has intermingled with other lumber of the same kind and value. *Mine LaMotte Lead & Smelting Co. v. White*, 106 Mo. App. 222, 80 S. W. 356.

And the owner of lumber manufactured from logs which the manufacturer had

therein, replevin therefor will not lie. *Wells, Replevin*, § 154; *Shinn, Replevin*, § 206; *Cobbey, Replevin*, 2d ed. § 238; *Sharp v. Johnson*, 38 Or. 246, 84 Am. St. Rep. 788, 63 Pac. 485; *Hoefter v. Agee*, 9 Colo. App. 189, 47 Pac. 973; *Schwarz v. Lee Gon*, 46 Or. 219, 80 Pac. 110; *Moseley v. Cheatham*, 62 Ark. 133, 34 S. W. 543; *Hart v. Morton*, 44 Ark. 447; *Usry v. Rainwater*, 40 Ga. 328; 24 Am. & Eng. Enc. Law, 492. An exception to this rule, however, is made by some authorities where the property sought to be replevined consists of a part of a large mass of the same nature and quality, such as wheat in an elevator, corn in a crib, etc., easily divisible into aliquot parts. 2 *Cobbey, Replevin*, 2d ed. § 400. But this rule can find no application in this case, for the reason that the proof shows the corn was on the stalk in a large field, of unequal yield in spots, and being devoured by cattle and hogs. Plaintiff's interest, therefore, was almost impossible of identification and seizure under the writ, and of separation from defendant's interest in the mass, without loss or injury to one or the other of these contending parties.

The judgment of the trial court is affirmed.

All the Justices concur.

mingled with logs of his own may maintain replevin to recover, out of the common mass of lumber of the same quality and value, the quantity which his logs have contributed thereto. *Bent v. Hoxie*, 90 Wis. 625, 64 N. W. 426.

So, in *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551, affirming 2 Dill. 398, Fed. Cas. No. 12,486, it was held that where logs cut from lands of the state, without license, have been intermingled with logs cut from other lands, so as not to be distinguishable, the state is entitled, under the law of Minnesota, to replevy from the whole mass an amount equal to the logs cut on its lands. The court said: "The remedy thus afforded by the law of Minnesota is eminently just in its operation, and is less severe than that which the common law would authorize."

And replevin may be maintained for corn delivered by the plaintiff to a warehouseman, which the latter, wrongfully, or without the consent of the plaintiff, has put in mass with other corn, whereby identification has become impossible, and the defendant must bear the loss or inconvenience caused by his wrongful intermixture. *Low v. Martin*, 18 Ill. 286.

—no fault.

Where it does not appear that either party was at fault in causing the commingling of property, but the mixture was made innocently and in good faith, some courts simply follow the general rule that where



property cannot be identified or separated, so as to be seized in kind, replevin will not lie. Thus, it has been held that replevin cannot be maintained for cotton so mingled with other cotton in bales as to be incapable of identification; as division in kind cannot be made without injury to the other party, for, if a bail or bails be torn to pieces, the cotton would have to be re-baled at additional expense. *McKennon v. May*, 39 Ark. 442.

And replevin cannot be maintained for 49 hogs belonging to the plaintiff, which have been intermingled with others, and cannot be identified, but are described merely as such number out of a drove of 68 hogs then in the defendant's possession. *Guille v. Wong Fook*, 13 Or. 577, 11 Pac. 277.

This rule is followed, also, in some cases, even where the commingled property is all of the same kind and quality. Thus, it has been held that replevin cannot be maintained for logs so mingled with other logs in driving, that the plaintiff is unable to identify his specific property (*Ames v. Mississippi Boom Co.* 8 Minn. 467, Gil. 417); and that replevin cannot be maintained for corn delivered by the plaintiff to the defendant, a warehouseman, which the latter, with the consent of the plaintiff and for convenience and saving of storage, has put in mass with other corn owned by himself and others, with the understanding that a like quantity and quality of corn is to be delivered to the plaintiff out of the common mass in store, when required. *Low v. Martin*, supra.

And in *Hull v. Hull*, 1 Idaho, 361, it was held that replevin cannot be maintained for grain which is mixed with other grain of the same kind, so that it cannot be designated or separated therefrom, or delivered to the plaintiff, if he has made no demand for judgment for any amount of money in case the property cannot be delivered.

But, by the weight of authority, where the commingled goods are all of the same nature and value, so that a fair division can easily be made, although an actual separation by identifying the specific property of each part owner is impossible, any owner may recover his share of the bulk in an action of replevin. *Read v. Middleton*, 62 Iowa, 317, 17 N. W. 532; *Grimes v. Cannell*, 23 Neb. 187, 36 N. W. 479.

Thus, replevin may be maintained for a quantity of grain placed on storage in mass, or mixed, by common consent, in a crib, warehouse, or mill, with other similar grain, although the identical grain so contributed to the mass cannot be distinguished. *Piazek v. White*, 23 Kan. 621, 33 Am. Rep. 211 (corn); *Grimes v. Cannell*, supra (corn); *Henderson v. Lauck*, 21 Pa. 359 (corn); *Young v. Miles*, 20 Wis. 615 (wheat).

Likewise, replevin may be maintained for a quantity of crude oil belonging to the plaintiff, which has been mixed by a third person with like oil belonging to the defendant. *Wilkinson v. Stewart*, 85 Pa. 255, 13 Mor. Min. Rep. 1. 37 L.R.A. (N.S.)

And one whose logs, without his fault, have been mixed with those of another so that he cannot identify them, may maintain replevin for a quantity of logs out of the common mass, equal to the quantity owned by him, in the absence of evidence that his logs differed in description, quality, or value from those of the defendant, with which they were intermixed. *Eldred v. Oconto Co.* 33 Wis. 133.

So, replevin may be maintained for a certain number of pieces of timber called "headings," which have been innocently mingled with other headings of a like description and value, although the plaintiff does not identify his property, as in such a case he may recover a like number out of the whole lot. *Reid v. King*, 89 Ky. 388, 12 S. W. 772.

And replevin may be maintained for lumber which the defendant has caused to be manufactured from timber cut from land owned by the plaintiff, although the defendant has, in good faith, mingled such lumber with lumber of his own, of the same quality and value; and the plaintiff may recover a proportional share of the mass. *Keweenaw Asso. v. Niel*, 120 Mich. 270, 79 N. W. 183.

But where printing cloths have been sent to a printing establishment, the owners of which have on hand large quantities of similar goods of their own, and all the goods in the establishment are subsequently seized upon execution against the printers,—while the owners of the cloths so sent to them may maintain replevin therefor, if the printers have actually confused the plaintiff's goods with their own, so that those of each cannot be distinguished, yet, if the printers have not actually confused, but have disposed of, the plaintiff's goods, even though they had, at the time, goods of like character of their own, which they intended to put in their place, the plaintiff cannot maintain replevin therefor. *Wood v. Fales*, 24 Pa. 246, 64 Am. Dec. 655.

A. C. W.

#### MISSOURI SUPREME COURT. (Division No. 1.)

CLINTON COUNTY, Resp.,  
v.

ELIAS T. SMITH et al.  
and  
E. C. HALL, Appt.

(238 Mo. 118, 141 S. W. 1091.)

**Bond — for money borrowed — collateral.**

1. That payments by one who has borrowed money belonging to a school district,

*Note. — Limitation of action: payment or promise by principal as extending limitation period as to surety.*

This note includes cases where the statute of limitations was set up as a defense

giving as security a bond secured by mortgage, were credited to him individually on the books of the district, and not indorsed on the bond, does not render the indebtedness one merely on open account against him, with the bond as collateral, so that the payments will not affect the running of the statute of limitations against the sureties on the bond.

**Limitation of actions — payment by principal — effect upon sureties.**

2. Payments on account by one who has given bond with sureties to secure money lent him by a school district, before the limitation period has expired, will toll the statute as against the sureties.

**Laches — failure to enforce bond — effect on liability of surety.**

3. Delay short of the limitation period in enforcing payment of a bond from the

principal will not release the sureties from liability thereon.

(November 29, 1911.)

**A**PPEAL by defendant Hall from a judgment of the Circuit Court for Clinton County in plaintiff's favor in an action brought to recover the amount alleged to be due on a school bond. Affirmed.

**Statement by Woodson, J.:**

This was a suit brought by the relator against the appellants on a school bond, executed by E. T. Smith as principal and E. C. Hall and Daniel Smith sureties, to recover the amount due thereon. The bond was for \$500, bearing 8 per cent interest, and was secured by a mortgage or deed of

by a surety, indorser, or guarantor, but it does not cover cases where the acknowledgment, new promise, or payment was made by the personal representative or agent of a co-contractor, nor by a partner after dissolution of the partnership, nor by a guardian as against his ward, nor by an assignee in bankruptcy as against the debtor.

**In General.**

The question whether a partial payment by the principal debtor will suspend the running of the statute of limitations in favor of the surety is part of the broader question, *i. e.*, whether a partial payment by one of two parties jointly and severally liable upon an instrument suspends the running of the statute in favor of the other. *Steele v. Souder*, 20 Kan. 39.

Three distinct and irreconcilable theories relating to the power of one joint maker or joint obligor to deprive the other of the defense of the statute of limitations have been announced. The first of these theories is that such a power exists. The courts announcing this doctrine have followed the rule of Chief Justice Mansfield in *Whitcomb v. Whiting*, 2 Dougl. K. B. 652. The entire decision of Lord Mansfield on the subject is as follows: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." This opinion of Lord Mansfield has not met with universal approval, and many of the jurists of this country have not hesitated to discredit it as unsound.

The second theory enunciated on this subject by some of the judges of England, subsequently to the decision of Lord Mansfield above referred to, and by many of the courts of this country, is that one joint maker of a note has no power to deprive another joint maker of the defense of the statute of limitations. This second theory is ably supported by the exhaustive opinion of Mr. Justice Story in the case of *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174. Among 37 L.R.A. (N.S.)

the many opinions in harmony with that of Mr. Justice Story is that of Mr. Justice Branson in *Van Keuren v. Parmelee*, 2 N. Y. 528, 51 Am. Dec. 322, wherein is found an elaborate review of all the authorities on the question, and a vigorous denial of the soundness of the doctrine announced in *Whitcomb v. Whiting*, *supra*.

The third theory announced is that there does exist such a power, but that it ends when the legal term prescribed by the statute of limitations has elapsed. This latter doctrine is based on the ground that a community of interest, which alone makes the admission of one debtor binding on another, ceases whenever the statute of limitations takes effect, and leaves both in the position of mere strangers, not answerable for each other's words or acts. In other words, that, after the statute has barred a debt, the persons who were the debtors are no longer jointly concerned, or, as Judge Lamar expresses it in the case of *Brewster v. Harde-man*, Dudley (Ga.) 138, "time has severed the ligament that bound them together as joint debtors, and it cannot be reunited but by the consent of all."

And in this connection, it is interesting to note that the decision of Lord Mansfield in *Whitcomb v. Whiting*, *supra*, was in direct conflict with the decision of an English jurist rendered ninety years previously, in *Bland v. Haselrig*, 2 Vent. 151. Most of the cases on all the theories are collated in the notes to *Whitcomb v. Whiting*, 1 Smith, Lead. Cas. 8th ed. pt. 2, p. 642. This discussion as to the three theories is taken from *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123.

It is believed, however, that the difference between the first theory as thus stated, and the third, is more nominal than real, and that there are actually only two theories,—one that the payment by the principal before the bar of the statute will interrupt it as to the surety, and the other that such a payment will not interrupt the statute. In other words, it is believed that the line of cleavage in the cases lies entirely within that class of cases where the payment was

trust upon certain real estate described in the pleadings.

The suit was brought after various payments of the principal and interest had been paid; also after the real estate had been sold under the deed of trust, and the proceeds thereof had been credited thereon. There was still due thereon at that time approximately the sum of \$714.55. The trial was had before the court without the intervention of a jury, which resulted in a judgment for the respondent and against the sureties for the penalty of the bond, and 8 per cent interest thereon until paid. E. T. Smith, the principal, was never served, and Daniel Smith suffered a judgment by default against him. After unsuccessfully moving for a new trial, and

in arrest of judgment, Hall appealed to this court.

The bond sued on was in the following words and figures:

State of Missouri, County of Clinton.

Know all men by these presents, that we, Elias T. Smith, as principal, and —, as sureties, jointly and severally firmly bind ourselves and our respective heirs, executors, and administrators to the county of Clinton, state of Missouri, in the sum of \$500, to be paid to said county for the use and benefit of the school fund of township 54, range 30, of said county, to the payment whereof we jointly and severally bind our heirs, executors, and administrators firmly by these presents. Sealed with

made before the bar of the statute attached, and that never, in any jurisdiction, at common law or under the statutes, has it been held that a payment by the principal after the bar of the statute would extend the statutory period as to a surety.

The principles upon which the common-law rule rested have been variously assigned, and perhaps can be grouped under four heads: (1) Quasi partnership. (2) Agency. (3) Community of interest. (4) Part payment as benefiting all, and therefore binding all.

#### Common-law rule abrogated.

In a majority of the jurisdictions it is held that payment or promise by the principal will not extend the statutory period as to the surety, and comparatively few of the cases observe any distinction in this respect between a payment or a promise made before the bar of the statute and one made afterwards. Those in which this distinction is made will be hereafter cited. Often there is nothing in the case to show whether the payment was made before or after the bar. *Underwood v. Patrick*, 36 C. C. A. 330, 94 Fed. 468 (security on mortgage; decided under Colorado statutes); *Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Dean v. Munroe*, 32 Ga. 28 (indorser); *McBride v. Hunter*, 64 Ga. 655 (security); *Davis v. Mann*, 43 Ill. App. 301; *Robinson v. Briscoe*, 55 Ill. App. 131; *Lash v. Bozarth*, 78 Ill. App. 196 (although surety urged principal to pay); *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Deaton v. Deaton*, 109 Ill. App. 7 (security or mortgage); *Mozingo v. Ross*, 150 Ind. 688, 41 L.R.A. 612, 65 Am. St. Rep. 387, 60 N. E. 867; *Koontz v. Hammond*, 21 Ind. App. 76, 51 N. E. 506; *Meitzler v. Todd*, 12 Ind. App. 381, 54 Am. St. Rep. 531, 39 N. E. 1046; *Dougherty v. Hoffstetter*, 12 Ind. App. 690, 40 N. E. 278; *Drake v. Stuart*, 87 Iowa, 341, 54 N. W. 223; *Root v. Bradley*, 1 Kan. 437 (payment allowed by administrator of deceased principal, who was also surety); *Steele v. Souder*, 20 Kan. 39; *McMillan v. Leeds*, 37 L.R.A. (N.S.)

58 Kan. 815, 49 Pac. 159; *Peru Plough & Wheel Co. v. Ward*, 6 Kan. App. 289, 51 Pac. 805.

In Louisiana it seems that a payment or acknowledgment by the maker of a note does not interrupt prescription as to an indorser. *Jacobs v. Williams*, 12 Rob. (La.) 183; *McCalop v. Newcomb*, 2 La. Ann. 332; *Hickman v. Stafford*, 2 La. Ann. 792; *Citizens' Bank v. Murdock*, 22 La. Ann. 130.

But the rule in Louisiana seems to be otherwise in case of a surety. *Bloom v. Kern*, 30 La. Ann. 1263.

Also as to security on mortgage. *Cucullu v. Hernandez*, 103 U. S. 105, 26 L. ed. 322; *Cockfield v. Farley*, 21 La. Ann. 521; *Collier v. His Creditors*, 12 Rob. (La.) 398.

In none of these cases was there any reference to a distinction between payments before the bar of the statute and those after.

The rule in Maine would now probably agree with these decisions, although no case has been found under the Revised Statutes. For the common-law rule in Maine, see under heading "Common-law rule followed," *infra*.

The following decisions also repudiate the common-law rule: *Faulkner v. Bailey*, 123 Mass. 588; *Stickney v. Eaton*, 14 Allen, 108 (acceptor of draft). Both these Massachusetts cases were decided under the Revised Statutes. The rule there was different at common law. For the opposite holdings, see under heading "Common-law rule followed," *infra*. See also heading, "Distinction observed," *infra*. *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Borden v. Fletcher*, 131 Mich. 220, 91 N. W. 145 (where surety urged principal to make the payments); *Godde v. Marvin*, 142 Mich. 518, 105 N. W. 1112 (where surety was present at time payment was made). But the opposite rule was adopted in *Mainzinger v. Mohr*, 41 Mich. 685, 3 N. W. 183, where principal and surety went together to the creditor and co-operated in making a payment, and nothing was said as to whose money it was; it bound the surety as well as the principal. *Regan v. Williams*, 88 Mo. App. 577, affirmed in 185 Mo. 620,

our seals, and dated the 1st day of September, A. D. 1890. The conditions of this bond are: That whereas, the said Elias T. Smith, principal, has this day borrowed from said county the sum of \$500, belonging to the capital school fund of township 54, range 30, of said county, which said sum of money the said principal and sureties agree to pay to said county for the use and benefit of the said township school fund, on or before the — day of —, A. D. 18 —, with interest thereon from the date hereof until paid, at the rate of 8 per cent per annum, said interest to be paid annually on the — day of — of each and every year until the whole debt shall be paid off and discharged: Now, therefore, if the principal and sureties shall

well and truly pay or cause to be paid the said sum of money borrowed and the interest thereon according to the tenor and effect of this bond, then this obligation shall be void; otherwise, it shall remain in full force. But it is expressly agreed and understood that all interest not punctually paid when due shall, when due, be added to the principal, and shall bear interest at the same rate as the principal until paid. And it is further agreed and understood as a condition of this bond that, should default be made in the payment of the interest when due, or should the principal of this bond fail to give additional security hereunto when lawfully required, in either case both the principal and interest shall become due and payable.

105 Am. St. Rep. 600, 84 S. W. 959, and the affirming decision expressly overruling *Bender v. Markle*, 37 Mo. App. 234. In this case the principal was the vendee of lands, who had assumed a mortgage upon the same, and the surety was the vendor, but they were held not to be joint promisors. *State ex rel. Shipman v. Allen*, 132 Mo. App. 98, 111 S. W. 622 (surety considered the instrument invalid, and had protested); *Corbyn v. Brokmeier*, 84 Mo. App. 649 (guarantor); *Maddox v. Duncan*, 143 Mo. 613, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 N. W. 688, reversing 62 Mo. App. 474 (indorser); *Monroe v. Herrington*, 110 Mo. App. 509, 85 S. W. 1002 (indorser). But in Missouri the rule is different in the case of a surety on a bond. See under heading, "Common-law rule followed," *infra*. See also under heading, "Distinction observed," *infra*. *Lang v. Gage*, 65 N. H. 173, 18 Atl. 795 (payments made by surety for the principal); *Newell v. Clark*, 73 N. H. 289, 61 Atl. 555; *Mason v. Kilcourse*, 71 N. J. L. 472, 59 Atl. 21 (indorser); *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663 (surety sent word to principal that he must pay as much as he could); *Ulster County Sav. Inst. v. Deyo*, 116 App. Div. 1, 101 N. Y. Supp. 263, affirmed in 191 N. Y. 505, 84 N. E. 1122; *Akin v. Van Wirt*, 124 App. Div. 83, 108 N. Y. Supp. 327 (surety told principal he must keep the interest paid); *Fowler v. Wood*, 78 Hun. 304, 28 N. Y. Supp. 976, affirmed in 150 N. Y. 584, 44 N. E. 1124 (security on mortgage); *Re Petrie*, 82 Hun. 62, 31 N. Y. Supp. 65; *Re Sanders*, 4 Misc. 343, 24 N. Y. Supp. 317; *Lane v. Doty*, 4 Barb. 530 (payment after death of surety); *McMullen v. Rafferty*, 89 N. Y. 456, affirming 24 Hun. 363 (guarantor, payments made with his knowledge); *Harper v. Fairley*, 53 N. Y. 442 (indorser). But the rule is different in New York when payment is made at the request of the surety. *Munro v. Potter*, 34 Barb. 358; *Winchell v. Hicks*, 18 N. Y. 558; or where the surety later ratifies the payment. *First Nat. Bank v. Ballou*, 49 N. Y. 155, affirming 37 L.R.A. (N.S.)

*Huntington v. Ballou*, 2 Lans. 120; *Meade v. McDowell*, 5 Binn. 195 (guarantor); *Frazer v. D'Invilliers*, 2 Pa. St. 200, 44 Am. Dec. 190 (indorser); *Furst v. Building & L. Asso.* 128 Pa. 183, 18 Atl. 341 (guarantor). But it has been held that payment of interest made during the joint responsibility of both, *i. e.*, before the death of either, is constructive acknowledgment as to the surety, and interrupts the statute as to him. *Zent v. Heart*, 8 Pa. 337; *Browning v. Tucker*, 9 R. I. 500 (guarantor). The rule seems to be different in Rhode Island, however, in respect to sureties. See under heading, "Common-law rule followed," *infra*. *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44. See also South Carolina decisions under heading, "Distinction observed," *infra*; *Bassett v. Thrall*, 21 Waah. 231, 57 Pac. 806; *Coleman v. Ward*, 85 Wis. 328, 55 N. W. 695.

In a few cases following this rule, however, although the court makes no point of the distinction between payments before and those after the bar, yet the facts show that the payments were made before the bar attached. *Branch Bank v. Lanier*, 7 Ala. 595; *Hunter v. Robertson & Robertson*, 30 Ga. 479 (indorser); *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123.

And in one case under this rule the facts show that the payment was made after the bar. *Christian v. State*, 7 Ind. App. 417, 34 N. E. 825.

In several of the cases no importance is given the distinction, and the argument of the court seems to imply that the distinction does not matter; that the rule would be the same whether the payments were before or after the bar. *Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Hunter v. Robertson & Robertson*, 30 Ga. 479 (indorser); *McLin v. Harvey*, 8 Ga. App. 360, 69 S. E. 123; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Mozingo v. Ross*, 150 Ind. 688, 41 L.R.A. 612, 65 Am. St. Rep. 387, 50 N. E. 867; *Steele v. Souder*, 20 Kan. 39; *Jacobs v. Williams*, 12 Rob. (La.) 183 (indorser); *Mason v. Kilcourse*, 71 N. J. L. 472, 59 Atl. 21,

Then followed the signatures of the parties. While the bond is not dated, yet the petition stated, and the evidence showed, that the bond was executed on September 1, 1890.

Counsel for appellant, Hall, asked the following declarations of law, which were by the court refused:

"(1) The court, sitting as a jury, declares the law to be that under the pleadings and evidence in this case the finding must be for the defendant E. C. Hall.

"(2) The court, sitting as a jury, declares the law to be that under the evidence the liability of the defendant E. C. Hall on the instrument sued on was a collateral liability, and that the payment of part of the interest thereon by the prin-

cipal, E. T. Smith, did not prevent the running of the statute of limitations as to the said defendant E. C. Hall.

"(3) The court, sitting as a jury, declares the law to be that if the court finds that the defendant E. C. Hall was surety on the bond sued on, and further finds that by the laches of the plaintiff or its agent, the county court, the said E. C. Hall was injured, then such surety should be relieved from liability to the extent of such injury, if any."

The court made a special finding of facts and gave certain conclusions of law, which were as follows: "I have carefully considered the defense based upon the statute of limitations. The bond is dated September 1, 1890, and the penalty of \$500. Mr.

#### Common-law rule followed.

In a few jurisdictions, however, the common-law rule is still adhered to, that a payment or promise by the principal will extend the statutory period as to the surety (*Clark v. Sigourney*, 17 Conn. 511; *Caldwell v. Sigourney*, 19 Conn. 37); so in Maine before the Revised Statutes went into effect (*Pike v. Warren*, 15 Me. 390, implied; *Shepley v. Waterhouse*, 22 Me. 497; *Patch v. King*, 29 Me. 448); and even since the Revised Statutes, where a surety made a payment on a note out of money received from the sale of property pledged to him by the principal debtor as an indemnification against loss to him, but did not inform the holder of the note that the money was not his own, the payment was held to have suspended the statute as to such surety (*Holmes v. Durell*, 51 Me. 201). But *Gardiner v. Nutting*, 5 Me. 140, 17 Am. Dec. 211, is opposed, where the guarantor was also commissioner of the estate of the principal, and as such allowed the note as a claim against such estate. The result would now probably be different in Maine, although no actual distinction has been found under the Revised Statutes.

In Massachusetts, the early cases were decided according to the rule at common law. *Hunt v. Bridgham*, 2 Pick. 581, 13 Am. Dec. 458; *Frye v. Barker*, 4 Pick. 382; *Sigourney v. Drury*, 14 Pick. 387. The rule in Massachusetts under the Revised Statutes is different. See under heading, "Common-law rule abrogated," *supra*, and *infra*, "Distinctions observed."

In Missouri, payments on a bond by the principal stop the running of the statute as to the surety. *Craig v. Callaway County Ct.* 12 Mo. 94; *Lawrence County use of School Twp. No. 10 v. Dunkle*, 35 Mo. 395; *CLINTON COUNTY v. SMITH*; but in Missouri the rule is different as to a surety who is not a joint promisor, or as to one who considers the instrument invalid, or as to a guarantor or an indorser. See under heading, "Common-law rule abrogated," *supra*, and *infra*, "Distinctions observed."

North Carolina generally holds to the

common-law rule. *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Rep. 579; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772; *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315; *Moore v. Carr*, 123 N. C. 425, 31 S. E. 832 (indorser); *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636. But it has been held that when both signed as comakers, in order to take advantage of the statute after payment by the principal, the surety must prove that the creditor had knowledge of the suretyship (*Goodman v. Litaker*, 84 N. C. 8, 37 Am. Rep. 602; *Torrence v. Alexander*, 85 N. C. 143); but he may show this by parol evidence (*Welfare v. Thompson*, 83 N. C. 276); he may also show by parol evidence the fact of the suretyship (*Cole v. Fix*, 83 N. C. 463, and cases cited). Also it has been held that giving a new bond for the balance due on the original was not such an acknowledgment as to take the case out of the statute as to an indorser on the original (*Topping v. Blount*, 33 N. C. [11 Ired. L.] 62); also payment upon a draft by an acceptor will not interrupt the statute as to the drawer; their contracts are wholly unlike (*Wood v. Barber*, 90 N. C. 76). See also under heading, "Distinction observed," *infra*.

The common-law rule is also adopted in Ohio. *Glick v. Crist*, 37 Ohio St. 388 (surety standing by at the time of the payment and making no statement); also in *Partlow v. Singer*, 2 Or. 307; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; *Perkins v. Barstow*, 6 R. I. 505; *Woonsocket Inst. for Savings v. Ballou*, 16 R. I. 351, 1 L.R.A. 555, 16 Atl. 144. The court states in this case that although the rule there announced is at variance with the rule now prevailing in the United States, yet it is too firmly settled in that state to be altered by anything short of a statute. The rule in Rhode Island seems to be different in respect to a guarantor. See under heading, "Common-law rule abrogated," *supra*.

The common-law rule is also followed in *McConnell v. Merrill*, 53 Vt. 149, 38 Am. Rep. 663, where the surety procured a sale

Smith, the principal, on January 7, 1891, paid \$13.30; February 3, 1892, \$40; October 5, 1897, \$70; October 7, 1903, \$20; December 9, 1904, \$20; April 3, 1906, \$200; and the sale of the mortgaged premises produced a net credit on the bond of \$192.20, December 5, 1906. Mr. Hall has paid nothing on the bond, and has never acknowledged the debt. In this case Daniel Smith's and E. C. Hall's signatures appear at the foot of the instrument after Elias T. Smith's, and, although the recitals do not show in what capacity Daniel Smith and Mr. Hall acted, they are, beyond question, not principals, but sureties; but, being sureties, signing the bond with their principal, and at the same time, they made the identical contract which he made, and, under the issues here, are bound to the precise extent to which he is bound. They are all payors and comakers. There is therefore no escape from the conclusion that this case is governed by Vernon County use of School Fund v. Stewart, 64 Mo. 408, 27 Am. Rep. 250, the ten-year limitation (§ 4272, Rev. Stat. 1899) is not available to defendants, and the finding and judgment must be for plaintiff.

"Plaintiff has alleged that the amount due on the bond was on September 21, 1906, \$714.55. A computation of princi-

pal, interest, and credits shows that on June 10, 1904, when action was brought, \$685.92 was the amount of the debt. The best authorities are to the effect that the liability of the surety at the time recourse is had to the bond is limited to the penalty of the bond. If, after that, the surety fails or refuses to pay, he is liable for interest and damages for detention of the fund. 27 Am. & Eng. Enc. Law, 2d ed. 453; Bank of Brighton v. Smith, 12 Allen, 243, 90 Am. Dec. 144; Pennsylvania Co. v. Swain, 189 Pa. 626, 42 Atl. 297; Folz v. Tradesmen's Trust & Sav. Fund Co. 201 Pa. 583, 51 Atl. 379; Thomas Laughlin Co. v. American Surety Co. 51 C. C. A. 247, 114 Fed. 627. Judgment, therefore, will go for the plaintiff for the amount of the penalty of the bond, with interest after service of summons, June 12, 1907, at 8 per cent per annum, the contract rate, \$538.55."

Mr. W. S. Herndon, for appellant, and Mr. E. C. Hall, *in propria persona*:

The undertaking of the surety being collateral to the loan, a payment on the loan made by Smith could in no wise interrupt the statute of limitations as to such surety.

Maddox v. Duncan, 143 Mo. 613, 41

of the principal debtor's property, and at the same time promised to pay the balance on the note, and then had the proceeds of the sale indorsed on the note.

And in Green v. Morris, 58 Vt. 35, 4 Atl. 561, where the surety went with the creditor to the principal, and told the latter that something must be paid on the note; the principal handed the surety some money, the surety handed it to the creditor, and he indorsed it as from the surety.

**Distinction observed between payments before and those after the bar of the statute.**

In a few jurisdictions a distinction is observed between payments made before the bar of the statute and those made afterwards. In these jurisdictions a payment or promise made by the principal before the bar has attached will suspend the running of the statute as to the surety but payments or promises made afterwards will not. Schindel v. Gates, 46 Md. 604, 24 Am. Rep. 526; Hooper v. Hooper, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508; Whitaker v. Rice, 9 Minn. 13, Gil. 1, 86 Am. Dec. 78; Northwest Thresher Co. v. Dahltorp, 104 Minn. 130, 116 N. W. 106 (the distinction is not made very prominent in this case); Smith v. Caldwell, 15 Rich. L. 365.

In some other jurisdictions this distinction very probably holds, though not often made emphatic. It clearly holds in 37 L.R.A. (N.S.)

the following cases: Sigourney v. Drury, 14 Pick. 387; Craig v. Callaway County Ct. 12 Mo. 94; Green v. Greensboro Female College, 83 N. C. 449, 35 Am. Rep. 579. See other decisions from these states, *supra*, where the distinction was not referred to.

In fact this distinction is likely observed in all those states where the common-law rule has not been changed by statute. This is stated as a fact in Cross v. Allen, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67, but often there is no special stress laid upon it in the case, and very many times it is not even referred to.

#### England.

Several early English decisions follow Whitcomb v. Whiting, 2 Dougl. K. B. 652, and apply the rule to cases of principal and surety, holding that payment or promise by the principal interrupts the statute as to the surety.

An acknowledgment of a maker of a note was held to take it out of the statute as to the surety. Perham v. Raynal, 9 J. B. Moore, 566, 2 Bing. 306, 3 L. J. C. P. 271. This case was decided subsequently to Atkins v. Tredgold, *infra*, but it reinstates the authority of Whitcomb v. Whiting, *supra*, and holds it to be sound doctrine as to a judgment. Justice Best says in this case that two of the judges in Atkins v. Tredgold have thrown out *dicta* impugning the authority of Whitcomb v. Whiting, but that their expressions are only *dicta*, and

L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688; *Regan v. Williams*, 185 Mo. 629, 105 Am. St. Rep. 600, 84 S. W. 959; *Corbyn v. Brokmeyer*, 84 Mo. App. 649; *Monroe v. Herrington*, 110 Mo. App. 509, 85 S. W. 1002; *Thompson v. Brown*, 121 Mo. App. 528, 97 S. W. 242.

The liability of the defendant Hall is that of a surety on a bond, and not that of a direct promisor.

Gray v. Davis, 89 Mo. App. 450.

Mr. Lester B. Hooper for respondent relied on *Vernon County use of School Fund v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250; *Maddox v. Duncan*, 143 Mo. 621, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 688, and *Regan v. Williams*, 185 Mo. 628, 105 Am. St. Rep. 600, 84 S. W. 959.

Woodson, J., delivered the opinion of the court:

Counsel for appellant make and discuss many legal propositions in their briefs, but, in the view we take of the case, it is only necessary to notice two of them, namely, the statute of limitations and the alleged laches of the plaintiff in not bringing its suit at an earlier date.

We will consider those questions in the order stated. The record shows that E. T. Smith, the principal in the bond, made the

following payments at the dates stated, namely: January 7, 1891, \$13.30; February 3, 1892, \$40; February 6, 1893, \$40; January 15, 1894, \$40; October 5, 1897, \$70; October 7, 1903, \$20; December 9, 1904, \$20; April 3, 1906, \$192.20, the proceeds of the sale of the land under the deed of trust. This record shows that, instead of those payments being indorsed upon the bond, the clerk of the county court, whenever a payment was made, would give Smith, the principal in the bond, credit therefor on the records of the court.

From that course of dealing, counsel for appellant, Hall, seem to have reached the conclusion that Smith, the principal in the bond, was indebted to the county for the use of the school district on an open account, and that the bond sued on and executed by E. T. Smith and the sureties was only a collateral agreement to pay that account. Manifestly that is the view of appellant's counsel, as clearly appears from the second declaration of law asked by them. With all due respect for their ability and legal learning, we are constrained to take a different view of the transaction. The record nowhere shows that E. T. Smith was indebted to the county on account for any sum for any purpose, but it does show that he borrowed from the county on Sep-

that the two other judges abstained from saying anything to the same effect. He also says that *Bland v. Haselrig*, 2 Vent. 152, ought not to have weight, for one of the judges differed and the decision was erroneous, except that the verdict found precluded any other judgment.

To the same effect, see *Burleigh v. Stott*, 2 Mann. & R. 93, 8 Barn. & C. 36, 6 L. J. K. B. 232; *Re Powers*, L. R. 30 Ch. Div. 291, 53 L. T. N. S. 647; *Re Frisby*, L. R. 43 Ch. Div. 106, 59 L. J. Ch. N. S. 94, 61 L. T. N. S. 632, 38 Week. Rep. 65; *Dowling v. Ford*, 11 Mees. & W. 329, 12 L. J. Exch. N. S. 342.

The common-law rule has been changed in England by several limitation acts. An early act of great consequence was the so-called Lord Tentenden's act (Act 9, Geo. IV, chap. 14), providing that an acknowledgment or promise must be in writing and signed by the party to be charged thereby, and that no joint contractor shall be bound by such an acknowledgment or promise made by another, but that payment shall have the same effect as before the act. This forms the basis of most statutes of limitations in the United States.

The mercantile law amendment act (Act 19 & 20 Vict. chap. 97, § 14), went farther, and provided that no co-contractor should lose the benefit of the statute of limitations, so as to be chargeable because of any payment made by another.

The real property limitation act 1874 37 L.R.A. (N.S.)

(Act 37 & 38 Vict. chap. 57), applies to mortgagors, mortgagees, and persons holding other interests in real property.

Under these statutes English decisions have generally departed from the rule laid down in *Whitcomb v. Whiting*, supra. Thus, where, after the death of the surety, the principal paid interest upon the note, it was held not to take the case out of the statute as to the executors of the surety. The doctrine of *Whitcomb v. Whiting* cannot be extended to a case like this. In the former case, all parties were alive when the payment was made. *Atkins v. Tredgold*, 2 Barn. & C. 23, 3 Dowl. & R. 200, 1 L. J. K. B. 228, 26 Revised Rep. 254.

To the same effect, see *Cockrill v. Sparke*, 1 Hurlst & C. 699, 32 L. J. Exch. N. S. 118, 9 Jur. N. S. 307, 7 L. T. N. S. 752, 11 Week. Rep. 428; *Wolmershausen v. Wolmershausen*, 62 L. T. N. S. 541, 38 Week. Rep. 537.

#### —Ontario.

After the death of a surety on a promissory note, a payment was made upon it by the maker out of his own money and on his own behalf, and he was sole executor of the deceased surety; the court held that this payment did not take the debt out of the statute as regarded the estate of the latter. *Paxton v. Smith*, 18 Ont. Rep. 178.

H. C. Sh.

tember 1, 1890, \$500 of the school district mentioned, and that he executed the bond in suit therewith with Daniel Smith and E. C. Hall as sureties. In so far as the county is concerned, all three are to be considered as joint promisors, and the payment of any sum on the bond by the principal before the statute of limitations runs is binding upon all of them alike.

This is fully settled by this court by the case of *Vernon County use of School Fund v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250. There, as here, the suit was one of these school bonds, and the defense was the statute of limitations, the same as here. The bond in that case was executed January 15, 1860, and some four or five years thereafter the principal in the bond died, and the administrator of his estate was duly appointed and qualified. The bond was duly presented to the probate court for allowance, and was by that court allowed June 7, 1867, and assigned to the third class of demands; and on December 2, 1869, the administrator of said estate paid on said demand the sum of \$44.33. Some time after January 15, 1870, and prior to December, 1874, suit was brought on said bond against the sureties to recover the balance remaining due thereon. As before stated, the ten-year statute of limitations was interposed as a defense by the sureties.

In discussing that question, on page 410 of 64 Mo. the court, in speaking through *Sherwood, Ch. J.*, said: "Repeated decisions of this court have settled the matter beyond controversy that the payment of a portion of a debt evidenced by a promissory note or similar obligation, by one of the payors before the expiration of the statutory period, would prevent the operation of the statute against the comaker as well as the party paying. *Craig v. Callaway County Ct.* 12 Mo. 94; *Lawrence County use of School Twp. No. 10 v. Dunkle*, 35 Mo. 395; *Block v. Dorman*, 51 Mo. 31. And no reason is seen why the same principle is not applicable where, as in the present instance, the legal representative of one of the makers makes a similar payment. The statute, after treating of new promises and acknowledgments in writing, and the effect to be given them, explicitly provides: 'Nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of principal or interest by any person' [*Wagner, Stat. 1872, chap. 89, art. 2, § 30*],—thus clearly showing that the legislature intended to make, and did make, a marked distinction between the attendant results of promises or acknowledgments on the one hand and the partial payments on the other. 37 L.R.A. (N.S.)

er. And if that language just quoted will not comprehend the payment by an administrator, it is difficult to see what language, short of a direct designation of the administrator, would be sufficiently comprehensive to accomplish that result. Had Clinton, the principal in the bond, remained alive and made the payment referred to, no doubt could arise, under the foregoing decisions, but that such payments would effectually prevent the operation of the statute as to the defendant. Can it alter the nature of the case, because the duty of paying the debt is devolved upon the administrator, rather than, and instead of, the decedent? We are clear that it cannot. If the defendant, instead of the administrator, had made the payment, could it be seriously doubted that he would have recourse against the estate of his principal? Upon what theory would such recovery be founded, except that of the continued existence of the mutuality and privity incident to the contract at the time of its formation? In *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378, it was held that, although the partnership was dissolved, yet a partial payment before the statute had run by Howard's former copartners would take the case out of the statute as to him. And it would seem obvious that the dissolution of a copartnership could accomplish no less towards sundering existing relations than the death of one of two or more joint obligors. The cases of *Chrisman v. Irwin*, 37 Mo. 169, 90 Am. Dec. 375, and that of *Cape Girardeau County use of Road & Canal Fund v. Harbison*, 58 Mo. 90, have not the slightest applicability here; because in neither case had any payment been made by the administrator. In the former an allowance was had against the estate of one of the makers, after the statute had attached, and in the latter case the administrator had, in making a deed of trust, acknowledged, after the claim was barred, the existence of the debt. Any remarks, therefore, in those cases, which are *dehors* the controlling facts incident to each, cannot be deemed as possessed of any authoritative value."

In the case at bar we are not required to go to the same length that this court did in that case. Here E. T. Smith, the principal in the bond, made the payments on the bond in person, before the statute had run, and not by his administrator, as was done in the case cited. By the case of *Regan v. Williams*, 185 Mo. loc. cit. 628, 105 Am. St. Rep. 600, 84 S. W. 960, the rule in the case last cited is somewhat limited, and rightfully so, in my opinion, yet that limitation does not affect the case



at bar, but restates the rule more clearly than any case which I have been able to find. In that case the court said: "2. In reply to the defense that the statute of limitations had run against the note before this action was begun, plaintiff asserts that the payments of interest by the Scott Investment Company and Carey to March 21, 1892, prevented the running of the statute, not only in favor of said parties, but of the defendant as well. The ruling that payment by a principal will suspend the statute as to a surety is invoked as applicable, because, by operation of law, the subsequent grantees of the land covered by the deed of trust became principals and the defendant a surety. The proposition contended for is sound enough, generally speaking. *Craig v. Callaway County Ct.* 12 Mo. 94; *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378; *Block v. Dorman*, 51 Mo. 31; *Vernon County use of School Fund v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250; *Bennett v. McCause*, 65 Mo. 194. These payments were made while the note was still alive, and the rule is well established that payments made by the principal, or by one of several point obligors, before the debt is barred, will stop the statute. But the reason why a payment by the principal stops it as to a surety is not because one is principal and the other surety, but because both are usually joint promisors; that is, the surety is affected by the act of the principal in his capacity as a joint promisor. The idea is that persons who jointly bind themselves are all liable to the promisee by virtue of their original agreement, so that performance or part performance by one is the act of all. *Sigourney v. Drury*, 14 Pick. 387; *Brandram v. Wharton*, 1 Barn. & Ald. 463, 19 Revised Rep. 354, 357; *Atkins v. Tredgold*, 2 Barn. & C. 23, 3 Dowl. & R. 200, 1 L. J. K. B. 228, 20 Revised Rep. 254. The principle only applies where the payment was made by one originally liable. *Sigourney v. Drury*, supra." And in *Maddox v. Duncan*, 143 Mo. loc. cit. 621, 41 L.R.A. 581, 65 Am. St. Rep. 678, 45 S. W. 690, this court said: "In *Craig v. Callaway County Ct.* 12 Mo. 94, it was ruled that the payment of interest by one of several joint obligors in a bond before the statute of limitation attaches takes it out of the statute of limitations as to the others. So it was held in *Vernon County use of School Fund v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250, that part payment made upon a bond by the administrator of one of the joint makers within the statutory period would prevent the running of the statute of limitation in favor of the other makers of the bond. And in *Bennett v. McCause*, 65 Mo. 37 L.R.A.(N.S.)

194, it was intimated that part payment of a note by a comaker will arrest the running of the statute as against all the parties to the note. The same rule was announced in *Bender v. Markle*, 37 Mo. App. 234. When this case was before the St. Louis court of appeals (*Maddox v. Duncan*, 62 Mo. App. 474), *Rombauer, J.*, in delivering the opinion of the court, said: "In *Leach v. Asher*, 20 Mo. App. 656, and *Zervis v. Unnerstall*, 29 Mo. App. 474, we reviewed the decisions in this state on that subject, and were forced to conclude that the rule as stated in *Craig v. Callaway County Ct.*, supra, was the rule prevailing in this state, whatever the rule may be in other jurisdictions." If we follow the rule announced in the foregoing cases, then we must hold in the case at bar that the respondent's cause of action is not barred by the statute of limitations, for the reason that the payments were made by E. T. Smith, the principal in the bond, which is binding upon his sureties or joint promisors; and the mere fact that the payments were entered upon the records of the county court, instead of the bond itself, does not change the legal effect of the payments.

We are therefore of the opinion that the trial court properly refused the second declaration of law asked by counsel for appellant.

2. It is finally insisted by counsel for appellant that respondent should be debarred of a right of recovery for the reason that it has been guilty of laches by the great delay in bringing this suit. This claim is clearly devoid of all merit, for the simple reason that the record shows that, in so far as the respondent is concerned, the principal in the bond, E. T. Smith, and the sureties, Daniel Smith and E. C. Hall, were joint promisors, and, under those facts, it was no more the duty of the respondent to sue E. T. Smith, one of the makers, in the absence of the statutory notice, than it was to sue the other two joint promisors, Hall and Smith, and the mere delay, short of the statutory period of limitation, in suing any one of them, will not release the others.

Moreover, in so far as the respondent is concerned, it was just as much the duty of appellant, Hall, to go and pay off and satisfy the bond as it was the duty of E. T. Smith. This is elementary, and has been so frequently adjudicated by this and other courts of the state, that it would be a useless waste of time to cite additional authorities in support thereof.

If appellant objected to delay of respondent, why did he not pay off and discharge the bond as he agreed to do, and then look to E. T. Smith, who as between themselves

were not joint promisors? By so doing, the school district would have lost nothing, nor would the appellant, for the reason that he could by proper proceedings have subjected the real estate conveyed by the deed of trust to the county to secure the loan, and thereby have reimbursed himself for the money so paid by him on the bond, which was more than ample for that purpose, if the evidence offered upon that point by appellant is true.

Finding no error in the record, the judgment is affirmed.

All concur.

### NEW YORK COURT OF APPEALS.

RE CITY OF NEW YORK, Relative to  
Opening Decatur Street.

RE PETITION OF FRANK B. WALKER,  
Appt.,  
v.

JOHN SCHAUF et al., Respts.

(196 N. Y. 286, 89 N. E. 829.)

#### Eminent domain — fee of street.

1. Nominal damages only should be awarded the owner of the fee and the abutting owners, in case of the taking by the

*Note. — Damages on condemnation of the fee of land over which there is an existing highway.*

In the note to Re New York (Briggs Ave.) 36 L.R.A. 273, the right to allowance for improvements made with knowledge property would be required for public use is discussed.

The question whether the owner of an easement of way over another's land is entitled to compensation where the land is taken for the purposes of a public highway is discussed in the note to Clayton v. Gilmer County Court, 2 L.R.A. (N.S.) 598.

The point here annotated has been the subject of discussion heretofore in a note to Re Buffalo, 15 L.R.A. 413, to which attention is directed for the earlier cases.

In the earlier note the conflict in the New York cases was noted.

#### Where owner of fee is not abutting owner.

Now, however, it seems to be well settled, according to the decision in Re New York (DECATUR STREET), that when the owner of the fee of the street has sold all the property abutting thereon, retaining in himself only the naked, unproductive fee, he is only entitled to nominal damages when this naked fee is condemned.

Re Schneider, 199 N. Y. 581, 92 N. E. 791, affirming on the point 136 App. Div. 444, 121 N. Y. Supp. 9, although reversing it on others, specifically states that "the determination of all the substantial ques-

city of the fee of a street which had been platted by the owner, who had sold all the lots upon the street, so that a perpetual easement in it had been dedicated to the lot owners.

#### Same — excessive damages — distribution.

2. The court of appeals will not participate in the division of a fund which had been awarded for opening a street, where none of the claimants are shown to be entitled to more than nominal damages.

(November 9, 1909.)

**A**PPEAL by petitioner from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a special term for Kings County directing payment to the abutting owners of certain awards made for lands taken by the city in condemnation proceedings. Reversed.

The facts sufficiently appear in the opinion.

Mr. John M. Perry, for appellant:

The court below erred in holding as matter of law that the fee had only a nominal value.

Osborne v. Auburn Teleph. Co. 189 N. Y. 397, 82 N. E. 428; Trowbridge v. Ehrich, 191 N. Y. 364, 84 N. E. 297; Re 11th Ave. 81 N. Y. 436.

tions involved on this appeal is controlled by our decision in Re New York (DECATUR STREET), and that substantial damages were erroneously awarded in the condemnation proceedings when, as now appears, no claimant was entitled to more than nominal damages."

In Re Johnson Ave. 135 App. Div. 630, 120 N. Y. Supp. 798, affirmed in 198 N. Y. 505, 92 N. E. 1087, and following Re New York (DECATUR STREET), where property owners pending proceedings by the city to condemn their property for street purposes began partition proceedings for a considerable tract of land, including the land named as an avenue on the city map, and filed a map showing the property "as divided into lots fronting and abutting on Johnson avenue, as laid out on the city map," but the avenue itself was not indicated as a portion of the property to be partitioned, but was retained by the owners in common, it was held that the purchasers of abutting lots, whose deeds recited and recognized the avenue as a boundary, were entitled to an easement of passage over the avenue, and that upon the passage of the title to the land to the city only nominal damages should be awarded the owners of the fee. In this case it was said: "It is not important that the common owners and the referee so bounded the abutting property as to retain title to the street. The only effect of that was that the abutting owners took no absolute title to the street, and that the common owners retained the right

The court below erred in assuming to import an irrelevant equity in favor of the abutting.

Cooley, *Taxn.* 2d ed. 606; 2 *Desty, Taxn.* 1237, 1238; 25 *Am. & Eng. Enc. Law*, 496; *Re Mead*, 74 N. Y. 221; 1 *Hare, Am. Const. Law*, 310; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

to receive whatever compensation should be legally awarded. It did not affect the amount of the award. The resolution of the board of public improvements directs that the whole cost be assessed back upon the property benefited, which means in effect that the abutting property must bear it. The presumption is that the abutting owners or their predecessors in title have already paid, and the common owners have already received in an enhanced price paid for the lots, compensation for the use of the street. 'It was the street that gave a character and recommendation to the lots, and enhanced the value of the adjoining property. This is the natural consequence of opening streets in the vicinity of a city, where population is increasing and constantly extending itself over a greater space of territory.'

Where a street was laid out on a city map, and was not inclosed or subjected to any private use, but was used by the public as a means of access to the lots on either side of it, although not formally opened, it was held in *Re West 177th Street*, 135 App. Div. 520, 120 N. Y. Supp. 354, order affirmed on later appeal in 130 N. Y. Supp. 1134, where the owner of land in the street had himself put in pipes and conductors commonly put under the surface of streets, and had sold the property in question in contemplation of the opening of a street by the city, to parties who were to build thereon and reconvey to the grantor, that the grantees acquired an implied right of way over the street to the property, notwithstanding the grantor reserved to himself the land within the lines of the street and any award which might be made therefor; and that when the street was formally opened by the city, the grantor was only entitled to nominal damages for his naked fee.

An owner of land on a proposed mapped street "named Beverly Road," who conveys lots as bordering thereon, is entitled to nothing but nominal damages for the fee of the street when it is formally opened by the city, since by reason of his previous dedication of it as a street it is of no remaining use to him. *Re Beverly Road*, 131 App. Div. 147, 115 N. Y. Supp. 208, on other points in 132 App. Div. 897, 116 N. Y. Supp. 1131, and 133 App. Div. 927, 118 N. Y. Supp. 1095. *Gaynor, J.*, distinguishes the case from *Buffalo v. Pratt*, 131 N. Y. 293, 15 L.R.A. 413, 27 *Am. St. Rep.* 592, 30 N. E. 233 (set out in *RE NEW YORK*) 57 L.R.A. (N.S.)

*Mr. James A. Sheehan*, for respondents *Schauf et al.*:

The awards made were intended for all parties interested.

Greater New York Charter, § 970; *Seton v. New York*, 130 App. Div. 154, 114 N. Y. Supp. 505; *Re Newton*, 45 N. Y. S. R. 19, 19 N. Y. Supp. 573; *Re William & A. Streets*, 19 *Wend.* 694; *Re Boston Road*, 27 *Hun*, 409.

The appellant has no interest in the

(DECATUR STREET), on the ground that in the *Buffalo* Case the abutting owner owned the strip in the city which the city was taking the fee of, whereas in the *Beverly Road* Case the strip never passed by the conveyance to the abutting owner, but remained a nominal and useless thing in the original tract proprietor. And the same learned justice said: "Moreover, it is an open question, if it be a question at all, whether by the taking, even where the abutting owner owns to the center of the street, of the fee by the city, but only 'in trust' for street uses, by the present charter of the city (§ 990), anything more is taken than by a taking of an easement for all street uses. The difference in substance between the two takings seems to be imperceptible. The fee is not taken absolutely, but only in trust for, and limited to such street uses. *Re New York*, 45 *Misc.* 162, 91 N. Y. Supp. 894."

There is strong *dictum* in *Re Carroll Street*, 137 App. Div. 39, 121 N. Y. Supp. 435, to the effect that one owning nothing but a naked fee in a street which has been thrown open to the use of abutting owners is only entitled to nominal damages when the fee is taken for street purposes. Thus: "Assuming that the appellant acquired title to the street by her deed, she was, after she conveyed to . . . the owner of the naked fee only. She owns no property abutting on that portion of the street, and for that reason is not subject to assessments for benefits. Her fee was subject to the right of ingress and egress over the land in the street, and in view of these facts a case is not presented in which substantial damages should have been awarded her. The city took from her a naked, unproductive fee, incapable of pecuniary advantage, useless, bereft of enjoyment and incapable of earning; and in the absence of reliable evidence establishing the contrary, the land must as to her be held to have possessed nominal value only."

Where owner of fee is abutting owner.

But where the fee owner is also an abutting owner he is entitled to substantial damages where the fee is actually condemned for a street, notwithstanding there may be existing private easements over the street.

Thus in *Re 173rd Street*, 78 *Hun*, 487, 29 N. Y. Supp. 205, where the ownership of the fee in land was taken from the adjoining owner by legislative authority, it

awards directed to be paid to the respondents Schauf and Jung.

Potter v. Boyce, 73 App. Div. 387, 77 N. Y. Supp. 24, affirmed in 176 N. Y. 551, 68 N. E. 1123; Kings County F. Ins. Co. v. Stevens, 87 N. Y. 291, 41 Am. Rep. 361; Van Winkle v. Van Winkle, 184 N. Y. 203, 77 N. E. 33; Mott v. Eno, 181 N. Y. 373, 74 N. E. 229; Graham v. Stern, 168 N. Y. 517, 85 Am. St. Rep. 694, 61 N. E. 891; Ré Ladue, 118 N. Y. 222, 23 N. E. 465.

The respondent Schmidt is entitled to be

was held that the owner was entitled not merely to nominal damages, but to such substantial damages as may be ascertained by measuring the effect upon the value of his remaining property by the loss of the fee in the street, notwithstanding the fact that the fee taken was subject to an easement of passage in favor of abutting owners; the rule being based upon the fact that the ownership of the fee of the land in the street by an adjoining owner vests in him certain rights of which he is deprived by the taking of the fee of the land, even for street uses. In this case an attempt was made to have the court distinguish it from the case of Buffalo v. Pratt, supra, in that there the city was vested with an absolute fee, whereas, in the proceeding taken in the city of New York (the case at bar) for acquirement of property for street purposes, there is vested in the city simply a qualified fee, the city taking it for street purposes only. But the court said: "An examination, however, of the section of the charter which is referred to in the opinion in the case cited indicates that the fee taken in the two proceedings is substantially the same; in the one, there being an express declaration in the statute authorizing the condemnation, that the property shall be held for street uses; and in the other, the authority to take is only for public streets, etc., and hence impressed with the same implied trust as is expressly impressed upon the land taken in the city of New York. We do not think, therefore, that the question is open for discussion, in view of the principles laid down in the case of Buffalo v. Pratt."

In Re 94th Street, 22 Misc. 32, 49 N. Y. Supp. 600, where the owners of the fee in the street which the commissioners of a city had mapped to be opened were abutting owners, and had dealt with the fee in the street among themselves in such manner as to retain the title thereto, but had, among themselves, subjected the fee to private easements, it was held, in the absence of clear and unequivocal proof of a dedication of the land in question to the public use, that when the city actually condemned the fee for street purposes, the owners were entitled to more than a mere nominal award; that the measure of the damage should be the value of the property taken, subject to the private easements.

"While an owner abutting upon an existing highway, to the center of which he has 57 L.R.A.(N.S.)

compensated for his private easements in Decatur street, acquired by the city.

Re 11th Ave. 81 N. Y. 448; Re Jerome Ave. 120 App. Div. 303, 105 N. Y. Supp. 319; De Peyster v. Mali, 92 N. Y. 267.

The report of the commissioners of estimate and assessment is conclusive.

Re Department of Public Parks, 73 N. Y. 565; Spears v. New York, 87 N. Y. 374; Farrington v. New York, 83 Hun, 125, 31 N. Y. Supp. 371.

The determination of the special term

title, is entitled to substantial damages for the taking of the fee of the highway by the city (Re 173d Street, 78 Hun, 487, 29 N. Y. Supp. 205), still the requirement of substantial damages is fulfilled by the awarding of a comparatively small sum." Re Westchester Ave. 126 App. Div. 839, 111 N. Y. Supp. 351, wherein award was held to be grossly excessive and the order allowing it reversed.

And in other cases it has been held that it is well settled that the owner of land which is subject to easements vested in adjoining owners is entitled to substantial damages, where the fee is sought to be acquired under legislative or municipal authority for the purposes of a public street. Re Trinity Ave. 35 Misc. 56, 71 N. Y. Supp. 24, reversed on another point in 81 App. Div. 215, 80 N. Y. Supp. 732; Re Summit Ave. 35 Misc. 59, 71 N. Y. Supp. 207, modified on another point in 84 App. Div. 455, 82 N. Y. Supp. 1027.

In Re Avenue "D," 200 N. Y. 536, 93 N. E. 498, after certain commissioners had adopted a permanent plan for laying out streets, avenues, and public places, the owner of a farm through which one of the avenues would run sold portions of the farm, reserving the part lying within the lines of the proposed avenue, and each of the portions sold adjoined another avenue, and was not entirely surrounded by the land retained, so that the purchaser could sell the lands he bought, in separate lots facing upon the other avenues to suit prospective buyers,—it was held that the covenants in the grant of the original farm owner were plain, and granted no easements by implication in the land which he reserved, and that upon its condemnation by the city he was entitled to substantial damages therefor.

In Gamble v. Philadelphia, 162 Pa. 413, 29 Atl. 739, the court held that the trial judge committed no error in submitting to the jury the question as to the damages the property owner was entitled to for the taking of the street, when he had conveyed his property on both sides of the street, designating the sides of the street as a boundary, after the property had been mapped as a street by the city, but before it was actually taken. The jury found the land was worth nothing, since it was subject to easements of passage, and the appellate court refused to reverse.

E. M. S.

as to the distribution of the awards was equitable.

Re 11th Ave. 81 N. Y. 448; *Mortimer v. Metropolitan Elev. R. Co.* 22 Jones & S. 322, affirmed in 113 N. Y. 626, 20 N. E. 877; *Chicago & N. W. R. Co. v. Cicero*, 157 Ill. 56, 41 N. E. 640; *Sedgw. Dam. chap. 2*, p. 47; *Leeds v. Metropolitan Gas-light Co.* 90 N. Y. 26-29.

Mr. Merle I. St. John, for respondent Wenzler:

The respondent Wenzler, as the owner of this abutting property at the time title vested in the city, then became entitled to all the award therefor, except a nominal award of \$1 for the naked fee.

Re Lewis Street, 2 Wend. 472; Re Jerome Ave, 120 App. Div. 297, 105 N. Y. Supp. 319; Re Beverly Road, 131 App. Div. 147, 115 N. Y. Supp. 208; Re Adams, 141 N. Y. 297, 36 N. E. 318; *Olean v. Steyner*, 135 N. Y. 341, 17 L.R.A. 640, 32 N. E. 9; Re 11th Ave. 81 N. Y. 436; Re Board of Street Opening, 27 App. Div. 265, 50 N. Y. Supp. 621; Re Taber, 91 App. Div. 612, 86 N. Y. Supp. 1140; Re Austin Place, 125 App. Div. 821, 110 N. Y. Supp. 525.

If the apportionment of an award between the owner of the naked fee and the abutting property is a matter largely discretionary with the lower court, then the apportionment once made by the lower court, should not be disturbed by this court.

Re 11th Ave. 81 N. Y. 436; *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828; Re New York C. & H. R. R. Co. 64 N. Y. 60.

Vann, J., delivered the opinion of the court:

The courts below had much difficulty in dividing a substantial sum of money between parties, not one of whom was regarded as entitled to more than a nominal amount thereof. They found division difficult, as there was no equitable principle upon which it could be founded. The leading facts out of which the controversy arose were found by the referee in substance as follows: Van Voorhis street, which was laid down on a map made about 1862, pursuant to chapter 296, p. 437, Laws 1852, is identical with Decatur street, the subject of this proceeding. One Ivins soon after the street was thus laid out acquired title to the fee thereof and of the property adjoining, and prior to his death in 1863 he caused a map to be made of the property on which Van Voorhis, now Decatur, street appeared as it had previously been laid out on the map of the commissioners. Mr. Ivins from time to time conveyed various parcels of land on both sides of the street, but so described it in the deeds as

to retain title to the fee of the street.

In 1903 the city of New York instituted proceedings to acquire the fee of the land embraced in Decatur street, and the commissioners awarded a substantial sum to unknown owners. The record does not contain the report of the commissioners, nor show for what interest or interests the award was made, except as it states that "the said awards in our report represent the full value of the parcels taken." The awards were confirmed without opposition. "The commissioners took testimony as to the value of the land so taken only, and no testimony was introduced before them as to damage (if any) done to the easements as to the abutting owners on each side of Decatur street." The evidence taken by the commissioners tended to show that since 1884, Decatur street, although not graded or paved, was opened and used for travel, with water mains therein, a roadway for vehicles through the center, a row of trees on either side, and a path between the trees and the fences bounding the property on both sides. The appellant, who has acquired the rights of Ivins to the fee of the street, claims the entire award, which is also claimed by the abutting owners. The referee to whom the matter of division was referred reported that the appellant was entitled to the whole amount, but both the special term and the appellate division were of a different opinion, and gave all to the abutting owners. The learned judge at special term said in his opinion: "Walker, a typical owner of the fee in the street, had and could have no benefit accruing from such ownership, for he owned no adjoining property that could be helped thereby, and the street itself, in the very nature of the case, could never produce any valuable thing. A naked unproductive fee, incapable of any pecuniary advantage, existed. Walker owned some barren interest,—that was all. The city took from him this land, as to Walker useless, bereft of enjoyment, and incapable of earning. In the absence of reliable evidence that it had value, every consideration shows that it had only nominal value. Hence the owner of the fee should share nominally in the award. But what was the value of the property interest taken from the abutting owners, and what did they receive in return? . . . The city took the servient estate and the easements, and *eo instanti* the street came into full legal life, with all the present advantages and all expectable opportunities and facilities, and there accrued to the abutting owners servitudes in the street that in every regard and to full degree replaced

what the city had taken. By operation of law the abutting owners had all or more than had been received by the grant. The subject of the easements, light, air, and access was not for an instant interrupted or impaired. What the city actually did was to change the legal status and relation of the abutting owners. What damage then did the abutting owners suffer? Clearly none. Hence their participation in the award should be nominal. . . . It is most equitable that the abutting owners should have this award. It ought not to have been awarded to them, . . . but the award exists although it ought not to exist. . . . I order it paid to them, not because the damage belongs to them, but because they must pay the same."

On the record as now presented to us we agree with the learned special term that no party was entitled to more than a nominal award, but we do not agree with that court, or with the appellate division, in giving the entire fund to the abutting owners upon the ground that they were assessed to pay the damages for opening the street, and thus created the fund which is the subject of division. The return does not show that the abutting owners were so assessed, but the special term assumed it, and the learned judge who wrote for the appellate division went to the office containing the record, and there learned it. The statute does not require it, but authorizes the assessment to be spread over a large area, and provides that a part may be imposed on the city. Greater New York Charter (Laws 1901, p. 411, chap. 466) § 980, as amended by Laws 1906, p. 1690, chap. 658. The appellate division was of the same opinion as the special term that each of the claimants "was entitled to only a nominal award and should have been given no more." One of the justices dissented in an elaborate opinion, and recommended a reversal of the order, with instructions to the court below to return the report to the referee for a further hearing "as to the value of such easements as related to the entire award."

Two cases are cited to show that substantial damages were properly awarded,—*Re 11th Ave.* 81 N. Y. 436; *Buffalo v. Pratt*, 131 N. Y. 293, 15 L.R.A. 413, 27 Am. St. Rep. 592, 30 N. E. 233. In both of these cases this court was hampered by a decision below, not appealed from, and therefore binding upon it, that an award of nominal damages only was improper. It also appeared in the later case that the owner of the fee of the street owned adjoining property, which is not the fact here, and it was held that such ownership gave him "the right to defend against and

to enjoin a use of, or an encroachment upon the street, under legislative or municipal authority; for purposes inconsistent with those uses to which streets should be, or have been ordinarily, subjected." Accordingly it was held that the owners "of the fee of the land in the street in front of their premises" were entitled to "such substantial damages as would be ascertained by measuring the effect upon the value of their property of such a deprivation."

In the earlier case the court said (page 448 of 81 N. Y.): "The most plausible of the objections taken is that, the award being intended to compensate for the loss or damage sustained by the parties interested in the land taken, the owners of the easement should not participate, because they are not deprived of their easement, but retain their right of way over the avenue in an improved form. This argument, however, applies with equal force to the owner of the fee. The land was, before the opening of the avenue as a public highway, subjected to a perpetual easement which deprived the owner of the beneficial enjoyment of the land. There would be manifest injustice in awarding the whole compensation to the owner of the fee, in view of the fact that such compensation is ultimately payable by the owners of the adjacent lots in the form of assessments, while no part of these assessments is chargeable to the owners of the fee of the land taken. The adjacent owners would thus be compelled to pay full value for a right of way which they already possessed. . . . If the compensation paid to the owners of the fee had been merely nominal, it would have been equitable to adopt the same rule in respect to the owners of the easement. . . . The rule of apportionment adopted by him [the referee], viz., one fourth to the owner of the barren fee and three fourths to the owners of the easement or right of way, it is difficult for us to review. It was adopted with reference to all the circumstances and equities of the case, in the exercise of a sound judgment by a referee who evidently had a thorough comprehension of the case, and was eminently qualified to decide such a matter. With his determination we see no reason to interfere."

The embarrassment of the learned judge who wrote the opinion in that case is obvious, and the embarrassment of the judges who have written more than twenty printed pages of opinions in the case at bar is equally apparent. We are unwilling to take part in the division of a fund to which none of the claimants are justly or equitably entitled, so far as now appears. In

order that complete justice may be done, we reverse the orders below, without costs to either party, and remit the proceeding to the special term, with leave to any party, or to the city of New York, to move to set aside the award and assessment, if any, and for a rehearing before the commissioners, or others to be appointed in their stead. If such motion is not made within thirty days, or if made is denied, application may be made by either party for a rehearing before the same or another referee, to the end that further evidence may be presented, especially as to the proportionate value of the respective interests and as to the amount, if any, assessed upon the abutting owners to pay for the improvement.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Willard Bartlett, and Hiscock, JJ., concur.

Chase, J., absent.

Orders reversed, etc.

Petition for rehearing denied November 30, 1909.

#### NORTH DAKOTA SUPREME COURT.

WALTER DICKINSON, Resp't.,

v.

W. J. CARROLL, Appt.

(21 N. D. 271, 130 N. W. 829.)

#### Note — gratuity — right to compel refund of proceeds.

One who voluntarily and with full knowledge of absence of indebtedness gives another his note cannot compel him to refund what the maker is compelled to pay thereon to a bona fide holder for value, without notice.

(March 9, 1911.)

**A**PPEAL by defendant from an order of the District Court for Ward County overruling a demurrer to the complaint in an action, brought to recover the amount paid on a promissory note. Reversed.

**Note.** — **DICKINSON v. CARROLL** appears to be a case of first impression upon the right of one who makes a gift of commercial paper, and is compelled to pay the same to a bona fide indorsee for value, to recover from the donee, as a careful search has failed to disclose other authorities.

Generally as to check or note as subject of gift by maker, see note in 27 L.R.A. (N.S.) 308.  
37 L.R.A. (N.S.)

#### Statement by Fisk, J.:

From an order overruling a demurrer to the complaint, defendant appeals. The complaint is as follows:

"(1) That on or about the 4th day of April, 1906, for value received, this plaintiff executed and delivered to the Blaisdell-Bird Company, a corporation, his certain promissory notes payable to the Blaisdell-Bird Company or order, one for \$100, due November 1, 1907, and one for \$180, due November 1, 1908, said notes bearing interest at the rate of 10 per cent per annum. That at said time and place he also executed and delivered to Grace Cochrane his two certain promissory notes, payable to Grace Cochrane or order, one for \$200, due November 1, 1906, and one for \$100, due November 1, 1907, said notes bearing interest at the rate of 10 per cent per annum.

"(2) That on or about November 26, 1906, this plaintiff paid one John W. Cochrane \$200, same to apply on his indebtedness to the said Grace Cochrane, and the said John W. Cochrane, having possession of the said note in favor of the said Grace Cochrane for \$200, returned the same to this plaintiff, and that thereupon the total indebtedness of this plaintiff to the said Grace Cochrane was \$100, and his total indebtedness to said the Blaisdell-Bird Company \$280. That thereupon this plaintiff executed and delivered to the said John W. Cochrane his certain promissory note, dated November 26, 1906, due November 1, 1907, payable to the said John W. Cochrane or order for \$380, and interest at the rate of 10 per cent per annum, said note representing this plaintiff's total indebtedness to said Grace Cochrane and said the Blaisdell-Bird Company, and said John W. Cochrane thereupon having possession of the said notes in favor of said the Blaisdell-Bird Company, but which had not been transferred by said the Blaisdell Bird Company, returned same to this plaintiff. That this plaintiff at said time believed that the said John W. Cochrane had authority to return said notes in favor of the Blaisdell-Bird Company and take in settlement thereof the note payable to himself, hereinbefore mentioned. That said John W. Cochrane in fact had no authority to do such act, and the same was done without the knowledge or consent of the Blaisdell-Bird Company.

"(3) That subsequently the said John W. Cochrane transferred the said note for \$380 to the said Grace Cochrane, receiving no consideration therefor except that she owned an interest in said note to the extent of \$100. That the said Grace Cochrane being indebted to one T. E. Fox as security, transferred the said note for \$380 to said

T. E. Fox. That some time about the fall of 1907 this plaintiff learned, and was informed by the Blaisdell-Bird Company, that the said John W. Cochrane had no authority to deliver the said notes in its favor, and take in settlement thereof the note payable to himself, and that the Blaisdell-Bird Company was the owner of an interest in said note to the extent of \$280 and interest, or the indebtedness thereby represented, and that the said notes in favor of the Blaisdell-Bird Company, executed by this plaintiff on April 4, 1906, were still unpaid and a good claim against this plaintiff.

"(4) That on or about February 6, 1908, this plaintiff paid to the said T. E. Fox the sum of \$146, which was the total indebtedness of the said Grace Cochrane to the said T. E. Fox, and also was the total amount of the interest in said note for \$380 owned by the said Grace Cochrane, and the entire balance of indebtedness from this plaintiff to said Grace Cochrane, including interest on the two original notes from date to payment. Thereupon the said T. E. Fox returned to the said Grace Cochrane the said note for \$380. That subsequently the said Grace Cochrane returned said note for \$380 to the said John W. Cochrane, her entire interest in the same having been paid, and that the balance of said note for \$380 was entirely without consideration. That \$280 thereof, or the indebtedness represented thereby, was the property of the Blaisdell-Bird Company, and the Blaisdell-Bird Company had the sole right to release the same.

"(5) That some time in the spring or middle part of the year 1908 the said John W. Cochrane transferred the said note for \$380 to this defendant, said transfer taking place long after the maturity of said note, and long after this plaintiff had been apprised of the facts hereinbefore set forth. That about the latter part of July or the first part of August, 1908, this defendant was informed of the facts hereinbefore set forth, and had full knowledge that he was not the owner of said note for \$380 or the indebtedness represented thereby. That he could not release the same, and that he could not legally enforce a collection thereof. That with full knowledge of said facts, and without the right or authority to release the balance of said note for \$380 or the indebtedness represented thereby, he went to this plaintiff and returned to him said note for \$380, taking in settlement thereof this plaintiff's promissory note, dated August 6, 1908, payable to this defendant or order, for \$290.08, due October 1, 1908, bearing interest at the rate of 12 per cent per annum. That the said note in favor of this defendant was entirely with-

out consideration. That this defendant was not the owner thereof or the indebtedness thereby represented, and had no right to transfer same.

"(6) That subsequently this plaintiff was compelled to and did settle with the Blaisdell-Bird Company in full his indebtedness to it, paying in full the notes in favor of the Blaisdell-Bird Company, described in paragraph 1 hereof.

"(7) That, before the maturity of said note in favor of this defendant, this defendant, in the usual course of business, indorsed and transferred the said note for value to the Second National Bank at Minot, a corporation, the said Second National Bank purchased the said note for value before maturity and without any knowledge of the facts hereinbefore set forth, or any knowledge that the said note was without consideration or in any way void or defective, or any knowledge that said defendant was not the owner of said note or the indebtedness thereby represented, or any knowledge that he had no right to transfer same. That by reason of the facts hereinbefore set forth, and that the said Second National Bank was a bona fide purchaser before maturity, in the usual course of business, for value, of the said note in favor of this defendant, this plaintiff was compelled to pay said note to said Second National Bank of Minot, and on or about the 29th day of October, 1908, did pay said note, amounting, with interest, to \$297.80, to the said Second National Bank, paying in cash \$7.80, and the balance in this note for \$290, due October 1, 1909, with interest at 12 per cent per annum, payable to the said bank or order.

"(8) That by reason of the facts hereinbefore set forth this plaintiff has been damaged in the sum of \$297.80, with interest thereon at the rate of 12 per cent per annum from October 29, 1909.

"Wherefore this plaintiff demands judgment against this defendant for the sum of \$297.80, with interest thereon at the rate of 12 per cent per annum from and since October 29, 1908, besides his costs and disbursements herein."

The sole ground of the demurrer is that the complaint fails to state facts sufficient to constitute a cause of action. Order reversed.

Messrs. Palda, Aaker, Green, & Kelso, for appellant:

A payment voluntarily made, and with full knowledge of all the facts, cannot be recovered when the obligor makes the payment, but does so, as it were, willingly, and admits that, notwithstanding he is not



technically liable to the obligee, his indebtedness is being wiped out.

*Scott v. Ford*, 45 Or. 531, 68 L.R.A. 469, 78 Pac. 742, 80 Pac. 899; *Clarke v. Dutcher*, 9 Cow. 674; *Wessell v. D. S. B. Johnston Land & Mortg. Co.* 3 N. D. 160, 44 Am. St. Rep. 529, 55 N. W. 922; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926; *Powell v. St. Croix County*, 46 Wis. 210, 50 N. W. 1013; *Gerecke v. Campbell*, 24 Neb. 306, 38 N. W. 847; *Cummings Harvester Co. v. Sigerson*, 63 Kan. 340, 65 Pac. 639; *Little v. Bowers*, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; *Union P. R. Co. v. Dodge County*, 98 U. S. 541, 25 L. ed. 196; *Selby v. United States*, 47 Fed. 800; *Gould v. McFall*, 118 Pa. 455, 4 Am. St. Rep. 606, 12 Atl. 336; *Pepperday v. Citizens' Nat. Bank*, 183 Pa. 519, 39 L.R.A. 529, 63 Am. St. Rep. 769, 38 Atl. 1030; *New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co.* 109 La. 13, 94 Am. St. Rep. 395, 33 So. 51; *United States v. Edmondston*, 181 U. S. 500, 45 L. ed. 971, 21 Sup. Ct. Rep. 718; *Laidlaw v. Detroit*, 110 Mich. 1, 67 N. W. 967; *Francis v. Hurd*, 113 Mich. 250, 71 N. W. 582; *Lathrope v. McBride*, 31 Neb. 289, 47 N. W. 922; *Flack v. National Bank*, 8 Utah, 193, 17 L.R.A. 583, 30 Pac. 746; *Mayer v. Hoffman*, 67 Wis. 279, 30 N. W. 355; *Redmond v. New York*, 125 N. Y. 632, 26 N. E. 727.

Messrs. Blaisdell, Bird, & Blaisdell, for respondent:

The note given by plaintiff to defendant was absolutely without consideration, and therefore void in defendant's hands.

*McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460; *Rudolph v. Hewitt*, 11 S. D. 646, 80 N. W. 133; *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466.

By the act of defendant in transferring the note, plaintiff was compelled to pay what he was not entitled to pay, and can therefore look to defendant for reimbursement. He has suffered a wrong, and therefore has his remedy, under the general principle that there can be no wrong without a remedy.

26 Am. & Eng. Enc. Law, 845, note 1; *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L.R.A. 253, 17 Am. St. Rep. 619, 24 N. E. 381; *Hynes v. Patterson*, 95 N. Y. 1; *Edmunds v. Deppen*, 97 Ky. 661, 31 S. W. 468; 27 Cyc. 836D, 840A.

Flsk, J., delivered the opinion of the court:

The allegations of the complaint, admitted by the demurrer, may be epitomized as follows: Plaintiff voluntarily, and with full knowledge of the facts, executed and delivered to defendant his negotiable promissory note without consideration, and the 57 L.R.A.(N.S.)

latter, with such knowledge accepted the same. Thereafter, and before its maturity, defendant transferred the same in due course and for value to an innocent purchaser, to whom plaintiff was obliged to and did pay the sum due thereon. Do such facts create any liability on defendant's part under any theory of law to reimburse plaintiff for the money which he was thus required to pay? The question thus presented is somewhat novel. Neither party has cited any authority directly in point, and we have been unable to find that the identical question has ever been before the courts for decision. As we view the matter, it is not a question involving a voluntary payment, as appellant's counsel seem to think, although somewhat analogous thereto. While the note was voluntarily given, it paid nothing, as there was concededly nothing to pay. It merely amounted to a voluntary promise on plaintiff's part to pay to defendant or order a sum of money at a future date. Such note was not voluntarily paid by plaintiff. He was compelled to pay it to such bona fide purchaser because of a legal duty so to do arising from the negotiable instrument law. On principle, we can discover no sound reason why defendant is under any obligation to plaintiff to reimburse him for the sum thus paid on such note. If, instead of voluntarily giving to defendant such negotiable note, plaintiff had given to defendant the face value thereof in cash, under the like circumstances, no one would contend that defendant would owe any legal duty to repay such sum to plaintiff. The act of defendant in transferring such note cannot be deemed an actionable wrong, as by the giving of the note, negotiable in form, it must be held that plaintiff contemplated that the same might be negotiated, and thereby consented thereto. As was said by the court of appeals of New York: "The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff, while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancelation. *Jackman v. Mitchell*, 13 Ves. Jr. 581, 9 Revised Rep. 229, 12 Eng. Rul. Cas. 321. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him." *Solinger v. Earle*, 82 N. Y. 393.

If, prior to the negotiation of such note

by defendant, plaintiff had elected to repudiate any liability thereunder, and had communicated his election so to do to the defendant, demanding a return and cancellation thereof, a different question would arise. Under such a state of facts, it might properly be said that the defendant's negotiation of the note would constitute an actionable wrong, entitling plaintiff to recover. But under the facts alleged in the complaint and admitted by the demurrer in the case at bar, we fail to see how defendant owes to plaintiff either a legal or moral duty in the premises. Neither in good morals nor in good conscience is defendant called upon to reimburse plaintiff for the loss suffered by him solely as a result of his own folly.

On the argument in this court, respondent's counsel requested that permission to amend the complaint be given in the event a decision is reached adverse to his contention. Such application must, of course, be addressed to the district court after the remittitur has been filed in that court. Permission to make such application is hereby granted.

For the above reasons, the order appealed from is reversed, and the cause remanded for further proceedings according to law.

All concur, except Morgan, Ch. J., not participating. Goss, J., being disqualified, did not sit; Winchester, Judge of the Sixth Judicial District, acting in his place by request.

Petition for rehearing denied April 3, 1911.

#### KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY EX  
REL. J. R. LAYMAN, Appt.,  
v.  
DENNIE SHEERAN.

(145 Ky. 361, 140 S. W. 568.)

Office — deputy sheriff — rival candidate.

The appointment by a sheriff as his deputy of one who withdrew from candidacy

*Note. — Validity of agreement made in consideration of withdrawal of candidacy for office.*

This note does not include cases of the sale of a deputyship or other office for a consideration other than withdrawal from candidacy, nor does it include cases of resignation from office as consideration for an agreement, nor agreements to withdraw by

for the nomination in consideration of the promise of a deputyship is not obnoxious to a statute forbidding the sale or letting to farm or deputation of any office.

(November 14, 1911.)

**A**PPEAL by the Commonwealth from a judgment of the Circuit Court for Breckinridge County sustaining a demurrer to the petition in a proceeding to oust defendant from the office of sheriff for an alleged violation of the statute prohibiting the sale or letting to farm of any office of trust. Affirmed.

The facts are stated in the opinion.

Messrs. Murray & Murray, Gus Brown, and J. R. Layman for the Commonwealth.

Mr. Claude Mercer, for appellee:

A promise made by a candidate for a party nomination for the office of sheriff, that, if another aspirant for the same nomination would withdraw and lend his aid in securing his nomination, in the event of the election of the promisor, the candidate thus withdrawing would be appointed deputy sheriff, is not a violation of the statute inhibiting the sale of a public office or a deputation thereof.

Field v. Chipley, 79 Ky. 260; Combs v. Brashear, 6 J. J. M. 631; Baldwin v. Bridges, 2 J. J. M. 7; Commonwealth v. Chinn, 110 Ky. 527.

Mr. N. McC. Mercer also for appellee.

Clay, C., delivered the opinion of the court:

Appellee, Dennis Sheeran, was elected sheriff of Breckinridge county at the general election held in November, 1909. He subsequently qualified, and is now the acting sheriff of that county. This proceeding was brought by the Commonwealth of Kentucky, on relation of its attorney for the ninth judicial district, for the purpose of ousting appellee from his office for an alleged violation of § 3740 of the Kentucky Statutes (§ 4842, Russell's Stat., prohibiting the sale or letting to farm of any office of trust or honor under the commonwealth, or deputation thereof, in whole or in part, upon penalty of ouster.

It is averred in the petition that, when

prospective bidders for positions like that of mail carrier.

As far as actual decisions upon this point go, the weight of authority is to the effect that an agreement in consideration of the withdrawal of candidacy for office is void as against public policy; and it matters not whether it is a withdrawal from the race for nomination, or, after nomination, from the race for election.

appellee was elected sheriff, he was elected as the candidate of the Republican party, and received his nomination at a convention held by that party. Prior to the convention, one Gabe Taul, who was eligible

to hold the office of sheriff, was a candidate for the nomination at the hands of the Republican party. A short time prior to the holding of the convention of said party in the county of Breckinridge, for

Two men being applicants to the constitutional appointing power for the office of inspector of flour in the city of New York, and considering their chances of obtaining the appointment about equal, made an agreement by which one was to withdraw his application and aid the other in procuring the appointment, in consideration of which the other, if appointed, was to allow the first one to receive one half the fees and emoluments of the office as long as he held it. The offer seemed also to intimate, and the conduct of the parties justified a suspicion, that the one withdrawing was also to be appointed deputy of the other; but the decision was not placed on that ground. The agreement was held to be void because it stipulated for pecuniary compensation for aid in obtaining an appointment, and also because it stipulated for a dangerous influence over a profitable office which was not intrusted to the one profiting thereby, and for the performance of the duties of which he was under no pecuniary or official obligation, and because it stipulated for a pecuniary compensation for withdrawing an application by which he had probably driven off competition, and had contributed to reduce the number of applicants to those two. *Gray v. Hook*, 4 N. Y. 449.

An agreement whereby a nominee for the office of mayor of a city was to withdraw from the candidacy and run for another office, and another candidate was to be substituted on the ticket for mayor, and pay all the campaign expenses of the former, was held illegal; and a subsequent promise by the substituted candidate to pay money in accordance with that agreement was held void. *Robinson v. Kalbfleisch*, 5 Thomp. & C. 212.

An agreement between two applicants for the office of Assistant Assessor of the United States, that one should withdraw his application, and if the other should receive the appointment, they would perform the duties jointly and share the receipts equally, is illegal as against public policy, and cannot be validated after the appointment is received, by mere confirmation. *Hunter v. Nolf*, 71 Pa. 282.

Where a nominee for the legislature withdrew from a ticket and permitted another nominee to be substituted in his place, and accepted in consideration a judgment note for \$500 as reimbursement for "expenses" incurred in obtaining his nomination, the whole transaction was corrupt, immoral, and within the prohibition of the act then in force (substance of the act not stated), and no collection could be had upon the note. *Ham v. Smith*, 87 Pa. 63.

Also, where there was a contract between a candidate for the office of auditor of a county and the then incumbent of that

office, to the effect that if the latter would support such candidate for the nomination, and not be a candidate for the same office himself, the former would, if nominated and elected, employ the other as deputy and clerk during the term of said office, the contract was held illegal and void as in contravention of public policy. *Stout v. Ennis*, 28 Kan. 706.

It will be observed, however, that *COM. EX REL. LAYMAN v. SHEERAN* holds that the appointment by a sheriff to the deputyship under him of one who withdrew from candidacy for the nomination, in consideration of a promise that he should be so appointed, is not obnoxious to the statute forbidding the sale or letting to farm of any office. There seems to be no reference in the decision to public policy.

And in *Woodworth v. Wilson*, 11 La. Ann. 402, an applicant for the curatorship of an estate withdrew upon the promise of another applicant to deliver lumber to him sufficient to pay off two notes outstanding against him, and this agreement was enforced by the court by granting judgment in favor of the one who withdrew for the difference between the amount of the notes and the value of the lumber actually delivered. But a memorandum is filed by a dissenting judge, expressing a doubt as to whether it is not against the policy of the law to enforce any contract which directly or indirectly has for its consideration the withdrawal of the applicant for the office of executor, administrator, or curator of a succession, in order to secure the appointment of another.

In *Gulick v. Ward*, 10 N. J. L. 87, 18 Am. Dec. 389,—a case not within the scope of this note, as it involved an agreement not to bid for a public contract,—the court refers to the case of *Parker v. Brown*, Cro. Jac. 612. In the latter case, the parties were both applicants for the office of under-sheriff, and the defendant, in consideration that the plaintiff would desist, promised if he obtained the office to pay him a sum of money. The court held the consideration to be lawful and the promise valid; but there is a query in *Gulick v. Ward*, whether that decision would now be the same; and that the court attempts to justify said decision in these words: "Neither the sheriff nor the public were, or could be, prejudiced by the withdrawal of one of the applicants; no competition was to be fostered; public policy did not require the anxious rivalry of candidates; perhaps, indeed, was best promoted by leaving the sheriff to unbiased and unsolicited selection; there was no interest, either public or private which could suffer from the absence of competition."

H. C. Sh.

the purpose of nominating candidates for county offices, including the office of sheriff, the appellee solicited the said Gabe Taul to withdraw from the race before the convention for said nomination, and not oppose him. The appellee and said Taul then entered into a contract and bargain whereby it was agreed and contracted between them that the said Taul would withdraw from said race for said nomination, and would not further oppose appellee, but would use his influence and efforts to secure appellee's nomination by the Republican convention for the office of sheriff, and would also use his influence and efforts to secure the election of appellee to said office at the regular election. In consideration of said Taul's withdrawing from said contest, and of his influence and efforts to secure the nomination and election of appellee as sheriff, appellee agreed and contracted with said Taul that when elected and qualified as sheriff he would appoint said Taul as a deputy sheriff of the county of Breckinridge for a period of one year, and that said Taul was to have the right and privilege of holding said deputyship for the whole period of appellee's term of office as sheriff, and that he would pay to said Taul the sum of \$40 per month for the first year of his deputyship, and such sum as might be further agreed upon for the remaining three years. In pursuance of said agreement and bargain said Taul withdrew from the race, and did use his influence to secure the nomination and election of appellee, and the latter did, after his election and qualification as sheriff, appoint said Taul a deputy sheriff of Breckinridge county, and said Taul qualified as said deputy and held said deputyship for a time thereafter. The petition further avers and charges that the appellee did sell and let to farm a deputation of the office of sheriff of Breckinridge county; that at the time said contract with said Taul was made the appellee expected to hold the office of sheriff, and, when he fulfilled said contract by appointing said Taul as deputy, he did hold said office. The petition concludes with a prayer asking that appellee be adjudged to have forfeited the office of sheriff and his right to hold the same, and that he be expelled from said office.

To this petition the appellee interposed a demurrer, which was sustained. The commonwealth having declined to plead further, the petition was dismissed. From that judgment, this appeal is prosecuted.

Section 3740 of the Kentucky Statutes is as follows: "No office or post of profit, trust, or honor under this commonwealth, whether civil or military, legislative, execu-

utive, ministerial, or judicial, nor the deputation thereof, in whole or in part, shall be sold or let to farm by any person holding or expecting to hold the same. Such person so selling or letting, and the person so buying or receiving the letting, or with whose knowledge the same has been bought for him by another, shall be disqualified from holding such office or post, or the deputation thereof, and, upon conviction, shall be expelled therefrom." The question of the validity of the contract by which appellee agreed to appoint Taul deputy sheriff, in consideration of the latter's support and influence, both before the Republican convention and at the general election, is not now before us. The sole question is: Is such contract a sale of the office or a deputation thereof within the purview of the statute?

It has long been the custom, where persons were candidates for an office attached to which are one or more deputyships, for one or more of the candidates to withdraw and give their support and influence to the strongest candidate, upon the assurance of an appointment to one of the deputyships. Whatever may be the moral quality of the act by which such support and influence are thus obtained, such an agreement is not a sale of the office within the meaning of the statute. It is nothing more than an agreement to appoint one to a deputyship at a certain salary. In the case before us the deputyship in question had to be filled, and for the services performed by the incumbent compensation had to be provided. In doing this the appellee never surrendered control, either of his own office or of the deputyship referred to. We therefore conclude that the trial court properly sustained the demurrer to the petition.

Judgment affirmed.

#### IOWA SUPREME COURT.

CHARLES S. BLACKETT, Appt.,  
v.

S. B. ZIEGLER et al.

(— Iowa, —, 133 N. W. 901.)

**Will — establishment by codicil.**

1. A paper signed and executed as a will, requesting the appointment of a certain person administrator, which is attached to a will, and does not refer to or identify it in any manner, cannot be regarded as a

**Note. — Effect of revocation of later will to revive an earlier one.**

The earlier cases involving his question will be found in notes appended to Bates v.

codicil which will revive a canceled will, under a statute providing that if a codicil is duly executed to a will defectively executed and clearly identified in such codicil, the will and codicil shall be considered as one instrument, and the execution of both sufficient.

**Same — revocation — execution of subsequent will.**

2. The mere execution of a revocatory will effects a cancellation of a prior one, although it is never probated, under a statute providing that wills may be revoked by the execution of subsequent wills.

**Same — destruction of revocatory will — effect.**

3. The destruction of a will which expressly revoked a prior one, which had been retained in existence, will revive the prior one, if such was the intent of the testator found by the jury from all the circumstances of the case.

**Evidence — re-establishment of will — declarations of testator.**

4. Upon the question of the revival of a will by destruction of an instrument purporting to revoke it, declarations of testator at the time of destroying the latter instrument are admissible in evidence.

(December 18, 1911.)

**A** PPEAL by plaintiff from a judgment of the District Court for Fayette County in defendants' favor in an action brought to set aside the probate of the will of Elizabeth W. Lewis, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. V. T. Price and C. S. Blackett, for appellant:

A will may be revoked by the execution of a subsequent will.

Schillinger v. Bawek, 135 Iowa, 131, 112 N. W. 210; Re Dunahugh, 130 Iowa, 692, 107 N. W. 925; Re Brown, 143 Iowa, 649, 120 N. W. 667; Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685.

The republication of a revoked will cannot be shown by parol evidence of testator's declarations, or of testator's intentions. Such evidence is incompetent.

Carey v. Baughn, 36 Iowa, 540, 14 Am. Rep. 534; McCarn v. Rundall, 111 Iowa, 406, 82 N. W. 924.

Messrs. Ainsworth & Hughes and Clements & Estey, for appellees:

A will is ambulatory, and takes effect only at the death of the testator; hence,

to have any force, it must exist at such decease, and, if not, it has no effect and cannot revoke a previous will.

Bates v. Hacking, 28 R. I. 523, 68 Atl. 622, 14 L.R.A.(N.S.) 937, 125 Am. St. Rep. 759, 68 Atl. 622; Marsh v. Marsh, 48 N. C. (3 Jones, L.) 77, 64 Am. Dec. 598.

The revoking will must be a valid one which the contestant can "bring forward, . . . and demand probate thereof," because, unless it is a valid will surviving the testator and capable of probate, it never has, or has had, any force or effect whatever.

Re Dunahugh, 130 Iowa, 695, 107 N. W. 925; Stephenson v. Stephenson, 64 Iowa, 537, 21 N. W. 19.

Parol evidence of the declarations of the testator are admissible to sustain the will.

Lorieux v. Keller, 5 Iowa, 196, 68 Am. Dec. 696.

The common-law rule is that the destruction of a second revocatory will revives the first.

Pickens v. Davis, 134 Mass. 252, 45 Am. Rep. 331; Taylor v. Taylor, 2 Nott & M'C. 482; Randall v. Beatty, 31 N. J. Eq. 643.

Deemer, J., delivered the opinion of the court:

Elizabeth W. Lewis, now deceased, made a will in the year 1895. Thereafter, and in 1904, she made another which disposed of her estate, and contained a clause revoking the will of 1895. She retained both wills until the year 1905, when she destroyed the one of 1904 by burning it, and about the same time executed the following paper:

To the Judge of the District Court of Fayette County, Iowa:—

I hereby request you in case of my death to appoint S. B. Ziegler, of West Union, Iowa, as administrator of my estate without giving bonds.

This she signed, and her signature was witnessed by two witnesses. The will of 1904 was left in the possession of a Mr. Preston, who drew it, until December of that year, when testatrix requested Mr. S. B. Ziegler, who had drawn the first will and had it in his possession, to get the

Hacking, 14 L.R.A.(N.S.) 937, and Cheever v. North, 37 L.R.A. 575.

In Re Wear, 131 App. Div. 875, 116 N. Y. Supp. 304, the court recognizes that a second will containing a revocation clause, and shown to have been in the possession of decedent, but which cannot be found, is presumed to have been destroyed by him with the intention of revoking it, but that such 37 L.R.A.(N.S.)

revocation does not operate to reinstate the former will.

However, where a testator destroyed her later will by burning it, at the same time declaring orally that the former will should count, it was held that this re-established the former will. Kerchner's Estate, 41 Pa. Super. Ct. 112.

R. L. S.

second one from Preston, which he did, and Ziegler took both wills to Mrs. Lewis's home, where each one was read to her, clause by clause, in the presence of Mr. and Mrs. Caldwell, the persons who witnessed the paper which we have heretofore set out, and after some discussion Mrs. Lewis said that she wanted the first will to stand, and she directed Ziegler to destroy the second one, which he did in her presence, and in the presence of the Caldwells. After the destruction of the second will, Mrs. Lewis said to Mr. Ziegler: "There is no executor in this will that stands. . . . I want you to act as my executor; you have always done my business for a great many years, and I want you to act." Mr. Ziegler made the objection that he did not care to act as executor of the will, because of the necessity of giving a bond, whereupon Mrs. Lewis said that he did not need to give a bond. The writing was then prepared by Mr. Ziegler, and was executed and witnessed as shown. This so-called codicil does not seem to have been attached to the will, but it was kept by Mr. Ziegler, and was presented for probate with the will. The first will was admitted to probate, and this action is brought to set aside the order. The trial court denied the relief asked, and plaintiff appeals.

The questions presented are new to this court, and some of them are the subject of many conflicting and irreconcilable decisions. In the absence of statute governing some of the matters arising upon the appeal, it may be said that there is no general rule, and that each court for itself has found it necessary to fix the rule for that jurisdiction. The relevant statutes of this state are as follows:

"All other wills, to be valid, must be in writing, signed by the testator, or by some person in his presence and by his express direction writing his name thereto, and witnessed by two competent persons; but if a codicil is duly executed to a will defectively executed and clearly identified in such codicil, the will and codicil shall be considered one instrument, and the execution of both sufficient." Code, § 3274.

"Wills can only be revoked, in whole or in part, by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making, of a new will." Code Supp. § 3276.

Section 3274 is quoted because of its bearing upon the claim that the paper heretofore set out is a codicil to the first 37 L.R.A. (N.S.)

will, and having been executed after the destruction of the will of 1904, it amounted to a republication of the first will. As to that, more hereafter.

It is admitted that the first will was never destroyed by the maker, and it is also conceded that the second will contained an express revocatory clause of the first will, and that this second will was absolutely destroyed by burning. These being the undisputed facts, the questions involved are: (1) Was the first will republished by the paper hitherto quoted, which, it is claimed, is a codicil to that will? (2) Did the destruction of the second will under the circumstances disclosed amount to a revivor of the first will?

Everyone concedes that a will expressly revoked by a subsequent will or other instrument of revocation may be republished or revived by the re-execution thereof, or by a codicil executed in accordance with statutory requirements for the execution of wills, showing an intention to revive the same. When done by a codicil, an intent to republish or revive the former will must be shown, and this may be inferred from any reference which makes such intent obvious, as, by reference to "my will," or to the will by date. *Crosbie v. Macdoulal*, 4 Ves. Jr. 610, 4 Revised Rep. 301; *Payne v. Payne*, 18 Cal. 291. And the codicil need not be attached to the will. *Van Cortlandt v. Kip*, 1 Hill, 590; *Pope v. Pope*, 95 Ga. 87, 22 S. E. 245; *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597. But, if not attached, there must be such reference to the will intended to be republished as to identify it, or to furnish the means for identification, without resort to any other testimony, save to show that the document sought to be incorporated is identical with that referred to in the will. The codicil itself must refer to the paper sought to be incorporated, if it be then in existence. *Newton v. Seaman's Friend Soc.* 130 Mass. 91, 39 Am. Rep. 433; *Damon v. Bibber*, 135 Mass. 458; *Parrott v. Avery*, 159 Mass. 594, 22 L.R.A. 153, 38 Am. St. Rep. 465, 35 N. E. 94; *Re Soher*, 78 Cal. 477, 21 Pac. 8; *Crosby v. Mason*, 32 Conn. 482; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238; *Allen v. Maddock*, 11 Moore, P. C. C. 427, 6 Week. Rep. 825, 4 Gray's Cases, 198; *Sunderland's Goods*, 4 Gray's Cases on Property, 217; *Re Young*, 123 Cal. 337, 55 Pac. 1011; *Re Andrews*, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529.

This is doubtless the rule intended to be announced by Code, § 3274, hitherto quoted. In other words, all wills must, as a general rule, be in writing, duly signed and attested; and if a codicil is relied upon

for a publication, it must clearly identify the will, and parol testimony is not admissible in the absence of any attempt to identify the will in the codicil. These being the rules announced by all of the authorities, it is apparent that the written instrument executed by Mrs. Lewis, either contemporaneously with or after the destruction of the second will, cannot be treated as a codicil to the first one, because it was not attached to, nor did it refer in any manner to, the prior will.

Moreover, the paper itself does not indicate any intent on the part of the maker to revive a former will. Construed without reference to the other testimony, it indicates a thought on the part of the maker that Ziegler should act as administrator of her estate without bond. If it means anything, this would seem to indicate that the maker wished her estate to be administered upon according to law, and not under any will. Manifestly this so-called codicil cannot be considered a republication of the first will.

The second question presented is much more difficult of solution. Shortly stated, it is this: Does the destruction or cancellation of a second will, containing an express revocation of a former one, in itself, revive the first or former one? Upon no subject relating to the law of wills are the authorities in such hopeless and irreconcilable conflict. A learned text writer has thus stated the law of England as it existed prior to the adoption of the statute known as 11 Vict. chap. 26, § 22.

"The English law prior to statutes upon this difficult question was in great confusion. The ecclesiastical courts seem disposed to hold, in cases of testaments, that no presumption arose, either for or against the validity of the first will, upon such a state of facts, and that the question was to be settled by the intention of the testator as disclosed by the evidence. The common-law tribunals, in dealing with wills, were inclined to adopt the theory that the revocation of the second will raised a presumption that testator thereby intended the first will to be in full force and effect. This was a *prima facie* presumption only, and might be rebutted by evidence of a contrary intention. The two sets of tribunals thus seemed to agree that the testator might revive his first will by the revocation of his second, if he intended to do so. Further doubt, however, arises upon attempting an analysis of the earlier English cases for two different reasons: First, it is not always clear whether the English courts are discussing a case where the second will expressly revoked the first, or where it was merely

inconsistent with it. Second, in many of the cases, especially in the ecclesiastical courts, the declarations of the testator might have been sufficient to republish his first will, as no set form was required for the execution of wills of personal property. It is therefore at times hard to determine whether the first will is valid because it has been republished after the revocation of the second will, or whether the mere revocation of the second will, with intent to revive the first, revived it without republication.

"This condition of uncertainty upon an important and often-occurring question was ended in England by the statute 1 Vict. chap. 26, § 22, which provides in substance that a will once revoked can be revived, but by a new codicil or re-execution. This statute has always been held to apply with equal force to a will revoked either by a later will containing a clause of revocation, or by a later inconsistent will. There such a statute is in force, the revocation of a later will by a testator who intends thereby to revive his earlier will, and who so declares his intention, has no effect to revive his earlier will, unless there is a re-execution or republication, as contemplated by the statute." Page, Wills, §§ 271, 272.

The same writer, in speaking of the law in this country, said: "In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The better line of authority make a distinction between the cases where the latter will contained an express revocation clause, and where it was merely inconsistent with the earlier will. 'There seems to have been material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case, the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have the effect to do away with its predecessor. Being cut off before having its disposition of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.' Where such distinction is recognized, the destruction

of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will. Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinction already given, that the destruction of the second will does not revive the first [will]." Page, Wills, § 273.

Authorities are cited in support of these views which need not be reproduced here, for we regard the statements of the text a correct exposition of most of the cases cited. See also Gardner, Wills, pp. 271-274. Any reference to the authorities upon the subject would be incomplete without incorporating therein a citation to two cases which may well be regarded as leading ones upon this perplexing problem. These are *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322,\* and *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 A. & E. Ann. Cas. 306. Opinion by Pound, C. This latter opinion carefully reviews all the decisions, both English and American, and finally adopts the rule of the ecclesiastical courts, making revivor of the former will a question of testator's intent, to be deduced from all the circumstances of the case. There is a valuable note to the case in 4 A. & E. Ann. Cas. commencing at page 313. We may remark, parenthetically, that the English statute referred to, which was passed in the year 1837, is no part of our written law, and cannot be considered as a part of the common law which we inherited at the time of the Revolution.

It should also be noted that we have no local statute upon the subject of the effect to be given the destruction of a second will upon a former one which is yet preserved. We have already copied the section of our Code with reference to the revocation of wills, and it is deemed proper, in view of some claims made by counsel, to indicate our views with reference to the proper interpretation of that statute. In the first place, it indicates that wills may be revoked, either in whole or in part. Next it indicates that revocation may be made by cancelation or destruction, or by the execution of subsequent wills; and the cancelation referred to is a written one, which must be executed in the same manner as the making of a new will. This may be then simply an instrument of cancelation or revocation, or it may be a part of another and subsequent will, which con-

tains an express clause of revocation. The word "cancelation" may have had a different meaning at common law, but in our statute it manifestly means revocation by a written instrument. Again, physical destruction of a will amounts to a revocation, when so intended by the testator. Again, a will may be revoked under this statute, either in whole or in part, by the execution of subsequent wills. This follows when there is an inconsistency between the two wills, and there is no express revocatory clause. See, as sustaining this view, *Fry v. Fry*, 125 Iowa, 424, 101 N. W. 144; *Schillinger v. Bawek*, 185 Iowa, 131, 12 N. W. 210; *Re Dunahugh*, 130 Iowa, 692, 107 N. W. 925; *McCarn v. Rundall*, 111 Iowa, 406, 82 N. W. 924; *Re Brown*, 143 Iowa, 649, 120 N. W. 667. These matters are pointed out in order that we may distinguish, harmonize, explain, and, perhaps, criticize, some of the cases relied upon by appellee. If a will be revoked by destruction, as by burning, and a second one is executed in its place, there is nothing to revive upon the destruction or revocation of the second one. A will once executed may be revoked by the execution of an instrument of revocation or cancelation, and this instrument may be a new will, containing an express clause of revocation; or by an instrument of revocation alone.

Upon the execution of such an instrument, the prior will is revoked, no matter whether the instrument of revocation be probated or not. It is the execution of the instrument in proper form which effectuates the revocation. This view is sustained by reason and the weight of authority, although disapproved by a minority of the courts. See, as sustaining the rule, some of our own cases already cited, and the following from other jurisdictions: *Re Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373; *Brown v. Brown*, 8 El. & Bl. 876, 27 L. J. Q. B. N. S. 173, 4 Jur. N. S. 163, 11 Eng. Rul. Cas. 491; *Re Cunningham*, 38 Minn. 169, 8 Am. St. Rep. 650, 36 N. W. 269; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698; *Cheever v. North*, 106 Mich. 390, 37 L.R.A. 561, 58 Am. St. Rep. 499, 64 N. W. 455; *Marsh v. Marsh*, 48 N. C. (3 Jones, L.) 77, 64 Am. Dec. 598. Clearly this is the doctrine heretofore announced by us in *McCarn v. Rundall*, 111 Iowa, 406, 82 N. W. 924 and *Re Dunahugh*, 130 Iowa, 692, 107 N. W. 925.

If revocation, either in whole or in part, is to be implied from the execution of a second will, this revocation does not



become effective if the second will is destroyed or revoked before probate, for the reason that every will, as such, is ambulatory in character, and if not in existence at the time of testator's death, and there being nothing to probate except the original will, there is no inconsistency and no revocation by implication. This is the doctrine of the Connecticut and other courts, although, as we think, they unduly extend it by making it apply to instruments expressly revoking prior wills. Doubtless the reason for this was to find some ground upon which to base the doctrine of revivor, although not calling it by that name. See *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685, as explained in *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517; *Stetson v. Stetson*, 200 Ill. 607, 61 L.R.A. 258, 66 N. E. 262; *Flintham v. Bradford*, 10 Pa. 90; *Randall v. Beatty*, 31 N. J. Eq. 643; *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650. In the instant case, there was an express revocation of the former will in the one executed in the year 1904. But this second will, containing the revocatory clause, was destroyed by burning. The first will had not been destroyed, but had been kept by the testatrix, and at the time of the burning of the second there is no doubt, under the testimony, that she intended to revive the first. To be logical and inconsistent, we must hold that the second will, when executed with its clause of express revocation, revoked or canceled the first will, and we are required now to formulate a rule with reference to the revivor of the first will by reason of the destruction of the instrument of revocation. The safest doctrine, we think, is that announced by the ecclesiastical courts of England, to the effect that it is a question of testator's intent, to be gathered from admissible parol testimony. It would not do to hold that the former will was absolutely revived by the destruction of the second, for that may have been entirely contrary to testator's intent. Having made the second will, and laid aside and, perhaps, forgotten the first, it would be dangerous to hold that the destruction of the second *ipso facto* revived the first, no matter if testator did not so intend. On the other hand, it would in many cases frustrate testator's intent, were we to hold that the former will could only be revived in such case by a re-execution or a republication thereof after the destruction of the second will, which had not been admitted to probate, and which could not be, because of its destruction. There is no danger, then, it seems to us, in holding it to be a 37 L.R.A. (N.S.)

question of testator's intent, to be arrived at from all the circumstances in the case. Testimony to establish such intent could only come from disinterested witnesses, and we can perceive of no harm which would result in submitting such question as one of fact.

In the construction of wills, testator's intent has always been regarded as controlling, and so with reference to what should be regarded as his will. There can be no valid objection to a rule leaving the question of revivor in such cases as this to be found as a matter of intent upon permissible parol testimony.

Declarations of testator at the time of revoking a will have generally been admitted, when testified to by disinterested parties. *Boyle v. Boyle*, 158 Ill. 228, 42 N. E. 140; *Behrens v. Behrens*, 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Re Steinke*, 95 Wis. 121, 70 N. W. 61. Even where a contrary rule prevails, admissions are admissible when part of the *res gestæ*. *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *Hayes v. West*, 37 Ind. 21; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Townsend v. Howard*, 86 Me. 285, 29 Atl. 1077; *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424. There are the conclusions announced in *Barksdale v. Hopkins*, 23 Ga. 332; *McClure v. McClure*, 86 Tenn. 174, 6 S. W. 44; *Carpenter v. Miller*, 3 W. Va. 174, 100 Am. Dec. 744; *Re Gould*, 72 Vt. 316, 47 Atl. 1082; *Rice County v. Scott*, 88 Minn. 386, 93 N. W. 109; *Colvin v. Warford*, 20 Md. 357; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

We do not think there is any presumption one way or the other from the destruction of the instrument of revocation. The whole matter is one of fact, dependent upon the testimony which may be offered to show testator's intent. This is the rule announced by the later and better authorities, as shown in *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 A. & E. Ann. Cas. 306, and the one best calculated to effectuate justice. It is the rule by statute in New York and Indiana. See *Re Forbes*, 24 N. Y. Supp. 841; *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004. The result of its application to the case at bar is to affirm the judgment of the court below, and it is so ordered.

Sherwin, Ch. J., concurs in the result reached herein.

## MICHIGAN SUPREME COURT.

FREDERICK VOLLI, Plff. in Err.,

v.

FREDERICK WIRTH.

(164 Mich. 21, 129 N. W. 9.)

## Limitation of action — oral loan.

The right to recover money loaned at interest without any agreement as to the time of its return, or written evidence of the transaction, is barred if demand is not made within the statutory period for simple contract debts.

(December 22, 1910.)

**E**RROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover money loaned at interest. Affirmed.

## Statement by Ostrander, J.:

This action was begun in justice's court, where the plaintiff declared, orally, upon the common counts in assumpsit, and filed a bill of particulars, the last item of which was money delivered to defendant December 11, 1898. The plea was the general issue, with notice that the cause of action was barred by the statute of limitations. In the circuit court the cause came on to be tried October 22, 1909, and counsel for plaintiff made an opening statement to the jury. This statement, in substance and effect, was that plaintiff came to this country from Germany in 1889, and became acquainted with the defendant, "I think during the first or second year he was in this country. At any rate, within the first years he was in this country, he was out of employment and not feeling very well, and he went to Mr. Wirth's and stayed there, and made it his home, and while there he let Mr. Wirth have \$40, without any statement about the interest. He just let him have it to take care of, and upon the express agreement that when he wanted the money, he should tell Mr. Wirth that he wanted it, and then Mr. Wirth, after being told that he wanted it, was to have a reasonable time to raise the money, and not be crowded. And the thing ran along a year or such a matter, and he let him have \$12 more on the same arrangement,—nothing said about interest,—just let him have it to take care of it; and it was stated when he wanted it he would pay him the two sums together. And about a year after that, \$18; and about a year after that, and, I think, the latter

part of the year 1898, Mr. Volli had some money in the City Savings Bank, and Mr. Wirth wanted to use some money, and he spoke to him about it, and he either drew the whole sum, or the principal portion of it, from the bank and gave it to him, again upon the identical same understanding he had given him the other money. He was to take care of it for him and use it, and take care of it, and nothing said about the interest, and pay him back when he wanted it, and he let him have \$180 at that time. . . . And the thing ran along until about November, 1905. Mr. Volli wanted to get his money together, and he asked Mr. Jacob Kuester, a carpenter living upon Medbury avenue, 1050 Medbury, a man whose acquaintance he had made, and a friend of his, where he sometimes stayed when he had no particular work, and he took him out, and Mrs. Kuester fixed up in German a paper, an acknowledgment showing what sums of money he had let him have up to that time. And he went out then and told him he would either like to have the money or else sign an acknowledgment, because he could not tell what might happen, and Mr. Wirth says: 'You give me another year, and come again, and I will pay you the whole sum,' and he went away again, and he did not make further demand upon him at that time, until about two years after. And he . . . went out there a year ago last summer, shortly before these suits were started, and he again asked him to pay the money, or give some obligation. He says: 'You never come out here unless you bring a couple of loafers with you, and I want you to get off my farm,' and he drove them off the place. And Mr. Volli then brought suit to recover his money, and you all understand that there is a certain jurisdiction in the justice court; so he brought suit for these four sums, \$40, \$12, \$18, and \$180, and that is the suit that is now before you for determination."

At the conclusion of this statement, the attorney for defendant submitted to the court whether, assuming the facts stated to be proven, plaintiff was entitled to recover. In answer to questions by the court, the attorney for the plaintiff stated that no receipt for the money was given, no partial payment ever made, no note given, the defendant had not been absent from the state, but had lived all the time within 4 or 5 miles of the plaintiff, plaintiff had not been confined or insane. After an argument, during which plaintiff's attorney was permitted to offer in evidence a paper writing, referred to in the opening statement of counsel, which was prepared for the purpose of obtaining an acknowledgment of the debt from the defendant, the court directed a

**Note.** — As to when statute of limitations begins to run against action on contract payable on demand, see note to Fallon v. Fallon, 32 L.R.A. (N.S.) 486.  
37 L.R.A. (N.S.)

verdict for the defendant. This writing, literally translated, reads: "I have of Mr. Frederick Volli a capital borrowed and indeed in sums: first, \$40, then \$12, \$18. On 26 December, 1898, the sum of \$180, then later \$50 and then \$25; now is the sum \$325 to-day not yet paid with interest. Detroit, the 2 Dec. 1905."

A number of requests to charge were preferred on the part of the plaintiff and refused, and exceptions were taken. The question presented by the assignments of error is whether the action is barred by the statute of limitations; it being admitted that the last item of money involved in this suit was given to defendant December 11, 1898, and the first demand was made December 2, 1905.

Messrs. **Lehman, Riggs, & Lehman** for plaintiff in error.

Messrs. **Merriam, Yerkes, Simons, & Ladd**, for defendant in error:

Where a demand is necessary upon which to found an action, the demand is barred unless made within the period of the statute of limitations.

**Kimball v. Kimball**, 16 Mich. 211; **Palmer v. Palmer**, 36 Mich. 487, 24 Am. Rep. 605; **Freeman v. Ingerson**, 143 Mich. 7, 106 N. W. 278; 9 Am. & Eng. Enc. Law, 214; **Meherin v. San Francisco Produce Exch.** 117 Cal. 215, 48 Pac. 1074; **Travelers' Ins. Co. v. Stucki**, 4 Kan. App. 424, 46 Pac. 42; **Codman v. Rogers**, 10 Pick. 112; **Thompson v. Whitaker Iron Co.** 41 W. Va. 574, 23 S. E. 795; **Waters v. Thanet**, 2 Q. B. 757, 2 Gale & D. 166, 11 L. J. Q. B. N. S. 87, 6 Jur. 708; **Jones v. Eisler**, 3 Kan. 134; **Morrison v. Mullin**, 34 Pa. 12; **Steele v. Steele**, 25 Pa. 154; **Todd's Appeal**, 24 Pa. 431; **Pittsburgh & C. R. Co. v. Graham**, 36 Pa. 77; **Franklin Sav. Bank v. Bridges**, 20 W. N. C. 43, 8 Atl. 611; **Teasley v. Bradley**, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; **Wright v. Paine**, 62 Ala. 340, 34 Am. Rep. 24.

The statute runs from the time when plaintiff might have perfected his right, irrespective of the time at which he actually perfected it.

**Massie v. Byrd**, 87 Ala. 672, 6 So. 145; **Shelburne v. Robinson**, 8 Ill. 597; **Newson v. Bartholomew County**, 103 Ind. 526, 3 N. E. 163; **Great Western Teleg. Co. v. Purdy**, 83 Iowa, 430, 50 N. W. 45; **First Nat. Bank v. Greene**, 64 Iowa, 445, 17 N. W. 86, 20 N. W. 754; **Keithler v. Foster**, 22 Ohio St. 27; **Steele v. Steele**, 25 Pa. 154.

**Ostrander, J.**, delivered the opinion of the court:

The writing prepared at the instance of the plaintiff indicates that interest was due, 37 L.R.A.(N.S.)

and that interest was expected is conceded in the brief for plaintiff. It seems, then, that each transaction amounted to a lending of money upon interest, payable within a reasonable time after demand. It is not perceived in what respect the case would be different if each time plaintiff gave defendant money, he had received a demand note or a receipt for money to be accounted for on demand. And if it be assumed that an actual demand was contemplated by the parties, and was necessary before an action to recover the money could be maintained, no demand was made until nearly seven years had expired after the last money was given to defendant. The court therefore was not in error in holding that the plaintiff could not recover. **Palmer v. Palmer**, 36 Mich. 487, 24 Am. Rep. 605; **Freeman v. Ingerson**, 143 Mich. 7, 106 N. W. 278.

The judgment is affirmed.

#### NORTH CAROLINA SUPREME COURT.

JOHN A. ROBERTSON

v.

T. W. HALTON, Appt.

(156 N. C. 215, 72 S. E. 316.)

#### Damages — fraud in horse trade — substitution — amount.

1. If one who, in trading horses, defrauded the other party, substitutes another animal for the one originally transferred, upon complaint of the party defrauded, the measure of damages in case the latter animal is not as represented is merely the difference between the value which the substituted animal would have had had it been as represented and what it in fact was, and damages cannot be awarded upon both transactions.

#### Evidence — fraud — different transactions.

2. In an action to recover damages for false representations in regard to an animal which one who had defrauded another in a trade substituted for the one which he first transferred, evidence of the deceit in the first transaction is admissible to prove intent in the last.

(October 11, 1911.)

*Note. — May purchaser recover damages for breach of warranty or fraud as to both articles, where one article is substituted for another at his request, and both are defective.*

The right of a purchaser to recover damages for fraud or breach of warranty as to different articles, where a substitution has been made at his request, but neither article complies with the representation or warranty, depends upon all the circumstances

**A** PPEAL by defendant from a judgment of the Superior Court for Craven County in plaintiff's favor in an action brought to recover damages for alleged deceit and false representations by defendant in a horse trade. Reversed.

The facts are stated in the opinion.

Messrs. Moore & Dunn for appellant.

Messrs. Simmons & Ward for appellee.

Walker, J., delivered the opinion of the court:

This action was brought to recover damages in the sum of \$125 for deceit and false warranty in a horse trade, and was tried upon issues which, with the answers thereto, are as follows: "(1) Did the defendant procure the exchange of his mule for plaintiff's mare by fraud and misrepresentation, as alleged in the complaint? Answer: Yes. (2) If so, what damages is plaintiff entitled to recover by reason thereof? Answer: Fifty dollars. (3) Did defendant procure the exchange of his mare for the

mule swapped him by plaintiff by fraud and misrepresentation, as alleged in the complaint? Answer: Yes. (4) If so, what damages is plaintiff entitled to recover by reason thereof? Answer: Seventy-five dollars." Plaintiff alleged that he was fraudulently induced by the defendant to exchange a bay mare he owned and valued at \$200 for a mule owned by the defendant, and \$20 as the difference in the value between the two animals, with the understanding that the mule could be returned and another mule substituted, if desired by plaintiff; that, in order to induce the plaintiff to trade, the defendant warranted the mule in several respects, and made certain false and deceitful representations to him as to the fine qualities of the mule. When the plaintiff discovered that he had been deceived, he told the defendant that he was not satisfied with the trade, and that he must make his representations good, whereupon the defendant said that he had a good mare he would substitute for the mule, and

of each particular case. If the substitution in effect constitutes a new agreement, made in compromise and settlement of the purchase under the original agreement, there being no reason why such a settlement could not properly be made, it will ordinarily bar the right of the purchaser to claim damages, either general or special, for the original breach of warranty or fraud practised upon him. On the other hand, if the second transaction amounts to a mere substitution of one article for another, leaving the original contract in full force, a different rule applies, and the purchaser may recover damages for breach of warranty as to the original article, or he may rescind and recover the entire amount paid, including the amount paid on the original contract. *Broderick v. Hartman*, 141 Mo. App. 259, 124 S. W. 1060; *Russell v. Wolff*, 19 Misc. 536, 43 N. Y. Supp. 1077; *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234.

In *Smith v. Newberry*, supra, the court, in holding that if the seller made a new contract with the buyer, taking the property sold back, and substituting another for an additional consideration to boot, whatever rights the purchaser had under the original contract were surrendered, remarked: "It is but common fairness to require men to deal frankly with each other, and when new and substituted contracts are made, to say whether they intend to reserve controverted claims and demands growing out of the original transaction. It may well be that in making the second trade, both parties took into account the conditions attaching to the first. If they did not do so, they should have said so."

Where a contract for the sale of property contains an agreement for substitution if not satisfactory, the purchaser may rescind the original contract after substitution has

been made, on the ground that the substituted article does not fulfil the warranty, and the measure of his recovery is the purchase price paid under the contract. *Housing v. Solomon*, 127 Mich. 654, 87 N. W. 57. And this is also the measure of recovery where the seller agrees to make a substitution and fails to do so. *Tygart v. Sutton*, 8 Ga. App. 20, 68 S. E. 488; *Russell v. Wolff*, 19 Misc. 536, 43 N. Y. Supp. 1077; *Vogel v. Osborne*, 34 Minn. 454, 28 N. W. 453. In either case, if the purchaser has not paid the purchase price, he is entitled to recover at least nominal damages. *Vogel v. Osborne*, 34 Minn. 454, 28 N. W. 453. Compare with *ROBERTSON v. HALTON*, holding that under such circumstances damages cannot be based on a warranty as to both articles, unless the damages are special.

If, by the second contract or substitution, the purchaser, in accepting the substituted property, receives the full value of the consideration paid for the property received under the original contract, his damage for the breach of the warranty under the original contract is but nominal. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234. And damages for breach of warranty as to the article originally delivered cannot be claimed where a substitution is made which fully meets the warranty, and is accepted by the purchaser as satisfactory. *R. B. Gage Mfg. Co. v. Woodward*, 17 R. I. 464, 23 Atl. 16.

An agreement subsequently entered into to replace any property theretofore sold, found to be defective, does not bar the purchaser from maintaining an action for breach of warranty, based on the original contract, the agreement not constituting a settlement thereof. *Broderick v. Hartman*, 141 Mo. App. 259, 124 S. W. 1060.

A. G. S.

at the same time made certain warranties and deceitful representations as to her fine qualities. Judgment was entered upon the verdict, and the defendant appealed.

It will be observed at a glance by anyone reading the evidence sent up that this case has been tried upon a wrong theory. Why should the defendant be twice mulcted in damages? The trade was, at first, that they should exchange the plaintiff's mare for the mule and \$20. If there had been no further exchange or negotiation and there was a breach of warranty as to the mule, or a deceit practised upon the plaintiff, he would be entitled to recover this difference between the value of the mule as he was and as he was represented to be, or as, under the contract or the representation, he should have been. When they again traded, the defendant's mare took the place of the mule, and why is not the measure of damages the difference between the value of the defendant's mare, which he substituted for the mule, as it was and as it should have been? The defendant's mare took the place of the mule, and in this way any damages for deceit in the exchange of the mule and \$20 "to boot" for the plaintiff's mare were satisfied. If the mare, which was substituted for the mule in the trade, had answered the terms of the warranty or representation, the plaintiff surely could not recover damages for the first deceit, unless he had suffered some special loss in addition to the ordinary damages which result in such cases from the deceit or false warranty, as in *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696, where the warranty or representation was that certain rags, which the plaintiff sold to the defendant, were clean and in sanitary condition, and they turned out to be infected with germs of smallpox, and consequently the disease broke out in the defendant's mill and spread among his employees, causing him great loss and damage, and the court held that the defendant was entitled to recover damages for the wrong commensurate with loss, either upon the warranty or the count for deceit; and in this connection Justice Gray, who wrote the opinion, said: "The damages recoverable for a breach of warranty, or for a false representation, include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; 37 L.R.A. (N.S.)

*Wilson v. Dunville*, Ir. L. R. 4 C. L. 249, and Ir. L. R. 6 C. L. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals, either in an action of tort for the false representation (*Mullett v. Mason*, L. R. 1 C. P. 559, 1 Harr. & R. 779, 35 L. J. C. P. N. S. 299, 12 Jur. N. S. 547, 14 L. T. N. S. 558, 14 Week. Rep. 898; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Faris v. Lewis*, 2 B. Mon. 375; *Sherrod v. Langdon*, 21 Iowa, 518; *Marsh v. Webber*, 16 Minn. 418, Gil. 375), or in an action for the warranty, either in tort (*Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, L. R. 1 C. P. Div. 92, 45 L. J. C. P. N. S. 28, 33 L. T. N. S. 572, 24 Week. Rep. 142, 23 Eng. Rul. Cas. 586), or even in contract (*Black v. Elliot*, 1 Fost. & F. 595. See also *Randall v. Newson*, L. R. 2 Q. B. Div. 102, 46 L. J. Q. B. N. S. 259, 32 L. T. N. S. 164, 25 Week. Rep. 313, 23 Eng. Rul. Cas. 480)." There is no evidence now in this case of any damage of that kind, and the ordinary rule prevails, which may be thus expressed: The difference in actual value between the article as warranted and the article as delivered is all that can be properly recovered as damages, unless in exceptional cases of special damages. Whatever that difference in the actual circumstances of the case is shown to be is the true rule and measure of damages, where the articles delivered are not what the contract calls for. *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139.

While the court seems to have given the correct instruction in regard to the measure of damages,—that is, the difference between the value of the mare, as represented by the defendant, and its real value,—the jury were permitted, under the direction of the court, to assess damages as to both transactions,—the first swap and the second or substituted one. This was error. The charge of the court is also very meager, and as to the deceit, it omitted an essential element,—the *scienter*. There was abundant proof of a *scienter*, but it was not correctly applied, if considered at all in the charge; and for that reason we have called attention to the law, as stated in former decisions of this court, and it will be well in such cases to be guided by them. The deceit in the first transaction, if established, will be evidence of the intent or *scienter* in the last, as the two are so closely connected with each other, and such evidence is admissible to show fraud in the second exchange, under the rule in *Brink v. Black*, 77 N. C. 59, and subsequent cases approving it. *Gilmer v. Hanks*, 84 N. C. 317;

Coble v. Huffines, 133 N. C. 422, 45 S. E. 760. A case directly in point is State v. Weaver, 104 N. C. 758, 10 S. E. 486. But the first transaction is not a separate cause of action, and is only relevant to the controversy as tending to show the deceitful purpose in the last exchange.

We decide, therefore, that there should have been two separate issues: one as to the warranty, and the other as to damages, unless the case is so presented at the next trial that the rule of damages for the deceit and the one for the warranty will not be the same, in which case there may be an issue as to the damages for each cause of action; but we hardly see how this can be upon the evidence as it now appears. When there are no punitive damages, one issue as to damages, in cases like this, is generally sufficient, unless there is more than one cause of action, so relating to different transactions as to entitle the plaintiff or other party to an assessment of damages upon each of them.

In regard to the nature of the warranty or deceit, much must depend upon the facts and circumstances of each case, as it is presented. We have stated some general rules, though, which will serve as guides to us in such matters: (1) When the statements made by sellers amount to nothing more upon their face than a mere commendation of the goods which is usual in sales,—a puffing of wares, as it is sometimes called,—there is no warranty or deceit. *National Cash Register Co. v. Townsend*, 137 N. C. 652, 70 L.R.A. 349, 50 S. E. 306. (2) Where the statement takes the form of an opinion or estimate of value or quality, and it is doubtful whether or not a warranty was intended, the question should be submitted to the jury to say whether one was, in fact, intended. *Unitype Co. v. Ashcraft Bros.* 155 N. C. 63, 71 S. E. 61, citing authorities. In *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840, it was said upon a kindred question, relating to a sale of fertilizers: "The defendant had a right to have the question whether the force and effect of the affirmations of the plaintiff in regard to the quality of the fertilizer did not constitute a warranty of the quality [go to the jury]. If the vendor represents an article as possessing a value which, upon proof, it does not possess, he is liable as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury. *Thompson v. Tate*, 5 N. C. (1 Murph.) 97, 3 Am. Dec. 678; *Inge v. Bond*, 10 N. C. (3 Hawks) 37 L.R.A.(N.S.)

101; *Foggart v. Blackweller*, 26 N. C. (4 Ired. L.) 238; *Bell v. Jeffreys*, 35 N. C. (13 Ired. L.) 356; *Henson v. King*, 48 N. C. (3 Jones, L.) 419; *Lewis v. Rountree*, 78 N. C. 323; *Baum v. Stevens*, 24 N. C. (2 Ired. L.) 411." (3) Where, though, the words or language clearly show a warranty, it becomes a question of law for the court, without the aid of the jury, to so declare, as in *Unitype Co. v. Ashcraft Bros.* supra; *Case Threshing Mach. Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004; *Audit Co. v. Taylor*, 152 N. C. 272, 67 S. E. 582. (4) In order to constitute a deceit, several facts must concur and be established by the proof. There must be a statement made by the defendant (a) which is untrue. (b) The person making the statement, or the person responsible for it, either must know it to be untrue, or be culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It must be made with the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff must act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffer damage. 155 N. C. 66, 71 S. E. 62 second column; *Pollock*, Torts, 7th ed. 276; *Whitehurst v. Life Ins. Co.* 149 N. C. 273, 62 S. E. 1067; *Unitype Co. v. Ashcraft Bros.* supra. The gist of the action for deceit is fraudulently producing a false impression upon the mind of the other party by words or acts, or concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. *Stewart v. Wyoming Cattle Ranch Co.* 128 U. S. 383, 32 L. ed. 439, 9 Sup. Ct. Rep. 101. In order to maintain the action, it is sufficient to show that the defendant practised a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *National Bank & L. Co. v. Petrie*, 189 U. S. 423-425, 47 L. ed. 879-881, 23 Sup. Ct. Rep. 512. In *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 314, the three requisites of an actionable deceit were thus stated: "(1) The representation must be false. (2) The party making it must know that it is false, commonly called the 'scienter.' (3) It must have misled the other party and induced him to contract upon the faith of the representation as true,"—citing numerous cases, and specially *Lunn v. Shermer*, 93 N. C. 164; *Black v. Black*, 110 N. C. 398, 14 S. E. 971; *Ashe v. Gray*, 88 N. C. 190 (a. c. on rehearing, 90 N. C. 137),—all actions against horse dealers. (5) A warranty is contractual, but may be joined with a cause of action for deceit, which is a tort.

The old and new mode of pleading is clearly stated in *Ashe v. Gray*, supra, and, quoting from the opinion of the court (by Chief Justice Pearson) in *Bullinger v. Marshall*, 70 N. C. 520, Chief Justice Smith says: "If there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty, and the justice of the peace has jurisdiction, or may declare in tort for a false warranty, and add a count in deceit, in which case a justice of the peace has not jurisdiction, the plaintiff being permitted to declare collaterally in tort for a false warranty in order to enable him to give in a court for the deceit, which, of course, was in tort." *Ashe v. Gray*, 88 N. C. 192. See also same case (*Ashe v. Gray*) on rehearing, 90 N. C. 137.

For the error noted by us, a new trial upon all the issues will be had in the lower court.

#### NORTH CAROLINA SUPREME COURT.

##### STATE OF NORTH CAROLINA

v.

GEORGE MITCHELL, Appt.,

(156 N. C. 659, 72 S. E. 632.)

#### Intoxicating Liquor — exchanging — liability.

Lending whisky with the understanding that it is to be returned in kind is within a statute making it unlawful in any manner to sell or otherwise dispose of intoxicating liquor for gain.

(November 15, 1911.)

**A**PPPEAL by defendant from a judgment of the Superior Court for Forsyth County, convicting him of unlawfully selling intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. Louis M. Swink and J. S. Grogan for appellant.

Messrs. T. W. Bickett, Attorney General, and G. L. Jones, Assistant Attorney General, for the State.

Brown, J., delivered the opinion of the court:

There is but one question presented, and that is: Is it a violation of the prohibition act for one to lend another whisky, upon the understanding that other whisky will be returned in place or it? The evidence is contradictory. The prosecuting witness

testified that he purchased the liquor for cash, and paid 50 cents down when he made the purchase. The defendant testified that he furnished whisky to the prosecuting witness, but that it was a loan, and upon the understanding that the whisky was to be returned as soon as an order made by prosecuting witness could be received.

The point comes up on the charge of the court, who instructed the jury as follows: "If you find from the evidence, beyond a reasonable doubt, that the witness Curry applied to the defendant for liquor, and it was then and there agreed by and between the witness Curry and the defendant that the defendant would let Curry have whisky, in consideration of an agreement on the part of Curry to deliver to the defendant other whisky in return for that which he received, and after this agreement was made the defendant delivered to the witness Curry a quantity of whisky, in consideration of the agreement of Curry to deliver to the defendant a like quantity when Curry's whisky arrived on the train, such transaction, if not a technical sale, would nevertheless be such as is made unlawful by the statute to which your attention has been directed, and your verdict will be 'guilty.'"

This exact question has never been decided in this state, and it has been decided both ways in other jurisdictions. The *Cyclopædia of Law and Procedure* says: "Where the statute prohibits the sale of liquor by certain persons or under certain conditions, and the indictment distinctly charges a sale, there can be no conviction on evidence which proves a gift or exchange of liquor, as distinguished from a sale." Again, on page 181 of the same volume: "A loan of liquor, with the understanding that it is to be repaid in other liquor of the same kind, is not a sale." 23 Cyc. 269. The author of the article in Cyc. is Henry C. Black, author of the well-known work on *Intoxicating Liquors*. The cases cited in the notes do not appear to fully sustain the text. It is held in Georgia that an exchange of liquor does not constitute a sale. *Skinner v. State*, 97 Ga. 690, 25 S. E. 364. Same in Arkansas. *Robinson v. State*, 59 Ark. 341, 27 S. W. 233. It was so decided in Texas in *Ray v. State*, 46 Tex. Crim. Rep. 176, 79 S. W. 535, but specially held otherwise, and the Ray Case overruled, in *Tombeaugh v. State*, 50 Tex. Crim. Rep. 286, 8 L.R.A. (N.S.) 937, 123 Am. St. Rep. 841, 98 S. W. 1054, 14 A. & E. Ann. Cas. 275.

The true rule, we think, is clearly stated by the court of criminal appeals of Texas in the latter case: "While the doctrine of

Note. — For loan of intoxicating liquor as a sale, see notes to *Tombeaugh v. State*, 8 L.R.A. (N.S.) 937, and *Clark v. State*, 31 L.R.A. (N.S.) 517.  
37 L.R.A. (N.S.)

an accommodation exchange seems to have been recognized by this court in the Ray Case, *supra*, in our opinion that case should be overruled. There might be a case—to illustrate, where some member of a family should be bitten by a snake, or some venomous insect—that would require the immediate use of whisky, with no time to send for a physician to obtain a prescription. In such case it might be allowable to borrow whisky from a neighbor on account of such emergency. We do not believe the doctrine should be extended beyond some pressing necessity. Certainly not to a case of a loan by one club member of whisky to a stranger in social drinking or as a beverage. In our opinion, it makes no difference in this respect whether the party loaning be a club member or not. His exchange of whisky to another person under the circumstances here detailed would be a sale, and comes under the doctrine announced in Keaton's Case, 36 Tex. Crim. Rep. 259, 38 S. W. 522. We fail to see any difference between such transaction and the payment of money for the whisky at the time." These cases appear to sustain that view: Com. v. Clark, 14 Gray, 367; Com. v. Abrams, 150 Mass. 393, 23 N. E. 53; Leach v. State, — Tex. Crim. Rep. —, 53 S. W. 630; Taggart v. State, — Tex. Crim. Rep. —, 97 S. W. 95; Sparks v. State, — Tex. Crim. Rep. —, 99 S. W. 546; Coleman v. State, 53 Tex. Crim. Rep. 578, 111 S. W. 1011; Beckham v. State, 54 Tex. Crim. Rep. 28, 111 S. W. 1017; Wilson v. State, 54 Tex. Crim. Rep. 13, 111 S. W. 1018.

Justice Manning, in *State v. Colonial Club*, 154 N. C. 177, 31 L.R.A.(N.S.) 387, 69 S. E. 771, reviews the authorities to some extent as to what constitutes a sale. Quoting from 2 Bl. Com. 446, he says: "A sale is a transmutation of property from one man to another, in consideration of some price or recompense in value." Justice Dillard, in *State v. McMinn*, 83 N. C. 668, defines a sale as follows: "A sale is the transmutation of the property in a personal chattel from one to another on a *quid pro quo*, paid or agreed to be paid, and such a change of property in the retail of spirituous liquors by the small measure is usually effected by the delivery of the article and the payment of the price simultaneously; but it may be in other modes," etc.

We think, tested by these definitions, in any view of the evidence, the transaction constituted a sale, and was a clear violation of the prohibition law of this state. The transaction was nothing more or less, according to the defendant's own evidence, than a barter of liquor. The title to the

liquor passed absolutely, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or other liquor to be delivered at some future date. As said in *Com. v. Clark*, *supra*, by the supreme court of Massachusetts. "It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise, instead of by money, which is but the representative of value or property."

In adopting the prohibition statute enacted by the general assembly, our voters had in view the prevention of the traffic in intoxicating liquors in the state. If it were allowable to carry on an exchange or barter for whisky, the law would be rendered practically worthless and incapable of enforcement. Whenever a person was charged with an illicit sale of liquor, the defense in most cases doubtless would be that the transaction was only an exchange or barter. Our statute is very broad and comprehensive in its terms, and its framers evidently had in view, not only the prohibition of a sale of liquor for money, but for barter likewise. It reads: "It shall be unlawful for any person or persons, firm or corporation, to manufacture or in any manner make, or sell, or otherwise dispose of for gain," etc. Public Acts, Extra Session, 1908, chap. 71.

We think his Honor was correct in his instructions to the jury.

No error.

## TEXAS COURT OF CRIMINAL APPEALS.

EX PARTE EARL EPPERSON.

(— Tex. Crim. Rep. —, 134 S. W. 685.)

Municipal corporation — automobile — forbidding operation by children.

Charter authority to license and regulate hackmen, draymen, drivers, and all others pursuing like occupations, does not empower a municipality to forbid children under a specified age to operate automobiles on its streets.

(February 15, 1911.)

*Note.* — Power to prescribe qualifications of chauffeurs.

While it is common in acts regulating the use of motor vehicles to make some provision as to the qualifications of chauffeurs, the question of the validity of these provisions does not seem to have been often questioned.

In *Chicago v. Banker*, 112 Ill. App. 94,



**A**PPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed under an alleged invalid ordinance. Petitioner discharged.

The facts are stated in the opinion.

Messrs. Kennedy & Robbins for applicant.

Mr. C. E. Lane for the State.

Davidson, P. J., delivered the opinion of the court:

This is an original application for writ of habeas corpus. The city of Clarksville, organized under the general incorporation laws of Texas as a municipal corporation, passed the following ordinance: "It shall be unlawful for any person under the age of sixteen years to operate any automobile or other motor vehicle upon the streets or ways of the city of Clarksville,"—and in a subsequent ordinance prescribes a penalty of not less than \$5 nor more than \$100. There is an agreement in the statement of facts that the city of Clarksville had not by any ordinance prescribed any manner or means by which a person's ability to operate an automobile or other motor vehicle may be ascertained, and the qualifications of the driver of such vehicle are not specified nor prescribed by the ordinance. It is further agreed that the applicant is fifteen years of age.

Two questions are presented to this court: "First, the age of the applicant; second, the constitutionality of the ordinance under which the applicant was arrested." Relator's contention is that the ordinance is invalid, first, because the city council of the city of Clarksville had no authority, express or implied, under the general laws of the state, under which the city is incorporated, to enact such legislation; second, that, even though the city council had authority to enact such legislation, it is nevertheless void, because it is an arbitrary exercise of power, is discriminatory, and in derogation of common rights; third, the ordinance is void, because it prohibits an occupation rec-

ognized by the state as lawful and conceded by the public as useful and remunerative; and, fourth, the ordinance is unconstitutional and void, because it deprives persons of their liberty—that is, the right to follow a lawful avocation for the support of life, as well as in pursuit of happiness and pleasure—without due process of law.

The city of Clarksville, being organized as a municipal corporation under the general laws of the state, must look to such law for its authority to act. Article 430, Sayles's Anno. Civ. Stat. 1897, is as follows: "To license, tax, and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters, and all others pursuing like occupations, with or without vehicles, and prescribe their compensation, and provide for their protection, and make it a misdemeanor for any person to attempt to defraud them of any legal charge for services rendered, and to regulate, license, and restrain runners for railroads, stages, and public houses." It will be noticed from the reading of this article that the city is limited in regard to the matters specified to those of regulation. The statute nowhere grants power to a city council to prohibit any of the matters specified in said article. It is a familiar rule, and thoroughly settled, that municipal corporations have only such power as may be granted by the legislature, unless otherwise provided in the Constitution; and wherever the question of grant of power is at issue, the grant will be taken more strongly in favor of the granting power, and against the grantee, where an application of this principle is made to municipal corporations. Applying this rule to the statute quoted, it will be observed that the power of the municipal corporation in regard to the control of matters therein stated is only one of regulation, and not one of prohibition. Viewed from this standpoint of the law, the ordinance is invalid, and must be held void, and the applicant discharged from custody.

The applicant is ordered discharged from custody.

it was held that an ordinance compelling one who used his automobile for his private business and pleasure only to submit to an examination and take out a license (if the examining board saw fit to grant it) imposed a burden upon one class of citizens in the use of the streets, not imposed upon others, and the ordinance was held beyond the power of the city council, and void.

In *Unwen v. State*, 73 N. J. L. 529, 64 Atl. 163, a legislative act requiring every resident or nonresident owner of an automo-

bile to file a verified declaration that he was competent to drive a motor vehicle, and a statement of his name and address, and a description of his automobile, and providing for a fee of \$1, was held within the exercise of the police power.

For a note on validity of excise or license tax upon automobiles, see *Christy v. Elliott*, 1 L.R.A.(N.S.) 215, and the supplemental note to *Mark v. District of Columbia*, post, 440.

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

STATE OF WASHINGTON, Appt.,  
v.

JOSEPH M. SNOW, Resp't.

(65 Wash. 353, 118 Pac. 200.)

**Larceny — misappropriation by officer — legality of possession.**

A statute rendering it larceny for one having property in his control, as a public officer, to appropriate it to his own use, applies to an officer having public money in his possession, although no law authorized him to receive it.

(October 19, 1911.)

**A** PPEAL by the State from a judgment of the Superior Court for Thurston County sustaining a demurrer to an information charging defendant with the crime of grand larceny. Reversed.

The facts are stated in the opinion.

Messrs. W. V. Tanner, Attorney General, George A. Lee, Assistant Attorney General, and John M. Wilson, for the State:

The information follows the section of the statute defining larceny, and states facts sufficient to constitute a crime against the laws of the state of Washington.

State v. Spaulding, 24 Kan. 1; 2 Bishop, New Crim. Law, 8th ed. § 364; Skagit County v. American Bonding Co. 59 Wash. 1-15, 109 Pac. 197-199; State v. O'Brien, 94 Tenn. 79, 26 L.R.A. 252, 28 S. W. 311; Ex parte Ricord, 11 Nev. 288; Ex parte Hedley, 31 Cal. 109; People v. Gallagher, 100 Cal. 466, 35 Pac. 80; People v. Hawkins, 106 Mich. 484, 64 N. W. 736; People v. Sanders, 139 Mich. 442, 102 N. W. 959; State v. Tumey, 81 Ind. 559; State v. Pohlmeier, 59 Ohio St. 491, 52 N. E. 1027; People v. Royce, 106 Cal. 173, 37 Pac. 631, 39 Pac. 524.

Messrs. Thomas M. Vance and C. E. Collier for respondent.

Gose, J., delivered the opinion of the court:

This is an appeal by the state from a judgment sustaining a demurrer to an information.

The charging part of the information is as follows: "That on or about the 31st day of July, 1909, at Olympia, in the county of Thurston and state of Washington, one

Joseph M. Snow did commit the crime of grand larceny as follows, to wit: He, the said Joseph M. Snow, then and there being an officer of the state of Washington, to wit, the duly appointed, qualified, and acting state highway commissioner of said state, and then and there having in his possession, custody, and control, as such officer, the sum of two thousand one hundred forty-two and  $\frac{05}{100}$  (\$2,142.05) dollars in lawful money of the United States, of the value of two thousand one hundred forty-two and  $\frac{05}{100}$  (\$2,142.50) dollars, being the property and funds of said state of Washington, did then and there unlawfully, fraudulently, and feloniously, and with intent to deprive and defraud the state of Washington thereof, withhold, steal, and appropriate to his own use the said sum of two thousand one hundred and forty-two and  $\frac{05}{100}$  (\$2,142.05) dollars."

The Code (Rem. & Bal. § 2601) provides that "every person who, with intent to deprive or defraud the owner thereof— . . . (3) Having any property in his possession, custody, or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody, or control, or as a finder thereof, shall secrete, withhold, or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto," steals such property and is guilty of larceny. The grade of the offense is defined by § 2605. The grounds of demurrer are (1) that the information does not charge a crime or offense, and (2) that the court is without jurisdiction. The judgment was that the "general demurrer" be and is sustained, and that the case be dismissed.

The only question presented by the appeal is the legal sufficiency of the information. The position of the state is that the respondent is fraudulently holding funds of the state as a public officer, and that the information charges a crime under the terms of the statute quoted, regardless of the fact that there is no law authorizing him to "receive" the money. On the other hand, the respondent contends that, there being no law authorizing him to receive the money, he is not within the denunciation of the statute. A careful reading of the statute discloses that it is twofold in its nature, as applied to the fraudulent withholding or appropriation of public property by a public officer. The first provision is directed only against the unlawful withholding or appropriation. The second

**Note.** — For embezzlement as affected by want of authority of defendant to receive the money or property in the first instance, see note to Smith v. State, 17 L.R.A. (N.S.) 531.

37 L.R.A. (N.S.)

is directed against such unlawful withholding or appropriation by a person "authorized, by agreement or by competent authority, to take or hold" the possession, custody, or control. The respondent is charged only with an infraction of the first provision of the statute. The information does not charge that he was authorized by "competent authority to take or hold" the property. The charge is that having the money of the state in his possession, custody, and control as a state highway commissioner, he unlawfully, fraudulently, and feloniously appropriated it to his own use. It seems clear that the legislature contemplated that a public officer might have property of the state in his possession and custody without warrant of law, and that it intended to make it criminal for such an officer to fraudulently withhold or appropriate it to his own use.

But, putting this view to one side, we think the information charges a crime. The charge is that the respondent fraudulently withheld public money as a public officer. This the statute condemns as a criminal offense. Respondent cannot obtain and hold the property of the state in virtue of his office, and excuse himself from criminal responsibility by admitting the actual withholding, and by asserting that he received it without statutory authority, and hence that he does not hold it as a public officer. This view is, we think, in accord with the better authority. In *State v. Spaulding*, 24 Kan. 1, the indictment charged the defendant as city clerk with embezzling city money. By far the larger portion of the money was received by him as license fees. There was no statute or ordinance authorizing him to receive such money. It was contended on his behalf that the money did not belong to the city, but to the licensees, from whom he received it without lawful authority. In meeting this contention, the court, speaking through Judge Brewer, said: "On the other hand, the state rests upon the broad proposition that, when a party assumes to act for another, he is concluded by that assumption, no matter who else is bound; that if A assumes to act as the agent of B, and receives money belonging to B, he cannot thereafter deny that it is B's money, and that, notwithstanding B is not concluded by his acts, and though in fact he was not the agent of B; that this doctrine, universally recognized in civil, is equally true in criminal, law. A man may not say: 'I have the right to receive money,' and receive it, and then, when challenged for its receipt or embezzlement, avoid liability by saying, 'I had no right to receive it.' He has voluntarily assumed a

position the responsibilities of which he may not avoid. The defendant may not say that he holds this money simply for the licensees, because he himself has issued the licenses, which he might rightfully issue only when the city had received the money; that by issuing, he conclusively, so far as he was concerned, affirmed that the money he had received and was holding was city money. The law of estoppel binds him, whether it binds anyone else or not, and is equally potent in a criminal as well as a civil action. . . . But we hold that, when one assumes to act as agent for another, he may not, when challenged for those acts, deny his agency; that he is estopped not merely as against his assumed principal, but also as against the state; that one who is agent enough to receive money is agent enough to be punished for embezzling it. An agency *de facto*, an actual, even though not legal, employment, is sufficient." In *Skagit County v. American Bonding Co.* 59 Wash. 1, 109 Pac. 197, a like contention was made on behalf of the appellant, a surety for a defaulting county auditor, and rejected by this court. While not stated in direct terms, the gist of the decision is that a public officer, who receives public funds without statutory authority, but in virtue of his office, is estopped to dispute his right to receive it.

In *Ex parte Ricord*, 11 Nev. 287, it is held that it does not lie in the mouth of one who holds the money of another to deny that he had the authority which he claimed in order to collect it, and which the confidence reposed in him by his employer enabled him to claim with success. In *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, the court, addressing itself to the inquiry as to the criminal responsibility of one who receives property for another assuming to act as its agent, said: "By virtue of his relation, he became possessed of property which was not his, and which belonged to the company, if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from various persons who were willing to pay. He was a *de facto* servant, and it is unnecessary that his relation should have grown out of a lawful contract of agency. It was enough if he acted, and was permitted to act, as such." The same rule was announced in *People v. Sanders*, 139 Mich. 442, 102 N. W. 959, where the defendant as a deputy township treasurer came into the possession of money belonging to the township. The contention that there was no crime, because the money was received without lawful authority, was rejected as unsound. What we conceive to be the correct rule

is aptly stated in *State v. Pohlmeier*, 59 Ohio St. 491, 52 N. E. 1027, in the following language: "The statutory definition of the offense regards the actual relation of the agent, servant, or employee, and not the legality of the mode in which it was created nor the extent of the authority conferred. And the rule that one who receives money or any other thing of value in the assumed exercise of authority as agent for another is estopped thereafter to deny such authority, applies in criminal prosecutions as well as in civil actions." This view has the support of *Mr. Bishop*, 2 *Bishop*, New Crim. Law, 364. The same principle is announced in *State v. Tumey*, 81 Ind. 559; *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524; *State v. O'Brien*, 94 Tenn. 79, 26 L.R.A. 252, 28 S. W. 311; *Ex parte Hedley*, 31 Cal. 109; *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80.

The respondent relies upon the following authorities: *San Luis Obispo County v. Farnum*, 108 Cal. 562, 41 Pac. 445; *People v. Pennock*, 60 N. Y. 421; *Orton v. Lincoln*, 156 Ill. 499, 41 N. E. 159; *Warswick v. State*, 36 Tex. Crim. Rep. 63, 35 S. W. 386; *State v. Johnson*, 49 Iowa, 141, 3 Am. Crim. Rep. 62; *People ex rel. Howard v. Cobb*, 10 Colo. App. 478, 51 Pac. 523; *People ex rel. Lane v. Hilton* (C. C.) 36 Fed. 172; *State v. Moeller*, 48 Mo. 331; *Moore v. State*, 53 Neb. 831, 74 N. W. 319. In the *Farnum*, *Pennock*, *Orton*, *Cobb*, *Hilton*, and *Moeller* Cases it was held that the sureties were not liable upon an official bond, where the money did not come into the hands of the principal as a public officer in pursuance of law. The bond in each of these cases was substantially the same as the bond in the *Skagit County Case*. In that case this court said that the breaches of duty relied upon for a recovery on the bond were for the unauthorized acts of the officer,—acts that were not a part of his official duties, but illegally performed "for his personal and private benefit." It is further said that one of the undertakings of the sureties was that their principal would give faithful, honest, and efficient service, and that, he having misappropriated and embezzled public moneys, the sureties became liable therefor. In the *Warswick Case*, under a statute making it a criminal offense for an officer of any county, city, or town to fraudulently take, misapply, or convert to his own use any money or property belonging to such county, city, or town "that may come into his custody or possession by virtue of his office or employment," it was held that an information charging the defendant with the receipt of a certificate of deposit as county judge, and with having fraudulent-

ly converted it, did not state a crime, there being no statute authorizing him to take the custody or possession of such property. A like view was taken in the *Johnson* and *Moore Cases*, under similar statutes. The decision in the latter case was, however, by a divided bench. Judge Sullivan, in dissenting, announced a view in harmony with that expressed by Judge Brewer in *State v. Spaulding*, supra. It will be noticed that in these cases the offense consisted in the conversion by a public officer of property "that may come into his custody or possession by virtue of his office or employment." The portion of the statute charged to have been violated in the case at bar contains no such provision. We fully indorse the statement of Judge Brewer in the *Spaulding Case*, that the law of estoppel binds the respondent, whether it binds anyone else or not, and that it is applicable alike to civil and criminal cases. The rule announced in the *Pohlmeier Case*, that the statute defining the offense regards the actual relation of the party to the money and not the legality of the mode of its acquirement, impresses us as being both wholesome and sound.

We think this information charges a crime, and the judgment is therefore reversed.

Dunbar, Ch. J., and Fullerton, Parker, and Mount, JJ., concur.

#### NEW YORK COURT OF APPEALS.

FULTON LIGHT, HEAT, & POWER COMPANY et al., Respts.,  
v.

STATE OF NEW YORK, Appt.

(200 N. Y. 400, 94 N. E. 199.)

**Navigable water — title to bed.**

1. The title to the bed of a nontidal navigable stream the first settlers upon which acquired their title under the principles of the common law is in the riparian owners, except where it constitutes a territorial boundary.

**Boundary — on stream — title to thread.**

2. A boundary in a state patent of land said to lie on the bank of a river, beginning at a tree on the east shore of the river, thence around the land to the river, and

*Note. — Right of government to divert water from nontidal stream without compensation to riparian owner.*

For a general treatment of the question of state and Federal ownership of waters, see note to *Smith v. Deniff*, 50 L.R.A. 737.

Owing to the conflict among the authorities and the different premises upon which

then "up and along the same" to the place of beginning, does not prevent the title from extending to the thread of the stream.

**Water — right of state to divert.**

3. The right of a state to use the bed and waters of a river for the improvement of navigation does not extend to the diverting of the waters from the river to an artificial channel along the bank, constructed not for the improvement of the navigation of the river, but as a separate navigable water way, and if it attempts to do so, it must make compensation to the riparian owner for the injury thereby caused him.

(January 17, 1911.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirm-

the decisions are predicated, it is difficult to state a comprehensive general rule or rules by which the class of cases under discussion is governed, except to say in the most general way that where the title to the bed of the stream is in the riparian proprietor, any diversion of the waters thereof for public use constitutes a taking which requires compensation; and that where the title to the stream, including its bed, is in the state, the weight of authority is to the effect that, for some public purposes, at least, such waters may be diverted without liability to a riparian owner thereby deprived of the normal flow of the stream. Since at common law the title to the beds and waters of all nontidal streams was in the riparian owners, all cases permitting the public to remove the waters from such streams without compensating riparian owners are departures from the rule as originally established.

Many courts have confused the common-law test of public ownership, to wit, presence of tide, with navigability. In these jurisdictions a marked distinction is drawn between streams which are navigable and those which are not, in respect to the property which riparian owners may have in them. In a navigable stream the bed and the waters are held to belong to the state; while in non-navigable streams the owners of the bank own to the thread of the stream, or, if both banks, the entire bed; and in addition have a qualified ownership in the water itself. All streams navigable in fact are navigable in law, under both the common and civil law systems; and therefore, if navigability is made the test of public right, the public may take the water from most streams without compensation. This is contrary to the common-law rule. By the civil law, however, the running water was regarded as common property, so that by applying the civil law directly, the public might take such water as it needed without compensating anyone for it.

In some states the streams which are actually navigable are declared vested in the people by express constitutional or

ing a judgment of the Court of Claims in plaintiffs' favor in an action brought to recover compensation for the appropriation by the state of certain of plaintiffs' lands and riparian rights for barge canal purposes. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel E. Brong, Andrew E. Tuck, and Arthur J. Hammond, with Mr. Edward R. O'Malley, Attorney General, for appellant.

The right to use the water of the Oswego river for power is dependent upon ownership of the bed of the river.

Sweet v. Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; Lawrence v. Whitney, 115 N. Y. 410, 5 L.R.A. 417, 22 N. E. 174; People ex rel. Loomis v. Canal Ap-

statutory provision; but such provisions do not affect vested rights.

In those cases which determine the rights of the state according to the navigability or non-navigability of the stream, the weight of authority, as above stated, is to the effect that in non-navigable streams water cannot be diverted by the state, even for public purposes, without compensating riparian owners thereby deprived of the right to use the diverted water.

**Diversion for navigation purposes.**

This note does not include those cases in which it appears that the waters were diverted in improving the navigability of the streams in which they naturally flow, as such cases as a class involve broader principles than the class of cases under discussion.

As to whether the waters of a non-navigable stream may be diverted for purposes of navigating water ways distinct from the stream from which the waters are taken, the better rule would seem to be that laid down in *FULTON LIGHT, HEAT, & P. COMPANY v. STATE*. This decision is directly supported by *Cohen v. United States*, 162 Fed. 364, where it was held that the United States government could not divert the waters of a non-navigable stream to the injury of a riparian owner, for canal purposes, where the construction of the canal was not for the benefit or improvement of that stream, but for the improvement of navigable waters in another and different locality, on the ground that such a diversion would be a taking of the private property of the riparian owner for a public use, within the meaning of the constitutional provision entitling him to compensation therefor. So, also, in *Beidler v. Sanitary Dist.* 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118, it was held that the right of the public to improve navigation without liability for consequential injuries does not include the right to take the water of a stream (nontidal, and owner of banks also owner of bed of stream) to supply an artificial channel or canal. It was here

praisers, 33 N. Y. 461; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Pollitt v. Long*, 58 Barb. 20; *Gould, Waters*, 3d ed. § 204; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Springfield v. Harris*, 4 Allen, 494, 81 Am. Dec. 715; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Harding v. Stamford Water Co.* 41 Conn. 87.

The state did not, by the patent granted, alienate any part of the bed of the Oswego river, for the reason that the patent did not by express terms include land under the waters of the Oswego river.

*Gould, Waters*, 3d ed. § 36; *East Haven v. Hemingway*, 7 Conn. 186; *Middletown v. Sage*, 8 Conn. 221; *Church v. Meeker*, 34 Conn. 421; *Com. v. Roxbury*, 9 Gray,

451; *Canal Comrs. v. People*, 5 Wend. 423; *State v. Pacific Guano Co.* 22 S. C. 50; *Rosborough v. Picton*, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033; *Sage v. New York*, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Re New York*, 182 N. Y. 361, 108 Am. St. Rep. 809, 75 N. E. 156; *Case of the Royal Fishery of the Banne, Davies*, 149; *Atty. Gen. v. Farmen*, 2 Lev. 171, T. Raym. 246, 2 Mod. 106; *Geneva v. Henson*, 124 N. Y. Supp. 588; *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461.

The title of the state to lands under public navigable waters, whether fresh or salt, is ingrafted with a trust for the ben-

contended that the title of a riparian owner is subordinate to such use of the water as may be consistent with or demanded by the public right of navigation, and subject to the paramount right of the state to make any and all improvements to facilitate navigation, but the court answered by saying that such right did not extend to the making navigable of an artificial channel, and in effect held such principle applicable only in case the improvement was for the purpose of facilitating the navigation of a channel in which the water naturally flowed, or some stream or body of water naturally emptying into it, or into which it emptied. And in *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404, set out in *FULTON LIGHT, HEAT, & P. COMPANY v. STATE*, it was held that the state cannot divert the waters of a fresh-water stream, the land under which belongs to the owner of the adjacent banks, to aid in the carrying on of navigation in a canal district from the stream itself, without making compensation to the riparian owners injured by the diversion. And this rule was applied in *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447, where the complaining riparian proprietor owned to the center of the stream, it being held that the state could not divert the waters of the stream to feed a canal without making compensation to the injured owner; and in *Cooper v. Williams*, 5 Ohio, 391, 24 Am. Dec. 299, affirming 4 Ohio, 253, 22 Am. Dec. 745, wherein it was held that the waters of a stream cannot be diverted to feed a canal constructed under authority from the state without compensating lower riparian owners for the loss of the right to use the diverted water. Also in *Avery v. Fox*, 1 Abb. U. S. 246, Fed. Cas. No. 674, it was held that the Federal government, in improving navigation between the states, could not wholly divert a fresh-water stream from riparian lands by conducting the water through a canal without compensating such injured owners. And the same conclusion was reached in *Lowndes v. United States*, 105 Fed. 838, where, in improving navigation, the waters of a creek were diverted into a canal, to 37 L.R.A. (N.S.)

the injury of persons having vested rights in the waters of such creek.

In a number of jurisdictions the courts, following what they supposed to be the civil-law rule, but which was in fact established by the Code Napoleon, held that the same principles apply to fresh-water streams which are actually navigable as the jurisdictions adhering to common-law principles apply to tidal waters; namely, that the state may divert such waters for public purposes, such as navigation, without compensation except in case of interference with vested rights. Thus, in *Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126, the court rejected the theory that the state can do nothing which will cause a diversion of a public water course not a tidal stream, and adopted the doctrine that fresh-water streams which are actually navigable are subject to the paramount right of the state to control and dispose of the waters thereof in which the riparian owners have only a qualified right for public purposes without violating the constitutional provision against taking property. Applying the latter doctrine it was held that the state can entirely absorb a navigable nontidal stream by diverting its waters into a canal constructed to promote and facilitate navigation without liability to a riparian owner thereby deprived of all benefit formerly derived from the river. This decision was commented upon adversely in 1 *Farnham, Waters*, p. 404, where the author said that the court had been misled by the apparent force of certain cases which seem to imply a right to destroy the rights of riparian owners, but which in fact had no such force. It might also be worthy of note that the rule that the right of the public was superior to that of the individual, and that the individual might be made to suffer loss for the public, was changed in Mississippi by Constitution 1890, § 17, which made the right of the owner of private property superior to that of the public, wherefore he may be compelled to part with his property only by full payment for it or any right in relation to it.

est of the public, and is inalienable except for certain public uses.

*Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Coxe v. State*, 144 N. Y. 396, 30 N. E. 400; *New York v. Hart*, 95 N. Y. 443; *Brookhaven v. Smith*, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, 80 N. E. 665, 11 A. & E. Ann. Cas. 1; *Shively v. Bowlby*, 162 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 26 L.R.A. 378, 43 Am. St. Rep. 729, 38 N. E. 992; *Bristow v. Cormican*, L. R. 3 App. Cas. 641.

Boundary running along the edge or bank or shore even of a non-navigable

And in *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461, the court said that the territory about the Mohawk river, a fresh-water stream, had been settled under the civil law by the Dutch, and then applied to it the rule of the Code Napoleon to the effect that the title to its bed was in the people, which is contrary to the rule as laid down by the Dutch writer Vinnius (see *Farnham, Waters*, p. 240), and held that because of that fact the waters of the river belonged to the people, and could be diverted for canal purposes without compensating damaged riparian owners. The court attempted to evade the force of *Canal Fund Comrs. v. Kempshall*, supra, on the ground that in that case there was evidence of an express grant of the bed of the stream with the grant of the bank, and that therefore it was unnecessary for the court to base the decision on the fact that the river was a fresh-water stream, and the title in the riparian owner because of that fact. But in *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, set out infra, in subdivision entitled, "Diversion for water-supply purposes," Chancellor Kent's rule of navigability, that is, presence or absence of tide, was adopted as to all fresh-water streams in New York state except the Mohawk and the Hudson rivers, and the doctrine of *People ex rel. Loomis v. Canal Appraisers*, held applicable to such rivers only.

And in *Rundle v. Delaware & R. Canal Co.* 14 How. 80, 14 L. ed. 335, it was held that under the principles of the civil law as adopted in Pennsylvania, under which her large fresh-water rivers are treated as belonging to the public, the waters in such a river could be diverted by a canal company chartered to construct a canal for purposes of navigation between that river and another river, without the necessity of compensating either riparian owners or licensees of water power on the river from which the waters were diverted. So, in *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312, it was held that the state may authorize the construction of a canal for navigation purposes, and the

stream does not convey the land to the middle of the stream.

*Child v. Starr*, 4 Hill, 369, 5 Denio, 599; *Halsey v. McCormick*, 13 N. Y. 296; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; *Geneva v. Henson*, 195 N. Y. 447, 88 N. E. 1104; *Ogden v. Jennings*, 62 N. Y. 526; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Thayer v. Finton*, 108 N. Y. 394, 15 N. E. 615; *Lovejoy v. Lovett*, 124 Mass. 270.

The state is entitled to use the bed and waters or the river for the improvement of navigation, without compensation, by virtue of its paramount right to control navigation.

*People v. Platt*, 17 Johns. 196, 8 Am.

diversion of the waters of a navigable river, without compensation for injuries to the right of a riparian owner to whom the state had previously granted a right to divert waters, but with the express proviso that navigation should not be obstructed, it being said that the right granted the riparian owner was a mere license, revocable by the state at the peril of the licensee.

#### Diversion for power purposes.

Authorizing canal commissioners to take water from private streams for canal navigation by making compensation does not authorize them to take water to be leased or sold for the benefit of the state to private parties for power purposes. *Cooper v. Williams*, supra; *Buckingham v. Smith*, 10 Ohio, 288. In the latter case the court said: "The state, notwithstanding the sovereignty of her character, can take only sufficient water, from private streams, for the purposes of the canal. So far the law authorizes the commissioners to invade private right as to take what may be necessary for canal navigation, and to this extent, authority is conferred by the Constitution, provided a compensation be paid in money to the owner. The principle is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for public use, or demanded by the public welfare. We know of no instances in which it has or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."

But in *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828, affirmed in 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, it was held that the state may grant the right to divert water from a navigable stream for power purposes without compensation to lower riparian owners,

Dec. 382; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Re State Reservation*, 37 Hun, 537; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Slingerland v. International Contracting Co.* 169 N. Y. 60, 56 L.R.A. 494, 61 N. E. 995; *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 198 N. Y. 287, 34 L.R.A.(N.S.) 1084, 91 N. E. 846, 19 A. & E. Ann. Cas. 694; *West Chicago Street R. Co. v. Chicago*, 201 U. S. 506, 50 L. ed. 845, 26 Sup. Ct. Rep. 518; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Scrantom v. Wheeler*, 179 U. S. 141,

45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *North-eastern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *People ex rel. Chicago v. West Chicago Street R. Co.* 203 Ill. 551, 68 N. E. 78; *West Chicago Street R. Co. v. People*, 214 Ill. 9, 73 N. E. 393.

Messrs. Charles A. Collin, John L. Wells, William D. Gaillard, and George Coffing Warner, with Mr. Hugo Hirsch, for respondents:

The Oswego river is non-navigable in law, and the court of claims committed no error in construing the Stene patent of 1793 in accordance with the established common-law doctrine of this state for construing

where the water power was created by an improvement by the state of the stream, as in such a case the surplus water power over that required for navigation was merely incidental to the improvement.

#### Diversion for highway purposes.

The rule that a riparian owner cannot be deprived of a portion of a stream through diversion by the state, its political subdivisions or officers, without compensation, was recognized in *McCord v. High*, 24 Iowa, 336, where water was diverted through an artificial channel by a road supervisor in constructing a highway crossing over a stream.

#### Diversion by railway.

In *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570, it was held that the adoption of the constitutional provision making all flowing streams and natural water courses the property of the state for mining, irrigation, and manufacturing purposes after the territory had been settled under the principles of the common law, which vested the streams of the territory in the owners of the lands through which they flowed, did not deprive the riparian owners of the right to have the water flow in its natural bed, in view of the 14th Amendment to the Federal Constitution, which protects property against all state action that does not constitute due process of law, so as to allow a railroad company having power to take property by eminent domain proceedings to divert a stream from the lands through which it flowed without compensating the injured riparian owners. Continuing, the court said that if such constitutional provision had had the effect of taking streams which had become vested in private persons without compensation, it would have itself contravened the Federal amendment above referred to.

#### Diversion for drainage purposes.

In *Stevens v. Worcester*, 196 Mass. 45, 81 N. E. 907, it was held that a city cannot

not divert the water of a stream for purposes of sewerage without compensating riparian owners injured by the diversion.

And in *Re Dancy Drainage Dist.* 129 Wis. 129, 108 N. W. 202, it was held that the legislature of the state cannot authorize a drainage district to destroy even a navigable river without compensation, where the title to the bed of the stream is in the state in trust. This was upon the ground that the state cannot abdicate a trust.

So, it is held that a public corporation organized to provide a drainage system cannot contest its liability to compensate for injuries done to riparian owners by diverting water from a navigable stream to supply its ditch, upon the ground that incidentally it has created a navigable channel, and that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation. *Beidler v. Sanitary Dist.* 211 Ill. 628, 67 L.R.A. 820, 71 N. E. 1118.

Where a diversion by the state or a corporation to which it has delegated its powers is with the consent and to the advantage of the riparian owners affected, the appropriation of waters does not amount to an exercise of the power of eminent domain. *Murphy v. Wilmington*, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345, holding that the diversion of the water for sanitary purposes of a small, nonbeneficial water course, by a city through which it flowed, where made with the consent of the affected riparian proprietors, and for their benefit, was not an exercise of the power of eminent domain.

#### Diversion for irrigation purposes.

Rules similar to those applied in the foregoing cases seem applicable to diversions for purposes of irrigation, which is conceded to be a public purpose. Thus, it is held that an act authorizing an irrigation company to appropriate the waters of natural streams in arid districts for the purpose of irrigation, domestic use, and other beneficial purposes, to the exclusion of other riparian owners, for any but domestic use, without providing compensation,



deeds of lands bordering on streams non-navigable in law.

Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417, 9 Paige, 547; Van Buren v. Baker, 12 N. Y. S. R. 209; Crill v. Rome, 47 How. Pr. 398; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Re State Reservation, 37 Hun, 546; Hooker v. Cummings, 20 Johns. 99, 11 Am. Dec. 249; Morgan v. King, 35 N. Y. 458, 91 Am. Dec. 58; People v. Platt, 17 Johns. 210, 8 Am. Dec. 382; Canal Fund Comrs. v. Kempshall, 26 Wend. 413.

A deed by a private person of lands bordering on an interior fresh water nontidal stream, forming no part of the state boundary, and non-navigable in law, is presumed to convey the fee of the land to the center of the stream.

violates the constitutional provision against taking property without compensation. Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758. But such an act, if limited to apply only to streams upon the public lands of the state, would seem to be valid. Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078.

And the same conclusion was reached in Crawford Co. v. Hathaway (Crawford v. Hall) 67 Neb. 325, 60 L.R.A. 889, 100 Am. St. Rep. 647, 93 N. W. 781, wherein it was held that the legislature cannot abolish vested riparian rights by authorizing the appropriation of public waters for irrigation except as such rights are taken or impaired in an exercise of the power of eminent domain, in which case compensation must be made, although irrigation is essential to successful agriculture in arid portions of the state.

So, it is held that a charter authorizing a canal company to "acquire" water privileges for purposes of irrigation in arid districts confers no right to use the water of non-navigable streams, to the injury of riparian owners, without making compensation. Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian, supra.

See also Salem Flouring Mills Co. v. Lord, as set out infra, under subtitle, "Diversion for water-supply purposes."

#### Diversion for water-supply purposes—in general.

There is some conflict among the authorities as to whether or not nontidal waters may be diverted for the purpose of furnishing a municipality and its inhabitants with water for domestic use without compensating injured riparian owners, but the great weight of authority denies such a right even where the municipality is located on the banks of the stream.

The following cases adhere to the general rule that the waters of a stream cannot be diverted for municipal purposes to the injury of a riparian proprietor without compensating him for the resulting damage: Pine v. New York, 103 Fed. 337, affirmed 37 L.R.A. (N.S.)

Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33; Mott v. Mott, 68 N. Y. 246; Wilcox v. Bread, 92 Hun, 9, 37 N. Y. Supp. 867.

The state has appropriated claimants' rights to the use of the water, and must compensate them therefor. 2 Farnham, Waters, 1565.

Gray, J., delivered the opinion of the court:

The respondent company, as its name indicates, is a corporation, engaged in the business of manufacturing and supplying gas, electricity, and steam for producing light, heat, and power to the city of Fulton and to other cities, towns, and villages. Its power plant and other properties, as af-

in 50 C. C. A. 145, 112 Fed. 98, and reversed on other grounds in 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Ulbricht v. Eufaula Water Co. 86 Ala. 587, 4 L.R.A. 572, 11 Am. St. Rep. 72, 6 So. 78; Beckerle v. Danbury, 80 Conn. 124, 67 Atl. 371; Oelschleger v. Boston, 200 Mass. 425, 86 N. E. 883; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Higgins v. Flemington Water Co. 36 N. J. Eq. 538; Gilzinger v. Saugerties Water Co. 66 Hun, 173, 21 N. Y. Supp. 121, affirmed without opinion in 142 N. Y. 633, 37 N. E. 566 (non-navigable stream); Standen v. New Rochelle Water Co. 91 Hun, 272, 36 N. Y. Supp. 92 (non-navigable stream); Sumner v. Gloversville, 35 Misc. 523, 71 N. Y. Supp. 1088, holding, however, that the amount must be material; Fischer v. Clifton Springs, 121 N. Y. Supp. 163, affirmed without opinion in 140 App. Div. 918, 125 N. Y. Supp. 1119; Gallagher v. Kingston Water Co. 25 App. Div. 82, 49 N. Y. Supp. 250; Gray v. Ft. Plain, 105 App. Div. 215, 94 N. Y. Supp. 698; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Ehrgood v. Moscow Water Co. 4 Lack. Legal News, 151; Heckscher v. Shenandoah Citizens' Water & Gas Co. 2 Legal Chron. 273, affirmed in Shenandoah Co.'s Appeal, 2 W. N. C. 46 (non-navigable stream); Reading v. Althouse, 93 Pa. 400; Lycoming Gas & Water Co. v. Moyer, 99 Pa. 615; Haupt's Appeal, 125 Pa. 211, 3 L.R.A. 536, 17 Atl. 436; Leonard v. Rutland, 66 Vt. 105, 28 Atl. 885; Rigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147; Swindon Waterworks Co. v. Wiltz & B. Canal Nav. Co. L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, 22 Eng. Rul. Cas. 226. And in Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393, referred to in FULTON LIGHT, HEAT, & P. CO. v. STATE, the court, adhering to the rule that the title to the beds of fresh-water streams is in the owners of the adjacent lands, held that although actually navigable, such public easement

fectured by this litigation, are situated at the city of Fulton, on the easterly side of the Oswego river. Under the provisions of chapter 147 of the Laws of 1903, generally known as the barge canal act, the state had appropriated certain of the land properties and riparian rights of the claimants, and this claim was filed and prosecuted in the court of claims, as provided for by the act to recover compensation therefor. The claimants recovered a judgment against the state for sums of money "for the permanent appropriation" of certain described parcels, and, as to two of them, for their right, title, and interest in the land in the bed of the river and as riparian owners. The judgment has been unanimously affirmed at the appellate division, and thus all questions

of fact have been conclusively established, leaving, however, for our consideration, legal questions of some importance to the state, in the execution of the great work undertaken. They arise upon the defenses interposed by the state to the claim of the respondents.

The state disputes its liability upon the grounds, in substance, that the Oswego river is a navigable river, the ownership of the bed of which is by law in the state; that, the land affected being in the bed of the river, the claimants never acquired title to it by grant, or otherwise; and, upon the assumption that the title is in them, the work undertaken being for the improvement of navigation, that the state can use the bed and waters of the river without coming un-

gives the state no right to divert the water of such a stream or its source, or to authorize their diversion for any use other than navigation, except by virtue of the right of eminent domain and upon making just compensation; and that therefore a city cannot divert waters which would naturally flow through a nontidal stream for the purpose of furnishing a municipal water supply, without compensating the riparian owners injured by the diversion.

And the fact that a municipal corporation owns land upon a stream gives it no right to divert water from the stream to the injury of other riparian owners, in sufficient quantities to supply the domestic wants of its inhabitants, where the city itself is not located upon the stream. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L.R.A. 572, 11 Am. St. Rep. 72, 6 So. 78; *Harding v. Stamford Water Co.* 41 Conn. 87; *Osborn v. Norwalk*, 77 Conn. 663, 60 Atl. 645; *Elberton v. Hobbs*, 121 Ga. 749, 49 S. E. 779; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Etna Mills v. Waltham*, 126 Mass. 422; *Hall v. Ionia*, 38 Mich. 493; *Jones v. Portsmouth Aqueduct*, 62 N. H. 488; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367, 41 Atl. 385, affirmed on this point in 60 N. J. Eq. 399, 45 Atl. 596; *Warder v. Springfield*, 9 Ohio Dec. Reprint, 855; *Craig v. Shippensburg*, 7 Pa. Super. Ct. 526; *Irving v. Media*, 10 Pa. Super. Ct. 132, affirmed on opinion below in 194 Pa. 648, 45 Atl. 482; *Lord v. Meadville Water Co.* 135 Pa. 122, 8 L.R.A. 202, 20 Am. St. Rep. 864, 19 Atl. 1007; *Lonsdale Co. v. Woonsocket*, 25 R. I. 423, 56 Atl. 448; *Roberts v. Gwyrfai Dist. Council* [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 64 J. P. 52, 48 Week. Rep. 51, 81 L. T. N. S. 465, 16 Times L. R. 2, 25 Eng. Rul. Cas. 401, affirming [1899] 1 Ch. 583, 68 L. J. Ch. N. S. 233, 63 J. P. 181, 47 Week. Rep. 376, 80 L. T. N. S. 107, 15 Times L. R. 165; *Swindon Waterworks Co. v. Wiltz & B. Canal Nav. Co.* L. R. 7 H. L. 697, 45 L. J. Ch. N. S. 638, 33 L. T. N. S. 513, 24 Week. Rep. 284, 22 Eng. Rul. Cas. 226. But in *Elgin v. Elgin Hydraulic Co.* 85 37 L.R.A. (N.S.)

Ill. App. 182, affirmed in 194 Ill. 476, 62 N. E. 929, it was said that a municipal corporation, by buying a small plot of land on the bank of a river, became a riparian owner, and could divert its proportionate share of the waters. This expression of opinion, however, was obiter, as the decision really turned upon the fact that the party contesting the city's alleged right to divert the water was not an interested riparian proprietor.

And a city cannot absorb a stream for municipal purposes even when located on its banks. *New Whatcom v. Fairhaven Land Co.* 24 Wash. 493, 54 L.R.A. 190, 64 Pac. 735. And in *Salem Flouring Mills v. Lord*, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832, it was held that the riparian right of a city owning land on a stream does not extend so far as to authorize it to divert from the stream a sufficient amount of water to accommodate and meet the necessities of irrigation, cooking, laundry, sanitation, etc., for a state farm, penitentiary, and asylum where from 1,300 to 1,500 persons are confined, the latter institution being located about a third of a mile from the stream. In connection with the latter case see *Filbert v. Dechert*, infra.

But in a few instances a different conclusion has been reached where the municipality itself was located upon the banks of the stream. Thus, under the Mexican and Spanish laws, Mexican pueblos were entitled to so much of the water flowing through the pueblos as was necessary for municipal and domestic purposes of the pueblo, and this right was superior to the rights of the riparian proprietors. *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 327, 39 Pac. 762. And it is held that this superior right of the pueblos vests in the cities which became the successors of such pueblos. *Ibid.* And in *Canton v. Shock*, 66 Ohio St. 19, 58 L.R.A. 637, 90 Am. St. Rep. 557, 63 N. E. 600, it was held that a city situated on a stream may supply water to its inhabitants for domestic use without compensating a lower proprietor, who has been using the water of the stream for power purposes. (But it would seem that even

der any liability to make compensation to those persons whose properties may be taken or interfered with.

The Oswego river is a fresh-water stream, of some 25 miles in length, flowing in a northerly direction, through the city of Fulton, into Lake Ontario. At the part where the claimants' properties are situated, the river is not navigable for some distance to the north and the south; but, above and below, it has been used for purposes of navigation and commerce. Its navigability is not, in any wise, affected by any of the claimants' structures. In 1793 the state granted to Conrad Stene, by letters patent, a tract, containing 200 acres of land, which, it is claimed, comprehends within the description of the grant the

premises to which the claimants assert title and rights. By meane conveyances, what title Stene had to them has passed to these claimants, and, although their properties are on the east side, and within the margin, of the river, they have not, since 1793, constituted any part of the bed of the natural channel. Prior to 1819, the then owners of the premises, Hubbard and Falley, had, at a short distance southerly from the present power plant, constructed a wing dam, extending into the river, and a sawmill, which was operated thereafter by water supplied from the dam through a flume upon their lands. In 1827, pursuant to the authority of acts of the legislature, the canal commissioners of the state, for the purpose of improving the navigation of the river by the

in Ohio this rule does not apply where the municipality is not located on the stream, but merely owns a tract of land thereon. See *Warder v. Springfield*, 9 Ohio Dec. Reprint, 855.) And in *Barre Water Co. v. Carnes*, 65 Vt. 626, 21 L.R.A. 769, 36 Am. St. Rep. 891, 27 Atl. 609, it was said: "Dwellers in towns and villages watered by a stream may use the water for domestic purposes to the same extent that a riparian owner can, provided they can reach the stream by a public highway, or secure a right of way over the lands of others. It is immaterial how the dwellers on the stream take the water for the purposes for which they may lawfully use it. They can drive their cattle to the stream, and allow them to quench their thirst, and can carry water in pails to their homes; or each individual can carry the water in a pipe to his dwelling for such use, provided he can secure a right of way for that purpose; or the dwellers on the stream may combine their funds to procure cheaper and better transportation by means of a pipe, and may use the water for their several necessities to the same extent that they could if it flowed past their dwellings in a natural channel." (But see *Leonard v. Rutland*, 66 Vt. 105, 28 Atl. 885.) And in *Filbert v. Dechert*, 22 Pa. Super. Ct. 362, it was held that the officers of a state insane asylum located on riparian lands as agents of the state, may take from the stream all the water necessary for the natural wants of the inmates, numbering some 900, although the taking resulted in a loss to lower riparian owners; but that the state could not take water to operate a fountain or for the manufacture of ice to be sold off the premises. In *Feliz v. Los Angeles*, 58 Cal. 73, it was held that a city through which a stream runs may, as against riparian proprietors, divert the waters of the stream for the municipal and domestic purposes of its inhabitants, even though such use required all the waters of the stream. This decision seems to be based upon the theory of prior appropriation: but in a later California case (*Vernon Irrig. Co. v. Los Angeles*, supra) it was established that the city had such a right of

diversion as a successor to the rights of the Mexican pueblo, Reyna de Los Angeles.

But the preferential right of the Mexican pueblos to the waters in a stream could be asserted only to the amount needed to supply the wants of the inhabitants; and a city, as the successor of a pueblo, cannot sell water for use on extra-municipal non-riparian lands, to the injury of the riparian proprietors. *Vernon Irrig. Co. v. Los Angeles*, supra. See also *Feliz v. Los Angeles*, supra. And a municipality having a right to take all the waters of a stream upon which it is located that its inhabitants require for domestic use has no right materially to diminish the flow of the waters in the stream by supplying water to parties outside of such city, or by supplying to manufacturers for power purposes more than a reasonable share of the water, considering all the circumstances. *Canton v. Shock*, supra. And in *Haupt's Appeal*, 125 Pa. 211, 3 L.R.A. 536, 17 Atl. 436, it was held that a municipality, under an act authorizing it to provide a supply of water for its inhabitants, and clothing it with the right of eminent domain, has no power to carry any part of a water supply provided for the use of its inhabitants outside the burrough, for the inhabitants of another municipality. Nor can a water company incorporated for the purpose of supplying a particular municipality with water apply the water to the use of another municipality, or industries remote from such particular municipality, as against riparian owners or another burrough which has acquired the right to use the water. *Ibid.*

Where the waters are diverted from a navigable or public stream, and by navigable or public stream is here meant all streams that are actually navigable, it seems that municipalities may take a water supply without compensating riparian owners. Thus, in *Minneapolis Mill Co. v. Water Comrs.* 56 Minn. 485, 58 N. W. 33, affirmed in 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157, on the ground that the Minnesota law governed the case, it was said that the rights of riparian owners on navigable or public streams of water are

construction of the Oswego canal, had erected a dam across the river. This canal followed the river, using its actually navigable portions, and, where not navigable, passing around the dams built for its facilitation. The dam pier and the portion of the dam wall between the pier and the center of the river took the place of the former wing dam, and were, in part, upon the power-plant property. They remained as constructed until 1857, when, the pier and easterly end of the dam having been carried away by a flood, the entire dam and dam pier were rebuilt of stone by the state, in substantially the same location. As originally constructed by the commissioners, and as reconstructed, down to the time of the present appropriation by the state, the state dam had one or more

openings in the dam pier along the southerly side of the sawmill, for the purpose of supplying water power to it and to the various plants which have been put up on its site and elsewhere upon the property. The southerly walls of the sawmill and of the buildings which have replaced it rested upon the northerly portion of the original, and of the reconstructed, dam piers. Around the easterly end of this dam, which reached from bank to bank of the Oswego river, the Oswego canal was built, and thereafter so much of the river water was diverted into it as was needed for its operation; but no water power was cut off, nor otherwise affected. No payment appears ever to have been claimed, or offered, for any damages to the power-plant property. It is to be presumed,

subordinate to public uses of such water, that the public have the right to apply the waters of a navigable stream to public uses without making compensation to riparian owners, that the navigation of the stream is not the only public use to which these waters may be applied, that the right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and that in thus taking water from navigable streams or lakes for ordinary public uses, the state is not controlled by the rules which obtain between riparian owners as to the diversion from and the return of water to its natural channel. And in *Crill v. Rome*, 47 How. Pr. 398, which dealt with the Mohawk river, the territory about which was settled by the Dutch, it was held that a city, under authority from the legislature, could take water from that river without compensating injured riparian owners, it being said that where the river is navigable the people of the state are proprietors of the waters therein, and, having title, may divert the same for public uses other than navigation. And in *Taggart v. Jaffrey*, 75 N. H. 473, 28 L.R.A.(N.S.) 1050, 76 Atl. 123, it was said that if the state owned the bed of a pond and the stream running therefrom, it could divert the entire pond from the outlet without infringing on the private rights of the owners of lands on the outlet; but that the public could not, after granting the bed of the outlet to private owners, use the water in the pond to the injury of such grantees without making compensation to them, although it retained title to the pond itself.

—right as affected by constitutional and statutory provisions.

For a general treatment of the question of the effect of constitutional provisions asserting title to navigable water upon vested riparian rights, see note to *Madison v. Spokane Valley Land & Water Co.* 6 L.R.A.(N.S.) 257.

Rights acquired to the use of the waters of a stream for irrigation cannot be taken 37 L.R.A.(N.S.)

by a city for domestic use without compensation under constitutional provisions declaring that the waters of natural streams not heretofore appropriated are the property of the public, subject to be appropriated, and that those using the waters for domestic purposes shall have preference over those claiming for any other purpose, where the irrigation rights were acquired prior to the adoption of such constitutional provisions, especially where no contrary intent is clearly shown by the terms used. *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. And the same is true where the rights to use the water for a beneficial purpose were acquired subsequent to the adoption of the Constitution, but prior to the attempt of the city to appropriate the waters for the domestic use of its inhabitants. *Sterling v. Pawnee Ditch Extension Co.* 42 Colo. 421, 15 L.R.A.(N.S.) 238, 94 Pac. 339; *Montpelier Mill Co. v. Montpelier*, 19 Idaho, 212, 113 Pac. 741. And under such constitutional provisions the right of a city to divert water for the use of its inhabitants is not superior to the right of an individual or a farming community to divert water for domestic or other beneficial purposes, in the sense that the city can destroy rights previously acquired without compensating the senior appropriator. *Sterling v. Pawnee Ditch Extension Co.* supra. And any legislative attempt, in authorizing the appropriation of water for municipal uses, to limit the right to compensation to those only whose rights in the water vested prior to the passage of the statute, impairs constitutional property rights which vest after such passage, but prior to the attempt of a municipal corporation to appropriate the waters of a stream. *Idem.* And a statute authorizing a corporation to take water from a river, and providing that no party shall be entitled to any damages because of the diversion, is unconstitutional and void, where there are riparian proprietors who have vested rights. *Harding v. Stamford Water Co.* 41 Conn. 87. And a mere legislative authority to divert the waters of a stream for domestic use by the inhabitants

and the facts warrant the presumption, that the owners regarded themselves as not, appreciably, injured by what was done at the time, as, also, by reason of the provision made for their case by the legislature in an act passed in 1823 (Laws 1823, chap. 112). It was enacted "for the relief of the owners of hydraulic privileges, where dams are erected by canal commissioners," and, while providing that such owners shall be entitled to the use of so much of the surplus water as may be necessary for their mills, upon their constructing a raceway and gate in the dam, further provided, that nothing therein contained should be so construed as to deprive them "of any right or rights which they may have owned and possessed prior to, and independent of, any license or grant made by this act, unless compensation shall be made therefor," etc. The owners of the mill plant, in 1827, executed a bond to the state, as required by the act where millowners avail themselves of the right to construct a raceway and a gate, conditioned to keep them in constant repair; but, of course, that could not affect any rights which they may have possessed. They were expressly saved by the act. As already observed, no claim was ever made against the state for any of the acts of the canal commissioners in constructing the Oswego canal, and matters remained as they were in the

time of Hubbard and Falley's ownership; excepting that changes were made to the old flume and a new hydraulic canal was built. The claimants hold the parcels of property and the riparian rights, affected by the appropriation of the state under the provisions of the barge canal act, with the same right, title, and interest as did Hubbard and Falley, who first commenced to subdivide the tract of 200 acres by various grants. The state had not, heretofore, sought to acquire any further rights or properties than were involved in the construction of the Oswego canal, in 1827, on the easterly margin of the river, and in the diversion thereto of so much of the river waters as was necessary. The claimants and their predecessors in interest appear to have utilized and enjoyed, without claim or interference on the part of the state, such properties and rights as had become vested in Conrad Stene and his grantees. The riparian rights of the claimants attached to the three parcels involved here, and consisted in the right to use the river waters; the most beneficial right, naturally, being the use at the power-plant structure of the opening in the dam. It is found that ever since 1827, until the present appropriation by the state, the claimants and their predecessors in title have been "in the actual, undisputed, and open possession, claim-

of a city does not authorize it to do so to the injury of the riparian owners, unless compensation be made. *Hough v. Doylestown*, 4 Brewst. (Pa.) 333 (the court said that there was no distinction between an individual and a municipal corporation acting under legislative authority); *Roberts v. Gwyrfaï Dist. Council* [1899] 2 Ch. 608, 68 L. J. Ch. N. S. 757, 64 J. P. 52, 48 Week. Rep. 51, 81 L. T. N. S. 465, 16 Times L. R. 2, 25 Eng. Rul. Cas. 401, affirming [1899] 1 Ch. 583, 68 L. J. Ch. N. S. 233, 63 J. B. 181, 47 Week. Rep. 376, 80 L. T. N. S. 107, 15 Times L. R. 165. And any attempt by the legislature so to authorize a municipal corporation to divert the waters of a stream for the domestic use of its inhabitants without compensation violates the constitutional provision that private property shall not be taken for public use without compensation. *Hough v. Doylestown*, *supra*. So, a mere legislative grant of an exclusive right to conduct to and furnish a city with water for domestic purposes confers no right upon the grantee to divert the waters of a running stream to the injury of riparian proprietors, although for such a public use, without making compensation therefor, especially where there is nothing in the statute from which the intention of the legislature to give the use of the water can legitimately be inferred. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Stein v. Ashby*, 24 Ala. 521; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758. And the fact 37 L.R.A. (N.S.)

that a corporation is chartered for the purpose of supplying, and is under contract to supply, a municipality and its inhabitants with water, does not give the corporation any right to use or appropriate the waters of a natural stream without compensating riparian owners. *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L.R.A. 376, 53 Am. St. Rep. 262, 20 So. 780. And the following cases are to the effect that a private company which was incorporated for the purpose of furnishing a municipality with water cannot divert water as against a riparian owner, to supply the inhabitants of such a municipality with water for domestic use: *Saunders v. Bluefield Waterworks & Improv. Co.* 58 Fed. 133, reversed for want of jurisdiction in 11 C. C. A. 232, 25 U. S. App. 70, 63 Fed. 333; *Standard Plate Glass Co. v. Butler Water Co.* 5 Pa. Super. Ct. 563; *Philadelphia & R. R. Co. v. Pottsville Water Co.* 182 Pa. 418, 38 Atl. 404. Nor does the fact that a private individual is under contract to furnish a municipality with water for domestic use authorize him to appropriate the waters of a stream to the injury of lower riparian owners. *Howe v. Norman*, 13 R. I. 488. And a city, although authorized by statute to take water from a river, cannot justify such a taking, where it has not complied with the statutory requirements. *Lund v. New Bedford*, 121 Mass. 286 (question of compensation under statute not raised).

G. J. C.

ing under and by virtue of written instruments, title, ownership, and rights of possession," of the properties in question, and have drawn from the river, through the openings in the dam pier, so much of the water as has been needed for their purposes. The possession and occupation for upwards of sixty years, prior to the filing and service of the appropriation maps, are found to have been "adverse to any claim by the state to any part thereof, except as to the construction and maintenance of the said state dam and the use of the waters of the Oswego river by the state."

In this situation, in 1906, the state engineer took the requisite action under the provisions of the barge canal act, to appropriate the lands, structures, and waters of the claimants, in question. By the terms of that act it was, among other things, provided that that official should be authorized to "enter upon, take possession of, and use lands, structures, and waters, the appropriation of which for the use of the improved canals, and for the purposes of the work and improvement authorized by this act, shall in his judgment be necessary." (Laws 1906, chap. 365, § 4.) The state engineer was to make and file maps of the lands to be appropriated, and the superintendent of public works was to serve upon the owner of any real property, so appropriated, notices of the filing and date of filing of such maps, which should specifically describe the portions appropriated. The act provides that, from the time of the service of such notice, the entry upon, and the appropriation by the state of, the real property therein described, should be deemed complete; that such notices should be conclusive evidence of such entry and appropriation, and of the quantities and boundaries of lands appropriated; and that the court of claims should have jurisdiction to determine the amount of compensation for lands, structures, and waters so appropriated, or damages caused by the work of improvement. The state engineer made, and duly filed, maps, specifically describing the three parcels involved here and the water rights of two of them, and the superintendent of public works duly served upon the claimants the notices, as required by the act; which also took, with respect to the two parcels, all the claimants' "right, title, and interest as riparian owners."

There is no serious dispute with respect to what the state has appropriated of the claimants' lands and water rights, and the question is whether, upon the facts, the claimants were invested with that lawful ownership of these lands and waters, within the banks of the Oswego river, which would support their judgment for compensation.

It must, finally, be noted as a material fact, that the proposed barge canal, where it crosses the claimants' property, is wholly outside the channel of the Oswego river, as it existed at the time of the service of the notices of appropriation, and as it was at the time of the grant by the state to Stene, in 1793.

This, perhaps somewhat extended, review of the facts, is in order to make intelligible the situation of the parties. Whether the ownership of the bed of the Oswego river was, or was not, in law, in the state, and whether, or not, its grant to Stene conveyed to him the land in the bed to the center of the stream, the claimants stand in the shoes of the owners of the tract of 200 acres, as they were in 1819, under the title derived from Stene; except so far as the state has exercised its paramount, or sovereign, right to improve the navigation of the river by the construction of the old Oswego canal and of the dam and other works incidental thereto. So far as it appears, the state had at no time sought to appropriate, *in invitum*, any rights to the claimants' predecessors in title, whatever they were; but, rather, had, from the time of the enactment of statutes bearing upon the construction of the Oswego canal to the enactment of the present barge canal act, reserved, if it had not recognized, those rights. It may be added that the situation presents facts and circumstances which would support the claimants' record title and rights by adverse possession and by prescription.

It is argued in behalf of the state that the Oswego river is a public navigable river, and that, under the rule of the common law, it was vested with the ownership of its bed. The fact is that this river is not navigable for any purpose at the city of Fulton, for some distance north and south; although in other portions it is used for navigation and commerce. But, were it altogether navigable in its course, the question of its ownership would be settled by the common-law rule relating to the title to beds of nontidal, or fresh-water, streams. In law, the term "navigable river" has received a technical application to rivers, or arms of the sea, in which the tide ebbs and flows. The common law of England regarded all fresh-water rivers as non-navigable. Under its rule the title to the soil of the sea, or of the arms of the sea, or of tidal rivers, was in the Crown, subject to an easement in favor of the public for passage or transportation; while fresh-water rivers belonged to the owners of their banks, also subject to the use of the public as navigable highways. This public right was not affected by the situation of the title, whether in the Crown, or in the riparian owner. Whether salt, or

fresh, water streams, if they were large enough to be capable of common passage, and thus, in fact, were navigable, they were regarded as common highways, which might not be impeded. See Lord Hale's Tract De Jure Maris; Ex parte Jennings, 6 Cow. 518, 18 Am. Dec. 447; Morgan v. King, 35 N. Y. 454, 91 Am. Dec. 58. The common law of England fixed, as an unalterable rule, the title to the bed of tidal streams in the sovereign, and to the bed of fresh-water streams in the owners of the adjacent banks, the owner of each side taking to the center, or *usque ad filum aquæ*, but made no distinction against the public right of passage & transportation. The navigability, in fact, of the stream, had no relevancy to the question of the title to its bed; it was relevant solely to the public right to pass, or to transport, upon it, as upon a highway. A stream, to be exclusively owned by the riparian owner, must be too small to be navigable in fact. In adopting the common law of England, the people of this state took over such of its rules as were applicable to, and consistent with, their condition and circumstances. It became, and is, the law of the state and the basis of its jurisprudence, except so far as its principles and rules of action have been modified by Constitution, statutes, or usages, or were inapplicable to our situation. Its rules upon the subject of the rights of riparian owners, necessarily, applied but imperfectly to the situation of our country, with its many large navigable bodies of water in bays, rivers, and great inland lakes. We have but to contrast the situation of Great Britain, an island, with short rivers, navigable, ordinarily, only so far as the tide ebbed and flowed, to perceive the extent to which modifications of those rules became essential. In our state, there were to be considered, in applying the common-law rule, the extent to which our fresh-water rivers and lakes formed territorial boundaries, and the nature of the title acquired under the laws of the state, to whose dominion England had succeeded. In the former case, the rule was clearly inapplicable, and, in the other cases, as I understand the result of the decisions, two of our rivers formed exceptions to the general rule. The part of the Hudson river above the ebb and flow of the tide, and the Mohawk river, a fresh-water stream, in grants made to settlers under the Dutch government, were excepted, and, upon the English succession, the beds of those waters, never having been conveyed, vested in the Crown, as lands not theretofore granted. As to those rivers, the people of this state have ever asserted title, as to unappropriated lands. See Canal Appraisers v. People, 17 Wend. 571; Canal

Fund Comrs. v. Kempshall, 26 Wend. 404; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393. The case of People v. Tibbetts, 19 N. Y. 523, involved the rights of riparian owners on the Hudson river, and cannot be regarded as supporting the appellant's position. Smith v. Rochester, supra. Chancellor Walworth, in Child v. Starr, 4 Hill at page 372, speaks of the case of Canal Fund Comrs. v. Kempshall, supra, as removing any doubt upon the question of whether the common-law rule prevailed here in the construction of conveyances of lands bounded by, or upon, a fresh-water, or nontidal, stream. In Smith v. Rochester, supra, it was distinctly so held. In Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407, which involved the riparian rights of owners upon the Chenango river, a fresh-water stream, it was held that, though navigable as a highway, it was a private river; that they owned the bed and banks, subject to the public easement of navigation; and that the legislature, except under the power of eminent domain, upon making compensation, could not interfere further than for the purpose of regulating, preserving, and protecting the public easement.

I know of no exceptions in this state to the common-law rule of riparian ownership of the beds of fresh-water streams, where not constituting boundary lines, other than the two rivers referred to. If not affected by situation, or by derived title, there is no good reason why the common-law rule should not obtain with respect to our fresh-water rivers. To meet differing political institutions and usages, it has been somewhat enlarged or extended, with respect to the riparian owner's right of access and of use on tide waters. Rumsey v. New York & N. E. R. Co. 133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A. (N.S.) 326, 80 N. E. 665, 11 A. & E. Ann. Cas. 1. The Oswego river, however it is to be regarded as a highway for navigation and commerce, is not taken out of the common-law rule by any fact or feature; and two decisions by the courts of this state have determined its character of non-navigability in law, at an early day. I do not think that their authority has been shaken by the principle of any subsequent decision of this court upon the applicability of the common-law doctrine of riparian rights. The first of the cases I allude to is that of Varick v. Smith, 5 Paige, 137, 28 Am. Dec. 417; Id., 9 Paige, 547. Varick and Smith were owners of lands and mills on opposite sides of the Oswego river, a short distance below one of the dams built in connection with the old Oswego canal. The state had leased to Smith, in 1827, the wa-

ters of the river not needed for the canal, and he claimed the right thereunder to divert the waters to his mill on the east side of the river, to such extent as to prevent them from supplying Varick's mill on the west side. Varick, claiming under state patents, to own in fee to the center of the Oswego river, with the riparian right to have one half of the surplus water, not needed for the canal, flow upon his lands, brought suit against Smith and the attorney general to have the lease annulled and an injunction restraining the diversion of the water involved. Varick succeeded in establishing his claim and his rights predicated thereon. In the various opinions rendered in the course of the litigation by the vice chancellor and by Chancellor Walworth, in affirmance, it was held, at all times, that the Oswego river was subject to the common-law right of riparian ownership to the center, which was subordinate, only to the servitude of the public, for the purposes of navigation and commerce, and to the governmental right of eminent domain. Its navigability in fact did not affect its non-navigability in law, as a fresh-water stream, and the common-law character of its riparian ownership was consequently unaffected. Vice Chancellor Gridley, in determining the issues upon the trial, refers to Lord Hale's statement that fresh rivers belong to the owner of the soil adjacent, and to his definition of navigable, or public, rivers, in the absolute sense of the term, as being only such, which are arms of the sea, where the sea flows and reflows, and holds that this doctrine of the common law is controlling; that it "is still the law of the land." *Van Buren v. Baker*, 12 N. Y. S. R. 209, is the second of the early Oswego river cases and involved a claim of the plaintiff to the title to an island in the river, under a conveyance from the state of a tract of land on the easterly side of the river. In sustaining a judgment in the plaintiff's favor, the general term (in 1887) followed the authority of *Varick v. Smith*, *supra*.

Upon the question thus far discussed, I conclude that the common-law rule governs with respect to the character of the Oswego river, and being, within its definition, non-navigable in law, the state would not hold title to its bed by virtue of its sovereignty, and could exercise no other right therein, save that of eminent domain, within constitutional limitations; except as such right might relate to the improvement of the channel and bed of the river for the purposes of navigation and commerce, as one for the advantage of the public easement. We are not called upon to give, or to search for, a reason for a rule which, by long standing, has acquired the stability of a rule of prop-

erty; it is sufficient that a rule exists, by which the property rights of persons have been deemed to be measured and fixed. If there was any reason for the abandonment of this rule of the common law, the courts of the land, presumably, would have acted upon it; but it has remained, with only such modifications as to accord with the requirements of a new geographical situation and with differing political conditions.

It is objected in behalf of the state, the premises affected being in the bed of the Oswego river, that the grant by letters patent to Stene did not convey to him any part of the bed. As the people of this state became the owners of the unsettled lands upon the river, in right of the succession of the state to their dominion, they were capable of being granted by the legislature under letters patent. Those by which Stene took, in 1793, granted a tract of 200 acres "on the east side of the river below the Falls," by a description, which ran from "a white ash sapling . . . standing on the east shore of the Oswego river" by courses to the east, to the north, and to the west "to the said river, and then up and along the same to the place of beginning." This grant should be construed as to its descriptive language, as would be any ordinary grant of property. Being presumed to have been made for a sufficient consideration, there is no reason for construing it with any extraordinary strictness as against the grantee. It is not like a legislative grant of some exclusive franchise, or privileges, where the rule of a favorable construction to the state will be rigidly applied. As a boundary of the grant is on a fresh-water river, the location of the monument for the starting point in the sapling is not a delimitation of the westerly boundary line. As the monument could not conveniently, or properly, be placed in the channel of the river, in placing it on the bank it merely fixed a point in the south line; to which line the course from the northerly boundary returned along the river. Such a monument indicates the place of the line, or of its intersection with the stream, and not the end of it. *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Van Winkle v. Van Winkle*, 184 N. Y. 193, 204, 77 N. E. 33. It is an old and well-settled rule, where the grant has no other boundary on the river side but the stream itself, that the legal presumption is that it was intended to convey to the middle of such stream. A boundary line, which is described as "along the shore," or "along the bank," of a fresh-water stream, would not extend the grant to the center; for there would be a prescribed limitation of the line to the shore, or bank. But where, as here, the



line, when it reaches the river, is then described as running "along the same," it will be construed as following the thread of the stream. A boundary by, or along, a water course, is effectual to take the grant, by legal construction, to its center, and running the line to a monument standing on the shore does not restrict the grant; for it is only referred to as giving the directions of the lines, and not as restricting the boundary. *Child v. Starr*, 4 Hill, 369, 375; *Luce v. Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Seneca Nation v. Knight*, 23 N. Y. 498; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Gouverneur v. National Ice Co.* 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865. I conclude, therefore, upon the question of the effect of the state's conveyance to Stene by its letters patent, that it granted to him a tract of land bounded westerly by the center of the Oswego river.

It is further objected on behalf of the state that if the Oswego river is not in law a public navigable river, within the common-law, the state is, nevertheless "entitled to make use of its bed and waters for the improvement of navigation without compensation." The argument is that the proposed construction of the barge canal is such an improvement, and falls within the rule, which authorizes the state authorities, in such cases, to control and regulate the river. The right of the state to make improvements in the river for the benefit of the public, in facilitating navigation and transportation thereon, must be fully conceded. It may do so without regard to the private ownership of the bed of the river. The proprietary interest of the riparian owner is subordinate to the public easement of passage, and the state may be regarded as the trustee of a special public servitude; as it was termed in *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404. In the exercise of its authority, in that respect, the legislature may direct the performance of acts by state officers, which tend to promote the public right of passage and transportation, without subjecting the state to liability. When, however, it is not the channel, or bed, of the river, which is to be regulated, and land is taken, and the river waters are diverted for the purpose of constructing and operating some other channel distinct from that of the river, then the limit of the state's authority freely to intrude upon the riparian owner's rights has been reached. *Ibid.*; *Smith v. Rochester*, 92 N. Y. 463, 484, 44 Am. Rep. 393. In *Kempshall's Case*, his millrace on the Genesee river was obstructed for the purpose of constructing a state aqueduct for canal purposes, and to his claim for damages (as riparian owner 37 L.R.A. (N.S.)

to the center of the river) the state opposed his absolute right to divert the river water for such purposes. The state was held to be liable for damages in diverting the water from the mill. The chancellor observed that "the only restriction upon his [Kempshall's] right to use the bed of the river absolutely as his own was the right of the public to navigate the stream." Page 413. It was said, in the same case, by Senator Verplanck: "I cannot assent to the position that the conceded common-law authority of the state over such rivers, for the purposes of navigation, comprehends the right to divert the waters to other purposes of artificial navigation, wholly distinct from that of the river itself." Page 421. This language was quoted in the opinion of this court in *Smith v. Rochester*, *supra*, as was, also, the further remark of the Senator that "by its [the state's] sovereign right of eminent domain, it undoubtedly may do so, . . . but all these exercises of sovereign authority are, alike, 'the taking of private property for public use,' which the Constitution pronounces may not be done, 'without just compensation.'" Page 422.

It is found, in this case, that "the proposed barge canal, where it crosses the property of the claimants, is wholly outside the channel of the Oswego river, as it existed . . . in 1906 and as it was at the time of the grant by the state in 1793." It is also found that the lands occupied by the claimants' properties "have not, since 1793, constituted a part of the natural channel, or bed, of the Oswego river." When, in 1906, under the provisions of the barge canal act of 1903, the state authorities made the appropriations described in the notices, the claimants were deprived of the use of the water through the opening of the dam pier, over and around which the power-plant structure had been built, and there were taken from them distinct parcels of land and the appurtenant riparian rights. It is difficult, if at all possible, to perceive how all this could be done for this new artificial water way upon the bank of the river, without liability for damages; any more than it was possible in the case of the aqueduct for state canal purposes in *Kempshall's Case*, *supra*. The claimants had a proprietary interest in the water power of the Oswego river, which was incidental to the grant to their predecessors in title, and which entitled them to compensation for the appropriation of that interest for the public use. That a stream, adequate in size for public transportation or passage, should be subjected to a control, or a regulation, confined to such purposes, suggests no legal injury to riparian ownership. But

when, under the plea of the improvement of navigation, the property of the riparian owner is taken, or diminished by the diversion of the waters, for a public work not within, but wholly outside, the channel of the river, I think there is a clear case for the enforcement of the constitutional guaranty of compensation. If the appropriation is for a purpose not incidental to the natural, or public, servitude in the river, how could that provision of the fundamental law of this government—so instinct with the principle of justice—find juster application? The state, by the exercise of its power of eminent domain, could take these claimants' lands and divert from their power-plant properties the water power which operated them, upon making just compensation therefor; but, in my opinion, it had no unlimited right to make a use of the river for a public purpose, except as such purpose was related to the improvement of the channel, or bed, of the river itself, for purposes of navigation or transportation.

Possibly, the question of title and right by adverse possession and prescription does not become important, in view of the conclusions already stated. As the point is made that the state reacquired the bed of the Oswego river "as canal lands at the time of the construction of the Oswego canal in 1826," and at that time acquired all the water power, it may be useful to discuss this question. I think that, on the facts, the record title of the claimants to the land in question, by long-continued possession and occupation, and their right, by prescription, to use the waters not actually needed for the old Oswego canal, are reinforced and made good. Such possession and right were not inconsistent with the public right of easement. It is found that such possession and occupation, by them and by their predecessors in interest, of the properties described, and the use by them of the water for supplying water power, "for upwards of sixty years prior to the filing and service of the appropriation maps, have been under claim of title founded upon written instruments, and open, notorious, and adverse to any claim of the state, or anyone else, to any part thereof, except as to the construction of the state dam and the use of the waters of the Oswego river by the state, as aforesaid (i. e., for the old Oswego canal). No cause of action for the recovery of the possession of any part . . . has accrued to the state within forty years prior to the service and filing of said appropriation maps; nor has the state, nor anyone from whom it claims, received rents and profits within said period from said three properties, or any part of either thereof." As between individuals, under such circum-

stances, the period of twenty years is prescribed by the Code of Civil Procedure as constituting an adverse possession. Section 369. By § 362 of the Code, it is provided that the people will not sue with respect to real property, "by reason of the right or title of the people to the same, unless either: (1) The cause of action accrued within forty years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time." No lapse of time will furnish a defense to an encroachment on a public right (*Burbank v. Fay*, 65 N. Y. 57, a case where the plaintiff claimed rights to the continued use of the water of a part of the Erie canal); but that a right to the enjoyment of an easement may be gained by prescription against the state was held at an early day. In the case of *Canal Fund Comrs. v. Kempshall*, already alluded to, *ubi supra*, where rights in the Genesee river were involved, it was said by Senator Verplanck (at page 421 of 26 Wend.): "The paper title made out is supported and attested by such a continued occupation of the bank and use of the water for thirty-five years, under claim of title to the whole, as would alone establish an adverse possession conclusive against any private claim.

. . . The long adverse possession is alone sufficient to give an indisputable title against all private claimants, since it exceeds the twenty years' statutory limitation of private suits. But the state itself, if it were not concluded by its own grant, cannot sue for these lands under water, or their issues or profits, unless the right or title had accrued within forty years (according to the act of 1804 . . .), or unless the people have received the rents and profits within that term. As neither of these facts can be maintained here, then it follows, according to the same statute, that 'the persons holding such lands shall freely hold and enjoy the same against the said people and all persons claiming under them.'"

In another case, it was held, with respect to the right of riparian owners, as against the state, to maintain a wing dam in the Niagara river, that a claim for compensation for the value of its use might be lawful, if it had "the support of a prescriptive right to maintain it." *Re State Reservation*, 37 Hun, 537. And see *Timpson v. New York*, 5 App. Div. at page 429, 39 N. Y. Supp. 248. In *Burbank v. Fay*, *supra*, the elements necessary to constitute a prescriptive right were considered, and it was said that "the possession should have certain qualities and characteristics, such as being

adverse, continuous, uninterrupted, and by the acquiescence of the owner of the estate over which the easement is claimed. An adverse possession under this rule means a claim asserted as a matter of right, and cannot grow out of a mere permissive enjoyment." At page 65 of 65 N. Y. In that case, the claim was, in effect, against the state, whose commissioners' acts, in depriving the plaintiff of certain privileges, were the subjects of complaint, and the rule was deemed applicable to the case, inasmuch as the possession did not comply with it. There was no proof how the privileges connected with the use of the Erie canal basin commenced, and therefore it was necessary to presume, as the only lawful manner was by permission of the state authorities, that it commenced in that manner.

Therefore I think that the title of these claimants is as well supported by the adverse character of the possession of the premises, as by the record title.

At some length—quite sufficient, I think, for the purpose—I have discussed the important questions presented upon this appeal. For an ampler discussion of the questions of fact and of law, a reference to the opinions of the court of claims may, most profitably, be made. Judge Rodenbeck, who spoke for that court, has treated them with great thoroughness and ability.

Upon the question of title by adverse possession, or prescription, which has been discussed, I am authorized to say that Chief Judge Cullen is of the opinion, on the authority of *Burbank v. Fay*, 65 N. Y. 57, *Donahue v. State*, 112 N. Y. 142, 2 L.R.A. 576, 19 N. E. 419, and *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 14 L.R.A. 481, 28 N. E. 358, that, as against the state, no title to the river could be obtained through private use or occupancy, whether adverse or by permission, however long continued, or by prescriptive right. Judge Willard Bartlett agrees with the Chief Judge in that view. Judges Werner, Chase, and Hiscock prefer to express no opinion upon that question. Upon all the other questions discussed, all of my Associates concur with the opinion, except Judge Collin, who takes no part in the decision.

The judgment appealed from should be affirmed.

Cullen, Ch. J., and Werner, Willard Bartlett, Hiscock, and Chase, JJ., concur. Collin, J., not sitting.

Judgment affirmed, with costs.

Motion for reargument denied May 6, 1911.  
87 L.R.A. (N.S.)

## CALIFORNIA SUPREME COURT. (In Banc.)

FIDELITY & CASUALTY COMPANY OF  
NEW YORK, Appt.,

v.

FRESNO FLUME & IRRIGATION COM-  
PANY, Resp.

(— Cal. —, 119 Pac. 646.)

### Insurance — parol promise of agent — enforcement.

1. A parol agreement as to rates different from those named in the policy, made by an insurance agent to secure business which had been carried by a rival company, is not binding on the insurer, where the policy provides that no provision or condition of the policy shall be varied or altered by anyone unless by written consent of the president or secretary of the company.

### Same — ratification of acts — suing on policy.

2. An insurance company does not, by attempting to enforce by action the payment of premiums on a policy of insurance written by an agent, ratify his unauthorized oral agreement as to rates, made to secure the business.

### Same — failure to sign — effect.

3. That an applicant for insurance does not sign the policy does not absolve him from its provisions as to rates of premium and limitation of agent's authority, so as to enable him to enforce an oral agreement that the rates shall be different from those named in the policy.

### Appeal — judgment for prevailing party.

4. Judgment should not be rendered for appellant upon reversal of a decision in defendant's favor in an action to recover the premiums alleged to be due on an insurance policy, if the findings as made would not support it.

(December 4, 1911.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Fresno County in defendant's favor in an action brought to recover premiums alleged to be due on two insurance policies executed and delivered by plaintiff to defendant. Reversed.

The facts are stated in the opinion.

Messrs. Chickering & Gregory, for appellant:

Under no circumstances can the terms of an agreement in writing be altered by parol

**Note.**—As to effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note to *Gish v. Insurance Co. of N. A.* 13 L.R.A. (N.S.) 826. As to the effect of the doctrine of waiver or estoppel upon the parol-evidence rule, as applied to policies of insurance, see note to *Haapa v. Metropolitan L. Ins. Co.* 16 L.R.A. (N.S.) 1165.

evidence, except in an equitable proceeding for the reformation of the written instrument.

*Osborn v. Hendrickson*, 8 Cal. 31; *Schroeder v. Schmidt*, 74 Cal. 459, 16 Pac. 243; *Murray v. Dake*, 46 Cal. 640; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766; *Piereson v. McCahill*, 21 Cal. 122; *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037; *Reedy v. Smith*, 42 Cal. 245.

Where the waiver relied on is the act of the agent, the burden is on the party endeavoring to establish such waiver to show either that the agent had power from the company to make the waiver, or that the company subsequently acknowledged and ratified the act of the agent, or dispensed with the observance of the conditions.

*Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Deweese v. Manhattan Ins. Co.* 35 N. J. L. 366; *Kyte v. Commercial Union Assur. Co.* 144 Mass. 43, 10 N. E. 518; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242; *Westerfeld v. New York L. Ins. Co.* 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

The findings are insufficient to support the conclusions of law and the judgment.

*Hawkins v. Hawkins*, 50 Cal. 558; *Kim-mell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Fennell v. Zimmerman*, 96 Va. 197, 31 S. E. 22; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, 40 C. C. A. 119, 99 Fed. 856.

Mr. L. L. Cory, for respondent:

A court of equity will always interfere to prevent fraudulent use of a paper for a purpose not contemplated at the time it was made, even where there is no mistake or fraud in its execution.

*Murray v. Dake*, 46 Cal. 644; *Martin v. Parsons*, 49 Cal. 100; *Isenhoot v. Chamberlain*, 59 Cal. 637; *Eva v. McMahon*, 77 Cal. 472, 19 Pac. 872; *Renshaw v. Gans*, 7 Pa. 117; *Partridge v. Clarke*, 4 Pa. 166; *Campbell v. McClenachan*, 6 Serg. & R. 171; *Clark v. Partridge*, 2 Pa. St. 13; *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Monne v. Ayer*, 20 Jones & S. 139; *Green v. Morris & E. R. Co.* 12 N. J. Eq. 165; *Martin v. New York, S. & W. R. Co.* 36 N. J. Eq. 109; *Coger v. McGee*, 2 Bibb, 321, 5 Am. Dec. 610; *Taylor v. Gilman*, 25 Vt. 411; *Durham v. Taylor*, 29 Ga. 166; *Parkhurst v. Van Cortland*, 14 Johns. 15, 7 Am. Dec. 37 L.R.A. (N.S.)

427; *Quinn v. Roath*, 37 Conn. 17; *Rearich v. Swinehart*, 11 Pa. 233, 51 Am. Dec. 540; *Olmstead v. Michels*, 1 L.R.A. 840, 36 Fed. 455; *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323.

The plaintiff is bound by the representations and statements made by its representative, which induced the acceptance of these policies by the defendant.

*Farnum v. Phoenix Ins. Co.* 83 Cal. 256, 17 Am. St. Rep. 233, 23 Pac. 869.

By bringing suit upon the policies, the plaintiff has ratified the contract as actually made by its representatives, and is bound thereby.

*Balfour v. Fresno Canal & Irrig. Co.* 123 Cal. 395, 55 Pac. 1062; *Thompson v. Spray*, 72 Cal. 533, 14 Pac. 182; 1 Am. & Eng. Enc. Law, 2d ed. 1181; *Gribble v. Columbus Brewing Co.* 100 Cal. 67, 34 Pac. 527.

Messrs. Goodfellow, Eells, & Orrick also for respondent.

#### Per Curiam:

The appeal in this case was taken to the district court of appeal, which rendered a judgment of reversal. A rehearing was ordered, and, upon the second submission, two of the justices adhered to the views first announced, while the third wrote an opinion for affirmance. Upon this failure to agree the appeal was transferred to this court for hearing and determination.

Our own examination of the case has satisfied us of the correctness of the disposition first made by the court of appeal, and we adopt the following opinion of Hall, J., giving the reasons upon which that court based its judgment of reversal.

"This is an appeal from a judgment in favor of defendant, taken within sixty days after the entry thereof. The action was brought to recover a balance of premiums unpaid upon two insurance policies executed and delivered by plaintiff to defendant and accepted by defendant, whereby plaintiff insured defendant against loss or damage resulting from liability for damages or injuries to employees of defendant during the period of one year from the date of the policies. At the time of the execution of the policies a certain sum was paid as premium, based on the amount of wages that defendant estimated that it would pay to its employees during the year. The policies are attached to and made a part of the complaint. The policies clearly and without ambiguity provide that the premium to be paid shall be a certain given per cent of the wages actually paid during the year by the defendant to its employees, and provide that, if the wages actually paid exceed the estimated wages stated in the schedule contained in the policies, the as-

sured shall pay the additional premium earned, and, if the wages actually paid shall be less than the estimated wages stated, the insurer shall return to the assured the unearned premium *pro rata*. As a defense to the two causes of action set forth in plaintiff's complaint, the defendant pleaded: 'That heretofore, and on or about the 14th day of April, 1902, the plaintiff made application to the defendant to insure and indemnify it for one year from April 14, 1902, against all loss from any of the matters and things set forth in the complaint of the plaintiff herein. That the defendant thereupon informed the plaintiff that as it was then insured in another company covering all the matters and things set forth in the complaint of plaintiff, and for all such insurance paid as a premium a flat rate of \$850 per annum, and the plaintiff thereupon assured the defendant that it would insure the defendant for one year upon the same terms, and it was then and there agreed upon, by and between the plaintiff and defendant, that the plaintiff would issue and deliver to the defendant, and the defendant would thereupon accept, the policies of insurance set forth in plaintiff's complaint, and that the defendant would be charged therefor and would only be required to pay a flat rate of \$850 per annum in lieu and stead of the sliding scale and rate as set forth in plaintiff's complaint, and each cause of action therein, and that thereupon, and in pursuance to said agreement, and not otherwise, the policies of insurance set forth in plaintiff's complaint were so issued and delivered to the defendant, and the defendant accepted the same. That the sole inducement to the defendant, leading it to accept said policies of insurance from the plaintiff, was the statement and agreement and representation of the plaintiff that it would accept from the defendant the sum of \$850 in full for all premiums due; or to become due, upon said policies of insurance, covering said policy year, and that no other sum of premium of any kind would be required or demanded or exacted of the defendant by the plaintiff. That at the time said policies of insurance set forth in plaintiff's complaint were issued and delivered to the defendant, the plaintiff then and there stated, represented, and assured the defendant that, notwithstanding the rate and terms of said policies of insurance, all the premiums that the defendant would be required to pay for said policies of insurance was the flat rate of \$850; and in consideration of said assurances and statements, the defendant was induced to, and did actually, accept said policies of insurance.' The court found the facts to be in accordance with the above allegations of

the answer, and gave judgment for defendant accordingly.

"The only evidence to support the above findings of fact consisted of testimony as to statements and agreements orally made by Mr. Shepherd, the local agent of plaintiff at Fresno, to and with Mr. Shaver as the president of the defendant, and oral statements and conversations between Mr. Bosworth, the general agent of the plaintiff at San Francisco, and Mr. Shepherd. This testimony as to oral negotiations and conversations, both before and at the time of the delivery of the policies, was admitted over the objections and exceptions of plaintiff, and these rulings are now relied upon as grounds for reversing the judgment.

"It is not claimed that, according to the written terms of the policies accepted by defendant, the amount sued for is not owing from defendant to plaintiff, but it is claimed by defendant that it is not bound by the terms of the written contracts.

"The theory of defendant, upon which it claims that this case is taken out of the general rule that, where the terms of a contract are reduced to writing, parol evidence is not admissible to vary or contradict the terms of the writing, is that it would be a fraud to allow one party to enforce the covenants of the writing contrary to his oral agreement by which the other party was induced to enter into the contract. In support of this contention respondent has cited a number of cases, among which are *Murray v. Dake*, 46 Cal. 644; *Isenhoot v. Chamberlain*, 59 Cal. 637, and *Eva v. McMahon*, 77 Cal. 472, 19 Pac. 872.

"But conceding that a court of equity will not permit one party to enforce a written contract contrary to his oral agreement, where to do so would work a fraud upon the other party to the contract, and that the same matter may be set up in defense of an action at law on such written contract, without seeking a reformation of the written contract (*Eva v. McMahon*, supra; *Hoppough v. Struble*, 60 N. Y. 430; *Walker v. Brem*, 67 Cal. 600, 8 Pac. 320), it is essential that such oral agreement be made by the party to the contract or by his agent, acting with authority, actual or ostensible,

"The policies delivered to and accepted by respondent were signed by the president and secretary of plaintiff, and countersigned by its general agent, Bosworth. No evidence of the authority of Bosworth was given other than that he was the general agent of the plaintiff, and none was given as to the authority of Shepherd other than that he was the local agent of Fresno, and by the terms of his employment had no authority to change a policy in any way.

"It may be conceded that this was suffi-

cient to clothe the agents with ostensible authority coextensive with the business intrusted to them, in the absence of any notice of a limitation thereon. But the policies accepted and retained by defendant contained the provision that 'no condition or provision of this policy shall be varied or altered by anyone unless by written consent of the president or secretary of the company.' This was a limitation upon the authority of agents of which defendant had notice. That such provisions in policies are valid has frequently been decided. The matter is discussed at great length in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and it was there held (syllabus) that 'it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered.'

'In *Clever v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660, the supreme court of Michigan said: 'When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy.' To precisely the same effect are *Catoir v. American L. Ins. & T. Co.* 33 N. J. L. 487; *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 809, 24 Pac. 242.

'The same rule is followed in *Massachusetts*. 'A company which has seen fit to prescribe that the terms and conditions of its policies shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the insured has assented to be bound.' *Kyte v. Commercial Union Assur. Co.* 144 Mass. 43, 10 N. E. 518.

'To the same effect are *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31, and *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34.

'Limitations upon the power of agents, contained in a policy, similar to the limitations contained in the policies sued on in this case, were held reasonable and binding on the assured in *Westerfeld v. New York L. Ins. Co.* 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

- L.R.A.(N.S.)

"Defendant in the case at bar accepted the policies and retained them until the expiration of the insurance year, with full knowledge of their terms. There is no pretense that any misrepresentations were made as to their actual terms, or that any trick or device was resorted to by which defendant was prevented from reading them, and under such circumstances defendant must be presumed to have known the contents of the policies. *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63.

"Defendant thus knew that the agent had no power to alter the provisions of the policies without the written consent of the president or secretary of the insuring company. If defendant chose to rely upon the oral agreement of the agent, it did so at its peril. The oral representations and agreement thus made were not the representations or agreement of the plaintiff, and for this reason the findings to that effect are not sustained by the evidence, and the evidence of such oral agreement and representations should not have been admitted in evidence.

"We do not think the contention of respondent that plaintiff ratified the alleged oral modification of the contracts by bringing this action can be sustained. We are unable to assent to the proposition that by attempting to enforce a written contract according to its terms, plaintiff ratifies unauthorized oral modifications thereof."

Upon the second argument in the court of appeal, and in presenting the case here, the respondent has laid special stress upon the point that, because the policy was signed by the insurer alone, and not by the insured, it is conclusive with respect to its obligations alone, and not with respect to those of the party not signing. But we think there is no merit in this position. The receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper. 9 Cyc. 260, 391; Civil Code, § 1589; *Watkins v. Rymill*, L. R. 10 Q. B. Div. 178, 188, 52 L. J. Q. B. N. S. 121, 48 L. T. N. S. 426, 31 Week. Rep. 337, 47 J. P. 357. Under the common-law rules of pleading, the fact that one of the parties had not executed the writing, if it were a specialty, would have required that he be sued in assumpsit, rather than in covenant; but the binding force of his obligation and the extent of his liability would not have been affected by the mere form of action. *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199.

The respondent cites a number of cases

in which, notwithstanding the existence of an agreement in writing (signed by one of the parties alone), the party not signing has been permitted to prove the real agreement by parol evidence. But none of these dealt with the situation here presented, i. e., that of a writing which was intended, when signed by one of the parties, and accepted by the other, to operate as a contract embodying all of the obligations on both sides. The authorities relied upon all fall within recognized exceptions to the parol-evidence rule. Some of them deal with writings which were prepared for execution by both parties, but were signed by only one. The opinion in *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515, while generally favorable to the contentions of the appellant, contains some references bearing upon this point. See also *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683. Other citations are to cases laying down the well-settled rule that recitals of consideration are not conclusive. *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212, 29 Pac. 119. This rule is not applicable here, where the clause relied upon is not a mere recital, but is a positive undertaking to pay premiums according to a specified mode of computation. The remaining authorities of respondent, so far as they have any bearing on the point under discussion, have to do with writings which were not intended to embody the entire agreement of the parties, but were either memoranda in the nature of receipts, or were silent with respect to some of the terms upon which the parties had agreed. *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; *Bank of Australasia v. Palmer* [1897] A. C. 540, 66 L. J. P. C. N. S. 105; *Routledge v. Worthington Co.* 119 N. Y. 592, 23 N. E. 1111; *Rapp v. Giddings*, 4 S. D. 492, 57 N. W. 237; *Ames v. Southern P. Co.* 141 Cal. 728, 99 Am. St. Rep. 98, 75 Pac. 310.

On the other hand, the contention of appellant that a policy of insurance, when accepted by the insured, is conclusive evidence of the engagements of the parties with respect to the obligations declared in it, and may not be contradicted by evidence of previous verbal arrangements, is abundantly sustained. *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. ed. 674; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Liverpool L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 579, 69 Pac. 936; *Niagara F. Ins. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Moore v. State Ins. Co.* 72 Iowa, 414, 34 N. W. 37 L.R.A. (N.S.)

183; *United States Casualty Co. v. Charleston, S. C. Min. & Mfg. Co.* (C. C.) 183 Fed. 238. The reasoning of these cases lends no support to the respondent's supposed distinction between the obligations of the party signing and those of the party not signing the policy. Indeed, the case last cited is, in this respect, precisely like the one before us.

We cannot, however, give assent to appellant's claim that judgment in its favor should be ordered. The findings, as they stand, would not support such a judgment. Under such circumstances, it has been the usual practice of this court, where a reversal was found necessary, to send the case back for a new trial. There may be exceptional instances justifying a different procedure (see *Finnell v. Jas. H. Goodman & Co. Bank*, 156 Cal. 18, 26, 103 Pac. 483); but we see no reason, in the present appeal, for departing from the ordinary course.

The judgment is reversed.

Petition for rehearing denied.

#### KANSAS SUPREME COURT.

W. H. GUTHRIE  
v.

F. B. FIELD et al.  
and

J. W. RIFFIE, Appt.

(85 Kan. 58, 116 Pac. 217.)

#### Deed — blanks — intrusting to agent — misapplication — effect.

Where the owner of real estate executes and acknowledges a deed thereto, leaving the name of the grantee blank, and intrusts it to another, with authority to negotiate a sale of the land, fill in the name of the buyer, and deliver the deed upon certain conditions, and the holder of the deed, in violation of his instructions, delivers it to a third person, who fills in his own name and records the deed, an innocent purchaser of the property upon the faith of the record acquires such a right that his claim of title cannot be adjudged void at the suit of the original owner, without compensation being made for what he has lost by the transaction.

(June 10, 1911.)

Headnote by MASON, J.

*Note.* — *Effect of deed executed with name of grantee blank, where name of grantee is filled in and deed delivered contrary to grantor's authorization.*

This note does not include cases involving merely the general question as to the

**A**PPEAL by defendant Riffe from a judgment of the District Court for Finney County, quieting plaintiff's title to a certain tract of land. Reversed.

The facts are stated in the opinion.

Messrs. James T. Burney & Son and Hopkins & Hopkins, for appellant:

A deed regularly executed and intrusted to a third person, with the name of the grantee blank, but with the understanding and agreement that the blank may be filled in before delivery, is, when so completed and delivered, a valid deed in the hands of a bona fide purchaser for value.

2 Cyc. 159, 171; Lafferty v. Lafferty,

validity of a deed executed in blank as to the name of the grantee, or any question as to the authorization of another than the grantor to fill in the grantee's name in such a deed; but, assuming that the grantor has executed a deed in blank as to the name of the grantee, and has duly authorized the filling in of the blank in a certain way or upon certain conditions, the question is as to the effect, where the grantee's name is filled in contrary to the grantor's authorization.

As to a grantor's authorization of the filling in of the grantee's name in a deed signed and acknowledged with a blank therefor, see note to McCleery v. Wakefield, 2 L.R.A. 529.

In accordance with the general rule that a deed executed in blank as to the grantee's name does not pass legal title to the property described, unless the blank is filled by a person having authority to fill it, before the deed is actually delivered by the grantor (13 Cyc. 540, 541), it seems clear that, where the blank is filled up and the deed delivered contrary to the grantor's authorization, it is at least voidable, if the grantee has knowledge of that fact, or of circumstances sufficient to put him upon inquiry as to the extent of the authority of the person filling up the blank.

Thus, an owner of property, who has executed a deed thereof, with the name of the grantee and the amount of the consideration left blank, and has delivered the deed to his agent, with authority to fill the blanks and deliver the deed when the prospective purchaser shall have accepted the title and deposited the consideration in a certain bank to the credit of the owner, is not bound by a filling of the blanks and delivery of the deed to the purchaser before the latter has accepted the title and deposited the consideration, if the purchaser had knowledge of the fact that the deed was thus executed with blanks, as he assumed the risk that the agent was strictly pursuing his authority in delivering the deed, and that he was legally authorized to fill the blanks before making such delivery. Lund v. Thackery, 18 S. D. 113, 99 N. W. 856.

And where an owner of land has executed a deed therefor, with the name of the

42 W. Va. 783, 26 S. E. 262; McClain v. McClain, 52 Iowa, 272, 3 N. W. 60; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; Clute v. Small, 17 Wend. 238; Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Rainbolt v. Eddy, 34 Iowa, 440, 11 Am. Rep. 152; South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Porter v. Hardy, 10 N. D. 551, 88 N. W. 458; Whitmore v. Nickerson, 125 Mass. 496, 28 Am. Rep. 257; Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328; Putnam v. Clark, 29 N. J. Eq. 412; Ragsdale v. Robinson, 48 Tex. 379; Garland v. Wells, 15 Neb.

grantee left blank, and has delivered the deed to an agent, with authority to insert the name of one with whom the owner has a contract for the property, and to deliver the deed to the latter upon his payment of the agreed price, and the agent inserts in the instrument, as grantee, the name of a stranger, who has knowledge of the facts, and delivers the deed to the latter, without authority, the deed is void, and will be canceled at the suit of the grantor, as against such grantee,—though if such grantee had conveyed to a bona fide purchaser, the first purchaser might have been estopped, as against such purchaser, to deny the validity of his deed. Schintz v. McManamy, 33 Wis. 290.

And in Barden v. Grace, 167 Ala. 453, 52 So. 425, it was held that where a grantor, thinking that he is selling to a certain grantee, signs a deed in which the space for the name of the grantee is in fact blank, and delivers the deed to one whom he believes to be an agent of the supposed grantee, and the deed is subsequently filled in with the name of a man unknown to the grantor, it is void, and not even a subsequent innocent purchaser on the strength thereof will be protected as against the grantor.

But where an owner of land has executed a deed therefor, in blank as to the name of the grantee, and has sent the deed to another person, with authority to fill in the name of the grantee, upon payment being made to the grantor for the land, the fact that such holder of the deed does not fill in the name of the grantee in strict accord with the authority with which he is invested will not, as between the grantor and an innocent purchaser for value, render the conveyance void. Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470.

And where an owner of land has executed a deed thereof, in blank as to the grantee, and has delivered the deed to his agent, with authority to insert the name of a grantee in the blank and deliver the deed, and the agent makes a fraudulent use of the deed by inserting the name of a relative, as grantee, and delivering the deed to the latter, without consideration, and for his own benefit,—while the deed is voidable as to such grantee, it is good as to purchasers



298, 18 N. W. 132; *McCleery v. Wakefield*, 76 Iowa, 529, 2 L.R.A. 529, 41 N. W. 210; *Burnside v. Wayman*, 49 Mo. 356; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Otis v. Browning*, 59 Mo. App. 326; *Hilton v. Houghton*, 35 Me. 143; *Bank of Herington v. Wangerin*, 65 Kan. 423, 59 L.R.A. 717, 70 Pac. 330; *Lowden v. Scholharie County Nat. Bank*, 38 Kan. 533, 16 Pac. 748; *State v. Matthews*, 44 Kan. 596, 10 L.R.A. 308, 25 Pac. 36; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. 100; *Jordan v. McNeil*, 25 Kan. 465; *McNeil v. Jordan*, 28 Kan. 7.

Messrs. O. H. Foster, Edgar Foster, and H. O. Trinkle for appellee.

under him without knowledge of the fraud, and he can convey a good title to an innocent purchaser. *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132.

Likewise, where the owner of a lot has delivered a deed thereof, executed in blank as to the name of the grantee, to a contractor, upon his promise to produce receipts showing payments for material furnished and work done upon a building on another lot, to the extent of the value of the lot in question, and the contractor, without producing such receipts or being able to do so, inserts the name of an innocent third person in the deed, as grantee, and delivers the deed to such grantee for value, for his own benefit, the grantee having no knowledge as to the manner in which the contractor acquired possession of the deed,—the grantee acquires thereby an interest in the land, either as owner or as mortgagee, if he accepted the deed merely as security for a loan to the contractor. *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081.

And where a part owner of realty has executed a deed of his own interest, with the grantee's name left blank, and has left the deed with his attorney, with authority to fill up the blank with the name of one of the grantor's co-owners, and to deliver the deed to such grantee upon receipt of the price, in case one of the co-owners will take his interest at a price fixed, but otherwise the deed to be destroyed, and the attorney fills up the blank with his own name as grantee, has the deed recorded, and procures a loan secured by mortgage on the property, representing to the mortgagee, who acts innocently and in good faith, that he has purchased the property from the grantor,—while the deed is void as to the attorney, or as to anyone having notice of the fraud, it is valid as to the innocent mortgagee to the extent of his rights under it, or the rights which he would have under it if it were valid, and his mortgage constitutes a valid lien upon the property. *State v. Matthews*, 44 Kan. 596, 10 L.R.A. 308, 25 Pac. 36.

And an owner of real property, who has executed in blank a printed form of a deed, and has delivered it to another person to enable the latter to sell the property as his agent, and to convey it to the purchaser by filling up the blanks and delivering the in-

*Mason*, J., delivered the opinion of the court:

W. H. Guthrie recovered a judgment against F. B. Field, the Osage Live Stock Company, a Missouri corporation, and J. W. Riffie, quieting his title to a tract of land in Finney county. Riffie appeals. The facts, as found by the court or testified to by the plaintiff, are substantially as follows:

Guthrie, a resident of Finney county, on March 10, 1908, delivered to Field, who lived in Kansas City, a warranty deed to the property, fully executed and acknowledged, except that a blank was left for

instrument, will be estopped, as against a subsequent innocent purchaser, from denying that the deed was complete when he executed it, after his agent, four years subsequently, has filled up the blanks, inserting his own name as grantee, and has himself sold and conveyed the property to a person ignorant of the facts in reference to the first conveyance, upon which he relied as a valid deed of the first owner. *Pence v. Arbuckle*, 22 Minn. 417.

The following cases, though upon their facts within the scope of this note, seem to turn upon the excluded question as to the sufficiency of parol authority, or the necessity for written authority, or authority under seal, to fill up blanks in a deed after execution. Thus, in *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266, where a grantor had executed a deed in blank as to the name of the grantee, and had delivered it to an agent with verbal directions to fill the blank with the names of two certain proposed purchasers, if they accepted his offer to sell, and the agent, in the absence of the grantor, sold the lands to another on the same terms as those of the grantor's offer to sell to the first parties, caused the name of such other person to be inserted in the deed as grantee, and delivered it to him as the grantor's deed, it was held that the instrument was not the deed of the signer thereof, and conveyed no title to the premises, as it could not become his deed until the name of a grantee was inserted; and that act could not be performed by an agent, in the absence of the principal, unless his authority was in writing.

On the other hand, in *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435, it was held that, where an owner of land has executed a deed regularly in other respects, with a blank left for the name of a grantee, and has placed it, in that condition, in the hands of another person with verbal authority, but no authority under seal, to fill up the blank with the name of a solvent person, and deliver the deed to the person whose name is inserted as grantee,—although the person so authorized fills in the name of an insolvent person, and then delivers the deed to that person, as the deed of the grantor, it will be recognized as a valid deed.

A. C. W.

the name of the grantee. The arrangement between them was that Field was to have thirty days within which to find a purchaser, and, upon collecting \$2,000 for Guthrie, was to fill in the name of the buyer and deliver the deed. At the expiration of the thirty days, Guthrie went to Kansas City and asked Field for the return of the deed. Field answered, in substance, that the land had been "about stolen" from him, and that he did not have the money to pay Guthrie. On April 14, 1908, Guthrie filed a petition in the district court against Field, alleging the sale of the property to him, and asking judgment for the price. He also caused an attachment to be levied upon the land as the property of Field, but no service was obtained, and the proceeding was abandoned. On May 8 or 10, 1908, a stranger came to Guthrie with the deed, the blank still remaining unfilled, and asked him to insert therein his own name (that of the stranger). Guthrie, after examining the deed, which was handed to him for the purpose, returned it, saying that he had received nothing for it, refusing to fill the blank, and forbidding the stranger to do so, or to record the deed. On May 12, 1908, the deed was filed for record, containing the name of the Osage Live Stock Company as the grantee. On May 16, 1909, J. W. Riffie, of Kansas City, in closing a deal involving other property, accepted at a consideration of \$800 a deed from that corporation, he acting in good faith, in reliance upon the record, and without notice of any irregularity. On June 17, 1909, Guthrie brought this action, seeking to set aside the two conveyances described.

The plaintiff contends that the original deed was absolutely void, and incapable of becoming a source of title in anyone, because no one but Field had authority to fill in the blank, and he appears not to have done so, inasmuch as the deed was shown to have left his hands without the name of any grantee having been inserted. The modern and, as we think, the better rule, is that authority may be given by parol to insert the name of a grantee in a deed, even after delivery, and such authority may be implied from the circumstances. 2 Cyc. 159-160, 168-172; 3 Enc. L. & P. 431-435. We do not regard it as material by whose hand the blank was filled. If Field had complied with his instructions in all other respects,—if he had collected the \$2,000 and remitted it to Guthrie,—the fact that a representative of the Osage Live Stock Company, instead of Field, wrote in the name of the corporation, after the expiration of the thirty

days, would hardly be deemed a sufficient ground to avoid the deed. The act of writing the name would have been essentially that of Field, though done by another hand. If the blank deed had been stolen from Field, and the thief had inscribed the name of a grantee, an entirely different situation would be presented. But Field's statement was that the land—not the deed—had been "almost stolen" from him, and this negatives the idea of a surreptitious taking. If Field delivered the deed in blank, his breach of trust was as pronounced, and the probable effects as readily to be anticipated, as though he had first filled in the name of a grantee.

The effect of the delivery of a deed executed in blank must depend upon the circumstances, and upon the manner in which the question is raised. In Iowa the rule is firmly established that "one who takes a conveyance of property by delivery of a deed executed and delivered to his grantor by a prior owner, and blank as to the name of the grantee, becomes a purchaser without notice as effectually as though his grantor had executed a direct conveyance." *Hall v. Kary*, 133 Iowa, 465, 470, 119 Am. St. Rep. 639, 110 N. W. 930, 931. In *Creveling v. Banta*, 138 Iowa, 47, 55, 115 N. W. 598, doubt is expressed as to the wisdom of the rule, but only on the ground that it gives opportunity for concealing property from creditors. We need not determine, however, what the immediate effect would have been if Field had delivered the deed to the Osage Company in violation of his instructions, but for a fair consideration, and without notice of any wrong. Whether (in accordance with the view taken in *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856) the mere existence of the blank would have prevented the company from acquiring rights as an innocent purchaser—would have charged it with the duty of learning the actual scope of Field's authority—need not be decided. The trial court was justified in finding that Field did violate his instructions, and that the Osage Company was chargeable with notice of the fact. Little evidence was available concerning the actual negotiation attending the delivery of the deed, and the circumstances shown did not compel a finding that the company acted in good faith.

It follows that under the evidence and findings the deed did not pass title; that, as between Guthrie and the Osage Company, it could have been set aside. Riffie, however, stands upon a different footing. Either he or Guthrie must suffer by the wrongful act of Field. Riffie has been diligent throughout. His conduct has been that

of the ordinary business man. He had no reason to suspect any irregularity and no means of ascertaining the real facts except by making an unusual investigation, for which there was no apparent occasion. Guthrie, on the other hand, by intrusting Field with the blank deed, gave him the power to make a perfect record title in anyone he might choose. Guthrie intended that Field should fill in and deliver the deed, but only upon certain conditions. Guthrie reposed confidence in Field that he would act in accordance with his instructions, knowing that, if he did not, some innocent person might be misled. Field delivered the deed contrary to his instructions, and the consequence followed that might have been anticipated if he were to prove unfaithful,—a stranger to the transaction parted with his money having every reason to suppose he was obtaining a good title. Under these circumstances, the loss must fall upon Guthrie rather than upon Riffe. The principle involved is thus stated: "It is a well-settled principle, applicable to both negotiable and non-negotiable contracts, that where a person, with intent to execute a contract, delivers to another an incomplete instrument, and such other has authority, either expressly given or implied by law, to complete the instrument, such instrument is enforceable in the hands of a purchaser for value and without notice, notwithstanding the blanks have been filled up in a manner violative of the authority conferred. This doctrine is based on principles of agency. The filling of such blanks in a wrongful manner by a person having express or implied authority to fill them in another way is deemed to be a breach of confidence merely, and is held to be within the scope of the principle that, where one of two innocent persons must suffer through the wrongful act of a third person, the loss must fall on that one who has reposed confidence in such third person, and thereby enabled him to perpetrate the wrong." 3 Enc. L. & P. 440-442. The peculiar applicability of the principle to the situation here presented is illustrated by a distinction thus pointed out: "The courts which hold to the doctrine of estoppel by negligence in execution base their holding on the maxim that, where one of two innocent persons must suffer, that one must bear the loss whose conduct made it possible. But, as has been pointed out in many well-considered cases, this principle applies only where one of the two innocent parties has reposed confidence in the person whose wrongful act occasioned the loss, and consequently is not properly applicable where the instrument was complete when it left

the maker's hands, and the person who made the alteration had no authority, express or implied, to do so." 3 Enc. L. & P. 445. The weight of authority sustains the view, although there is some conflict, that no title can be acquired, even by an innocent purchaser, in virtue of the unauthorized delivery of a deed deposited as an escrow. 16 Cyc. 581; 17 L.R.A. 511, note. This is put on the ground that the grantor has been guilty of no negligence. If he is shown to have been negligent, the rule is otherwise. 66 Am. St. Rep. 201, 202, note. An obvious distinction is to be noted between depositing a completed deed, to be delivered upon conditions, and intrusting to another a paper which, at his will, may be converted into an instrument, attested as genuine by the real signature and acknowledgment of the grantor, purporting to convey the property to anyone the holder may select. One who arms another with such an uncontrollable power must know that, if his chosen agent shall prove dishonest, that is likely to happen which in fact happened here; and, if such result follows, it must be regarded as the consequence of his own imprudence. In acknowledging a blank conveyance before an officer, a grantor in effect declares it to be a deed, which it is not, so long as its terms are incomplete. Having purposely put forth his solemn declaration that he has signed the instrument as a complete deed, when he has not in fact done so (expecting the custodian to find a purchaser, fill in the blank, and effect a transfer of title), he is answerable for the consequences if another innocently suffers loss through relying upon such assurance; and he cannot avail himself of the plea that a blank deed is no deed. Where one intrusts a completed deed to another, he so far retains means of control that, by an action against the grantee, he can bring notice of a controversy to a possible purchaser,—a method not available where no grantee is named. In *McNeil v. Jordan*, 28 Kan. 7, one who was induced by her agent to sign and acknowledge a deed to him, supposing it to be a different instrument, was held to be bound by it, when the rights of an innocent purchaser had intervened. The court there said: "Where a person not illiterate or of feeble mind, possessed of legal capacity to make a contract, executes and acknowledges a deed without ascertaining its character and extent, upon the representations of another, he puts confidence in that person; and, if injury ensues to an innocent third person by reason of that confidence, his act is the means of that injury, and he ought to answer to it." (P. 15.)

An instrument signed under such circumstances would be deemed a forgery (26 L.R.A.(N.S.) 138, note; 17 A. & E. Ann. Cas. 705, note), and upon that ground has been held incapable of supporting a title even for the benefit of an innocent purchaser (McGinn v. Tobey, 62 Mich. 252, 4 Am. St. Rep. 848, 28 N. W. 818). In the case cited, however, the conclusion was also based upon the view that the owner of the land was not in fact negligent, although he signed the deed without reading it, since he had reason to rely upon the statements made to him. In *State v. Matthews*, 44 Kan. 596, 604, 10 L.R.A. 308, 25 Pac. 36, 39, this court, speaking of a deed executed in blank, said: "The directions of the maker with reference to filling the blank were oral, the instrument was filled up in the absence of the maker, and not in accordance with, but contrary to, her directions, and to her injury; but the parties, now claiming benefits under it, . . . acted innocently and in good faith, and without the slightest knowledge of . . . fraud or of the imperfections or infirmities of the instrument when it left the hands of the maker, . . . and they parted with value on the strength of the instrument as it appeared when they or either of them first saw it, and as the maker . . . and her agent . . . made it to appear. In all such cases the weight of authority is that the instrument will be held to be valid to the extent of the innocent party's rights under it, or the rights which he or she would have under it if it were valid. . . . This is founded upon the general principle of law often announced by courts, and which has become axiomatic, 'that, whenever one of two innocent persons must suffer loss on account of the wrongful acts of a third, he who has enabled the third person to occasion the loss must be the person who shall suffer.' . . . It is almost universally held that whenever an instrument is procured from one person by the fraud or villainy of another, even if such fraud or villainy should amount to a criminal offense, if all the rights which the instrument apparently gives should at that time or afterwards be transferred to another who should be an innocent and bona fide holder for value, the innocent and bona fide holder could enforce the instrument against the maker, although the maker might also be an innocent person. . . . In such a case the maker would be estopped from claiming that the instrument was void as against the innocent bona fide holder. There may be some authorities that hold a contrary doctrine; but, if so, 37 L.R.A.(N.S.)

we do not choose to follow them. (Pp. 604, 605.) The case of *Stone v. French* 37 Kan. 145, 151, 1 Am. St. Rep. 237, 14 Pac. 530, 533, is cited in support of the plaintiff's contention, but we think it wholly consistent with the views already expressed. There a deed signed and acknowledged, but not delivered during the life of the grantor, after his death reached the hands of the grantee, and was recorded. It was held that one purchasing upon the faith of the record acquired no rights, upon the ground that the owners of the land (the heirs of the person named as grantor), not having been in any way negligent, could not be deprived of their property by the acts of a person for whose conduct they were in no way responsible. In the opinion it was said: "A deed not delivered, but wrongfully in the hands of the apparent grantee, without fault or negligence on the part of the owner of the land, is unlike a deed not delivered, but which, through the fault or negligence of the owner, has been permitted to get into the hands of the apparent grantee." (37 Kan. 151.) In *Wiggenhorn v. Daniels*, 149 Mo. 160, 50 S. W. 807, a landowner executed a deed in blank, which was wrongfully filled in and recorded. He was allowed to prevail against one who claimed to be an innocent purchaser on the faith of the deed. There, however, the defeated claimant had no title in the deed referred to; a purported conveyance to him turning out to be a forgery. In *Westlake v. Dunn*, 184 Mass. 260, 100 Am. St. Rep. 557, 68 N. E. 212, the owner left a blank deed with an agent to deliver upon the payment of the purchase money. A proposed buyer obtained the deed from the agent by representing that he wanted to show it to a friend, who was to furnish a part of the price, and that he would return it in a few moments. Instead of doing so, he filled in his own name and raised money upon a mortgage. The court held that the mortgagee could not recover, saying that neither the owner nor the agent had reason to suspect that the deed would be used as it was, and that they owed no duty to anyone to see that it was not so used, and therefore could not have been negligent in that respect. An instrument in the form of an executed deed, save that no grantee is named, has in one sense no legal effect. But as it is manifestly adapted to the use to which it is often put,—to enable the holder to accomplish a transfer,—it would seem to be within the reason of this language, used of a non-negotiable certificate of indebtedness assigned in blank: "If the owner of the instrument intrusts it to another, he does so charged with notice of

the power to deceive which he is putting into that other's hands; and, if deception follows, he must bear the burden. . . . It cannot be said that the owner is free from all obligation to contemplate the possibility of wrongdoing by a third person." *Scollans v. E. H. Rollins & Sons*, 179 Mass. 340, 353, 88 Am. St. Rep. 386, 60 N. E. 983, 984. The *Dunn-Westlake Case*, however, differs from the one at bar, in that the actual perpetrator of the fraud had not been intrusted with the delivery of the deed, but had obtained possession of it under the pretense of desiring it for a temporary purpose; his attitude being much the same as though he had taken it surreptitiously.

While for the reasons indicated the judgment must be reversed, it does not follow that the plaintiff should be denied all relief. Riffie paid only \$800 for the conveyance from the Osage Company. There was a mortgage upon the land, but he did not become personally responsible for its payment. He appears to have executed a deed to the property, but, as this was after the commencement of the action, it cannot affect the result. Guthrie would be entitled to have the title quieted in himself except for the fact that Riffie has suffered loss through his negligence and misplaced confidence. The extent to which Guthrie's right is thus qualified is measured by the amount of the loss. The principle upon which Riffie is protected does not require that he shall enjoy the full fruits of his bargain with the Osage Company,—merely that he shall be saved from actual loss. This result will be accomplished if he is paid \$800 and interest. Guthrie should have an opportunity to make that payment, and thereupon to have his title quieted. If he elects not to do so, or fails to do so within a time to be fixed by the trial court, judgment should be rendered for Riffie.

The judgment is reversed and the cause remanded for proceedings in accordance herewith.

All the Justices concur.

## OREGON SUPREME COURT.

FRANK KIERNAN, Appt.,

v.

CITY OF PORTLAND et al., Respts.

(57 Or. 454, 111 Pac. 379.)

**Voters — submission of amendment — filing proposal.**

1. The validity of the submission to the 37 L.R.A. (N.S.)

voters of a proposed charter amendment cannot be destroyed because the proposal for it was filed with the city auditor in his capacity as clerk of the common council rather than as clerk of the city, where the ordinance authorizing the proceeding required the proposal to be filed merely with the auditor.

**Municipal corporation — ordinance — repeal — effect of amendments.**

2. The repeal of an ordinance as amended, which provides for the submission of a question to the voters on a certain date, carries with it an amendment requiring its submission on another date.

**Same — ordinance — submitting question to voters — time of passage.**

3. A resolution fixing the date when a proposition shall be submitted to the voters of the city may be passed before the expiration of the period which must elapse before a prior ordinance repealing a proposition to submit at another date can take effect.

**Statute — initiative measure — title.**

4. A title may be affixed to an initiative measure for purposes of identification, although the law does not in terms require it.

**Voters — clerical mistake — effect on election.**

5. A vote of the electors amending the city charter will not be void because of a clerical failure to print on the ballot the fact that the amendment was submitted by the council, although the ordinance under which the submission was made required it to be done.

**Same — preparation of ballots — variance from voters' pamphlet.**

6. A vote upon the question of the adoption by the electors of a charter amendment will not be void because the squares to be crossed in the ballot were not numbered in the same order as in the voters' pamphlet of instructions, where the words "yes" and "no" were plainly printed opposite the squares on the ballots, so that no one could have been misled.

**Same — charter amendment — invalid provision.**

7. The adoption by the voters of a city of a charter amendment authorizing the building of a bridge is not rendered void by the insertion of an invalid provision

**Note.**—A writ of error in this case was dismissed by the United States Supreme Court (*Kiernan v. Portland*, 223 U. S. 151, 56 L. ed. —, 32 Sup. Ct. Rep. 231) upon the ground that the existence of the republican form of government was a congressional, and not a judicial, question, following the decision to the same effect in *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. —, 32 Sup. Ct. Rep. 224,—and that the question whether the statute was in violation of the state Constitution was not a Federal question. The initiative and referendum are considered in the notes to *Ex parte Pfahler*, 11 L.R.A. (N.S.) 1092, and *Ex parte Farnsworth*, 33 L.R.A. (N.S.) 969, and notes thereto.

that it be turned over to the county when completed.

**Bridge — right to enjoin erection — failure to secure permission.**

8. A taxpayer cannot enjoin the construction of a bridge by the city on the ground that it will cross navigable waters of the United States, and that no permission from it or from the state corporation having control of the port has been secured.

**Ports — state control — interference with municipal bridges.**

9. The creation of a corporation to control a river for the purpose of facilitating and protecting commerce does not give it power to interfere with the construction by a municipal corporation of a bridge across the river, where its charter empowers it to construct bridges, and it has constitutional power to amend its charter in local matters by adopting any provision asserting a right which the legislature might have conferred upon it.

**Municipal corporation — legislative control.**

On Petition for Rehearing.

10. The legislature may enact general laws governing municipal corporations under constitutional provisions that corporations may be formed under general laws, and that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town.

**Government — republican form — initiative.**

11. A republican form of government is not destroyed by taking from the legislature and committing directly to the people the power over the enactment of certain kinds of legislation.

**Municipal corporation — freedom from legislative control.**

12. The people may confer upon the voters of a municipal corporation the right to enact local laws which cannot be affected by special acts of the legislature, so long as the legislature is not prevented from controlling them by general enactments.

(November 1, 1910.)

**A** PPEAL by complainant from a decree of the Circuit Court for Multnomah County in defendants' favor in a suit brought to enjoin the issuance and sale of municipal bonds for the construction of a bridge. Affirmed.

Statement by McBride, J.:

This is a suit by Frank Kiernan against the city of Portland, a municipal corporation, Joseph Simon, mayor of the city of Portland, A. L. Barbur, auditor of the city of Portland, and Joseph Buchtel.

Article 5, §§ 75 to 92, inclusive, of the city charter, provides the method by which the city of Portland may construct or ac-

quire public utilities, including bridges, but prohibits the city from entering into any contract for such purpose until the question is first submitted to the vote of the electors.

On April 7, 1908, an initiative petition, containing the required number of signatures, was filed with the council, requesting the city to build a bridge across the Willamette river, from Broadway street in East Portland to the west side of the river, whereupon the city of Portland took steps to obtain plans and specifications for building said bridge. On May 8, 1908, the auditor notified the mayor of the filing of said petition, and requested him to comply with his duties under the charter in regard thereto. On October 20, 1908, the petition, containing a sufficient number of signatures, was presented to the council at a legally called meeting, and at said date the council requested the opinion of the city attorney as to the validity thereof. On October 27, 1908, the attorney filed his opinion, affirming its validity, and thereafter, on November 11, 1908, the council passed an ordinance (No. 18,531) submitting to a vote of the people an amendment to the city charter, providing for the construction of said bridge and for issuing bonds in the sum of not to exceed \$2,000,000 to pay for the same, designating said proposed amendment as § 118½ of article 7 of chapter 3, and on November 25, 1908, the council passed a resolution, submitting the proposed amendment to a vote of the people at a special election on April 23, 1909. Thereafter, on February 17, 1909, the council passed an ordinance (No. 18,976) amending ordinance No. 18,531 so as to fix the date of the election on May 8, 1909, instead of April 23d, as originally specified. On March 31, 1909, the council passed an ordinance (No. 19,174) expressly repealing ordinance No. 18,531 as amended, and no special election was held under any ordinance or resolution. On March 31, 1909, the same date as that of the repealing ordinance, a resolution was passed authorizing the submission of the charter amendment to a vote of the people at the general election to be held June 7, 1909. More than twenty days prior to the election, the auditor of the city published the proposed charter amendment, with the ballot in full, in the city's official newspaper, as required by law, and also sent out and distributed copies of said amendment to the voters of the city. On June 7th the election was held, at which there were cast for the amendment 10,087 votes, and against it 6,061, and on June 21st the mayor proclaimed that the amendment had been adopted. On October 27, 1909, the council passed an ordinance (No.

20,208) authorizing the issue and sale of bonds to build the bridge, and thereafter plaintiff, a taxpayer of the city, brought this suit to enjoin the sale of such bonds, alleging ordinance No. 20,208 to be void, by reason of the fact that the alleged charter amendment § 118½ was not properly enacted. Upon trial in the court below the plaintiff's suit was dismissed, and defendant had a decree for costs. Plaintiff appeals.

**Mr. Ralph R. Duniway**, for appellant: Municipalities cannot issue bonds unless the power to do so is conferred by legislative authority, express or implied.

28 Cyc. 1575; 21 Am. & Eng. Enc. Law, 2d ed. 45, 70; Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; Klamath Falls v. Sachs, 35 Or. 325, 76 Am. St. Rep. 501, 57 Pac. 329.

When a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative; *viz.*, that the thing shall not be done otherwise.

19 Cyc. 26; Scott v. Ford, 52 Or. 296, 96 Pac. 99.

The only way the electors of a municipality and the council can amend the charter is to proceed in the mode and manner set forth in the law.

28 Cyc. 242-244, 1547-1549; State v. Langworthy, 55 Or. 303, 104 Pac. 424, 106 Pac. 336; Murphy v. San Luis Obispo, 119 Cal. 624, 39 L.R.A. 444, 51 Pac. 1085; San Luis Obispo v. Fitzgerald, 126 Cal. 279, 58 Pac. 699.

The proceeding to amend the charter of the city of Portland is a special proceeding and a special election, and notice must be given and the steps taken in the mode and manner provided by the law.

Guernsey v. McHaley, 52 Or. 555, 98 Pac. 158; Marsden v. Harlocker, 48 Or. 90, 120 Am. St. Rep. 786, 85 Pac. 328; Roesch v. Henry, 54 Or. 230, 103 Pac. 439; State v. Langworthy, 55 Or. 303, 104 Pac. 424, 106 Pac. 336; Haines v. Forest Grove, 54 Or. 443, 103 Pac. 775; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Tukey v. Omaha, 54 Neb. 370, 69 Am. St. Rep. 711, 74 N. W. 613; Thomasville v. Thomasville Electric Light & Gas Co. 122 Ga. 399, 50 S. E. 169; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; Hansard v. Green (Hansard v. Harrington) 54 Wash. 161, 24 L.R.A.(N.S.) 1273, 132 Am. St. Rep. 1107, 103 Pac. 40; Aylmore v. Seattle, 48 Wash. 42, 92 Pac. 932; 28 Cyc. 242, 244, 1547-1549.

The attempted changes in the time for holding the election were invalid.  
57 L.R.A.(N.S.)

Long v. Portland, 53 Or. 92, 98 Pac. 149, 1111; State ex rel. Bradford v. Portland R. Light & P. Co. 56 Or. 32, 107 Pac. 958; Ardmore v. State, 24 Okla. 862, 104 Pac. 913; Jackson v. Shlomborg, 70 Miss. 47, 11 So. 721; Blanchard v. Hartwell, 131 Cal. 263, 63 Pac. 349.

No one can ascertain what the voters decided on in the election.

Tukey v. Omaha, 54 Neb. 370, 69 Am. St. Rep. 711, 74 N. W. 613; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374, 49 N. E. 335; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Thomasville v. Thomasville Electric Light & Gas Co. 122 Ga. 399, 50 S. E. 169; Dawson v. Dawson Waterworks Co. 106 Ga. 696, 32 S. E. 907; Skinner v. Santa Rosa, 107 Cal. 464, 29 L.R.A. 512, 40 Pac. 742; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; Hansard v. Green (Hansard v. Harrington) 54 Wash. 161, 24 L.R.A.(N.S.) 1273, 132 Am. St. Rep. 1107, 103 Pac. 40; Aylmore v. Seattle, 48 Wash. 42, 92 Pac. 932.

There is no "title" to a document to be submitted as an amendment to the charter of a city.

21 Am. & Eng. Enc. Law, 2d ed. 975; Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849; State v. Langworthy, 55 Or. 303, 104 Pac. 424, 106 Pac. 336; 2 Abbott, Mun. Corp. p. 1320, § 523; Ex parte Haskell, 112 Cal. 412, 32 L.R.A. 527, 44 Pac. 725; Ex parte Young, 154 Cal. 317, 22 L.R.A. 330, 97 Pac. 822.

Recording in the office is not equivalent to filing.

Chapin v. Kingsbury, 135 Mass. 580; Hilts v. Hilts, 43 Or. 164, 72 Pac. 697; Conant's Estate, 43 Or. 530, 73 Pac. 1018; Naylor v. Moody, 2 Blackf. 247; State ex rel. Morgan v. Lamm, 9 S. D. 418, 69 N. W. 592; Meridian Nat. Bank v. Hoyt & Bros. Co. 74 Miss. 221, 36 L.R.A. 796, 60 Am. St. Rep. 504, 21 So. 12.

What the law requires to be done for the information of the voters is mandatory, and cannot be disregarded and construed away by the courts.

Westville v. Stillwell, 24 Okla. 892, 105 Pac. 664; Rampendahl v. Crump, 24 Okla. 873, 105 Pac. 201; Oregon Transfer Co. v. Portland, 47 Or. 1, 81 Pac. 575, 82 Pac. 16; Bank of Columbia v. Portland, 41 Or. 1, 67 Pac. 1112; Roesch v. Henry, 54 Or. 230, 103 Pac. 439; Guernsey v. McHaley, 52 Or. 555, 98 Pac. 158; Marsden v. Harlocker, 48 Or. 90, 120 Am. St. Rep. 786, 85 Pac. 328; 21 Am. & Eng. Enc. Law, 2d ed. 45-70.

The ordinance is invalid, as it is an attempt to exercise the sovereign power of the state of Oregon.

Oregon v. Portland General Electric Co. 52 Or. 515, 95 Pac. 722, 98 Pac. 160; Co-

quille Mill & Mercantile Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735, 38 Or. 215, 62 Pac. 775; Hume v. Rogue River Packing Co. 51 Or. 237, 31 L.R.A.(N.S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; Montgomery v. Shaver, 40 Or. 250, 66 Pac. 923; Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Shively v. Bowlby, 152 U. S. 30, 38 L. ed. 342, 14 Sup. Ct. Rep. 548; Union Bridge Co. v. United States, 204 U. S. 365, 51 L. ed. 527, 27 Sup. Ct. Rep. 387; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Oregon v. Portland General Electric Co. 52 Or. 502, 95 Pac. 722, 98 Pac. 160; Hope Twp. v. Ludwick, 151 Mich. 498, 15 L.R.A.(N.S.) 1170, 115 N. W. 419, 14 A. & E. Ann. Cas. 287; St. Louis v. Myers, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; 15 Am. & Eng. Enc. Law, 2d ed. 357; Straw v. Harris, 54 Or. 424, 103 Pac. 777.

The electors of the city of Portland have undertaken to grant a franchise from the state to the city of Portland permanently to appropriate a part of the property of the state, to wit, the Williamette river,—which cannot be done.

Straw v. Harris, 54 Or. 424, 103 Pac. 777; Oregon v. Portland General Electric Co. 52 Or. 515, 95 Pac. 722, 98 Pac. 160; State ex rel. Reardon v. Scales, 21 Okla. 683, 97 Pac. 587; Coquille Mill & Mercantile Co. v. Johnson, 52 Or. 547, 132 Am. St. Rep. 716, 98 Pac. 132; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; Hume v. Rogue River Packing Co. 51 Or. 237, 31 L.R.A.(N.S.) 396, 131 Am. St. Rep. 732, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865; Cook v. Dendinger, 38 La. Ann. 261; Nelson v. Homer, 48 La. Ann. 258, 19 So. 271; State ex rel. Garner v. Missouri & K. Teleph. Co. 189 Mo. 83, 88 S. W. 41; Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923; State ex rel. Fawcett v. Superior Ct. (Fawcett v. Pritchard) 14 Wash. 604, 33 L.R.A. 674, 45 Pac. 23; State ex rel. Snell v. Warner, 4 Wash. 773, 17 L.R.A. 263, 31 Pac. 25; Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Re Cloherty, 2 Wash. 137, 27 Pac. 1064; Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; Hope Twp. v. Ludwick, 151 Mich. 498, 15 L.R.A.(N.S.) 1170, 115 N. W. 419, 14 A. & E. Ann. Cas. 287; 15 Am. & Eng. Enc. Law, 2d ed. 357; Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735.

The consent of the Congress of the United States must be obtained for the erection of this bridge.

Union Bridge Co. v. United States, 204 U. S. 365, 51 L. ed. 527, 27 Sup. Ct. Rep. 37 L.R.A.(N.S.)

367; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.

The power to tax must be given by the legislature of the state or the sovereign people of the state.

Oregon Const. art. 11, § 5; Straw v. Harris, 54 Or. 424, 103 Pac. 777; Corbett v. Portland, 31 Or. 407, 48 Pac. 428; McMinnville v. Howenstine, 56 Or. 451, 109 Pac. 81; State ex rel. Reardon v. Scales, 21 Okla. 683, 97 Pac. 587; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; State v. Haines, 35 Or. 379, 58 Pac. 39.

The power of the state cannot be invaded by an amendment to the charter of cities by electors of cities.

Cook v. Dendinger, 38 La. Ann. 261; Nelson v. Homer, 48 La. Ann. 258, 19 So. 271; State ex rel. Garner v. Missouri & K. Teleph. Co. 189 Mo. 83, 88 S. W. 41; Fragley v. Phelan, 126 Cal. 383, 58 Pac. 923; State ex rel. Reardon v. Scales, 21 Okla. 683, 97 Pac. 587; Straw v. Harris, 54 Or. 424, 103 Pac. 777; McMinnville v. Howenstine, 56 Or. 451, 109 Pac. 81; Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; Ewing v. Hoblitzelle, 85 Mo. 64; State ex rel. Fawcett v. Superior Ct. (Fawcett v. Pritchard) 14 Wash. 604, 33 L.R.A. 674, 45 Pac. 23; Re Cloherty, 2 Wash. 137, 27 Pac. 1064; Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Tacoma Gas & E. L. Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; Hase v. Seattle, 51 Wash. 174, 20 L.R.A.(N.S.) 938, 98 Pac. 370.

Messrs. Frank S. Grant and William C. Benbow, for respondents:

The courts will not consider any irregularity in the election unless there is fraud, or unless the voters have been misled in such numbers as to change the result of the election.

Grove v. Haskell, 24 Okla. 707, 104 Pac. 56; Roesch v. Henry, 54 Or. 230, 103 Pac. 439; Ardmore v. State, 24 Okla. 862, 104 Pac. 913; Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; Dill. Mun. Corp. § 187, note 3.

The irregularities in the procedure leading up to the election will not be investigated on collateral attack.

Torres v. Torrence County, 15 N. M. 703, 110 Pac. 581; Day v. Kent, 1 Or. 123; Warner v. Myers, 3 Or. 218; Stevens v. Carter, 27 Or. 553, 31 L.R.A. 342, 40 Pac. 1074; 12 Cyc. 377; 16 Am. & Eng. Enc. Law, 377; McWhirter v. Brainard, 5 Or. 426; Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208; Evansville, I. & C. Straight Line R. Co. v. Evansville, 15 Ind. 395; McCrary, Elections, § 351; Crouse v. State, 57 Md. 331; Ryan v. Varga, 37 Iowa, 78; Santa Barbara County v. Yates, 13 Cal. App. 44,



108 Pac. 726; *Morrill v. Morrill*, 20 Or. 96, 11 L.R.A. 155, 23 Am. St. Rep. 95, 25 Pac. 302; *Meinert v. Harder*, 39 Or. 609, 65 Pac. 1056; 2 Joyce, Inj. § 1203; *School Dist. No. 116 v. Wolf*, 78 Kan. 805, 20 L.R.A. (N.S.) 358, 98 Pac. 237; *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667; *State ex rel. Atty. Gen. v. Johnson*, 35 Fla. 2, 31 L.R.A. 357, 16 So. 786; *Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714.

There was power to pass the provision.

*Kaddery v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153; *Farrell v. Columbia*, 50 Or. 169, 91 Pac. 546, 93 Pac. 254; *Stevens v. Benson*, 50 Or. 269, 91 Pac. 577; *Palmer v. Benson*, 50 Or. 277, 91 Pac. 579; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Hall v. Dunn*, 52 Or. 475, 25 L.R.A. (N.S.) 193, 97 Pac. 811; *Eugene v. Willamette Valley Co.* 52 Or. 490, 97 Pac. 817; *Long v. Portland*, 53 Or. 92, 98 Pac. 148, 98 Pac. 1111; *State v. Pacific States Teleph. & Teleg. Co.* 53 Or. 162, 99 Pac. 427; *State v. Langworthy*, 55 Or. 303, 104 Pac. 424, 106 Pac. 336; *Haines v. Forest Grove*, 54 Or. 443, 103 Pac. 775; *State ex rel. Gibson v. Richardson*, 48 Or. 309, 8 L.R.A. (N.S.) 362, 85 Pac. 225; *Zelig v. Blue Point Oyster Co.* 54 Or. 543, 104 Pac. 193; *Murphy v. Salem*, 49 Or. 59, 87 Pac. 532; *Irving Real Estate Co. v. Portland*, 56 Or. 140, 107 Pac. 955; *Ex parte Wagner*, 21 Okla. 33, 95 Pac. 435, 18 A. & E. Ann. Cas. 197; *Hartig v. Seattle*, 53 Wash. 432, 102 Pac. 408; *Ardmore v. State*, 24 Okla. 862, 104 Pac. 913.

Where the bridge is entirely within the boundaries of a state, the municipality may build it.

*Union Bridge Co. v. United States*, 204 U. S. 365, 51 L. ed. 527, 27 Sup. Ct. Rep. 367; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 683, 27 L. ed. 445, 2 Sup. Ct. Rep. 185; *The Nonpareil*, 149 Fed. 523; *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Southern R. Co. v. Reeder*, 152 Ala. 227, 126 Am. St. Rep. 23, 44 So. 699; *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153.

No one but the United States government or the state government can raise the question of its validity.

*Kundinger v. Saginaw*, 132 Mich. 395, 93 N. W. 914; *Portland v. Montgomery*, 38 Or. 215, 62 Pac. 755; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Ft. Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Great v. Moak*, 94 N. Y. 115; *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294; *Adler v. Metropolitan Elev. R. Co.* 138 N. Y. 173, 33 N. E. 935; *Lansing v. Smith*, 8 Cow. 151; 57 L.R.A. (N.S.)

*Doolittle v. Broome County*, 18 N. Y. 155; *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 22 N. E. 564.

Messrs. **Charles W. Fulton**, **Martin L. Pipes**, and **Hayward H. Riddell** also for respondents.

**McBride, J.**, delivered the opinion of the court:

1. Viewed in the light of our Constitution and the ordinance of the city of Portland passed in pursuance thereof, the validity of § 118½ of the city charter seems clear. Article 11, § 2, of our Constitution, as amended June 4, 1906, is as follows: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. . . ." In *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153, we held this provision not to be self-executing, and that in the absence of the legislation to the contrary, the city council might, by ordinance, order an initiative measure to be submitted to the voters. Pursuant to this decision the city council on March 26, 1907, passed ordinance No. 16,311, commonly known as the "McNary ordinance," providing for the submission of initiative measures to the people, and, the present measure having been regularly before them, they passed ordinance No. 18,531, submitting the same and fixing the date for the election on April 23, 1909. Later, presumably in order to have such special election coincide with the general primary election, another ordinance was passed, amending the previous ordinance, and fixing the date on May 8, 1909. Still later, on March 31, 1909, some doubt having arisen as to the validity of the election on the date last mentioned, an ordinance repealing the original ordinance as amended, was passed, and at the same meeting a resolution was adopted submitting the amendment to the voters at the general election to be held June 7, 1909.

2. The McNary ordinance provides that initiative petitions for charter amendments shall be filed not later than the sixtieth day before the election at which they are to be voted on, and also provides that the council itself may submit proposed amendments without an initiative petition, but that the same shall be filed with the auditor not later than sixty days before the election. The evidence is clear, and is not denied, that the present measure was on file with the auditor from the time of the presentation of the initiative petition, and it would seem clear that whether we regard it as a measure initiated by petition, or as a measure proposed by the council, the requisites of the law as to filing have been

substantially complied with, and that the measure was entitled to go upon the ballot.

3. Counsel for plaintiff attempts to draw a distinction,—that the original filing was with the auditor acting in his capacity as clerk of the council, and not in his capacity as general auditor and clerk of the city,—but no such distinction is made in the law. No good reason exists for requiring several filings of the same paper with the same officer, simply because the duties of his office are divided into several departments. In fact, there is but one office, and one officer with one title, namely city auditor.

4. The contention that the repealing ordinance of March 31st did not repeal ordinance No. 18,976 is unsound. The ordinance last mentioned did not destroy ordinance No. 18,531, but merely amended it by changing a date from April 23d to May 8th. As amended it was in full force; and when, on March 31st, an ordinance was passed repealing it "as amended," the whole ordinance, including amendments, was wiped out, if not directly, at least by implication.

5. Nor does the fact that the repealing ordinance could not take effect for thirty days take away from the council the power to pass a resolution to submit the charter amendment to a vote at the June election. They had a right, and it was their duty, to provide for a contingency which, in the natural course of things, would arise upon the expiration of the thirty days. Laws predicated upon future contingencies are not unusual.

6. The contention that the resolution submitting the amendment to a popular vote is uncertain and does not identify the amendment cannot be upheld. We have carefully compared the amendment with the resolution, and are certain that any person capable of reading and understanding the English language would instantly identify them as related to the same subject-matter and to each other. While the law does not in terms require that an initiative measure shall have a title, it does not prohibit a title, and if one is affixed it may be used for the purposes of identification, and in the present case we think the amendment sufficiently identified, both by reference to the title and to the subject-matter.

The alleged differences between the description of the proposed bridge in the resolution and ballot title are too microscopic to have misled anyone.

7. Plaintiff also contends that the failure of the auditor to have the words "charter amendment submitted by the council" printed upon the ballot rendered the election void. It may be conceded that these words should have been printed upon the ballot,

and that the ordinance requiring this to be done is in a sense mandatory upon the officers charged with the duty of preparing the ballot; but it does not follow that a failure in this respect renders the election void. The omission could have misled nobody, as the important question for the voter to decide was not who introduced the measure, but what its real merits were. Courts should hesitate to disfranchise 10,000 voters because of the neglect of an officer to comply with a technical and comparatively unimportant provision of the law, unless it can be seen that the effect of such negligence might have been to change the result of the election. Following the doctrine above announced, courts have frequently held statutes containing provisions similar to the one invoked by plaintiff in this case, to be merely directory as to the voter. *Jones v. State*, 153 Ind. 440, 55 N. E. 229; *Patton v. Watkins*, 131 Ala. 387, 90 Am. St. Rep. 43, 31 So. 93; *Maxwell*, Interpretation of Statutes, 556, 557.

8. The same answer may be made to the contention that the transposition of the ballot numbers in the voters' pamphlet rendered the whole proceeding void. The law provides substantially that the affirmative shall be designated by the even numbers, and the negative by the odd; but in printing the ballot title in the voters' pamphlet the negative was placed after the even number and the affirmative after the odd. In all other respects the ballot title corresponds with that actually printed upon the ballot. Ordinarily this might be misleading, but in the present case could not possibly be so. We here give the ballot title, omitting that part descriptive of the measure:

Shall article 6 of chapter 3 of the charter of the city of Portland, be amended by inserting § 118½?

152 ☐ YES.

153 ☐ NO.

The words "Yes" and "No" were printed in large Roman type, showing much more conspicuously than the figures, and were the very things that indicated to the voter where to mark his ballot. The mistake misled nobody, and was immaterial.

9. It is also urged that the amendment is void because it provides that upon completion of the bridge the executive board shall surrender and deliver the possession thereof to the county court of Multnomah county. We agree with counsel that it is beyond the power of the city to impose the care and maintenance of a public bridge

upon Multnomah county without the county authorities shall consent thereto, and that so far as this clause of the amendment goes, beyond giving a mere permission to do so, it is void.

10. It does not follow, however, that the whole amendment is void merely because one clause, easily separable from the rest, is ineffective. *Simon v. Northup*, 27 Or. 487, 30 L.R.A. 171, 40 Pac. 560.

11. The contention that no permission has been obtained from the War Department is negated by the evidence; and, even if this were not so, the plaintiff does not stand in such a relation to the subject-matter as to be able to raise the question, which is one to be settled between the government authorities and the city.

12. The objection that no permission has been received from the port of Portland may be answered in the same way. *Kundinger v. Saginaw*, 132 Mich. 396, 93 N. W. 914.

13. In addition to this, we have been cited to no statute requiring the city to obtain the permission of the port of Portland before constructing bridges over the Willamette river. This corporation is authorized to remove obstructions, to deepen the channels, and generally to have control over the river for the purpose of facilitating and protecting commerce; but it may well be doubted whether this grant of power was ever intended to authorize it to act as sole judge as to when and where and how a great city shall erect bridges over a water way exclusively within its own limits. Section 76 of the charter of 1903 authorizes the city to acquire, construct, and maintain bridges and ferries, and this could have no application to any bridges or ferries except over the Willamette river. In the emergency clause to the same charter the necessity for constructing new bridges is enumerated. The power to construct bridges having been given, the next question is as to the manner of its exercise. The people of this state, by the constitutional amendment heretofore quoted, have seen fit to confer upon municipal corporations the right to enact their own charters; the only limitation upon that right being that such charters shall not conflict with the Constitution or the criminal laws of this state. We take it, therefore, that within the limits of the municipality, and for those purposes which are purely municipal, the city of Portland may include in its charter by amendment any provision or right that the legislature might have granted before the Constitution was so amended. This being so, there is fair ground for the contention that the city may, by amendment to its charter, obtain the right to locate a public bridge over the Willamette river at any

point where such river is exclusively within the municipal boundaries, which is the case here.

We find no error in the record, and the decree of the Circuit Court is affirmed.

**King, J., concurring:**

I concur in the conclusion reached by Mr. Justice McBride, and only wish to add that in my opinion there can be no doubt as to the power of the city of Portland to build bridges across the Willamette river without asking the consent of the corporation of the port of Portland.

The act of legislature of February 18, 1891 (Laws 1891, p. 791, § 2), as amended by act Feb. 18, 1899 (Laws 1899, p. 146, § 1), incorporating the port of Portland, contains the following grant of power: "The object, purpose, and occupation of said corporation . . . shall be to improve the Willamette river at the city of Portland, and the Willamette and Columbia rivers between said city and the sea, so that there shall be made and permanently maintained in said Willamette river at said city, from wharf line to wharf line, and in the Willamette and Columbia rivers between said city and the sea, a ship channel of such width at any and all points as it may deem necessary. . . . So far as is necessary, requisite, or convenient to carry out the said objects and purposes, the said corporation shall have the full control of said rivers at said city of Portland and between said city and the sea, so far as and to the full extent that this state can grant the same, and shall have full power to, from time to time, make such rules and regulations for the navigation thereof, or the placing of obstruction therein, as may be requisite, necessary, or convenient in the creation or maintenance of such channel. . . . Provided always that nothing herein contained shall be so construed as to permit the removal of bridges or other obstructions existing by virtue of grant by this state of express authority therefor. . . ." From the foregoing it will be observed that there is no express provision requiring the city of Portland to apply to the port of Portland for permission to build bridges at any point within the city's corporate limits. It is too well settled to require citation of authority for support that grants of state sovereignty are always to be strictly construed.

Again, an express reservation as to bridges existing by virtue of an express grant of the state is made in favor of the city in § 76 of the charter of Portland, authorizing the building of bridges and the maintenance of ferries. In addition to this, the constitutional amendment relating to municipal-

ities (pursuant to which § 118½ of the charter was adopted) delegates to cities all the sovereignty of the state within their municipal boundaries, so far as that species of sovereignty relates to matters of purely municipal concern. Such grants of legislative power, however, may be recalled by the authority conferring them (*Straw v. Harris*, 54 Or. 424, 103 Pac. 777), and this power of recall serves to prevent the abuse of the privileges delegated.

While the port of Portland is in many of its attributes a municipal corporation, it is one organized for a special purpose, and possessing limited powers, derived, not from the Constitution, but from an express legislative grant. To give to this grant the broad construction claimed by counsel would be to make the port of Portland virtually master of the city of Portland, responsible to no superior authority. I believe the legislature intended the port of Portland corporation to be the servant of the city of Portland and of the state at large, in the promotion of commerce and prosperity, and not the dictator thereof.

Running through all the amendments to the port of Portland act, as well as through the various acts amending the charter of the city of Portland, is an evident intent of the legislature to prevent the rights of the city from being subverted to the wishes of this auxiliary corporation. It follows, then, that the city of Portland, having adopted appropriate amendments to its charter therefor, is acting within the scope of its authority, and is not required to obtain the consent of the port of Portland before constructing the bridge in question.

**Affirmed.**

A petition for rehearing having been filed, *King, J.*, on December 31, 1910, handed down the following additional opinion (57 Or. 466, 112 Pac. 402):

14. The principal point suggested by the petition for rehearing is the contention that the people of Oregon have no power, by constitutional provision or otherwise, to deprive the legislature of the sovereign power to enact, amend, or repeal any charter or act of incorporation for any city or town, and any attempt so to do is void. The constitutional provisions amending article 11, adopted in June, 1906, known as the "Charter Amendments," are as follows:

"Section 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the re-

mainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than 10 per cent of the legal voters may be required to order the referendum, nor more than 15 per cent to propose any measure, by the initiative, in any city or town.

"Sec. 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of Oregon."

It will be observed from the first sentence in § 2 that no restriction is placed upon the legislature with respect to the enactment of general laws; the exception being that no special laws creating or affecting the municipalities shall be enacted by the legislature. Under all the rules of construction, this exception reserves to the legislative department the right, whether by the people directly, through the initiative, or indirectly, through the legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws.

In *Farrell v. Portland*, 52 Or. 582, 586, 98 Pac. 145, it is held that the initiative amendments to the Constitution, bearing upon the creation and government of municipalities, including § 1 of article 11, must be construed together. In considering the effect of § 2, art. 11, it is there said: "But this section and the language used in it should not be construed alone. It is a part of the general initiative and referendum scheme first inaugurated by the amendment of 1902, and subsequently enlarged and extended by the amendments of 1906. All these amendments, so far as they refer to the same subject-matter, should be read together, and be so interpreted as to carry out the purpose of the people in adopting them, regardless of the technical construction of some of the language used." Since the above is the rule regarding the various amendments taken as a whole, much strong-

er must be the reason for reading and construing together all the sentences in the one section, from which it is obvious that the only restriction placed upon the legislature by § 2 pertains to the passage of special laws affecting municipalities. These agencies of the state are thereby enabled to enact such local measures, to revise existing local laws, and to exercise their powers affecting them, and thus carry out their general scope and purpose, so long as they are not inconsistent with the Constitution of the state, or of the United States, and are in harmony with all the special laws and general laws of the state, constitutionally enacted. *Straw v. Harris*, 54 Or. 424, 433, 103 Pac. 777. The language following the above excerpt from page 587 of 52 Or. of the opinion in *Farrell v. Portland*, concerning the limitations placed by the amendment upon the legislature, must be interpreted in the light of the questions there under consideration, from which it is manifest reference was had only to special laws affecting municipalities. The so-called "general initiative and referendum scheme," there alluded to, and whether it is in violation of this provision of the Federal Constitution, is fully considered and determined, adversely to petitioner's contention in *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, and *State v. Pacific States Teleph. & Teleg. Co.* 53 Or. 163, 90 Pac. 427, and there held to be not in conflict or inconsistent therewith. Other cases impliedly if not expressly sustaining this position are: *Farrell v. Portland* and *Straw v. Harris*, *supra*; *Haines v. Forest Grove*, 54 Or. 443, 103 Pac. 775; *State v. Langworthy*, 55 Or. 303, 104 Pac. 424, 106 Pac. 336.

15. The question, however, as to whether the people may, by constitutional amendment, reserve to themselves the right to enact any law to the exclusion of the legislature, and, by such method, delegate to municipalities powers not subject to abridgment, change, limitation, or recall by special acts of the legislative assembly, was not directly involved in any of the cases above cited. It would seem, however, that the views and conclusions reached in the decisions named necessarily dispose of this feature, but since counsel for petitioner insists that such disposal has not been made, and presents his contention in good faith, we will, at the possible expense of repetition of views announced in the above cases, consider the points thus presented. To begin, article 4, § 4, U. S. Const. reads: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the

legislature, or of the executive (when the legislature cannot be convened), against domestic violence." In *Luther v. Borden*, 7 How. 1, 48, 12 L. ed. 581, 601, the court observes: "Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department. The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence. Under this article of the Constitution, it rests with Congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See also *Cooley*, Const. Lim. 6th ed. pp. 42, 45; *Texas v. White*, 7 Wall. 700, 730, 19 L. ed. 227, 239; *Taylor v. Beckham*, 178 U. S. 548; 44 L. ed. 1187, 20 Sup. Ct. Rep. 1009, and 6 Mich. Law Rev. 304, where authorities sustaining the above view are collated. We have an illustration of the principles announced in *Luther v. Borden* in the admission of Oklahoma as a state. Before its statehood was recognized, Oklahoma had adopted, as a part of its Constitution, the initiative and referendum lawmaking system, patterned after the Oregon plan, regardless of which its senators and representatives were "admitted into the councils of the Union," and "the authority of the government under which they were appointed, as well as its republican character, is recognized by the proper constitutional authority;" thus determining that state, with its comparatively new legislative system, to be republican in form. This recent historical precedent should in itself be adequate to set at rest the temporarily mooted question in hand.

This court, however, has heretofore taken jurisdiction of cases of this character (*Kad-*

derly v. Portland, *supra*, State v. Cochran, 55 Or. 170, 105 Pac. 884), and, owing to the importance of the points presented, we will proceed to a consideration thereof. To ascertain whether taking from the legislature and delegating to the municipalities, or to the localities affected, local self-government, or a right to enact, maintain, and alter their charters as the legislature formerly did, and whether the taking from the legislature the right to make special laws upon the subject violates this provision of the national Constitution, makes it important that we first ascertain what is meant by a republican form of government. It is an expression which all assume to understand, yet, judging from the many unsuccessful attempts of eminent statesmen and writers to give it a clear meaning, it would seem the phrase is not susceptible to being given a precise definition. Especially is this true when sought to be applied to the Constitution of different states, concerning which Mr. James Madison, a member of the Constitutional Convention, said: "... If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period or during good behavior. It is essential to such a government that it be derived from the great body of society, and not from any inconsiderable proportion or a favored class of it. . . ." The Federalist, Hamilton ed. paper 39, p. 174. Another and more pointed definition appears in Chisholm v. Georgia, 2 Dall. 419, 457, 1 L. ed. 440, 456, by Mr. Justice Wilson, a member of the Constitutional Convention, who, but a short time after the adoption of the Federal Constitution, in adverting to what is meant by a republican form of government, remarked: "As a citizen, I know the government of that state [Georgia] to be republican, and my short definition of such a government is—one constructed on this principle—that the supreme power resides in the body of the people." From which it follows that the converse must be true; that is to say, any government in which the supreme power does not reside with the people is not republican in form. See also Mr. Justice Wilson's remarks to the same effect, reported in 5 Elliot's Debates, 160.

Measured in the light of the above, it is difficult to conceive of any system of law-making coming nearer to the great body of the people of the entire state, or by those comprising the various municipalities, than

that now in use here, and, being so, we are at a loss to understand how the adoption and use of this system can be held a departure from a republican form of government. It was to escape the oppression resulting from governments controlled by the select few, so often ruling under the assumption that "might makes right," that gave birth to republics. Monarchical rulers refuse to recognize their accountability to the people governed by them. In a republic the converse is the rule. The tenure of office may be for a short or a long period, or even for life, yet those in office are at all times answerable, either directly or indirectly, to the people, and in proportion to their responsibility to those for whom they may be the public agents, and the nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic,—not in name alone, but in fact. From this it follows that each republic may differ in its political system or in the political machinery by which it moves, but, so long as the ultimate control of its officials and affairs of state remain in its citizens, it will, in the eye of all republics, be recognized as a government of that class. Of this we have many examples in Central and South America. It becomes, then, a matter of degree; and the fear manifested by the briefs filed in this case would seem to indicate, not that we are drifting from the secure moorings of a public, but that our state, by the direct system of legislation complained of, is becoming too democratic,—advancing too rapidly towards a republic pure in form. This, it is true, counsel for petitioner does not concede, but under any interpretation of which the term is capable, or from any view thus far found expressed in the writings of the prominent statesmen who were members of the Constitutional Convention, or who figured in the early upbuilding of the nation, it follows that the system here assailed brings us nearer to a state republican in form than before its adoption. Mr. Thomas Jefferson, in 1816, when discussing the term "republic," defined and illustrated his view thereof as follows: "Indeed, it must be acknowledged that the term 'republic' is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly, and not personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its

composition more or less of this ingredient of the direct action of the citizens." Writings of Thomas Jefferson, vol. 15, p. 19. It is well known that at the time of the adoption of the Federal Constitution there existed in some of the Atlantic states a system of local government, known as "New England towns," in which the people had the right to legislate upon various matters, the masses assembling at stated periods for that purpose, all of which was within the knowledge of those composing the Constitutional Convention. After observing that a true republic, under his definition, would necessarily be restrained to narrow limits, such as in a New England township, and that the next step in use at that time was through the representative system, Mr. Jefferson pointed out that the further the officials of state or nation are separated from the masses, proportionately less does such state or government retain the elements of a republic; and on page 23 concludes: "On this view of the import of the term 'republic,' instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning that governments are more or less republican, as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of citizens is the safest depository of their own rights, and especially, that the evils flowing from the auperies of the people are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient." The observations quoted are in full accord with the recorded views of all the writers and statesmen of that time, when the intention of the framers of our national Constitution was fully understood, in the light of which it seems inconceivable that a state, merely because it may evolve a system by which its citizens become a branch of its legislative department, co-ordinate with their representatives in the legislature, loses caste as a republic. The extent to which a legislature of any state may enact laws is, and always has been, one of degree, depending upon the limitations prescribed by its Constitution; some Constitutions having few and others many limitations. But in all states, whatever may be the restriction placed upon their representatives, the people, either by constitutional amendment or by convention called for that purpose, have had, and have, the power to directly legislate, and to change all or any laws so far as deemed proper,—limited only by clear inhibitions of the national Constitution. Cooley, Const. Lim. 6th ed 44.

16. An examination of our state Consti-

tution, as first adopted, discloses many restrictions upon the lawmaking department, among which is a provision to the effect that no amendment thereto should be submitted to the people for ratification until after it passed two consecutive sessions of the legislature. In course of time, an amendment under this provision was legally submitted and adopted by a majority vote of the people, by which the people reserved the right to change the Constitution or any part thereof without awaiting this legislative formality, the validity of which is not open to doubt. Is it not possible, indeed, is it not practicable, then, for the people further to restrict the power of their representatives to legislate upon matters of public interest, and in so doing are they not, and even under the old system were they not, directly legislating? This system of direct legislation has been in common use throughout the various state governments since their inception; but until the adoption of the initiative and referendum amendments no one was heard to assert that an amendment to the Constitution of a state, merely because of depriving the legislature of some lawmaking power or powers held by it at the adoption of the national Constitution, was void on the grounds of being inconsistent with a republican form of government. The absurdity of such a contention, if made, would at once be obvious. But, viewed from any standpoint, such is the logical sequence of appellant's contention to the effect, that because the people have, by constitutional amendment, reserved the exclusive right to enact special laws concerning municipalities, and by constitutional amendment have delegated to municipal corporations the right to exercise such powers as before were only within the province of their representatives, through the legislature, to delegate, violates the provision of the Federal Constitution, guarantying to our state a republican form of government. In other words, it is argued that the right of the city of Portland to legislate upon matters of municipal concern, to provide for the exercise of its right of eminent domain, to build bridges, etc., would be in harmony with the above provision of the Federal Constitution if delegated by the people through their representatives, but not so if done directly by them through the initiative. In brief, the effect of this argument is that the people may legally do indirectly, by the mere enactment of a law, what they cannot do directly by constitutional amendment. The statement of this contention should be sufficient for its answer.

We held in *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, that a state could not, by

amendment of its fundamental laws or otherwise, except in the manner provided in § 3, art. 4, U. S. Const. delegate to any municipality or subdivision of the state prerogatives not subject to recall; that, so to do would, in effect, be the creation of a state within a state; and that, so long as the legislature is not precluded by the Constitution from enacting general laws affecting them, it may by that method amend, modify, or even abolish municipal corporations, and that even should this power be removed from the legislature there must remain with the people a right to do so, if not by enacting a law to that effect, then by the former system of direct legislation, consisting in the adoption of amendments to the Constitution, known as the fundamental laws of the state, and that this right of state government to retain control of these agencies and departments of state cannot be surrendered, but must always remain somewhere within the reach of that source of all power,—the people. We held, and still hold, to this view, not on the ground that to hold otherwise would be destructive of a republican form of government, but because to do so would in effect permit a state within a state, and accordingly violate § 3, art. 4, of the Federal Constitution, the first paragraph of which reads: "New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress." Suppose our lawmaking department should pass an *ex post facto* act, or a bill of attainder, such purported laws would be void, not because of being subversive of a republican form of government, but by reason of some express inhibition against legislation of that character, contained in another section of the Federal Constitution. If the national Constitution permitted or provided for the creation of a state within a state, could it be said that, by reason thereof, the state thus created would be unrepresentative in form? Under § 3 of article 4, above quoted, states may be divided and new ones created, the limitation being that no state shall be created within a state, but the creation of new states under that section has never been considered an unrepresentative step. Should our state attempt to surrender its powers to an executive for life, with the provision that upon his death his authority should pass by entailed inheritance to his son or other relative, and at the same time, by constitutional change or otherwise, further surrender any right to alter the system, ex-

37 L.R.A. (N.S.)

cept with the consent of such executive, it would lose its republican form, and in effect become a local monarchy within the Union, thereby furnishing an example of a violation of § 4, art. 4, of the Federal Constitution. But, so long as the people retain the power within themselves to conduct and manage the affairs of state,—either directly or indirectly,—a republican form of government is maintained, and comes within the provision of the Federal Constitution guaranteeing the same, being circumscribed in its powers only by the provisions of such Constitution. The effect of petitioner's contention is that any attempt on the part of the state to enact and enforce a law which may be in conflict with any provision of the national Constitution is not void because in conflict or inconsistent with the special provision violated, but because it deprives the state of its republican form of government; and this seems to be the character of reasoning adopted by the majority in *People ex rel. Atty. Gen. v. Johnson*, 34 Colo. 143, 86 Pac. 233, to which we are cited as sustaining petitioner's view. In that case the question was whether the consolidation of the city and county of Denver, the boundaries of which were made coterminous, abolished the city government, as distinguished from county government, thereby giving to such organization home rule to the extent of permitting it to do as the constitutional amendment of 1902 provided might be done,—enact all local laws, and elect such officers at such times as deemed advisable, concerning which it was held by the majority that the city and county governments, although covering the same territory, remained separate and distinct, requiring different officers to be selected for each, and in a different manner, as before the change. The reason for the conclusion appears to be on account of other provisions in the Constitution of Colorado, the majority not recognizing the rule invoked without exception in all other jurisdictions, including ours, that Constitutions with amendments must be construed as a whole, and that when two constructions are possible, one of which takes away the meaning of a section, and another giving effect to all the provisions, the latter must prevail. *State v. Cochran*, 55 Or. 170, 105 Pac. 884; *Farrell v. Portland*, 52 Or. 582, 98 Pac. 145. In an able and exhaustive dissenting opinion in that case by Mr. Justice Steele, concurred in by Mr. Justice Gunter, it is made clear that a Federal question (such as here presented) was not involved; that the 1902 amendment of Colorado's Constitution was not inconsistent with § 4, art. 4, of the Federal Constitution. After demonstrating that the



conclusion announced by the majority "overlooks the fundamental rule in the construction of Constitutions and statutes that a special provision controls the general one, and that both may stand" (People ex rel. Atty. Gen. v. Johnson, 34 Colo. 189, 193, 86 Pac. 233, 249), at the close of his opinion (page 193) it is observed: "Wherever the question has been presented, the courts have given effect to the wishes of the people and sustained the power to establish the form of government here provided, as not being in violation of the Federal Constitution, and not in excess of the powers of the people to so provide in their organic law. And it is to be regretted that this court felt in duty bound to undo the work of the charter convention, and to deny the people of this city and county the right to provide for a simple and economical plan of government, as directed by the Constitution." Our holding is that the state may, by constitutional provisions, directly delegate to municipalities any powers which it, through the legislature, could formerly have granted indirectly. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway bridge, formerly could have been granted by the legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the lawmaking department of our state, provision for which may be made by the legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject. Cooley, Const. Lim. 6th ed. 41, 45; Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536; Re Pfahler, 150 Cal. 71, 11 L.R.A.(N.S.) 1092, 88 Pac. 270, 11 A. & E. Ann. Cas. 911; Ex parte Wagner, 21 Okla. 33, 95 Pac. 435; State ex rel. Kansas City v. Field, 99 Mo. 352, 12 S. W. 802; Kansas City v. Marsh Oil Co. 140 Mo. 458, 41 S. W. 943; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; State v. Pacific States Teleph. & Teleg. Co. 53 Or. 103, 90 Pac. 427; Straw v. Harris, 54 Or. 424, 103 Pac. 777; McMinnville v. Howne-stine, 56 Or. 451, 109 Pac. 81.

17. In a public address prepared by Hon. Frederick V. Holman, attached to and filed as an appendix to petitioner's brief, it is argued that under our previous holding in Hall v. Dunn, 52 Or. 475, 25 L.R.A.(N.S.) 193, 97 Pac. 811, and Straw v. Harris, 54 Or. 424, 103 Pac. 777, to the effect that we have but one lawmaking department, composed of two separate and distinct law-

making bodies,—(1) the people, acting directly through the initiative; and (2) the people, acting indirectly through the legislature,—either of them in a manner provided by law may undo the work of the other, and necessarily must lead to disastrous results, etc., in that an act passed by the first may, immediately on the convening of the legislature, be repealed, and one enacted by the legislative assembly may also be rescinded through either the initiative or the referendum. But that objection applies only to the question of expediency, with regard to which the lawmakers, and not the courts, are concerned. It might not be inappropriate, however, to observe that the same objection may with equal force apply to all legislative bodies. Our legislature to convene next week can, if it so chooses, repeal all the laws (not included in constitutional amendments) enacted at the recent November election, and also undo the work of the last legislative assembly. Again, two years later or earlier a special session of the legislature might be called, and enact many laws, and the day following its adjournment the newly elected Legislature could be convened and repeal all the laws going into effect the preceding day. The same may also be said of Congress, but this is seldom, if ever, urged as an argument against a representative system, or alluded to as indicating that our government is becoming unrepresentative in form. In the appendix mentioned, it is observed that under our system, as interpreted by this court, we have four legislative bodies in place of two: (1) The legislature; (2) the people of the whole state; (3) the people of a municipality; (4) the common council or commissioners. This suggestion, however, overlooks the fact that in the above-cited cases advertence was made only to legal departments of the state, and not to municipal or other minor and quasi legislative bodies. The fallacy of this illustration (like many others to which our attention is directed, and which will not be specifically discussed) is obvious. The observation to the effect that under the interpretation given by this court to the charter amendments cities may invade the domain of state legislation to the extent, if desired, of condemning state property (such as capitol buildings, etc.), has no justification, either in the language of the charter amendments, or in anything said in any opinion of this court in interpreting such amendments. Many of the statements in our former opinions bearing upon points here presented are adverted to as *dictum*, and like contention is also made respecting our holding in the case at hand, to the effect that it is unnecessary to obtain the

consent of the port of Portland before the bridge in question may be constructed. The points decided, determining the status of the port of Portland in the matter, were all forcibly presented in the briefs and at the oral argument, and the effect of the conclusion reached by this court was that, taking either horn of the dilemma, appellant's position is untenable. It cannot, therefore, be said that our views upon either point are *dicta*, and the same may be remarked of much, if not all, of the numerous like references to previous adjudications by this court (as in *Straw v. Harris* and other cases) in which the views alluded to as *dicta* hold adversely to the wishes and contention of the writers of petitioner's brief and the appendix thereto. On what is *dicta*, and the effect thereof, see *Kirby v. Boyette*, 118 N. C. 244, 254, 24 S. E. 18; *Buchner v. Chicago, M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56; *Kane v. McCown*, 55 Mo. 181; *Ocean Beach Asso. v. Brinley*, 34 N. J. Eq. 438; 26 Am. & Eng. Enc. Law, (2d ed.) 165, 171; *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 143, 26 L. ed. 327, 336. The terms "*obiter dicta*," "*dictum*," etc., like the phrase "technicalities of the law," are too often invoked by counsel to express disapprobation of some proposition of law militating against their contention.

Numerous other points are presented upon which the views of this court are requested. Some of them, however, were disposed of in our former opinions herein, to which we still adhere, and those remaining, even though not specifically adverted to, are included in the above considerations. The petition for rehearing is denied.

Writ of error dismissed by the Supreme Court of the United States, February 19, 1912.

#### MISSISSIPPI SUPREME COURT.

ALBERT BROWN, Appt.,

v.

STATE OF MISSISSIPPI.

(— Miss. —, 55 So. 961.)

**Evidence — extra-judicial confession of stranger.**

An extra-judicial confession not under

**Note. — Admissibility in behalf of accused of extra-judicial confession of stranger.**

Of course, it is not intended to go exhaustively into the question of the admissibility, in behalf of an accused person, of evidence as to the acts and conduct of a third

oath, by a stranger who cannot be produced as a witness, is not admissible at the trial of an indictment for murder.

**Same — exclusion — error — cumulation.**

It is not error to refuse to permit a witness who has identified accused as one who committed a homicide to be asked on cross-examination if he was not present at the inquest, and if it was not true that no testimony about who did the shooting could be secured there, where it does not appear that the question called for more than cumulative evidence that he had made no disclosure at the inquest as to who did the deed.

(July 31, 1911.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Lee County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. Clayton, Mitchell, & Clayton, Boggan & Leake, and C. P. Long for appellant.

Mr. George T. Mitchell for the State.

McWillie, Special Judge, delivered the opinion of the court:

The appellant was indicted for the murder of Alonzo Addison, and, his previous conviction for manslaughter having been reversed (— Miss. —, 34 L.R.A. (N.S.) 811, 54 So. 305), he was again tried and convicted of the same offense, and from this second conviction the present appeal is prosecuted.

On the second trial the defense offered to prove that Henry Brown, a brother of the accused, who had never been indicted, stated to the sheriff and clancery clerk of the county that his brother had suffered long enough about the matter; that he was the man who slew the deceased; and that his brother was not present and had nothing to do with it in any way; that in pursuance of this confession he was taken in custody by the sheriff, and held a prisoner in the county jail for several months; that his confession and incarceration took place during the pendency of the former appeal herein; that before the reversal of judgment on that appeal, the grand jury having investigated the matter and failed to find an indictment against him, Henry Brown was discharged from custody, and was absent without the procurement of the

person for the purpose of fixing the crime upon the latter. And it is but consistent also to forego a discussion of the cases involving threats or declarations of a third person before the commission of the offense, which point to him as the perpetrator. In other words, it is not purposed to discuss cases like *Alexander v. United States*, 138

accused and his counsel, and his whereabouts were unknown to him and them; process for him as a witness for the accused having been returned "Not found." On the objection of the state, the court refused to admit the evidence, and its action in so doing is assigned for error.

It is well settled that testimony going to show confessions and admissions on the part of third persons made out of court is not admissible in exculpation of those on trial for crime. It is mere hearsay, and is excluded for this reason, although other reasons doubtless exist in the uncertainty to which it would subject all criminal proceedings. The following authorities clearly support this view: *Snow v. State*, 54 Ala. 138; *Snow v. State*, 58 Ala. 372;

*West v. State*, 76 Ala. 98; *Owensby v. State*, 82 Ala. 63, 2 So. 764; *Welsh v. State*, 96 Ala. 92, 11 So. 450; *Lyon v. State*, 22 Ga. 399; *Moughon v. State*, 57 Ga. 102; *Davis v. Com.* 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585; *State v. West*, 45 La. Ann. 928, 13 So. 173; *State v. Mitchell*, 107 La. 618, 31 So. 993; *State v. Evans*, 55 Mo. 460; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Hack*, 118 Mo. 92, 98, 99, 23 S. W. 1089; *Greenfield v. People*, 85 N. Y. 75, 86, 39 Am. Rep. 636, Id., 23 Hun. 454; *State v. White*, 68 N. C. 158; *State v. Gee*, 92 N. C. 756; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *Peck v. State*, 86 Tenn. 267, 6 S. W. 389; *Rhea v. State*, 10 Yerg. 258; *Horton v. State*, — Tex. Crim. Rep. —, 24 S. W.

U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350, holding that on a trial for murder, where it is shown that another person than the prisoner had armed himself, and was hunting for the deceased, under the belief that the latter had eloped with his wife, the threats of such other person against the deceased, and his declarations as to his purpose, are admissible as a part of the *res gestæ*. For another of numerous cases, which discusses this question rather fully, reference may be had to *State v. Beaudet*, 53 Conn. 542, 55 Am. Rep. 155, 4 Atl. 237, 7 Am. Crim. Rep. 84; and for a case which distinguishes the last one, and reaches a contrary result, it may be of interest to consult *State v. Hawley*, 63 Conn. 47, 27 Atl. 417.

And this note does not purport to include cases of bastardy suits or proceedings. For a single illustration of these, see *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450, holding that while one who, in a bastardy suit, is charged with being the father of the child, may be permitted to prove facts which tend to show that another is its father, he cannot introduce evidence of the other's declaration to that effect.

#### Generally.

While it is true that a person on trial for the commission of a crime may, in exculpation of himself, introduce direct evidence of acts and conduct of another, or of other concrete facts or circumstances, tending to fix the crime upon such other. (*Owensby v. State*, 82 Ala. 63, 2 So. 764; *Jones v. State*, 64 Ind. 475; *Green v. State*, 154 Ind. 655, 57 N. E. 637; *Com. v. Chabbock*, 1 Mass. 144; *State v. Haynes*, 71 N. C. 79; *State v. Davis*, 77 N. C. 483; *State v. Baxter*, 82 N. C. 602; *State v. Beverly*, 88 N. C. 632; *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *Stanley v. State*, 48 Tex. Crim. Rep. 537, 89 S. W. 643), the rule laid down by a line of decisions whose unanimity is as complete as the shock which they give the general sense of justice, that evidence of the confession or admission of a stranger that he is the perpetrator of the offense is not

admissible as a matter of substantive evidence for the purpose of exculpating the accused, where it is made neither under oath, subject to cross-examination, nor as part of what is indiscriminately denominated the *res gestæ*. *United States v. Miller*, 4 Cranch, C. C. 104, Fed. Cas. No. 15,773 (keeping gaming house); *United States v. McMahon*, 4 Cranch, C. C. 573, Fed. Cas. No. 15,699 (murder); *United States v. Mulholland*, 50 Fed. 415 (denying right of postmaster on trial for embezzlement of letter, to introduce evidence of admission by third person, since deceased, that he committed the offense); *Smith v. State*, 9 Ala. 990 (murder case); *Snow v. State*, 54 Ala. 138 (burglary); *Snow v. State*, 58 Ala. 372 (burglary); *West v. State*, 76 Ala. 98 (murder); *Owensby v. State*, 82 Ala. 63, 2 So. 764 (assault with intent to kill); *Welsh v. State*, 96 Ala. 92, 11 So. 450 (murder); *Way v. State*, 155 Ala. 52, 46 So. 273 (murder); *McDonald v. State*, 165 Ala. 85, 51 So. 629 (arson); *People v. Hall*, 94 Cal. 595, 30 Pac. 7 (burglary); *Mora v. People*, 19 Colo. 255, 35 Pac. 179 (murder); *Lyon v. State*, 22 Ga. 399 (assault with intent to murder); *Moughon v. State*, 57 Ga. 104 (involving prosecution for assault with intent to kill, and disclosing that the trial court rejected testimony of a third person that he did the shooting, and that the supreme court, while reversing the case, did so upon other grounds); *Daniel v. State*, 65 Ga. 199 (larceny); *Kelly v. State*, 82 Ga. 441, 9 S. E. 171 (burglary); *Delk v. State*, 99 Ga. 667, 26 S. E. 752 (murder); *Lowry v. State*, 100 Ga. 574, 28 S. E. 419 (murder); *Robison v. State*, 114 Ga. 445, 40 S. E. 253 (murder); *Perdue v. State*, 126 Ga. 112, 54 S. E. 820 (murder); *Kennedy v. State*, 9 Ga. App. 219, 70 S. E. 986 (bastardy); *Bonsall v. State*, 35 Ind. 460 (larceny); *Jones v. State*, 64 Ind. 475 (murder); *Siple v. State*, 154 Ind. 647, 67 N. E. 544 (murder); *Green v. State*, 154 Ind. 655, 57 N. E. 637 (murder); *State v. Smith*, 35 Kan. 618, 11 Pac. 908 (assault with intent to kill); *Davis v. Com.* 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585 (murder); *Selby v. Com.* 25 Ky. L. Rep. 2209, 80 S. W. 221 (murder); *Bacigaluپی v.*

28; *Bowen v. State*, 3 Tex. App. 623; *United States v. McMahon*, 4 Cranch, C. C. 573, Fed. Cas. No. 15,699; *United States v. Miller*, 4 Cranch, C. C. 104, Fed. Cas. No. 15,773.

Wigmore, in his learned work on Evidence, while admitting that the weight of authority sustains the rule as stated, condemns it as unsound and barbarous. 2 Wigmore, § 1476. In this he finds no support in the other text writers on the subject, nor in the legal encyclopedists, who perhaps had greater deference for the opinions of those learned judges who, daily witnessing the application of the law, refused to sacrifice its wholesome principles to untried theory. *Beat*, Ev. 3d Am. ed. p. 73; 2 *Rice*, *Crim. Ev.* p. 130, § 87; *Wharton*,

*Crim. Ev.* 9th ed. p. 176, § 225; 12 *Cyc.* p. 434. The learned author above named criticizes as "curious" and suggesting a "fantastic suspicion," the following language employed by the supreme court of Georgia in the case of *Lyon v. State*, 22 Ga. 399: "All one defendant would have to do would be to admit that his guilty accomplice was innocent, and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and, after his acquittal, appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person."

We are unable to concur in the author's estimate of the above reasoning. It com-

*Com.* 30 Ky. L. Rep. 1320, 101 S. W. 311 (murder); *State v. West*, 45 La. Ann. 14, 12 So. 7, subsequent appeal in 45 La. Ann. 928, 13 So. 173 (murder); *State v. Mitchell*, 107 La. 618, 31 So. 993 (murder); *State v. Jones*, 127 La. 694, 53 So. 959, (arson); *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414 (murder); *Com. v. Chabcock*, 1 Mass. 144 (burglary); *State v. Evans*, 55 Mo. 460 (arson); *State v. Duncan*, 116 Mo. 288, 22 S. W. 699 (murder); *State v. Hack*, 118 Mo. 92, 23 S. W. 1089 (larceny); *State v. Nicholson*, 56 Mo. App. 412 (maiming live stock); *Mays v. State*, 72 Neb. 723, 101 N. W. 979 (forgery); *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636 (murder); *State v. May*, 15 N. C. (4 Dev. L.) 332 (theft); *State v. Duncan*, 28 N. C. (6 Ired. L.) 236 (murder); *State v. White*, 68 N. C. 158 (larceny); *State v. Haynes*, 71 N. C. 79 (burglary); *State v. Bishop*, 73 N. C. 44, 1 Am. Crim. Rep. 594 (larceny); *State v. Baxter*, 82 N. C. 602 (larceny); *State v. Beverly*, 88 N. C. 632 (larceny); *State v. Fletcher*, 24 Or. 295, 33 Pac. 575 (murder); *Rhea v. State*, 10 Yerg. 258 (larceny); *Sible v. State*, 3 Heisk. 137 (theft); *Peck v. State*, 86 Tenn. 259, 6 S. W. 389 (murder); *Bowen v. State*, 3 Tex. App. 617 (murder); *Sharp v. State*, 6 Tex. App. 650 (murder); *Holt v. State*, 9 Tex. App. 571 (murder); *Horton v. State*, — Tex. Crim. Rep. —, 24 S. W. 28 (theft); *Hodge v. State*, — Tex. Crim. Rep. —, 64 S. W. 242 (murder); *State v. Totten*, 72 Vt. 73, 47 Atl. 105 (robbery); *State v. Hunter*, 18 Wash. 670, 52 Pac. 247 (assault with intent to commit rape, point indirectly involved). This result, in many cases, is reached by invoking the hearsay rule; and this rule may safely be said to be essentially the basic principle of the decisions which do not expressly invoke it.

The rule against the admission of such confessions is, in North Carolina, held to be especially applicable when the declarations, although consistent with the guilt of the declarant, are not inconsistent with the guilt of the accused. *State v. White*, 68 N. C. 158; *State v. Haynes*, 71 N. C. 79; *State v. Bishop*, 73 N. C. 44, 1 Am. Crim. Rep. 594; 37 L.R.A. (N.S.)

*State v. Baxter*, 82 N. C. 602. So in *Oddo v. State*, 152 Ala. 51, 44 So. 646, the court summarily states that on the trial of one accused of concealing stolen goods, the defendant could not introduce a statement of his wife to a third person, that she, and not the husband, bought and received the property, the court saying that this was wholly immaterial. It is not clear whether the court intended to place this upon the ground that the extra-judicial confession of a stranger is inadmissible in behalf of an accused, or upon the ground that since the defendant was charged with concealing or aiding in concealing, he might still be guilty of the concealment, notwithstanding that his wife bought and received the property.

When declarant jointly indicted with defendant.

One jointly indicted with others cannot, in his separate trial for the offense, prove a conversation between the others when they were alone, inculcating themselves, and exculpating him from all participation in the crime. *United States v. Douglass*, 2 Blatchf. 207, Fed. Cas. No. 14,989. So, it is held in the state courts that one cannot, upon his separate trial, introduce evidence to show that one jointly indicted with him has confessed or admitted that he, and not the defendant, committed the offense. *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *Lyon v. State*, 22 Ga. 399; *Kelly v. State*, 82 Ga. 441, 9 S. E. 171; *Delk v. State*, 99 Ga. 667, 26 S. E. 752; *Robison v. State*, 114 Ga. 445, 40 S. E. 253; *Siple v. State*, 3 Heisk. 137. And such a confession is not rendered admissible in behalf of the defendant merely because the person jointly indicted with him was tried and convicted before the latter's trial. *Siple v. State*, 154 Ind. 647, 57 N. E. 544.

#### *Res gesta.*

Where one of a number of persons assembled together is killed by a shot from a revolver, while its owner is, because of his drunken condition, being disarmed by a third person, the owner cannot, upon his trial

mends itself to this court as entirely sound, and, in view of the action of the grand jury in discrediting the confession, and refusing to return an indictment against the declarant on the strength of it, we have little doubt that the case in hand itself affords an illustration of such attempts to bring about a miscarriage of justice. The rule excluding such confessions itself suggests the reason why they have not been more frequently resorted to in behalf of the guilty. The confession in question was made out of court, was not supported by the oath of the party confessing, and the party was never subjected to cross-examination, which might very quickly have disclosed the falsity of the confession and the motive that prompted it. The law, in de-

termining what is hearsay, does not admit what a witness states some other person told him, any more than it admits what still another person may have imparted to the one next in the line of communication. It is all hearsay; and no just exception can be made because the party confessing has put himself in a position of some hazard. Many motives, apart from the love of truth and justice, induce men to assume the gravest risks. Among the strongest of these is family affection, and it is observable that in this case the property against which the trespass was directed was that of Henry Brown, and not his brother, the accused, and that in the confession proposed to be proved Henry Brown, while claiming to be the culprit,

for the killing of the deceased, introduce testimony of a physician that the person who attempted to disarm the defendant stated to him, the physician, when he came to get the latter to attend the deceased, that he had accidentally shot him. *Salby v. Com.* 25 Ky. L. Rep. 2209, 80 S. W. 221.

But one on trial for killing another during a fight in the dark may, as part of the *res gestæ*, introduce evidence of a declaration of a bystander made immediately after the fight, that he, the bystander, cut the accused in the back, where it appears that the accused received no such cut, but that the deceased did, and that death may have resulted therefrom. *Flanagan v. State*, 64 Ga. 52.

#### Confirmation of direct testimony.

It was stated in *Stanley v. State*, 48 Tex. Crim. Rep. 537, 89 S. W. 643, that if other facts in the case had shown, or tended strongly to show, that a third person was placed in a position in which he might have done the shooting, the confession of such third person might have been held admissible.

And it was declared in *State v. Fletcher*, 24 Or. 295, 33 Pac. 575, that unquestionably it would have been competent to prove that a third party, and not the prisoner, killed the deceased, but that this could have been done only by proof connecting the third person with the fact, that is, with the perpetration of some deed entering into the crime itself; and that after such direct proof had been given, it might be that evidence of a declaration of the third party that he had done the killing would have been competent in confirmation of the direct testimony connecting him with the fact of killing.

In *Munshower v. State*, 55 Md. 11, 39 Am. Rep. 414, the court referred to the position taken in the dissenting opinion in *Smith v. State*, 9 Ala. 990, that while it might be true that the confession of a third person of his guilt is not evidence in favor of another when standing alone and unaided by other facts and circumstances, yet that it is so whenever the party confessing is

connected with the crime by strong presumptive evidence; and it was stated in the *Munshower Case*, in effect, that, even assuming the correctness of this doctrine, there was nothing in that case to warrant its application, for the declaration, if ever made, stood alone, the record disclosing no facts or circumstances tending to connect the declarant with the crime.

#### Impeachment of declarant as witness.

A confession by a stranger even if sworn to, although it may be admissible merely for the purpose of proving that it was made, is not admissible for the purpose of having it accepted as true. *State v. Jones*, 127 La. 694, 53 So. 959.

Again, it has been declared that such a confession or admission is not admissible for any purpose, unless it be to affect the declarant's credibility as a witness at the trial. *McDonald v. State*, 165 Ala. 85, 51 So. 629.

Where a witness for the state in a case of homicide has testified that the defendant did the shooting, evidence that she had admitted to another witness that she herself did it is admissible upon proper foundation, for the purpose of impeaching her as a witness, but not as substantive evidence that she in fact was the guilty party. *Perdue v. State*, 126 Ga. 112, 54 S. E. 820.

In *Munshower v. State*, supra, it appeared that counsel for the defense asked a witness for the state whether, before the body of the deceased was found, he, the witness, had stated to another that the deceased had been murdered and buried in a certain place, and that his head had been mashed in; and contended that an answer to this question was admissible for the purpose of discrediting the witness, for the reason that, if he had answered the question in the negative, he would have been contradicted and discredited by the impeaching witness, and that, if he had answered it in the affirmative, it would have evidenced the possession of knowledge that the guilty party alone would be likely to have, and this would have discredited him,—admitting, however, that

stated that his brother "had suffered long enough about the matter." The extreme case of a confession on the gallows by one claiming to be the true offender, employed by Wigmore to illustrate his view, affords no ground for the relaxation of the rule; for the experience assuring us that the last breath of men not wholly bad is sometimes employed in the asseveration of a falsehood justifies the rejection of the hearsay statements of a malefactor who, having no longer any concern as to his own fate, may wish to serve a pal, a kinsman, or a friend. Even dying declarations, which are restricted to trials where the declarant was the victim of a homicide, although they derive additional solemnity from the fact of approaching death, are

admitted really for necessity, and in order to reach those manslayers who perpetrate their crimes when there are no other eye-witnesses.

While the question is one of admissibility of evidence, rather than of its probative force, it might be remarked, as showing the caution with which all confessions are received, that the confession of the accused himself is not admissible in the absence of evidence establishing the *corpus delicti*. It is worthy of note in this case that, although Henry Brown had been present at the previous trial of his brother, he remained wholly silent as to his authorship of the crime, and that his confession was not made until the state had disclosed all of its evidence and the trial re-

on a trial for murder the admissions or declarations of third persons that they killed the deceased are not evidence, but insisting that if such third persons, on being examined as witnesses, implicate the prisoner by their testimony, evidence of their declarations that they were guilty of the offense is admissible to discredit them. The court, however, said: "The witness, in his examination in chief, had made no statement inconsistent with the declaration which the question implied he had made in reference to the manner of Wetsell's death and the place where the body was buried and concealed. If he had answered in the negative, he could not have been contradicted, for it is well settled that no question respecting any matter irrelevant to the issue can be put to a witness on cross-examination, for the mere purpose of impeaching his credit by contradicting him, and if any such question be inadvertently put and answered, the answer of the witness is conclusive. 2 Taylor, Ev. § 1292. He was not bound to answer in the affirmative if the declaration would tend to inculpate himself, and if he chose so to answer voluntarily, then to allow the answer would be to permit his own antecedent declarations, when proved by himself as a witness, to go to the jury as evidence to exculpate the prisoner, when it is clear the same declarations could not, for that or any other purpose, be proved by any other witness. To allow the introduction of such testimony would effect a dangerous innovation upon the law of evidence in criminal cases, and open the door to the most fraudulent contrivances to procure the acquittal of parties accused of crime."

And the holding in *Blocker v. State*, 55 Tex. Crim. Rep. 30, 131 Am. St. Rep. 772, 114 S. W. 814, is indicated by the following language: "Where an accused is being tried for a homicide, it is legitimate and proper to introduce evidence that another party or other parties were in position to have committed the homicide, and motive and other matters of that character are also admissible to show a reason why the others, and not the accused party, committed the homicide. We deem unnecessary here to

collate these authorities. There is, however, an unbroken line of decisions in the reports of this court so holding. We are of opinion this testimony was admissible under the circumstances stated. The motive was as strong on the part of Aaron Massey as it was on the part of appellant." The testimony sought to be introduced in this case was that Massey had, after the killing, admitted that he was the guilty person, and it may be that the court intended to hold merely that evidence of such declarations or admissions is admissible when the declarant's motive is shown to be as strong as that of the defendant, and left it to implication that such motive must be established by other evidence.

#### Effect of declarant's death—generally.

The confession is inadmissible though the confessor be dead. *People v. Hall*, 94 Cal. 595, 30 Pac. 7.

The exception to the rule against the admission of hearsay evidence, which permits the admission of the declarations against interest of the deceased person, does not, upon the theory that the confession is an admission against interest in that it renders the confessor liable to punishment and destroys his character, apply in criminal cases so as to render a stranger's confession admissible in behalf of one who is charged with committing the crime. *United States v. Mulholland*, 50 Fed. 415. It is also declared in this case that the fact of the unavailability of the direct testimony of the deceased person finds a parallel in the fact that, by invoking the rule against self-elimination, the confessor, if living, could avoid testifying against himself upon the stand.

And it is declared in *State v. West*, 45 La. Ann. 14, 12 So. 7, that where a third person makes a direct admission that he killed the deceased, and then escaped, and this declaration was sought to be introduced in evidence through one who heard him make it, it was inadmissible; and that the accidental fact of the declarant's death did not alter the character of the declaration and the testimony in support of it. Subsequent appeal in 45 La. Ann. 928, 13 So. 173.

sulted in a verdict of manslaughter, on which his brother was sentenced to imprisonment for the short term of two years. The hazard he assumed was not, therefore, one of very great gravity, especially as his running away on being released goes strongly to show that, apart from facing a jury in his brother's behalf, he did not intend

to incur any decided risk, and was ready to recant his confession as soon as it had served its purpose, or exposed him to any great peril. This much is said in answer to the suggestion that only an imperative sense of guilt could have moved him to brave the great dangers that attended his confession, and as going to show that the

#### —dying declarations.

In this connection it is to be observed that this note does not include cases on the question as to the admissibility in behalf of the defendant in a homicide trial, of dying declarations of the person killed, that he, and not the accused, was responsible for the difficulty leading to the killing.

A stranger's confession of guilt cannot be admitted as a dying declaration (*West v. State*, 76 Ala. 98), since such a declaration is admissible only where the death of the declarant is the subject of the charge of homicide on trial, and the circumstances of the death are the subject of the declaration (*People v. Hall*, 94 Cal. 595, 30 Pac. 7; *Mora v. People*, 19 Colo. 255, 35 Pac. 179; *Davis v. Com.* 95 Ky. 19, 44 Am. St. Rep. 201, 23 S. W. 585).

Where it appears that one with whom the accused was fighting at the time of the killing of the deceased by a shot from the revolver of one of the combatants was suspected of having killed the deceased, and that, when an attempt was made to arrest him, he resisted, was wounded, and soon after died, it was held that the accused could not, in exoneration of himself, introduce testimony that the other, before dying, made some admission or declaration which led to the belief that it was he who had killed the deceased, as such was merely hearsay. *State v. West*, 45 La. Ann. 14, 12 So. 7. On subsequent appeal in this case, in 45 La. Ann. 928, 13 So. 173, it appeared that at the second trial such testimony was sought to be introduced, but from the brief of counsel it appears that "the object of it was not to prove the truth of the statements made by Baptiste, but to prove the fact of his having made them to show the jury his belief and opinion as to the party who fired the shot that killed Lyall, and consequently to raise and substantiate any doubts in their minds as to the guilt of the defendant." But the court disposed of the matter by merely remarking that the testimony was irrelevant.

#### Conclusion.

The practical unanimity of the highest state courts of the country in the adoption of a rule of law, while necessarily causing hesitation, should not forbid a statement of the considerations which point to the justice of a contrary view, especially when the rule is characterized by Professor Wigmore as unsound and barbarous. The court in *BROWN v. STATE* says that Professor Wigmore finds no support in the other text writers on the subject, nor in the legal

encyclopedists, "who perhaps have greater deference for the opinions of those learned judges who daily witness the application of the law, and refuse to sacrifice its wholesome principles to untried theory." Most of the decisions, however, dispose of the question with little more than a shake of the head; and if, therefore, the rule is founded in reason, we must look elsewhere than to judicial opinion in order to find the reason.

In this connection it is both interesting and instructive to listen to Professor Wigmore when he says in his great treatise on Evidence (§ 1476) that the extra-judicial confession of a stranger, instead of being excluded by the hearsay rule, should be regarded as embraced within the exception of that rule, permitting the introduction of declarations against interest of persons whose direct testimony is unavailable. He traces the history of this exception, and shows that acceptance was gained for the principle that all declarations of facts against interest (by deceased persons) were to be received, and that from the year 1800 until about 1830, this was fully understood as the broad scope of the principle. "It was," he says, "thus stated without other qualification; and frequent passages show the development of the principle to this point. But in 1844, in a case in the House of Lords, not strongly argued, and not considered by the judges in the light of the precedents, a backward step was taken, and an arbitrary limit put upon the rule [exception]. It was held to exclude the statement of a fact subjecting the declarant to a criminal liability, and to be confined to statements of facts against either pecuniary or proprietary interest." It is pointed out that thenceforward the exception as so limited was accepted in England, although it was plainly a novelty at the time of its inception, and that the same attitude has been taken by the American courts, excluding confessions of a crime or other statements of facts against penal interest, made by third persons. He argues that not only is the limitation unjustifiable on grounds of policy, but that it is inconsistent with the broad language originally employed in stating the reason and principle of the exception, as well as the settled principle upon which confessions are received. He also points out that the decisions in our books show that in almost all of the rulings the declarant was not shown to be deceased or otherwise unavailable as a witness, and therefore the declaration would have been inadmissible in any view of the exception, and that most of the early rulings had in view, not the present exception to the hearsay rule, but the doctrine that

supposed harshness of the rule may afford no reason for not adhering to it and excluding hearsay evidence as inadmissible.

It is assigned for error that the court below excluded the following question addressed on cross-examination to Vestor Addison, one of the two eyewitnesses of the

the tragedy, and brother to the deceased: "Wasn't there a crowd of men there, B. Harris and several others, that Mr. McNees got together there and told them they would have to hold the inquest, and you were right there, and they couldn't get any testimony about who did the shooting, and found that he came to his death by

the admission of one who is not a co-conspirator cannot affect others jointly charged. Professor Wigmore draws the moral by contemplating the spectacle that would have ensued if our courts, bound by "this barbarous doctrine," had heard the trial of Captain Dreyfus, and had refused, as they would have refused, to admit what the French court never for a moment hesitated to admit,—the authenticated confession of the escaped Major Esterhazy avowing himself the guilty author of the treason there charged.

The purpose of all evidence is to get at the truth. The reason for the hearsay rule is that the extra-judicial and unsworn statement of another is not the best method of serving this purpose. In other words, the great possibility of the fabrication of falsehoods, and the inability to prove their untruth, requires that the doors be closed to such evidence. So long therefore as a declarant is available as a witness, his extra-judicial statement should not be heard. Where, however, the declarant is dead or has disappeared, his previous statements out of court, if not inadmissible on other grounds, are the best evidence. But they are not rendered admissible by the mere fact that the declarant is unavailable,—something else is necessary. One fact which will satisfy this necessity is that the declaration is or was against the declarant's interest, and this is because no sane person will be presumed to tell a falsehood to his own detriment.

From what has been said, especially with respect to the essential fact that the hearsay rule is founded upon the desire to prevent perjury with impunity, it follows that the limitation which so circumscribes the exception to the hearsay rule, which admits declarations against interest, as to exclude all admissions which are against "penal" interest, is tantamount to a declaration that, while a man who makes an admission against his pecuniary or proprietary interest will be presumed to tell the truth, he will be presumed a liar when his statement is against his penal interest. It is going far to say that, whereas mankind holds property in such high regard that any of its statements to the detriment of its title and interest therein will be taken as true, the average individual takes such little thought of liberty, life, and soul, that he will slander and falsely condemn them for the purpose of exonerating another who, by the same token, has no greater solicitude for his own liberty, life, or soul; and this is especially unjustifiable in the light of the common knowledge that the individual, in-  
37 L.R.A. (N.S.)

stead of having a higher regard for property than for life and liberty, will, when accused of crime, exhaust his entire material wealth to secure liberty, life, and vindication.

The point might also be made, although it is to be admitted that there is some ground of distinction, that, while the confession would be admitted against the declarant himself, and for the purpose of sending him to the gallows, it is held inadmissible for the purpose of exculpating another. The reason why it is admitted against the declarant upon his trial is not, of course, the theory that if he was indiscreet enough to make the statement, he should suffer the consequences, but upon the ground that, having been made to his own detriment, it is presumed to be the truth. But the query occurs, Why should the presumption as to its truth diminish when the declaration is sought to be admitted in favor of another? Certainly this is not straining the quality of mercy.

Again, if, as seems indisputable, the desire to close the door to falsehood which cannot be detected dictates the exclusion of such testimony, the question as to the effect to be given to such a confession is solely one of weight and credibility. This being so, why not leave it to the jury to say in each instance whether a confession is false or true, rather than make an ironclad rule which excludes all confessions, when it must be known that in the nature of things, by the laws of chance or otherwise, some of them must be true? This would but accord to the jury the right to exercise the function which is its peculiar province, and would also help to justify the belief that there is something besides mere verbiage in the maxim, "Better that ninety-nine guilty should escape, than that one innocent person should suffer."

In this connection there comes to mind the recent case of the unfortunate Pittsburg man who, after serving many years of a sentence imposed upon him for homicide, was pardoned upon the confession of another that he did the killing. The truth of that confession, and the innocence of the unfortunate prisoner, seems to have been admitted and unquestioned, and, as stated, was the basis of the governor's pardon; yet the fact remains that if the confession had been made before the trial of the prisoner, it would not—at least unless taken under a commission or other legal sanction—have been admissible in behalf of the accused, because of the doctrine which the court in *BROWN v. STATE* denominates "wholesome."

L. A. W.



an unknown hand?" The purpose of this question was, of course, to discredit the witness, who had identified the accused as the slayer when seen by moonlight only a few feet distant. The witness had already testified that he paid no attention to the inquest, and it will be observed that the question involves no inquiry as to whether he testified differently, or at all, at the inquest, or was called on to testify at the same, and refused or evaded doing so, but merely that his attitude on the night of the killing was a negative one as to the identification of the accused. While he contradicted the several witnesses who testified that he in terms denied on the night of the killing that he was aware of the identity of the slayer, it was unquestionable on the evidence that he did not that night reveal who had committed the crime, unless he informed the deputy sheriff, who arrested the accused on the same night. This deputy, after he had testified that he made the arrest, was asked by the prosecution what conversation he had with the witness Vestor Addison on that night, when the court excluded the question on the objection of the defense, and the case went to the jury as if the accused had made no revelation that night as to the identity of the slayer. As thus viewed, the question in relation to the inquest could have evoked no other evidence favorable to the accused than such as would have been at most merely cumulative, and its exclusion does not constitute reversible error.

Affirmed.

#### ARKANSAS SUPREME COURT.

ARTHUR G. LEE, Appt.,

v.

VAUGHAN SEED STORE.

(— Ark. —, 141 S. W. 496.)

**Contract — statute of frauds — party to be charged.**

1. The party to be charged, who must sign a contract to make it binding under the

**Note. — Statute of frauds: printed or stamped signature.**

The general principle governing the decisions in the cases under annotation is well stated in 20 Cyc. 274, where it is said in substance that the signing required by the statute is a signature to the writing placed there with the intention of authenticating the writing, and that, if placed with this intention, it may occur at the beginning, in the body, or in the place designated for the witnesses' signatures, except in certain

37 L.R.A. (N.S.)

statute of frauds, is the one against whom it is sought to be enforced.

**Same — printed signature — effect.**

2. The printing of the name of the vendor at the beginning, in the body, and on the back of the merchant's order blanks, to be filled up by a soliciting agent, is not a sufficient signature to satisfy the statute of frauds.

**Same — letter acknowledgment — effect.**

3. A written notification by a merchant that he has received a "contract order" of a customer, but cannot fill it, is not such a recognition of the contract as to take it out of the statute of frauds.

**Evidence — burden of proof — authority of traveling salesman.**

4. One seeking to hold a merchant upon a contract made by a traveling salesman has the burden of showing authority on his part to bind his employer.

(November 6, 1911.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Sebastian County in defendant's favor in an action brought to recover damages for alleged failure of defendant to fill a contract order for goods given by plaintiff to defendant's salesman. Affirmed.

**Statement by Wood, J.:**

The appellant sued appellee on an alleged contract for the sale of onion sets, as follows: "Contract for onion sets between Vaughan's Seed Store, of the city of Chicago, state of Illinois, party of the first part, and Arthur G. Lee, of the city of Ft. Smith state of Arkansas, party of the second part. Said party of the first part sells said party of the second part the following amount of onion sets for delivery Jan. '08." Then follows description of the onion sets, and the terms of sale and shipment are set forth. The alleged contract is signed by appellant, and bears date April 8, 1907. It is made subject to certain (quoting) "terms and conditions on the back thereof, which are hereby agreed to." Among other recitals on the back is the following: "It is further agreed that the said Vaughan's Seed Store will care for this stock, keep it in the same warehouse,

jurisdictions where the statute requires the memorandum to be subscribed.

The cases to which the above rule most clearly applies are those in which a rubber stamp or typewriter was used in affixing the name. Thus, in Landecker v. Co-operative Bldg. Bank, 71 Misc. 517, 130 N. Y. Supp. 780, it was held that stamping one's name with a rubber stamp or typewriter at the end of a contract for the sale of goods is subscribing it, within the meaning of the statute of frauds. And in Degginger v. Martin, 48 Wash. 1, 92 Pac. 674, it was

and give it the same attention and care that they give any unsold portion of their own crop." Appellant alleged an offer to accept and comply with the terms of the contract on his part, and a refusal on the part of the appellee to comply with the contracts on its part, to the damage of appellant in the sum of \$642. The amended answer specifically denies every allegation in the complaint except that appellee is a corporation; then alleges that the appellant gave to H. Cheeseman, a traveling salesman, an order for a car of onion sets, to be submitted to appellee for acceptance or rejection; that appellee refused to accept the order, and at once notified appellant of such refusal. The answer also alleges that the appellee made no contract

with appellant for the sale of such onion sets, and that said H. Cheeseman made no contract with appellant in appellee's behalf; and that the said Cheeseman had no authority to make sale of onion sets. Then the answer sets up a custom of the trade to the effect that all such orders must be, and are, taken subject to confirmation, and that appellant knew of the custom. The last paragraph of the answer sets up the statute of frauds in bar of the action, for the reason there was no memorandum or contract of sale signed by the party to be charged. The appellant testified to the execution of the alleged contract. His testimony shows that one Cheeseman was the agent of appellee in the territory where Ft. Smith is located, and that he made the

held that a broker's contract for the sale of lands was sufficiently signed under the statute of frauds where the firm name under which the broker did business was typewritten and followed by his written initials. See also the *obiter* statement in *Bennett v. Brumfitt*, 37 L. J. C. P. N. S. 25, L. R. 3 C. P. 28, 17 L. T. N. S. 213, 16 Week. Rep. 131, *Hopw. & P.* 407, to the effect that the usual signature of a person engraved upon a stamp, and impressed by himself on the instrument, would be sufficient under the statute of frauds. And see *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 47 Atl. 675, wherein a letter dictated to a stenographer, typewritten by the latter, and signed with the name of the dictator by means of a rubber stamp furnished by him for that purpose, was held to be a writing signed by the dictator within a statute of limitations requiring acknowledgments of new or continuing contracts to be in "writing made or signed by the party to be charged thereby."

The question has also arisen in connection with the use of printed letter heads, and the same rule has been universally applied. Thus, in *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, where the rule that the place of the signature is immaterial is in force, the court held that a printed letter head, followed by the memorandum of sale, was sufficiently signed, it being said that the name might be printed provided it is recognized and appropriated as his by the party. And in *Tourett v. Cripps*, 48 L. J. Ch. N. S. 567, 27 Week. Rep. 706, it was held that a letter not signed in writing by the sender, but written on paper with his name and address printed at the top in such a way as to show that the sender recognized it as his own name, was sufficiently signed within the statute of frauds, to be binding on the sender. So, in *Saunderson v. Jackson*, 2 Bos. & P. 238, 3 Esp. 180, 5 Revised Rep. 382, it was said that where a trader is in the habit of using printed bills to which his name is prefixed, such a bill given to a vendee at the time of an order for future delivery is a good contract, within the statute of frauds. In connection with the foregoing cases, see also *Anderson v. Wallace* 57 L.R.A. (N.S.)

*Lumber & Mfg. Co. and Huckleaby v. Hook*, as set out *infra*.

The cases which present the question whether or not the entering of a memorandum of a sale in an order book in which, or upon which, the owner's name is printed, is a sufficient signing of the contract, also apply the rule stated. Thus, in *Jones Bros. v. Joyner*, 82 L. T. N. S. 768, it was held that a memorandum sufficient to bind the seller was shown where it appeared that a memorandum of sale was entered in his order book, and signed by the vendee, although the name of the seller did not appear in the memorandum, but was stamped on the leather cover into which the paper memorandum book was slipped. In the lower court it was held that such printed name was not a sufficient signing, it being said that it was evidently printed on the case for the purpose of identification of ownership, but the court refused to follow this line of reasoning which would have brought the case within the rule announced in *Nasmith v. Alexander Brown Mill. & Elevator Co.* 9 Ont. L. Rep. 21, 4 Ont. Week. Rep. 451, where, in holding that an order entered in defendant's contract book, on the fly leaf of which the defendant company's name had been stamped some years previously for the purpose of marking the time when a new proprietorship began, was not, because of such stamped signature, sufficiently signed under the statute of frauds, the court said: "The essence of signature, whether made by writing or stamp or print, must be to authenticate or identify the contract by the party to be charged. The cases all show that the signature must be substantially contemporaneous in the case of connected documents, and it will not do to import into the particular transaction a name previously written—as here, years before—with a totally different intent. There may be, of course, recognition by subsequent signation of a bygone contract, or perhaps an anticipatory signature of a subsequent contract,—but nothing such is proved here."

Other instances in which the rule has been applied also support the rule stated. Thus,

alleged contract on behalf of appellee with the appellant. The handwriting in the body of the instrument, except the last sentence, was that of Cheeseman. Appellant wrote the last sentence, to wit, "to be shipped when ordered out during January." The alleged contract was signed by appellant, and the name of appellee was printed in capital letters in the body of the contract, but was not written or printed at the bottom of the contract where the signature of appellant appears. Nor was the name of appellee written anywhere in the instrument by the agent of appellee. On April 16th appellee wrote appellant as follows: "We regret that we are unable to take care of your contract order for onion sets given our Mr. Cheeseman, as we seem to be pretty well booked up on the varieties in question."

After this a correspondence followed between appellant and appellee, in which it appears that appellant insisted that he had a contract with appellee for the delivery of the onion sets, and appellee on the other hand claimed that it had not booked appellant's order, and therefore had not approved or accepted same, and had not entered into a contract for the sale and delivery of the onion sets. Appellee also

claimed in its letters that the agent taking the order had no authority to bind appellee to approve and accept same; that the order so taken was, according to the custom of appellee and the usual custom of the trade, subject to its approval before it became a binding contract, and that it had never been accepted and approved, but on the contrary had been expressly rejected by appellee's letter in which it stated that it was "unable to take care of your" (appellant's) "contract order for onion sets." Appellant testified to the difference between the price of onion sets under the alleged contract and the market price, his evidence tending to show that he was entitled to recover, should the alleged contract be upheld, in the sum of \$710. He asked the court to direct a verdict for him in that sum but the court directed a verdict instead in favor of appellee, and appellant excepted and duly prosecutes this appeal.

Messrs. Read & McDonough, for appellant:

The contract was signed by both parties within the meaning of the law.

20 Cyc. 274; Clark, Contr. 125; Hall v. Misenheimer, 137 N. C. 183, 107 Am. St.

in *Schneider v. Norris*, 2 Maule & S. 286, in holding a bill of sale in which the name of the vendor was printed and that of the vendee written by the vendor, a sufficient memorandum within the statute of frauds as against the vendor, Lord Ellenborough said: "I cannot but think that a construction which went the length of holding that in no case a printing, or any other form of signature, could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If, indeed, this case had rested merely on the printed name, unrecognized by, and not brought home to, the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have offered some doubt whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning or signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written *Norris & Company* with his own hand. He has by his handwriting in effect said, 'I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract.'"

And in *Delaware Ins. Co. v. Pennsylvania F. Ins. Co.* 126 Ga. 380, 55 S. E. 330, 7 A. & E. Ann. Cas. 1134, under a statute 37 L.R.A. (N.S.)

requiring a contract of insurance to be in writing and signed by the insurer or on its behalf, a paper insuring a person, which commenced with the name of the insurance company and its general agent, was held sufficiently signed by the insurance company, where the paper was executed and delivered as and for a written contract of insurance, and was so received by the insured and premiums paid thereon, the court citing as authority *Browne*, Statute of Frauds, § 366, to the effect that a printed signature answers the requirements of the statute of frauds if there be sufficient evidence of its adoption as such by the party sought to be charged.

And in *Equitable Life Assur. Soc. v. Meuth*, 145 Ky. 160, 140 S. W. 157, under a statute requiring contracts to be in writing and subscribed at the end, it was held that when the president of an insurance company signed his name in his own hand, on the face of an insurance policy on the back of which his name was printed at the close of a list of privileges, he made the whole policy the contract of the company, under the rule that a printed signature is sufficient to satisfy the statute of frauds where the paper is delivered under circumstances showing an intention to regard the printed name as the person's own. But in *Vielie v. Osgood*, 8 Barb. 130, it was held that printed signatures are not subscribed within the meaning of the statute providing that a contract of sale must be in writing and subscribed by the party to be charged, it being said that the word "subscribed" means an actu-

Rep. 474, 49 S. E. 104; Wise v. Ray, 3 G. Greene, 430; New England Dressed Meat & Wool Co. v. Standard Worsted Co. 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112; Smith v. Howell, 11 N. J. Eq. 349; Clason v. Bailey, 14 Johns. 484; Tingley v. Bellingham Bay Boom Co. 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; Nebraska Bridge Supply & Lumber Co. v. Conway, 127 Iowa, 237, 103 N. W. 122.

The use of the printed form with appellee's name printed therein, and the filling of the blanks by its agent, makes a signature.

Anderson v. Wallace Lumber & Mfg. Co. 30 Wash. 147, 70 Pac. 247; Penniman v. Hartshorn, 13 Mass. 87; Merritt v. Clason, 12 Johns. 107, 7 Am. Dec. 286; Gerli v. Poidebard Silk Mfg. Co. 51 Am. St. Rep. 611, and note, 57 N. J. L. 432, 30 L.R.A. 61, 31 Atl. 401; Fordyce v. Seaver, 74 Ark. 395, 85 S. W. 1126, 4 A. & E. Ann. Cas. 892; Russell v. Nicoll, 3 Wend. 112, 20 Am. Dec. 670; 3 Parsons, Contr. 8; 1 Parsons, Contr. 591; Fagan v. Faulkner, 5 Ark. 161; New England Dressed Meat & Wool Co. v. Standard Worsted Co. 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112; Hawkins v. Chase, 19 Pick. 502; Saunderson v. Jackson, 2 Bos. & P. 238,

3 Esp. 180, 5 Revised Rep. 382; Coddington v. Goddard, 16 Gray, 436, 77 Am. Dec. 419.

The letters of appellee constitute a sufficient signing of the contract.

St. Louis, I. M. & S. R. Co. v. Beidler, 45 Ark. 17; Dyrenforth v. Palmer Tire Co. 240 Ill. 25, 88 N. E. 290; Capital City Brick Co. v. Atlanta Ice & Coal Co. 5 Ga. 436, 63 S. E. 562; First Presby. Church v. Swanson, 100 Ill. App. 39; Fagan v. Faulkner, 5 Ark. 161; Parker v. Carter, 91 Ark. 102, 134 Am. St. Rep. 60, 120 S. W. 836; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; Beckwith v. Talbot, 95 U. S. 289, 24 L. ed. 496; Jowers v. Phelps, 33 Ark. 465; Conner v. Abbott, 35 Ark. 376; Moore v. Robinson, 35 Ark. 293; Bernays v. Field, 29 Ark. 218; Whiting v. Beebe, 12 Ark. 421; Norman v. Molett, 8 Ala. 546; McClintock v. South Penn Oil Co. 146 Pa. 144, 28 Am. St. Rep. 785, 23 Atl. 211; Western U. Teleg. Co. v. Chicago & P. R. Co. 86 Ill. 246, 29 Am. Rep. 28; Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; Sams v. Fripp, 10 Rich. Eq. 447; Cotulla v. Barlow, — Tex. Civ. App. —, 115 S. W. 294; Breen v. Mayne, 141 Iowa, 399, 118 N. W.

al manual signing in writing. And in Zachrisson v. Poppe, 3 Bosw. 171, it was held that the printed signature of a broker authorized to sell, on a bill of sale, was not a sufficient signing within the statute of frauds. The ground upon which this decision was based are not stated, the opinion merely stating the conclusion. In connection with the two last cases, it should be noted that the true interpretation of the word "subscribed" is an actual manual subscription at the end of an instrument, and it would seem that that rule could be applied by using a rubber stamp or typewriter, and in fact it has been so held. See Landecker v. Co-operative Bldg. Bank, as set out supra.

And in Boardman v. Spooner, 13 Allen, 353, 90 Am. Dec. 196, the rule that the name, if not written, must be adopted, in order to comply with the statute, was adhered to in holding that a memorandum in writing signed by the party to be charged is not established by the mere stamping of the purchaser's name and the date on the bill of goods and order of delivery, at some time while the papers were in his possession, in the absence of evidence as to when or for what purpose it was done, on the ground that there was no showing that they adopted such a stamp as a signature or affixed it to the instrument with the intent to bind themselves thereby. And the same is true of Ferguson v. Trovaten, 94 Minn. 209, 102 N. W. 373, wherein it was held that the printed signature of the authorized agent of the vendor, appearing in 37 L.R.A. (N.S.)

a writing claimed to be a valid contract for the sale of land, did not constitute a subscribing or signing of the contract, within the meaning of the statute of frauds, where it was obvious from a mere inspection of the instrument that the name of the agent printed thereon was intended only for the purpose of authenticating certain printed instructions and conditions. And this rule was assumed in Anderson v. Wallace Lumber & Mfg. Co. 30 Wash. 147, 70 Pac. 247, where it was held that the using of a printed letter head, together with the writing of the party's name in the body of the instrument by his agent, was a sufficient compliance with the statute of frauds. See also Richmond Standard Steel Spike & Iron Co. v. Chesterfield Coal Co. 87 C. C. A. 636, 160 Fed. 832, wherein a writing purporting to be a contract between two corporations was held not so signed as to avoid the statute of frauds, where the name was merely typewritten at the end, without authority, with an unfilled blank following it for the signature of the officer who should execute it.

And the principle that a printed name, to be effective, must be ratified or adopted, was recognized in Hucklesby v. Hook, 82 L. T. N. S. 117, wherein it was held that an offer to purchase land written by the vendee on a letter head containing the printed name and address of the vendor, but not otherwise signed by him, is not sufficient within the statute of frauds, unless written at his dictation or adopted by him.

G. J. C.

441; *Reilly v. Steinhardt*, 58 Misc. 471, 111 N. Y. Supp. 472.

The appellant signed the contract, and the appellee accepted it, and it is therefore binding.

*Monongah Coal & Coke Co. v. Fleming*, 42 W. Va. 538, 26 S. E. 201; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794; *Cameron Coal & Mercantile Co. v. Universal Metal Co.* 26 Okla. 615, 31 L.R.A.(N.S.) 618, 110 Pac. 721; *McFarson's Appeal*, 11 Pa. 503; *Thiebaud v. Union Furniture Co.* 143 Ind. 340, 42 N. E. 741; *Peevey v. Haughton*, 72 Miss. 918, 48 Am. St. Rep. 592, 17 So. 378, 18 So. 357.

Mr. A. C. Cunkle and Mr. George W. Dodd, for appellee:

The party to be charged is the party against whom the contract is sought to be enforced.

20 Cyc. 272; *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; *Wood v. Planters' Oil Mill*, 76 Ark. 572, 90 S. W. 18; *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72; *Smith v. Smith*, 8 Blackf. 208; *Newby v. Rogers*, 40 Ind. 9; *Barstow v. Gray*, 3 Me. 409; *Old Colony R. Corp. v. Evans*, 6 Gray, 26, 66 Am. Dec. 394; *Dresel v. Jordan*, 104 Mass. 407.

The use of the printed name in the body or at the beginning of the memorandum, without any recognition or evidence of adoption or ratification, is not a sufficient signing.

*McMillen v. Terrell*, 23 Ind. 163; *Boardman v. Spooner*, 13 Allen, 353, 90 Am. Dec. 196; *Smith v. Howell*, 11 N. J. Eq. 349; *Dennison v. Carnahan*, 1 E. D. Smith, 144; *Jachrisson v. Poppe*, 3 Bosw. 171.

The signing of the contract by appellant does not make it binding, because there was no acceptance.

*Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 444.

The authority of commercial travelers or drummers as a matter of law is well defined, and in the absence of a showing to the contrary, their authority, as a general rule, extends only to the soliciting of orders for goods.

6 Am. & Eng. Enc. Law, 2d ed. 224, 227; *Ex parte Taylor*, 58 Miss. 478, 38 Am. Rep. 336; *Chambers v. Short*, 79 Mo. 204; 14 Cyc. 1088; *John Matthews Apparatus Co. v. Renz*, 22 Ky. L. Rep. 1528, 61 S. W. 10; *Holland v. Van Beil*, 89 Ga. 223, 15 S. E. 302; *Greenhood v. Keator*, 9 Ill. App. 183; *Kornemann v. Monaghan*, 24 Mich. 36; *Sigeison v. Kahmann*, 39 Mo. 207.

Wood, J., delivered the opinion of the court:

1. Section 3656 of Kirby's Digest provides: "No contract for the sale of goods, 37 L.R.A.(N.S.)

wares, and merchandise for the price of \$30 or upward, shall be binding on the parties, unless, first, there be some note or memorandum signed by the party to be charged." Under the above section, in order to bind appellee to the alleged contract, it must appear that same was signed by appellee. "The party to be charged" is the one against whom the contract is sought to be enforced. 20 Cyc. 272, and note. See also *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; *Century Dig.* p. 2286, § 244, where cases are collected; *Browne*, Stat. Fr. § 365.

Does the printed name of appellee in the body and on the back of the instrument constitute a signature within the meaning of the above statute? *Browne* on the Statute of Frauds says: "In regard to the place of the signature, there is no restriction. It may be at the top or in the body, of the memorandum, as well as at the foot. . . . But the name, besides being in his handwriting, must always be inserted in such a manner as to authenticate the instrument as the act of the party executing it, or in other words, to show the intention of the party to admit his liability upon the contract. The mere insertion of his name in the body of an instrument, where it is applicable to a particular purpose, will not constitute a signature, within the meaning of the statute, and although it be so inserted as to control and direct the entire instrument, still the better opinion seems to be that its insertion must also be intended as a final signature, and that, if it appear that the instrument was to be further executed, it will not be taken to have already been sufficiently signed." *Browne*, Stat. Fr. § 357.

The agent of appellee was furnished with a form of contract containing blanks to be filled and with the name of appellee printed in the body and on the back thereof. The agent when he took the order for goods filled in the blanks, but he did not sign the name of appellee to the instrument and did not write it in the alleged contract. The letters of appellee to appellant written after the instrument was signed by appellant (but introduced by appellant himself) indicate that appellee's agent who took the order had no authority to sign appellee's name to the alleged contract. His authority, according to these letters, was only to solicit orders and submit them for consideration and confirmation of appellee at its home office. But even if it could be assumed that the sales agent had authority to sign appellee's name, it does not appear that he did so.

"A signature consists both of the act of writing the party's name and of the

intention of thereby finally authenticating the instrument." Greenl. Ev. § 674, quoted in *Vines v. Clingfost*, 21 Ark. 312, and in *Seventh Street Colored M. E. Church v. Campbell*, 48 La. Ann. 1546, 21 So. 184; *Davis v. Sanders* 40 S. C. 510, 19 S. E. 138; *Watson v. Pipes*, 32 Miss. 466; 25 Am. & Eng. Enc. Law, 1065.

A name merely printed in an instrument where, according to its purport, the name should be mentioned in the recitals, is not a signature, within the meaning of the statute of frauds. See *Evans v. Ashley*, 8 Mo. 181. There must be a writing, stamping, or printing of the name by the party to be charged, in person or through a duly authorized agent, with the intention of authenticating and finally adopting the writing as his own. There is no proof to that effect in this record. We conclude therefore that the name of appellee printed in the instrument under consideration did not constitute a signing thereof, within the meaning of the statute of frauds.

Whether or not the letters of appellee to appellant, after the order of April 8th was taken, and with reference thereto, amounted to a signature authenticating the terms of the memorandum as a contract on the part of appellee within the statute, was a proper question for the court. In the first letter of April 16th appellee informed appellant that it was "unable to take care of his contract order" for onion sets. In this letter, appellee plainly told appellant that it could not fill his order. The designation of the instrument as "your contract order" meant no more than that it was a contract on the part of appellant when accepted by appellee, but informing him in the same letter that it could not accept it. In *Capital City Brick Co. v. Atlanta Ice & Coal Co.* 5 Ga. App. 436, 63 S. E. 562, it is held that a letter is sufficient to take the agreement out of the statute if it acknowledges the existence of the contract, even though the same letter attempts to repudiate the contract. But the letter of April 16th cannot be considered as anything more than information to appellant that appellee had received his order, but could not accept and fill same. The subsequent letters but emphasize the fact that appellee did not recognize the order as a contract on its part, and that, according to the custom of the trade, it would not become a contract until confirmed or adopted by it, which it had not done and would not do. We are of the opinion that the above is the only reasonable conclusion to be drawn from the letters of appellee which we have carefully examined. No useful purpose could be attained by setting them out in detail. The letters show that the

agent of appellee was but a traveling salesman or drummer, and that he had no authority beyond that of the ordinary drummer, to solicit orders for the sale of goods to be sent to his principal for the latter's acceptance or rejection.

The appellant testified that Cheeseman represented appellee in the Ft. Smith territory, but he does not pretend to state the extent of his authority. Appellant does, however, introduce the letters of appellee which, as we have stated, show that the extent of his authority was that only of a commercial traveler or drummer. As a general rule a commercial traveler or drummer has no authority except that of soliciting orders for the sale of goods. *Ex parte Taylor*, 58 Miss. 478, 38 Am. Rep. 336. "In the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal." 6 Am. & Eng. Enc. Law, 2d ed. 227, and note.

If any special authority existed beyond that of soliciting orders, the burden was on appellant to show it. *Holland v. Van Beil*, 89 Ga. 223, 15 S. E. 302; *Kornemann v. Monaghan*, 24 Mich. 30; 6 Am. & Eng. Enc. Law, § 224.

The judgment is correct, and is affirmed.

Petition for rehearing denied.

#### NEW HAMPSHIRE SUPREME COURT.

CLARENCE A. ELLIOTT

v.

TOWN OF MASON.

(76 N. H. 229, 81 Atl. 701.)

Nuisance — highway ditch — action by licensee.

A mere licensee using a right of way from abutting property to a highway cannot maintain an action against the township for nuisance in maintaining an open ditch along the side of the highway, which renders the private way unsafe, in attempting to cross which he is injured.

(November 7, 1911.)

*Note.* — *Duty as to condition of highway to persons entering or leaving private property.*

This note is limited to personal injuries. Cases in relation to injuries on sidewalks and at the intersection of railways are excluded.

For cases on the general question of the liability of towns for accidents off the

**T**RANSFER by the Superior Court for Hillsborough County for the opinion of the Supreme Court of a question raised on defendant's demurred to the declaration in an action brought to recover damages for personal injuries alleged to have been caused by the maintenance of a nuisance by defendant. Case discharged.

The facts are stated in the opinion.

Messrs. John M. Stark and Fremont E. Shurtleff for plaintiff.

Mr. Henry A. Cutter, for defendant:

Defendant is not liable.

Drew v. Bow, 74 N. H. 147, 65 Atl. 831; Wilder v. Concord, 72 N. H. 259, 56 Atl. 193; Welsh v. Franklin, 70 N. H. 491, 48 Atl. 1102; Wheeler v. Gilsom, 73 N. H. 429, 3 L.R.A. (N.S.) 135, 62 Atl. 597; Gates

v. Milan, 76 N. H. 135, 35 L.R.A. (N.S.) 599, 80 Atl. 39; O'Brien v. Derry, 73 N. H. 198, 60 Atl. 843; Hall v. Concord, 71 N. H. 367, 58 L.R.A. 455, 52 Atl. 864; Downes v. Hopkinton, 67 N. H. 456, 40 Atl. 433; Wakefield v. Newport, 62 N. H. 624; Grimes v. Keene, 52 N. H. 330; Farnum v. Concord, 2 N. H. 392; Eastman v. Meredith, 36 N. H. 301, 72 Am. Dec. 302; Hardy v. Keene, 52 N. H. 370; Ball v. Winchester, 32 N. H. 435; Rhobidas v. Concord, 70 N. H. 109, 51 L.R.A. 381, 85 Am. St. Rep. 604, 47 Atl. 82; Doolittle v. Walpole, 67 N. H. 554, 38 Atl. 19; Sargent v. Gilford, 66 N. H. 543, 27 Atl. 306; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Gross v. Portsmouth, 68 N. H. 266, 73 Am. St. Rep. 586, 33 Atl. 256.

traveled path of the highway, see the note to James v. Wellston Twp. 13 L.R.A. (N.S.) 1236.

For cases on the right of abutting owner to join his land to street by driveway or walk, see the note to Goodfellow Tire Co. v. Hurlbut, 30 L.R.A. (N.S.) 1074.

The cases in general support the statement in Morgan v. Hallowell, 57 Me. 375, where the court said: "It is well settled that even though there be a defect or obstruction within the limits of the highway as located, if it is not in the traveled part of the road, nor so connected with it as to affect the safety or convenience of those using the traveled path, the town is not responsible for an injury sustained by one using the road for the purpose of passing to or from a private way, or his own land." In this case, however, the plaintiff was injured without the street limits, while going to a circus.

Where a coach containing the plaintiff passed from the railroad station, along the railroad's private road, to the highway of the defendant town, and in turning into the highway struck a stone and the plaintiff was injured, the court approved the following instruction: "If the stone alleged to have caused the accident was not a defect or want of repair in the highway, and was an obstacle and unsafe to those only passing from the private way into the highway, the private way not being so made as to admit of safe and convenient turn and entrance upon the highway, and if, in consequence of the private way being so made, the coach was upset by the stone, the defendants were not liable; if, however, the stone made the highway unsafe, and caused the injury alleged, the driver exercising ordinary care and prudence, the defendants were liable." The court said: "We think, upon the facts stated in the present case, the instructions of the court of common pleas were right, and that the defendants were not liable for an injury sustained by a traveler passing from the highway to the way leading to the railroad station, by an obstruction which furnished no ground of complaint against the

town in reference to the public travel on the highway." Smith v. Wendell, 7 Cush. 498.

In Shepardson v. Colerain, 13 Met. 55, where the plaintiff, knowing at the time of going out that a section of the highway, known as the lane road, was impassable from snow, in returning home, while on a highway intersecting the lane road, turned to pass over a private way of his own and thus avoid the snow in the lane road, and while still in the highway, but outside the traveled part of it, suffered an injury, not from the snow but through a difference in grade between the traveled and untraveled parts, it was held that he could not recover from the town. The court said: "The traveler does not leave the ordinary route appropriated for travelers, for the purpose of entering upon a private way. But in the case at bar, there was no such newly appropriated way without the limits of the made way used by the public, for the purpose of continuing their travel upon a public way. The plaintiff left the wrought road, not for the purpose of finding a better road upon the public way, or with a view of continuing to travel upon the highway; but he designedly left the wrought road for the purpose of continuing his travel upon his private way over his own land. This he might do; but at his peril if injured thereby, he fully knowing the obstruction upon the lane road before entering upon his journey."

In Goodin v. Des Moines, 55 Iowa, 67, 7 N. W. 411, where there had been for a considerable time a path leading from a sidewalk across a lot to a church, and the city had lowered the grade of the sidewalk, thus cutting off the use of the path, and plaintiff coming at night from the church, not knowing of the change, stepped into the street and was injured, the court in affirming a judgment for the defendant city said: "The city has full and complete control of the streets, and may excavate or fill up the same at its pleasure, but in doing so it cannot encroach on private property for the purpose of erecting barriers, or any other purpose; nor is it bound to provide

Walker, J., delivered the opinion of the court:

The plaintiff's position, as we understand it, may be stated thus: The uncovered ditch which the defendant maintains by the side of the highway renders the approach from the highway to the adjoining landowner's premises dangerous and unreasonably inconvenient, and as to the landowner constitutes a private nuisance. The plaintiff at the time of his injury was the landowner's licensee for the purpose of traveling upon his private way. From these premises he deduces the conclusion that in the right of the owner he is entitled to maintain this action for the recovery of the damages he suffered from the alleged nuisance. He argues that, if the owner of the abutting land could re-

cover damages caused by the uncovered ditch, he has the same right under his license from the owner. But the fallacy of the argument consists in the assumption that his license to travel over the owner's private way gave him the rights of an owner of the land with respect to nuisances maintained upon adjoining land.

Under the law of this state, the ownership of land does not include the right to an unreasonable use of it which deprives an adjoining owner of the reasonable enjoyment of his land. The rights of adjoining proprietors of land are reciprocal and are determinable by the doctrine of reasonable user. "The doctrines of reasonable necessity, reasonable care, and reasonable use prevail in this state in a liberal form, on a

a safe, or any way by which the streets may be entered from private property. The citizen or traveler must get into the public ways of a city as best he can. Inasmuch as the plaintiff fell from private property into the street and was thereby injured, she cannot recover, and the jury were properly instructed to find for the defendant."

In *McCarthy v. Oshawa*, 19 U. C. Q. B. 245, where the plaintiff had placed a plank over a ditch to get from his premises into the street, and fell from it, it was held that the village was not responsible, as it was only responsible for street crossings.

In *Philbrick v. Pittston*, 63 Me. 477, where the plaintiff fell through planks, covering a gutter outside of the traveled way, used to give access to a private way or court leading to three or four houses standing south of the street, the access to the street from the plaintiff's house not being over these planks, but the nearest way from his garden down the street leading over them, the court said: "If towns were legally responsible for injuries received by persons going to and from the highways over the crazy and neglected platforms that lead across the gutters to their own or their neighbor's premises, because those structures have been suffered to exist within the located limits of the highway, it would be likely to add a somewhat important item to their liabilities. But such is not the law. It is no part of the duty of towns to provide a safe and convenient access to any man's house lot or garden in a country village from the street, and when a man avails himself of such conveniences as the abutters have seen fit to furnish in order to pass to or from the wrought and traveled part of the street, he cannot be accounted a traveler for whose security the town is bound to make the way safe and convenient."

In *Brown v. Skowhegan*, 82 Me. 273, 19 Atl. 399, where one engaged in teaching an evening singing school in a district schoolhouse in the defendant town, returning one night from the schoolhouse to the road, fell into a ditch which extended throughout the entire front of the schoolhouse,

within the limits of the highway, although not in the traveled part of the road, and open save at one place where there were rocks on which the scholars were accustomed to cross, it was held that the town was not liable under the statute which provided that: highways, etc., shall be opened and kept in repair so as to make it convenient for travelers. The court referred to *Philbrick v. Pittston*, supra, as holding that it was no part of the duty of towns to provide safe and convenient access to their streets from any man's house or lot, and said: "We think the principle thus declared applies as well to schoolhouse and lots. The fact that these are in the nature of public buildings and places cannot change the principle. Those charged with the care of such buildings and places must care for the approaches. The fact that part of such approaches is within the limits of the location of the highway does not put their care upon the town. Those frequenting such places must use the approaches thus provided, or make their own way. They are not upon the risk of the town, until they have reached that part of the road prepared for travelers, and thus become travelers. The duty of the town is only to travelers upon its roads, not to those approaching or leaving its roads. The plaintiff must prove, as indeed he has alleged, that he was traveling upon the road. . . . As was said in *Philbrick v. Pittston*, supra: 'He (at the time of the accident) had not reached that part of the street which was appropriated to public travel or prepared by the town for that purpose.' Hence, he was not, when hurt, a traveler, and so cannot recover."

In *Leslie v. Lewiston*, 62 Me. 468, where the plaintiff while going from an outhouse on her father's premises to the house, supposing she had reached the end of a drain reaching from the premises into the highway, fell into the drain upon the highway, it was held that she could not recover, not only because the defect in the way was due to the neglect of her father, but also because she was not a traveler upon the highway.

The court said: "It appears that the



broad basis of general principle." *Haley v. Colcord*, 59 N. H. 7, 8, 47 Am. Rep. 176; *Davis v. Whitney*, 68 N. H. 66, 44 Atl. 78; *Ladd v. Granite State Brick Co.* 68 N. H. 185, 37 Atl. 1041; *Franklin v. Durgee*, 71 N. H. 186, 58 L.R.A. 112, 51 Atl. 911; *Horan v. Byrnes*, 72 N. H. 93, 62 L.R.A. 602, 101 Am. St. Rep. 670, 54 Atl. 945; *Hamlin v. Blankenberg*, 73 N. H. 258, 60 Atl. 1010; *Moore v. Berlin Mills Co.* 74 N. H. 305, 11 L.R.A. (N.S.) 284, 124 Am. St. Rep. 968, 67 Atl. 578, 13 A. & E. Ann. Cas. 217.

And this principle is as applicable to towns in their qualified ownership and control of highways as to individuals. *O'Brien v. Derry*, 73 N. H. 198, 204, 60 Atl. 843. If the defendant town in leaving the ditch uncovered, over which the adjoining owner

must pass in order to go to and from his land, made an unreasonable use of the highway in view of the owner's reasonable occupation and enjoyment of his land, it may be guilty of maintaining a nuisance as to him. It might be said that its use of the highway in this particular was not justifiable, and that it ought to respond in damages to the landowner for any injury he is thereby compelled to suffer in the proper use and enjoyment of his property.

If it is assumed that this is a correct statement of the liability of the defendant to the one in possession of the adjoining land, it is necessary for the plaintiff to show that there is a similar liability on the part of the town to a bare licensee of the owner, who has no legal interest in the

only occasion the plaintiff had for passing into the street was to go around the drain, instead of crossing it. She had not reached, and had no purpose of reaching, the traveled part of the street. She was not using it as a highway, and had no intention of so doing. It was not as a part of the street, even, but as a curtilage of the house. She had appropriated it as a convenience for domestic purposes, as an appurtenant to the house in which she was residing. She was not, therefore, a traveler, in any such sense as is contemplated by the statute providing for the recovery of damages arising from defects in streets or highways."

It will be observed that in *ELLIOTT v. MASON*, the court, at the end of its opinion, suggests that a recovery could not be had on the ground of negligence as to the ditch, citing *Drew v. Bow*, 74 N. H. 147, 65 Atl. 831 in which case it was held that the ordinary ditch or gutter by the side of a highway was not a "sluiceway" within the New Hampshire statute making towns liable for defects in "sluiceways" on highways.

Warning those coming from private property of dangerous condition of street.

Where the plaintiff, walking outside of the street limits, on what he claimed was an old path, fell into the street which was being excavated, it was held that the District of Columbia was not required to warn those coming from private property, against the condition of the street which was then being constructed. *Young v. District of Columbia*, 3 MacArth. 137.

In *Mulvane v. South Topeka*, 45 Kan. 45, 23 Am. St. Rep. 706, 25 Pac. 217, where the plaintiff claimed that the defendant city had failed to place danger signals at a point where a well-traveled way, which had been used, as he contended, for more than fifteen years by the traveling public,—although not a regularly laid-out road,—intersected a street of such city which had been excavated a distance of some 4 or 5 feet below the surface across such traveled way, and that he, in driving over such way

to the city street, was precipitated into the excavation and injured, it was held that he could not recover. The court said: "There was no obligation resting upon the city to provide a way over private property to its public streets and avenues, and the fact that the ground over which the plaintiff passed had been used by the public for a number of years would not cast upon the city any duty to erect barriers or place danger signals upon such ground, unless the city had full and complete control over the same, as a part of the public streets of the city. There was nothing to indicate that this ground had ever been dedicated to the public, in such a way as to render the city liable, or give the plaintiff any right to use it as a traveled way. It is not the duty of a city to provide means of access from private property to its streets, nor is it liable for a failure to guard its streets from approach, at points where such approach is dangerous."

But in *Burnham v. Boston*, 10 Allen, 290, where the plaintiff was injured while driving from private lots much used as passways by the public into a public street, the court said: "Nor can it be maintained that a city or town would in all cases fulfil the duty incumbent on it by law by merely placing barriers across a street or way to protect travelers from injury by an existing defect or want of repair, without adopting any measures to guard against accident to those who might have occasion lawfully to come on the dangerous portion of the way from private lands adjoining and lying within the limits, which were closed against travelers approaching in other directions. Doubtless in many cases it would be a proper exercise of due and reasonable care to place a single barrier across a way or street which was defective and dangerous, sufficient to stop persons from passing over it by the usually traveled path. Such a precaution, for example, would be an adequate protection against accident on a highway in the country, which was not wrought for travel throughout its entire limits, or in places where the adjoining lands were so fenced by the owners, or

land, and who is not therefore deprived of any enjoyment of the rights of its use and occupancy, as the owner may be, or as a tenant might be. A merely temporary, transient occupation by a licensee or a visitor does not invest him with a legal interest in the land. The license "does not convey any right or estate in the land, and amounts to nothing more than an excuse for an act which would otherwise be a trespass." *Blaisdell v. Portsmouth*, G. F. & C. R. Co. 51 N. H. 483.

Though the question thus presented is somewhat novel, it has claimed the attention of the courts in a few cases. In *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 131, 21 Am. Rep. 436, it appeared that the defendant, by one of its locomotives,

ran onto and killed a horse near the house occupied by the plaintiff's husband and his family, and left the dead animal there; which soon created a nauseating stench and made the plaintiff sick. Her action was brought to recover damages for her physical suffering caused by the nuisance. But she failed in her suit, for the reason that she was not in the possession of the premises occupied by the family. The court say that the defendant "was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house. The right of action in this case was in the husband of plaintiff, he being the occupier and in the rightful possession of the house, with his family, by contract with the owner of the

natural obstacles were so interposed, that access to the way laterally was either unusual or difficult. But a very different standard of diligence would be applicable where a way or street was within the limits of a populous city or town, and was prepared for travel and actually used in every part, and to which constant access was had from private ways over lands of adjacent proprietors, entering it at the side. . . . If it was known to the defendants that a large amount of public travel came from these lots and entered Athens street laterally, so that, after coming within the limits of the street, a person using due care was exposed to the risk of accident in consequence of such defect, then it was incumbent on them to take suitable measures to protect travelers so entering the street, in like manner as they had done to guard against injury to those who came in other directions towards the place where the defect existed."

#### Miscellaneous.

The following cases, while perhaps not strictly within the scope of this note, should be read in this connection:

In *Kellogg v. Northampton*, 4 Gray 65, where the plaintiff while passing from a dwelling adjoining her father's, on the highway, to go upon such highway, when within a few feet from the gate broke through planking over a culvert and was injured, the court said in setting aside a verdict for the plaintiff: "We are of opinion that the defendants had a right to ask that the jury should be instructed that a town were not necessarily chargeable with damage arising from every defect existing within the located limits of a highway; that they would not be liable for obstructions or defects in portions of the highway not a part of the traveled path, and not so connected with it that they would affect the safety or convenience of those traveling on the highway and using the traveled path; and that the town would not be legally liable where an injury was sustained by a party using the road for the purpose of

passing to or from his private way or path, or his own land, although it was caused by a defect within the limits of the highway as located by law, but outside the part of the road used for public travel."

But upon the hearing of exceptions to a further verdict for the plaintiff in the *Kellogg* Case, 8 Gray, 564, the court in holding that the defendant was properly excluded from showing that the culvert was originally built at the request and for the accommodation of the plaintiff's father and his neighbor Bartlett, said: "To render a verdict for the plaintiff, the jury must have found that the place where the accident happened was within the limits of that part of the highway wrought and prepared by the defendants for public travel; that, being so wrought and prepared, persons traveling along the line of the highway were induced to come upon and pass over it; that, after it had been so used for public travel, the defendants had repaired it; and that, in consequence of these acts of the defendants, it had actually become part of the path or track usually traveled by the public in passing over the road. Under these instructions, no inquiry concerning the object for which the defendants originally built the culvert would have been material or proper. It must have been found to have been adopted and incorporated as a part of the highway, wrought, intended, and used for public travel at the time when the accident occurred, without regard to the purpose or design of its original construction." It will be noted, however, that the court said further: "It does not appear by the facts stated in the bill of exceptions that the plaintiff was injured while passing from the house of Bartlett to the highway. It is stated that she was passing along the highway from the house of Bartlett towards a house in South street. Nor does it appear that any question was raised at the trial as to the right of the plaintiff to recover on the ground that, at the time of the accident, she was not in the use of the highway in the same manner and for the same purpose as other travelers."

In *Webster v. Vanceburg*, 130 Ky. 320,

property. Had the husband brought this suit it could have been maintained." "We have found no case where a private action has been maintained for corruption of the air by offensive odors, except by a plaintiff who was the owner of or had some legal interest, as lessee or otherwise, in land, the enjoyment of which was affected by the nuisance." *Kavanagh v. Barber*, 131 N. Y. 211, 214, 15 L.R.A. 689, 30 N. E. 235. In that case the house was owned by the plaintiff's wife, and the family lived "in the house by sufferance of the wife;" but for the reason above suggested he was not permitted to recover for "the personal discomfort to which he was subjected in the occupation of the house." This doctrine was affirmed in *Hughes v. Auburn*, 161 N. Y. 96, 46 L.R.A. 636, 53 N. E. 389, where it was held that while a city may not conduct sewage into the house or upon the premises of an individual, and, if it does, is responsible to him in damages for the trespass or nuisance, the injury is one to property for which the owner alone may demand redress, and a member of his family has as such no special remedy against the municipality for personal suffering caused by its neglect of sanitary precautions against disease.

These cases are criticized in *Thompson v. Ft. Worth & R. G. R. Co.* 97 Tex. 590, 80 S. W. 990, 1 A. & E. Ann. Cas. 231, where an opposite result is reached. But the criticism is not convincing, and the decision seems to overlook the distinction between an action for negligence and one for a nuisance. The opinion cites approvingly but two cases—*Hunt v. Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697, and *Holly v. Boston Gaslight Co.* 8 Gray, 123, 99 Am. Dec. 233—both of which were actions for negligence. When a person manages his real estate in such a way as unreasonably to interfere with the correlative right of his neighbor to a reasonable enjoyment of his land, it is no justification for

the nuisance for the former to prove that he was guilty of no negligence, or that he exercised due care in what he did. The question is: Has he invaded the proprietary right of his neighbor? If the necessary result of his act is to injure the latter in the reasonable enjoyment of his property, "the law of negligence has no application, and the law of nuisance applies." *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 26, 9 L.R.A. 711, 25 N. E. 246, 247; *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 20 L.R.A. 844, 34 N. E. 85; *Joyce, Nuisances*, § 18; *Wood, Nuisances*, § 841; 29 Cyc. 1155. "But such liability does not rest upon the doctrine of negligence. It exists irrespective of that doctrine. The inquiry is not whether the town has negligently failed in its duty to the plaintiff, but whether for any reason it has deprived him of that reasonable enjoyment of his land to which under the circumstances he was entitled." *O'Brien v. Derry*, 73 N. H. 198, 205, 60 Atl. 843, 846; *Lockwood v. Dover*, 73 N. H. 209, 61 Atl. 32; *Roberts v. Dover*, 72 N. H. 147, 55 Atl. 895; *Lane v. Concord*, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687.

The cases cited by the plaintiff (*Paul v. Hazelton*, 37 N. J. L. 106; *Miller v. Greenwich Twp.* 62 N. J. L. 771, 42 Atl. 735; *Case v. Weber*, 2 Ind. 108) do not support the plaintiff's contention that permission of the owner to drive over his private way gave the plaintiff such an interest in the land that he could maintain an action for the nuisance, if the owner could. In those cases the plaintiffs were in the actual beneficial possession of the lands under parol licenses from the owners, which amounted to a parol letting. They had, in fact, the rights of a tenant at will, and not merely the temporary rights of a traveler who is permitted to pass over a private way for his own pleasure or convenience. Moreover, the injuries complained of were to property rights claimed by the plaintiffs,

19 L.R.A. (N.S.) 752, 132 Am. St. Rep. 392, 113 S. W. 140, it was held that a teamster who attempted to use a sidewalk along a railroad freight depot as a driveway to reach the depot took the risk of injury from its being unsafe for that purpose. The court said: "It is argued that the way used by appellant was the only practicable way for wagons to reach the depot. Be that as it may, the city was not legally bound to provide a roadway for wagons to the railroad depot, and is not liable for a failure to do so. If the driver of the wagon saw proper to use ways not provided for such vehicles, he has no legal complaint against the city that they were not fit for the use to which he was putting them. A city's legal duty is not to furnish streets, 37 L.R.A. (N.S.)

even where they may be needed; but it is to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided,—sidewalks for pedestrians; roadways for vehicles and horses."

It may be noted that in *Baker v. Dedham*, 16 Gray, 393, where the plaintiff's cow was injured in going through a passway under the highway, it was held that he could not recover. The court said: "The plaintiff has a private way passing under the highway in question, and this action is brought against the town for not keeping that way in repair. There being no statute requiring them to do this, the action cannot be maintained." B. B. B.

and not merely personal injuries occasioned by the defendants' violation of their proprietary duty to an adjoining landowner.

If, instead of being thrown from his carriage and injured, as alleged, the plaintiff, in attempting to pass from the private way to the highway, had observed the dangerous condition of the ditch, and had been put to some inconvenience in passing over it, or had come to the conclusion that the town was maintaining a nuisance at that place with reference to the use of the private way, would it be contended that, because he was upon the way by the permission of the owner, he was entitled to maintain a suit for his invasion of the owner's right of property? The mere fact that his damages might be small or nominal would not deprive him of the right, if he had it. Nor does the fact that he suffered serious injury have the effect of giving him the right. If anybody's right has been infringed, it is the landowner's right to the reasonable enjoyment of his property; and this is a right which he could not confer upon another without investing him with the title, or the right to the possession of the land or some part of it. The plaintiff's rights with reference to the nuisance were not greater after he got permission to use the private way than they were before. The existence of the private way was presumably an invitation to all persons to use it for proper purposes, but it did not invest them, when so using it, with a proprietary right in the land; one sufficient reason being that the parties did not intend it should have that effect. If the landowner had had the same experience in crossing the ditch that the plaintiff had, his action would be based upon the defendant's infringement of his right to the reasonable enjoyment of his land. After showing the fact of his lawful occupation of the land as an owner or tenant, and the injury to his reasonable enjoyment of the land by the defendant in permitting the nuisance to exist his right to redress would be established. But, in the absence of proof of such facts, he would fail in his suit, however great his injuries might be. *Wood, Nuisances*, § 853. Whether the facts of the particular case would sustain an action for negligence is a different and immaterial question in determining the plaintiff's right to recover for a nuisance affecting the reasonable enjoyment of the possession of real estate. So far as the plaintiff's declaration is based on his right as a mere licensee of the owner, the demurrer thereto, must be sustained; and it would seem that he could not recover as a traveler on the highway for the defendant's alleged negligence in suffering the uncovered ditch to exist. *Drew v. Bow*, 74 N. H. 147, 65 Atl.

Case discharged.

831.

All concurred.

## NEW YORK COURT OF APPEALS.

MOSLER SAFE COMPANY, Resp't.,

v.

MAIDEN LANE SAFE DEPOSIT COMPANY, App't.

(199 N. Y. 479, 93 N. E. 81.)

### Building contract — delay by architect — good faith.

1. The question of the good or bad faith of the architect to whose satisfaction and under whose direction work upon a building is to be done, in failing to pass upon plans and drawing for changes in the work so that its completion is delayed, is immaterial in determining the responsibility of the owner for such delays, so as to prevent his taking advantage of provisions in the contract for stipulated damages for failure to complete the work within a specified time.

### Damages — stipulated — delay in completing contract.

2. Liquidated damages, and not a penalty, are provided for by a contract for placing a safe and vault in a building within a specified time, and declaring that, whereas failure to complete the work within the time limited will cause serious loss, the precise extent of which might be difficult of estimation, therefore the contractor agrees to pay a specified amount for each day's delay; and the amount specified is not plainly disproportionate to the injury.

### Same — owner's responsibility — effect on contract.

3. The right of the owner of a building to liquidated damages for failure to complete a vault within a specified time is abrogated if he is responsible for a substantial part of the delay, and he cannot therefore recover such damages for delay beyond the time for which he is responsible.

### Same — provision for renewal — effect.

4. A provision in a contract for placing an improvement in a building, that if the owner shall require any deviation, the same may be made without annulling or invalidating the contract, will not operate

**Note.**—Upon the question whether a stipulation for damages in a building contract is to be regarded as a penalty or liquidated damages, see note to *Crawford v. Heatwole*, 34 L.R.A.(N.S.) 588. The question in respect of a provision for damages in a land contract is considered in the note to *Madler v. Silverstone*, 34 L.R.A.(N.S.) 4.

to renew a right to liquidated damages for delay in completion of the work after the provision therefor has been abrogated by delays to which the owner materially contributed.

(November 15, 1910.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County, Part XII., in plaintiff's favor in an action brought to recover the balance of moneys alleged to be due under contracts for the construction of certain vaults and safes within a specified time. Affirmed.

The facts are stated in the opinion.

Messrs. Alfred A. Wheat and Frank A. Gaynor, with Messrs. Rollins & Rollins, for appellant:

The acts and omissions of an architect or superintendent in respect to all matters intrusted to his determination under construction contracts are not impeachable except for fraud or bad faith.

Mahoney v. Oxford Realty Co. 133 App. Div. 656, 118 N. Y. Supp. 216; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; Smith v. New York, 12 App. Div. 391, 42 N. Y. Supp. 522; Snyder v. New York, 74 App. Div. 421, 77 N. Y. Supp. 637; Becker v. Woarms, 72 App. Div. 196, 76 N. Y. Supp. 438, 84 App. Div. 491, 82 N. Y. Supp. 1086; Jones v. New York, 60 App. Div. 161, 70 N. Y. Supp. 46; Sewer Com'rs. v. Sullivan, 162 N. Y. 594, 57 N. E. 1111; Del Genovese v. Third Ave. R. Co. 13 App. Div. 412, 43 N. Y. Supp. 8.

The court erred in charging that the defendant's entire claim for liquidated damages was abrogated if any substantial part of the delay was caused by the defendant or the architect, and in refusing to charge that the defendant was entitled to recover the damages for the delays not caused by the defendant or the architect.

Small v. Burke, 92 App. Div. 338, 86 N. Y. Supp. 1066; Wallis v. Wenham, 204 Mass. 83, 90 N. E. 396, 17 A. & E. Ann. Cas. 644; McGowan v. American Pressed Tan Bark Co. 121 U. S. 575, 30 L. ed. 1027, 7 Sup. Ct. Rep. 1315; Morse Dry Dock & Repair Co. v. Seaboard Transp. Co. 88 C. C. A. 263, 161 Fed. 99.

Messrs. Benjamin N. Cardozo and Malcolm Sundhelmer, for respondent:

Where a building contract provides that a building shall be completed by a designated date, and the owner permits the contractor to proceed with the work, and accepts the materials and labor thereafter, and the contractor fully performs his contract except as to the time provided for the completion thereof, the owner is 37 L.R.A.(N.S.)

estopped from interposing the delay as a defense to the action for the agreed price, and his only remedy thereafter is by a counterclaim or an independent action for the damages resulting from the delay.

Deeves & Son v. Manhattan L. Ins. Co. 195 N. Y. 324, 88 N. E. 395; Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315; Reading Hardware Co. v. New York, 129 App. Div. 292, 113 N. Y. Supp. 331; Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815; Crocker-Wheeler Co. v. Varick Realty Co. 104 App. Div. 568, 94 N. Y. Supp. 23; Kenny v. Monahan, 53 App. Div. 421, 66 N. Y. Supp. 10, affirmed in 169 N. Y. 591, 62 N. E. 1096.

If any substantial part of the delay was caused by the defendant's acts, the right to counterclaim for liquidated damages was defeated.

Willis v. Webster, 1 App. Div. 301, 37 N. Y. Supp. 354; Weeks v. Little, 89 N. Y. 566; Dodd v. Churton [1897] 1 Q. B. 502, 66 L. J. Q. B. N. S. 477, 76 L. T. N. S. 438, 45 Week. Rep. 490; Holme v. Guppy, 3 Mees. & W. 387, 1 Jur. 825; Dady v. New York, 57 Hun, 456, 10 N. Y. Supp. 819; Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469, 115 N. Y. Supp. 573; Thilemann v. New York, 82 App. Div. 136, 81 N. Y. Supp. 773; Callanan Road Improv. Co. v. Oneonta, 117 App. Div. 332, 101 N. Y. Supp. 1056; Cornell v. Standard Oil Co. 91 App. Div. 345, 86 N. Y. Supp. 633; Green v. Haines, 1 Hilt. 254; Deeves v. New York, 44 N. Y. S. R. 218, 17 N. Y. Supp. 460; Jefferson Hotel Co. v. Brumbaugh, 94 C. C. 279, 168 Fed. 867; Vilter Mfg. Co. v. Tygart's Valley Brewing Co. 108 Fed. 1002; Caldwell v. Schmulbach, 175 Fed. 429; Ittner v. United States, 43 Ct. Cl. 336; District of Columbia v. Camden Iron Works, 181 U. S. 453, 45 L. ed. 948, 21 Sup. Ct. Rep. 680; Missouri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 S. W. 1119; Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815; Walker v. London & N. W. R. Co. L. R. 1 C. P. Div. 518, 45 L. J. C. P. N. S. 787, 36 L. T. N. S. 53, 25 Week. Rep. 10; 3 Laws of England (Halsbury) 243; Hicks v. Monarch Cycle Mfg. Co. 176 N. Y. 111, 68 N. E. 127; Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256; Clydebank Engineering & Shipbuilding Co. v. Yzquierdoy Castaneda [1905] A. C. 6, 74 L. J. P. C. N. S. 1, 21 Times L. R. 58; Reading Hardware Co. v. New York, 129 App. Div. 292, 113 N. Y. Supp. 331; Small v. Burke, 92 App. Div. 338, 86 N. Y. Supp. 1066.

Gray, J., delivered the opinion of the court:

The plaintiff, in this action, has sought

to recover the balance of the moneys due under three contracts with the defendant, which provided for the construction, in one, of a fireproof vault, in another, of a fireproof and burglar-proof safe, and, in another, of a fire and burglar proof vault. These contracts were substantially the same in their general provisions, and each called for the completion of the work by a fixed date. Each contained an agreement for liquidating the damages in the event of noncompletion by the time fixed; the several agreements differing only in the amount. The agreement in the first contract reads "that time is of the essence of this contract, and whereas failure to thus complete the work within the time mentioned will cause serious loss and damage to the second party (the defendant), the precise extent of which might be difficult of estimation in money, the first party (the plaintiff) agrees to pay the sum of \$25 per day to the second party as liquidated damages for each day's delay in the completion of said work." In the second and third contracts, the amount is fixed at \$25 and at \$150, respectively. The answer of the defendant to the three causes of action, founded upon these three contracts, admitted due performance by the plaintiff, except as to the time of completion, and set up counterclaims for the liquidated damages provided in each contract to be paid, upon the basis of the number of days which had elapsed after the date fixed for completion. There was no dispute as to the number of days' delay, which ranged from 117 days under the first contract, to 211 days under the second contract, and to 193 days under the third contract. At the trial of the action, there was much evidence bearing upon the subjects of the preparation and approval of the various drawings, designs, and detail plans, and of the conduct of the parties, and of the defendant's architect, with reference thereto. It was the contention of the plaintiff that it showed that the defendant delayed the progress of the work in deviation from the plans, and in unreasonable omissions to pass upon the drawings, and that, in such, and in other ways, it was prevented from completing the work by the latter's default. The defendant contended that the evidence did not show it to be responsible for the delay, and that, so far as the acts of its architect were concerned, he was superintending the work under the agreement, and had acted in good faith. As to the first cause of action for the fireproof vault, the plaintiff did not dispute its liability for the delay, and the jury was directed to allow the defendant its counterclaim in full. As to the other claims of the plaintiff, upon the second and

third causes of action, the trial judge instructed the jury, in substance, that the defendant was entitled to recover damages, as stipulated in the contracts, for the delay in completing the work, unless they were satisfied that a substantial part of said delay was caused by its own acts or those of its architect. The jury returned a verdict in the plaintiff's favor, and the judgment thereupon entered has been affirmed by the unanimous vote of the justices of the appellate division. Upon this appeal by the defendant, we must presume that the evidence was sufficient to sustain the finding of the jury that the defendant was responsible for a substantial part of the delay in the completion of the contracts.

The correctness of the judgment below is attacked upon the ground that the court erred in its instructions to the jury upon the law, and the following rulings raised the question we are to consider: At the plaintiff's request, the trial judge charged as follows: "If any substantial part of the delay in the completion of said vault" (or of the fireproof safe in the other cause of action) "was caused by the wrongful acts of the defendant or its architect, or by alterations or deviation from the plans and specifications, or by the failure to approve drawings within a reasonable time, or by arbitrary and capricious acts, the entire cause for liquidated damages was canceled and abrogated, and the defendant is not entitled to recover the same." The trial judge refused to charge, at the defendant's request, that it was "entitled to recoup the liquidated damages for each and every day that the contract time was exceeded by the time of the actual performance, which was not caused by any act or fault of the defendant or the superintendent," or that "if the jury believed that there was any delay occasioned by the arbitrary or unreasonable act of the defendant, through the action of the superintendent, or otherwise, then the jury must consider what would have been a reasonable time to complete, after allowing to the plaintiff the time in which it was delayed." To these rulings, and to others raising the same questions of law, the defendant excepted.

The appellant preliminarily contends that it was erroneous to submit to the consideration of the jury the acts of the architect, in passing upon the question of the responsibility for the delay, inasmuch as his acts were not impeachable except for fraud or bad faith. It is argued that he was acting throughout under the provisions of the contract, and in such a capacity, as between the parties, that his acts could not be questioned, unless so arbitrary and capricious as to indicate fraud or bad faith. Without

discussing that point at any length, I think it will suffice to say that, while the contract did constitute the architect named therein the final arbiter in disputes "regarding the construction of the specifications," and "as to whether materials used and work done were according to their true intent and meaning," he was, in other respects, the agent of the appellant. It was provided that the work was to be done to his satisfaction and under his direction, and in determining upon the plans and drawings, or upon changes therein or in the work, he was the representative of the appellant. It was not necessary, if the jury believed that through any acts of his, or through his omissions to act within a reasonable time, substantial delays in the completion of the work were caused, that his conduct should indicate fraud or bad faith. The question was whether the appellant, through its architect or otherwise, was responsible for materially delaying the respondent in the completion of the work within the time specified. The question of the architect's good or bad faith was not material.

It having been conclusively determined that the defendant was responsible for a substantial part of the delay in the completion of the work, the principal question arises upon the instruction of the trial court, that thereby the right to counterclaim for the liquidated damages was abrogated. So far as I am aware, this court has not pronounced upon this precise question, and the courts below, in determining as they have, have followed (as I infer, in the absence of the expression of any opinion) the rule as it has been asserted in decisions of the courts in England and of the appellate division of the supreme court of this state. See *Holme v. Guppy*, 3 Mees. & W. 387, 1 Jur. 825; *Dodd v. Churton* [1897] 1 Q. B. 562, 66 L. J. Q. B. N. S. 477, 76 L. T. N. S. 438, 45 Week. Rep. 490; *Willis v. Webster*, 1 App. Div. 301, 37 N. Y. Supp. 354.

That this was a valid provision of the contracts liquidating the damages to result from the contractor's delay, and not a penalty, I entertain no doubt, and, though a disputed question upon the trial, the respondent is not very seriously questioning it on this appeal. Parties to contracts have the right to insert any stipulations that may be agreed to, provided that they be neither unconscionable, nor contrary to public policy. No rule of law forbids them from agreeing between themselves with respect to the anticipatory damages which shall be occasioned by the failure to complete the contract within the time specified. When they have done so, their declaration, in the event anticipated, that the sum

fixed is a liquidation of the damages, or a penalty, is not conclusive, and its interpretation is for the court, having regard to the nature of the contract and the circumstances. It may be observed, generally, that whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty. Where, however, the damages resulting from the breach would be uncertain or difficult, if not incapable, of ascertainment, then the agreement of the parties liquidating them in anticipation will be enforced. In *Ward v. Hudson River Bldg. Co.* 125 N. Y. 230, 235, 26 N. E. 256, 257, this question was discussed upon the authorities, and we considered it difficult to lay down any general rule applicable to all cases. It was said that, where parties "have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss, it will be treated as liquidated damages." P. 235. I think that these contracts come well within the class of cases in which the presumable damage from the failure to complete the work contracted for by the date fixed would be uncertain, if at all capable of exact ascertainment. Time was considered to be of the essence of the contract, and it was so stated therein. It is inferable that, when making the contracts for the construction of these vaults and safes, the owner must have regarded it as most important that the investment of capital should be made productive at the earliest possible moment. It was in mind, presumably, that to agree to liquidated damages, covering each day's delay, would act as a spur upon the contractor, and would save to the owner the delays and expense of an action at law to recover the actual damage he might be able to prove. But it is obvious, as I think, that the very reason for sustaining the validity of an agreement for liquidated damages, in such contracts as the present ones, as a reasonable and fair provision, also, suggests how essential it is that the owner shall be able to show strict compliance on his part, and that the contractor's obligation has not been released nor affected by his interference or dilatory action. In requiring this agreement to pay liquidated damages, it is to be presumed that the appellant intended, when called upon to act, to co-operate with all possible diligence with the contractor, and that the latter's situation was such at the time, and its ar-

rangements were so ordered as to enable it to complete the work within the time fixed. While such an agreement has not the harshness of a penalty, it is, nevertheless, in its nature such that its enforcement, where the party claiming the right to enforce has in part been the cause of delay, would be unjust. It is a reasonable view of the situation that denies, in such a case, the right to strict enforcement, and, where both parties are at fault with respect to the delay, remits the injured party to the remedy of an action at law, in which he can recover his actual loss from the contractor's failure to complete within what was a reasonable time. It was competent for the parties, anticipating mutations of mind and of conditions, to have provided against a forfeiture of the right to liquidated damages, by further agreeing that the architect was empowered to certify an extension of the time for completion, if the contractor was delayed in his work in certain specified events or by causes specified. With such a provision, the obligation to pay liquidated damages might be preserved and its commencement deferred to a substituted date. Without such a provision, where, by the mutual fault of the parties, the contractor's original obligation has been put an end to, how could he come under a new obligation to pay the liquidated damages from some subsequent date? Such an obligation could not be renewed except by some express agreement. Its nature forbids inferring its renewal. An apportionment of the fault is impossible under such a contract. *Weeks v. Little*, 89 N. Y. 566; *Willis v. Webster*, supra. The rule that there can be no apportionment of the damages for delays caused by mutual default has also been asserted in the Federal Courts. See *Caldwell v. Schmulbach* (C. C.) 175 Fed. 429.

In *Willis v. Webster*, a well-considered case, and one in which the question arose upon a substantially similar state of facts, it was forcibly said that where "liquidated damages are to be sustained after a given day, the plaintiff [contractor] is entitled to know with precision when he is laboring under such an obligation, and not be required to leave it to the judgment of a jury as to what is a reasonable time. It is impossible under the contract to apportion liquidated damages. Either the liability for the liquidated damage exists, or it does not. It cannot half exist, and half be waived. In the case at bar there was a definite contract which was abrogated by the acts of both parties; and it requires equally concerted action to breathe life into it again." Page 305 of 1 App. Div. In Halsbury's *Laws of England* (vol. 3, p. 243), the doctrine of 37 L.R.A. (N.S.)

the English cases is summed up in the following language: "Where the liquidated damages are stipulated for at so much per day or per week, there must be a definite date from which they are to run. If no such date is fixed by the contract, or if by the operation of intervening circumstances, the date fixed by the contract has ceased to be operative, and there is no provision in the contract under which another date can be substituted, all right to recover the sum stipulated for as liquidated damages has been put an end to, because there is no date from which the penalties can run." In *Dodd v. Churton* [1897] 1 Q. B. 502, which Lord Halsbury cites in support of the rule, the contract provided that the work should be completed by a certain day, and, in default of such completion, the contractor should be liable to pay liquidated damages. In construing the contract, Chitty, L. J., said: "The law on the subject is well settled. The case of *Holme v. Guppy*, 3 Mees. & W. 387, 1 Jur. 825, and the subsequent cases in which that decision has been followed, are merely examples of the well-known principle stated in *Comyns's Digest*, Condition L. (6) that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in *Russell v. Sa da Bandeira*, 13 C. B. N. S. 149, 32 L. J. C. P. N. S. 68, 9 Jur. N. S. 718, 7 L. T. N. S. 804. This principle is applicable, not to building contracts only, but to all contracts. If a man agrees to do something by a particular day, or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time."

The appellant finds an argument upon the provision of the specifications that, if the defendant should require any alteration or deviations, "the same could be made without annulling or invalidating the contract," and, in such event, that "an allowance shall be made for the same on one side or the other, as the case may be," by the architect, etc. I do not see that this affects the question differently. The provision operated to prevent the plaintiff from claiming that the contract was invalidated. It could not renew the obligation to pay liquidated damages, which had been put an end to by delays, for which the appellant was in part responsible. A provision of the contract in *Dodd v. Churton*, supra, was relied upon by the defendant, to the effect that any authority given by the architect for any alteration or addition, in or to the work, was not to vitiate the contract. It was held



"that this provision, however interpreted," did not reach the length contended for; that it did not "amount to a contract to do all the work, including any extras that may be ordered, within the time specified for the performance of the original work." "The provision," it was said, "is that the contract is not to be vitiated, *i. e.*, that it is to stand; but that does not exclude the application of the principle stated in Comyns's Digest, to which I have referred."

The doctrine of the English cases, to which I have referred, and of the case of *Willis v. Webster*, 1 App. Div. 301, 37 N. Y. Supp. 354, decided by the supreme court of this state, is salutary and just, and I think we should approve of it. Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and, in the absence of some provision under which another date can be substituted, it cannot be revived. If the respondent failed to complete within a reasonable time after crediting the appellant's delays, then the latter had a cause of action for the former's neglect, and the measure of damages would be the actual loss proved to have been sustained.

For these reasons, I advise the affirmance of the judgment.

**Haight, Vann, Werner, and Chase, JJ., concur; Cullen, Ch. J., not voting**

Judgment affirmed, with costs.

#### UTAH SUPREME COURT.

**WILLIAM J. BARRETTE, Appt.,**

**v.**

**S. A. WHITNEY, Respt.**

(36 Utah, 574, 106 Pac. 522.)

**Courts — probate — jurisdiction — distribution order — notice.**

1. Where by statute probate proceedings are deemed to be proceedings *in rem*, and the court acquires jurisdiction of the *res* and all persons interested in the property

by the notice given for the appointment of an executor or administrator, the giving of a notice of distribution is not jurisdictional, and therefore its omission will not subject the decree to collateral attack.

**Same — notice — sufficiency.**

2. The giving of proper notice for the appointment of an administrator brings into court all persons having an interest in the estate, for all purposes necessary for the settlement of the estate, including its distribution among the heirs of decedent.

**Same — statutory requirements.**

3. The mere fact that notices of the various steps in an administration proceeding are provided for by statute does not make them jurisdictional, so as to render the judgment subject to collateral attack in case they are not given.

**Probate — distribution — notice — due process.**

4. The legislature may within reasonable bounds, where probate proceedings are *in rem*, determine what shall constitute sufficient notice of the commencement of proceedings for the settlement of an estate, to give the court jurisdiction and to apprise those interested in the estate that the court will administer and ultimately distribute the property among the persons interested, without infringing the constitutional requirements of due process of law.

**Same — collateral attack — right to appeal.**

5. Anyone having an interest in an estate, although not named in the administration proceedings, may, by application to the probate court, make his interest appear, even after judgment, so as to qualify himself to appeal, and therefore there is no necessity for a collateral attack upon the judgment.

**Real property — marketable title — decree — assumption of existence of unknown parties.**

6. Title to real estate which depends upon a probate decree distributing a decedent's estate cannot be held to be unmarketable merely upon the assumption that some unknown claimant exists who will assert his claim, in the absence of any allegation that such claimant does exist, where all known interested parties were before the court when the distribution was made.

(Straup, Ch. J., dissents.)

(November 23, 1909.)

**Note. — Notice of distribution in probate proceedings as jurisdictional.**

For other annotation of collateral interest in the present connection, see note to *Sly v. Hunt*, 21 L.R.A. 680, on Conclusiveness of probate as *res judicata*; note to *Re Killan*, 63 L.R.A. 95, as to Remedy of distributee as to accounting of which he had no notice, and on which he did not appear; note to *Re Sicker*, 35 L.R.A. (N.S.) 1058, 37 L.R.A. (N.S.)

on Right to probate will on service of notice by publication.

As the inquiry which forms the subject of the present note is whether the omission of the prescribed notice of application for a decree or order of distribution is an error so fundamental that it will defeat the jurisdiction of the court, and render its order vulnerable to collateral attack, it does not deal with such questions as whether the omission of such a notice constitutes error,

**A** PPEAL by plaintiff from a judgment of the District Court for Salt Lake County in defendant's favor in an action brought to recover damages for breach of contract to convey a marketable title to real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Henderson, Pierce, Critchlow, & Barrette, for appellant:

A title is not marketable where it exposes the party holding it to litigation.

Swayne v. Lyon, 67 Pa. 436; Glassman v. Condon, 27 Utah, 463, 76 Pac. 343; Fry, Spec. Perf. § 579; Turner v. McDonald, 76 Cal. 179, 9 Am. St. Rep. 189, 18 Pac. 262; Herman v. Somers, 38 Am. St. Rep. 851, and note, 158 Pa. 424, 27 Atl. 1050; Moore v. Williams, 115 N. Y. 586, 5 L.R.A.

654, 12 Am. St. Rep. 844, 22 N. E. 233; Vought v. Williams, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; Schenck v. Wicks, 23 Utah, 581, 65 Pac. 732; Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 730, 41 N. W. 1056.

A decree of a probate court in any proceeding had before it in the course of the administration of an estate is binding only upon the parties who had notice of that proceeding.

Bresee v. Stiles, 22 Wis. 121; Long v. Thompson, 60 Ill. 27; Morris v. Hogle, 37 Ill. 153, 87 Am. Dec. 243; McGowan v. Smith, 22 Wash. 625, 61 Pac. 713; Wood v. Myrick, 16 Minn. 502, Gil. 447; Re Grider, — Cal. —, 21 Pac. 533; Hopkins v.

or whether personal notice is requisite to render such an order binding, or whether it is necessary to give any notice where the statute does not require it.

Although many courts hold probate proceedings to be in the nature of proceedings *in rem*, such proceedings are so treated for the purpose of rendering them binding on all the world where the required form of notice has been given, irrespective of the personal notice to the one who is attacking them; and no case other than *BARRETTE v. WHITNEY* has been found which takes the further step of holding that the giving of the prescribed notice of application for an order of distribution is not an essential prerequisite to the exercise of jurisdiction; the cases in which decrees rendered under such circumstances have been collaterally questioned uniformly holding them to have been made without jurisdiction.

In *Neal v. Robertson*, 55 Ark. 79, 17 S. W. 587, which was an appeal from a decree for distribution, it was said that, as to an heir to whom notice was not given, any order made would be *coram judice*.

In *Re Grider*, — Cal. —, 21 Pac. 532, a decree of partial distribution entered without notice was held a nullity as to the plaintiffs in an action brought by the children of testator to determine the interests of all parties to the property of the estate.

In *O'Neil's Appeal*, 55 Conn. 409, 11 Atl. 857, it was held that a decree of distribution made by a probate court on the application of an administratrix, which made no mention of a person entitled to participate as an heir to the estate, would not protect the administratrix in making payments to the persons named in the order, under a belief that she would be protected thereby, where such person had no notice of the proceeding to distribute, and the administratrix knew that such person was in existence and was an heir to the estate, and intentionally concealed and withheld such knowledge from the court.

In *Wilson v. McCarty*, 55 Md. 277, which was a petition for a final settlement and accounting, it was held that, to make a distribution an entire protection to an execu-

tor or administrator, it is necessary that such action be taken and such notice be given as the statute provides to justify the court in making it.

In *Shriver v. State*, 65 Md. 278, 4 Atl. 679, a suit upon an administrators' bond, in which the administrators contended that they were protected by a distribution made in the orphans' court, it was held that, as it did not appear that the proceedings in the orphans' court were not *ex parte*, they afforded no protection to the administrators against the claim of a party excluded therefrom.

In *Wood v. Myrick*, 16 Minn. 494, Gil. 447, an action on an administrator's bond by one claiming as assignee of certain creditors' claims directed by the probate court to be paid, want of notice by publication or otherwise that the probate court was going to act upon any claim against the estate, or direct payment of any such claim, was set up as a defense. It was held that as the only persons interested in a decree of distribution are those who by law are entitled to claim a share of the estate, the decree itself operates directly upon the persons interested in the estate, and is an adjudication of their rights therein; that the proceeding therefore is not *in rem*, but *in personam*; and without notice prescribed by the statute, the court does not acquire jurisdiction of the persons interested in the estate, and consequently has no jurisdiction to make the decree; that as the want of jurisdiction goes to the power to make any decree whatever, a decree without notice is absolutely void, and affords no protection to the administrator for payments under it; and therefore that the want of notice might properly be set up as a defense.

In *State ex rel. Morrison v. St. Gemme*, 31 Mo. 230, which was a suit upon an administration bond, it was held that the action of a court in awarding certain property to the widow, who was the administratrix, could not be sustained as a decree of distribution where made without notice to those interested.

In *Lilly v. Menke*, 126 Mo. 190, 28 S. W. 643, 994, it was held that in the absence of

McCann, 19 Ill. 112; Re Mitchell, 126 Cal. 248, 58 Pac. 549; Re McFarland, 10 Mont. 586, 27 Pac. 389; Neal v. Robertson, 55 Ark. 79, 17 S. W. 587; Abila v. Burnett, 33 Cal. 658; Shriver v. State, 65 Md. 278, 4 Atl. 679; Adams v. Adams, 46 N. J. Eq. 298, 19 Atl. 14; Re Leavens, 65 Wis. 440, 27 N. W. 324; Ruth v. Oberbrunner, 40 Wis. 238; Lilly v. Menke, 126 Mo. 190, 28 S. W. 643, 994; Burr v. Bloemer, 174 Ill. 638, 51 N. E. 821; Re Bunting, 30 Utah, 251, 84 Pac. 109.

Messrs. Van Cott, Allison, & Riter, for respondent:

A decree of distribution is a proceeding

notice to distributees, a judgment of distribution was clearly *coram non judice* as to them, and could not be the basis of recovery in a proceeding in equity to obtain partition of decedent's estate according to his last will and testament.

And in Baker v. Lumpee, 91 Mo. App. 560, which was an appeal from the denial of the motion to quash an execution issued against an executor on the application of a distributee for a share awarded by an order of distribution, it was held that, as it appeared that none of the distributees had notice of the order of distribution, the court did not have jurisdiction of the parties, and therefore that the order of distribution was void, and the motion to quash the execution should have been sustained.

In State ex rel. Brouse v. Burnes, 129 Mo. App. 474, 107 S. W. 1094, a suit on an administration bond, it was held that an order for distribution made at the final settlement of the executor's account was *coram non judice*, and void as to a grandchild whose existence was unknown to the administrator, and to whom no notice was given.

In Dewees v. Yost, — Mo. App. —, 143 S. W. 72, it was held that an order of distribution, including, among the property distributed, notes in testator's possession at the time of his death, of which he was supposed to be the sole owner, did not affect the interest therein of a co-owner not a party to the proceeding for distribution, its only effect being to transfer to the respective distributees the interest in the notes their decedent had at the time of his death; and therefore that the co-owner could not maintain an action against the estate upon the theory that the inclusion of the notes in the order of distribution amounted in law to the conversion of his interest in them.

In Adams v. Adams, 46 N. J. Eq. 298, 19 Atl. 14, which was a case of a bill filed by a widow to procure construction of the will of her deceased husband, which she claimed gave her a life interest in the residue of his estate, to which the executors set up in bar of the relief prayed a decree of distribution made by the orphans' court, it was held that, as the only notice given the widow was insufficient to bring her into court, the proceeding, as to her, was *coram non judice*. 37 L.R.A. (N.S.)

*in rem*; it may be made without any notice, unless the statute provides otherwise, in which case, if none is given, it is still conclusive against collateral attack; it can be questioned only on appeal or by direct proceeding, and a purchaser thereunder need not look beyond the decree itself, as the decree is conclusive on all the world.

Grignon v. Astor, 2 How. 319, 11 L. ed. 283; M'Pherson v. Cunliff, 11 Serg. & R. 422, 14 Am. Dec. 642; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381; Wilson v. Hartford F. Ins. Co. 19 L.R.A. (N.S.) 553, 90 C. C. A. 593, 164 Fed. 817; Good v.

In Van Houten v. Stevenson, 74 N. J. Eq. 1, 77 Atl. 612, it was held that a decree of distribution, made without the required statutory notice, that the executors as trustees under the will should take over from themselves as executors, and by way of distribution of the estate, a certain mortgage as payment or discharge of the balance coming to them as such trustees on distribution, was not conclusive, as against beneficiaries of the trust, that the security was then of the value at which it was turned over or distributed to the trustees.

In Re Killan, 172 N. Y. 547, 63 L.R.A. 95, 65 N. E. 561, it was held that a brother of an intestate who was not made a party to an accounting of the administrator, upon which a decree of distribution was made, might treat the proceedings in which the accounting was had as void, and institute a new proceeding to compel an accounting, without the necessity of coming in under the prior one by motion to open that decree; the position of the majority of the court being that, by the neglect of the administrators to cite persons unknown, the surrogate did not acquire jurisdiction judicially to settle the administrator's account and make distribution, and that the proceedings were therefore absolutely void as to the petitioner. The minority, however, took the position that the surrogate had jurisdiction of the fund to be distributed, and therefore of the question to be decided, and his jurisdiction could be attacked only directly in a proceeding for that purpose or by appeal; that orders and decrees in probate courts are not made between party and party, but are in the nature of judgments *in rem*, that are good as against all the world, even against the persons who are not cited.

In White's Estate, 163 Pa. 388, 30 Atl. 192, which was a proceeding by a grandson claiming under his grandfather's will, to compel an accounting by the executors, it was held that the finding by an auditor appointed to make distribution, that the provision made for the grandson in the will had been defeated by breach of a condition attached thereto, of which proceeding the grandson had not notice, was not binding upon him.

In McGowan v. Smith, 22 Wash. 625, 61 Pac. 713, it was held that a decree of dis-

Norley, 28 Iowa, 208; Sheldon v. Newton, 3 Ohio St. 494; Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Simmons v. Saul, 138 U. S. 453, 454, 34 L. ed. 1060, 1061, 11 Sup. Ct. Rep. 369; Garrett v. Doeing, 15 C. C. A. 209, 37 U. S. App. 42, 68 Fed. 57; Knight v. Hollings, 73 N. H. 495, 63 Atl. 40; Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; McArthur v. Allen, 3 Fed. 313; Holmes v. Oregon & C. R. Co. 7 Sawy. 380, 9 Fed. 229; Tilton v. Coffield, 93 U. S. 165, 23 L. ed. 858; Tilt v. Kelsey, 207 U. S. 56, 52 L. ed. 101, 28 Sup. Ct. Rep. 1; Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769; Hanley v. Hanley, 114 Cal. 694, 46 Pac.

736; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; Day v. Micou, 18 Wall. 162, 21 L. ed. 862; Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358, 3 A. & E. Ann. Cas. 231; Re Amy, 12 Utah, 278, 42 Pac. 1121; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20; Ehrngren v. Gronlund, 19 Utah, 416, 57 Pac. 268; Chilton v. Union P. R. Co. 8 Utah, 47, 29 Pac. 963; Rhode Island v. Massachusetts, 12 Pet. 718, 9 L. ed. 1258; Loyd v. Waller, 20 C. C. A. 548, 41 U. S. App. 381, 74 Fed. 607; State v. O'Day, 41 Or. 495, 69 Pac. 544; Griffith v. Bogert, 18 How. 164, 15 L. ed. 310; Parker v. Kane, 22 How. 14, 16 L. ed. 290;

tribution of a probate court, confirming a partition made by joint devisees between themselves, was void as to the grantee of one of them, where due notice was not given, and therefore did not preclude him from maintaining a subsequent action for partition.

In Bresee v. Stiles, 22 Wis. 120, it was held in an action of ejectment that an order distributing an estate according to the provisions of a will was not binding upon children born after the making of the will, for whom no provision was made therein, and who consequently were entitled to take as in case of intestacy, where they were not parties to the proceeding, and had no notice thereof.

So, also, in Ruth v. Oberbrunner, 40 Wis. 238, it was held that even though the statute was silent in respect to giving notice to parties interested in the application for judgment assigning the estate, such judgment was no bar to a subsequent action by the heirs against one taking under a testamentary provision alleged to be invalid; and that the notice required to be given of the application for the probate of the will did not have the effect to bring all parties interested in the estate before the probate court, so that without further notice the heir would be concluded in respect to the title of realty under a final order of distribution. The court said: "The proofs show that the plaintiffs resided in Germany; and the court found that no notice, either actual or constructive, was ever served upon them or either of them, of the proceeding for the distribution or assignment of the estate, prior to the time of the making of the order. We fully agree with the circuit court that such a notice was essential, and that the want of it deprived the probate court of jurisdiction to enter an order or judgment assigning the estate to the defendants, which would affect the rights of the plaintiffs. Failure to give the notice was not an irregularity or error merely, but it went to the jurisdiction of the court. It is a fundamental principle in the administration of justice, that no one shall be deprived of his property without his day in court, and having an opportunity to be heard. This principle is not always observed in the 37 L.R.A. (N.S.)

enactment of statutes, but it should ever be insisted upon and maintained, unless, by express words or strong implication, the legislature dispenses with the necessity of giving notice to a party before his rights are adjudicated. This remark is made in answer to the argument that, as the statute is silent in respect to giving notice to parties interested, of the application for judgment assigning the estate, it need not therefore be given. We can draw no such inference from that omission. It may be true that the statute nowhere requires previous notice to be given of the application for this order or judgment, while, in the subsequent sections, in regard to the partition of the real estate, provision is made for giving notice of that proceeding to the parties in interest. But we do not feel warranted in presuming from these facts that the legislature intended the judgment assigning the real estate should be made without some notice to the heir. If the order of distribution has the effect claimed for it, it is conclusive upon the question of title to real state, and may transfer it absolutely from the heir to the devisee under a void will. That a judgment attended with such grave results may be rendered by the probate court without notice to the heir, we are unwilling to hold until the legislature so declares by express words."

In Van Matre v. Swank, 147 Wis. 93, 131 N. W. 982, it was held that an order of distribution assigning a homestead in fee to the widow did not bind persons not before the court.

In Canfield v. Canfield, 55 C. C. A. 169, 118 Fed. 1, which was a bill for an accounting against a testamentary trustee, it was held that a decree of the probate court distributing the trust property and funds as property of the estate was void as against an heir of the *cestui que trust*, who was the real owner of the property, but who was not made a party to the proceedings.

In Rich v. Victoria Copper Min. Co. 77 C. C. A. 558, 147 Fed. 380, it was held that an order of distribution was no bar to an action for ejectment involving the title to the property distributed, where no notice of any application for such order had been given,

E. S. Q.

Harvey v. Tyler, 2 Wall. 341, 17 L. ed. 873; Comstock v. Crawford, 3 Wall. 407, 18 L. ed. 38; Cooper v. Reynolds, 10 Wall. 315, 19 L. ed. 932; Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Neville v. Kenney, 125 Ala. 149, 82 Am. St. Rep. 230, 28 So. 452; Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585; William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Kelley v. Morrell, 29 Fed. 736; Starkey v. Kingsley, 69 N. H. 293, 39 Atl. 1017; Cooper v. Sunderland, 3 Iowa, 114, 66 Am. Dec. 60.

Section 3779 of the Compiled Laws of Utah 1907 contains in substance the principle of the decisions that when the world is summoned into an estate by the publication of notice, all persons interested must take notice of the laws of the state where the property is situate, and that such proceeding is due process of law.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; The Mary, 9 Cranch, 144, 3 L. ed. 684; Cooper v. Reynolds, 10 Wall. 319, 19 L. ed. 933; Grignon v. Astor, 2 How. 338, 11 L. ed. 290; Day v. Micou, 18 Wall. 162, 21 L. ed. 862; 2 Black, Judgm. § 794; Snyder v. Murdock, 26 Utah, 238, 73 Pac. 22; Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769; Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Simmons v. Saul, 138 U. S. 453, 454, 34 L. ed. 1060, 1061, 11 Sup. Ct. Rep. 369.

Frick, J., delivered the opinion of the court:

Appellant brought this action as a vendee of certain real estate to recover damages for a breach of an agreement to convey a marketable title by the respondent as vendor. Upon a trial to the court, the title was held marketable, and therefore that the agreement had not been breached, and judgment was entered accordingly, from which this appeal is prosecuted.

The judgment is based upon an agreed statement of facts, and hence no findings were made by the court. The facts agreed upon are, substantially, as follows:

That on and prior to the 12th day of July, 1883, one Joseph Toronto was the owner in fee simple of the real estate which appellant purchased from respondent; that said Toronto, on said 12th day of July, 1883, died intestate in Salt Lake county; that thereafter, on the 1st day of December, 1900, after due notice, the district court of Salt Lake county, in its capacity and while acting as the probate court of said county, duly appointed one Joseph B. Toronto administrator of the estate of said Joseph Toronto, deceased; that said Joseph B. Toronto duly qualified and discharged the duties as administrator of said estate; that the petition praying for letters of ad-

ministration, among other things, also stated the names and residences of the several persons who, it was alleged, constituted all the heirs of said deceased; that an inventory and appraisement of the property belonging to said estate were duly made and filed, and notice to creditors duly published as provided by law; that after fully administering said estate said administrator, on the 4th day of April, 1902, filed his final account in said court, and therewith also filed an agreement signed by all the persons claiming to be the only heirs at law of said deceased, and asked that said estate, consisting wholly of real estate, be distributed among the persons named in said application for distribution; that no notice, either by publication or otherwise, was ever had or given of the hearing on said application for distribution; that on said 4th day of April, upon a waiver of notice by all of such heirs, and without any other or further notice, a hearing was had upon said application for distribution, and a decree was entered by said court, by the terms of which said court settled and approved the final account of said administrator, distributed and partitioned the real estate of which said Joseph Toronto died seised among the several persons who claimed to be his heirs. The application and decree of distribution are made a part of the statement of facts.

The application for distribution, among other allegations, in substance, also contained the following: That all the debts and taxes due from said deceased had been paid; that all the heirs were of full age; that said deceased left no personal property, and the names of the heirs are given as they appear in the petition praying for letters of administration, and the part to be allotted to each is fully described; that all of the heirs and distributees joined in the application; and that they each and all waived notice of the application for distribution. The application is duly signed by all the persons named therein, and is duly verified.

In the decree were also contained the following findings: "The above distributees are all the heirs of said deceased and the only persons interested in said decedent's estate, and all . . . have duly and regularly waived and dispensed with notice of the hearing . . . for distribution. . . . That said court has full jurisdiction of all the heirs of said deceased, . . . and full jurisdiction . . . to distribute all the property of said deceased as the same is herein partitioned and distributed." The portion assigned to each person is specifically described.

Appellant concedes that the appointment of the administrator and the proceedings were regular and according to law up to the time of making distribution. He, however, asserts that the failure to give any notice of any kind of the hearing on the application for distribution makes the decree of distribution void as to all persons who may have or claim to have any interest in said estate, except those who signed the waiver of notice or participated in the distribution. In other words, appellant contends that such a notice is jurisdictional, and that a decree of distribution without a notice is vulnerable to collateral attack. Distribution to the interested parties without notice, it is asserted, amounts to the taking of property without due process of law.

In this case it will be observed that no presumption that notice was given may be indulged, since it is admitted that no notice of any kind was given, but that the publishing or giving of such a notice was waived by the several persons who claim to constitute the heirs of the decedent. No doubt, if such a notice is jurisdictional, as appellant asserts, then the decree cannot be binding except on those who participated in it, since the persons who claim to be the only heirs could not, by such a claim, exclude or bind others who may have or claim to have an interest in the estate. The whole question therefore hinges upon whether notice of the hearing on the application for distribution is essential to give the court jurisdiction. Upon this question the courts are not in perfect harmony. Much of the diversity of opinion, however, arises from the fact that the appellate courts have not always agreed upon the character of probate proceedings, nor upon the status of probate courts. Some of the courts hold that probate courts are courts of special and limited jurisdiction, whose records must affirmatively disclose jurisdiction; while others hold that they are to be treated as courts of general jurisdiction, with all the presumptions incident to such courts. Again, the appellate courts generally regard probate proceedings as proceedings *in rem*, while a small number apparently treat such proceedings as *in personam*. That is, while such proceedings are, as a general rule, regarded by all courts as proceedings *in rem*, yet some of the courts, when they come to apply the doctrine of notice, seem to disregard the rule applicable to proceedings *in rem*, and apply the rule applicable to proceedings *in personam*. We make this observation for the reason that, if these distinctions are not kept in mind when the cases are examined, the reader may easily become

confused, and may conclude that the conflict among the courts with respect to probate proceedings is much greater than it really is. The divergence that has arisen among the appellate courts with respect to the effect to be given to the judgments of probate courts, and the reasons therefor, are in part stated in § 145 of volume 1, 2d ed. of Woerner on American Law of Administration. The following are some of the well-considered cases which hold that probate proceedings are, in their nature, proceedings *in rem*, and to which the doctrine of notice in such proceedings applies: Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Sheldon v. Newton, 3 Ohio St. 494; Wilson v. Hartford F. Ins. Co. 19 L.R.A. (N.S.) 553, 90 C. C. A. 593, 164 Fed. 819; Good v. Norley, 28 Iowa, 188 (by a divided court); Mohr v. Manierre, 101 U. S. 417, 25 L. ed. 1052; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; Garrett v. Boeing, 15 C. C. A. 209, 37 U. S. App. 42, 68 Fed. 51; Kearney v. Kearney, 72 Cal. 591, 15 Pac. 769; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; Ladd v. Weiskopf, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 101; Clark v. Rossier, 10 Idaho, 348, 78 Pac. 358, 3 A. & E. Ann. Cas. 231. The following text writers also state the rule to be as given in the foregoing cases: Waples, Proceedings in Rem, § 162; 2 Black, Judgm. §§ 635-639, 794, 808.

This court, in Snyder v. Murdock, 26 Utah, 233, 73 Pac. 22, has also, inferentially at least, held that probate proceedings are in their nature proceedings *in rem*. In a number of the foregoing cases, it is also directly held, as it necessarily must be, that a decree of distribution is a proceeding *in rem*, and not *in personam*. By referring to our statutes upon the subject of administration, it will be seen that such proceedings are treated as proceedings *in rem*, and not *in personam*. Section 3817, Comp. Laws 1907, among other things, provides that the petition for letters of administration must state the "facts essential to give the court jurisdiction of the case, and, when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property." Section 3818 is as follows: "When a petition praying for letters of administration is filed, the clerk must set the petition for rehearing, and give notice thereof by publication or by posting, and by mailing of notices to the heirs." Section 4026 provides the time for which notice must be given, and this court in a direct proceeding (Re Bunting, 30 Utah, 251, 84 Pac. 109) held that unless the notice is given for the time and in the manner provided in said section, the

court acquires no jurisdiction of the proceedings. From what is said in the opinion in that case it is at least inferable that if the notice is given as provided by the statute, the court acquires jurisdiction of the whole case; that is, of the property and of the persons interested in the estate. In other words, from what is there said it would seem that the notice which is given upon the filing of the petition for letters of administration is the jurisdictional notice, the giving of which, when given as required by the statute, brings not only the property, but the persons interested therein, within the jurisdiction of the court. Indeed, no other conclusion seems permissible if § 3779 of our statutes is to be given force and effect. That section reads as follows: "No order or decree affecting the title to real property, heretofore or hereafter made in any probate or guardianship matter, shall be held to be void at the suit or instance of any person claiming adversely to the title of the decedent or ward, or under a title not derived from or through the decedent or ward, on account of any want of notice, defect, or irregularity in the proceedings, or of any defect or irregularity in such order or decree, if it appears that, before the order or decree was entered, the executor, administrator, or guardian, as the case may be, was appointed by a court of competent jurisdiction, upon such notice as was or may be prescribed by law; and in an estate in which a competent court shall have appointed an executor, administrator, or guardian upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased or under the ward, on account of any such want of notice, defect, or irregularity, in any other manner than on direct application to the same court, made at any time before distribution, or on appeal."

Section 4037 provides as follows: "If all persons interested in an estate join in any petition, or signify in writing their assent thereto, notice may be dispensed with, and the hearing had at any time." There are a number of other sections which provide for notice and prescribe the method of procedure, but it is not deemed material to refer to any of them, since to do so would not shed any light upon, or aid in any way in disposing of, the real question before us.

From the provisions contained in § 3779, it seems reasonably clear that probate proceedings are deemed to be proceedings *in rem*, and that the court acquires jurisdiction of the *res*—that is, the property of the estate—and of all the persons

who have or claim to have any interest in the property, by the notice required to be given for the appointment of an administrator or executor, as the case may be. If this be so, then all other notices provided for, however important they may be in certain cases and under certain circumstances, are, nevertheless, not jurisdictional,—that is, are not made essential in conferring power upon the court to act,—and hence to disregard them would constitute a mere irregularity which would have to be assailed and corrected in a direct proceeding, and, if not so attacked, in the absence of fraud, would be conclusive as to all the world. That such is the effect of that statute is contended by respondent, while appellant asserts the contrary.

Quite a large number of cases in support of both contentions are cited by respective counsel. The leading case cited by counsel for respondent is *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283. In that case the question of the want of notice of the hearing on application by the administrator to sell real estate of the deceased to pay debts was involved. The question that the statutory notice was not given was raised in a collateral proceeding, and the Supreme Court of the United States in effect held that probate proceedings, in their nature, were proceedings *in rem*; that the probate court had acquired jurisdiction of both the property and all persons interested therein by the appointment of the administrator, and thereby, through him, obtained possession of the estate with full power to administer the same; that the notice of the hearing to show cause was not jurisdictional, and hence the judgment ordering a sale not assailable in a collateral proceeding. At page 339 of 2 How. Mr. Justice Baldwin, speaking for the court, said: "The record of the county court shows that there was a petition representing some facts, by the administrator, who prayed an order of sale; that the court took those facts which were alleged in the petition into consideration, and for these and divers other good reasons, ordered that he be empowered to sell. It did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting the prayer of the petitioner." It is further said, at page 340 of 2 How. that the provisions of the statute with respect to giving notice to the interested parties of the order to show cause why a license to sell the land should not be granted did "not affect the jurisdiction of the court. They apply only to its exercise." It is further said: "The court

having power to make the decree, it can be impeached only by fraud in the party who obtains it. *United States v. Arredondo*, 6 Pet. 729, 8 L. ed. 561. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects."

In *Wilson v. Hartford F. Ins. Co.* 19 L.R.A.(N.S.) at page 553, 90 C. C. A. at page 595, 164 Fed. at page 819, Mr. Justice Sanborn states the doctrine in the following language: "A proceeding in a probate court to administer upon the estate of a deceased person is a proceeding *in rem*, not *in personam*. The property within the jurisdiction of the court is the defendant, the executor or administrator is its representative, and all claiming any interest in that property under the deceased are parties to the proceeding."

In *Sheldon v. Newton*, 3 Ohio St. 494, in referring to the effect that the failure to give the heirs notice of an application by the administrator to sell real estate to pay debts has upon the jurisdiction of the court, the supreme court of Ohio uses the following language: "The heir was required to be made a party to the proceeding with a view to his having notice; but it is nowhere intimated that failure to give the notice should deprive the court of jurisdiction over the property. I am therefore strongly inclined to the opinion that such an omission goes only to the regularity of the proceeding, and not to the jurisdiction of the court." It was also, in effect held that probate proceedings are proceedings *in rem*, and that, when the jurisdiction of the probate court has once attached through the appointment of an administrator, by the giving of a statutory notice, subsequent notices with respect to the intervening proceedings are not jurisdictional, and a failure to give them does not make the court's decree collaterally assailable.

In speaking of this question, Mr. Chief Justice Dillon, in *Good v. Norley*, 28 Iowa, at page 208, said: "The following cases relating to administrator's sales, and that, too, under statutes providing that notice

of the application should be given in terms as strong as in our statute, if not stronger, hold that the proceeding is *in rem*; that the provision as to notice is directory; and that, if not given, it does not deprive the court of jurisdiction; and hence an order for a sale without such notice, or upon notice alone to the guardian, while irregular, and reversible on appeal, is not void, when collaterally attacked."

In *Mohr v. Manierre*, 101 U. S. 423, 25 L. ed. 1054, in speaking of the effect of a want of notice in probate proceedings after the court has acquired jurisdiction of the estate, Mr. Justice Field says: "It is apparent from these sections that the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court." (Italics ours.)

For other similar cases relating to probate proceedings, and where like expressions are used, see *M'Pherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 642; *Garrett v. Boeing*, 15 C. C. A. 209, 37 U. S. App. 42, 68 Fed. 51; *Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858; *Ladd v. Weiskopf*, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 101; *Clark v. Rosier*, 10 Idaho, 348, 78 Pac. 358, 3 A. & E. Ann. Cas. 231.

The only question therefore is: Did the district court of Salt Lake county, while acting as probate court, have jurisdiction of the property of the deceased and of the parties interested therein? While the probate proceedings in their nature are proceedings *in rem*, it does not follow that no notice of any kind to the interested parties is necessary in order to bind them. If the court, however, has once acquired jurisdiction of the property and of the parties, by the giving of the statutory notice, it is not easy to perceive how a judgment or decree affecting either or both is collaterally assailable by anyone interested in the property, although he may at any such proceeding, either by himself or through an attorney, have taken no part therein. When the notice for the appointment of an administrator was given as required by statute, we think that the effect of such a notice was to bring all the parties who had or acquired any interest in the estate into court. We cannot agree with counsel for appellant that the effect of this notice was only to bring the parties into court for the one purpose of appointing the administrator. While this was its immediate effect, it was clearly not its only purpose or effect. The effect of such a notice is to appoint someone, usually the person named in the petition, to administer the estate, and, for that pur-



ness, the court is given full power or jurisdiction over the property belonging to the deceased person. All the interested parties are thus notified that the estate of their ancestor is, in contemplation of law, placed under the charge and control of the court, and that the court will, in due course of time, deal with it as the property of the deceased person; that the court, in due course of time, will dispose of it and distribute it to those who may be entitled to it. All parties in interest must take notice of the law, and while they, as a general rule, may rely on what may be termed a presumption that the court will obey the law, they, nevertheless, may not remain silent when the court erroneously departs from or disregards any of the provisions of the law, and then assail the erroneous acts of the court collaterally. We think the more reasonable and the safer doctrine is that, when the statutory notice that an administrator will be appointed is given, such a notice not only is notice to the parties of the fact, but is notice to all the world, that the court, by the appointment of an administrator, will take charge of the property of the deceased to administer it, and that it will finally distribute the remainder, if any, to the heirs of the deceased.

As we have seen, the statute requires that the names, ages, and places of residence of the heirs must be given in the petition for the appointment of an administrator. It seems quite clear to us that this requirement is not for the sole purpose of appointing an administrator. Quite true, the proposed applicant for appointment may be entirely satisfactory to all the interested parties, and they may not desire to contest his appointment; but the court is not absolutely bound to appoint the applicant. Any suitable person, if there be one within the class entitled to appointment other than the applicant, may be appointed. If such another were appointed, could any interested person thereafter collaterally assail such an appointment? We think no one would so contend. If all parties in interest are thus notified, and are brought into court for one purpose which affects their rights by reason of interest in the property of the deceased, why are they not in court generally, and why does not the court, in the absence of an express statute to the contrary, acquire jurisdiction over them for any purpose which may affect their interest? It is unreasonable to suppose that they are partly in court and partly out of court. We think the true distinctions are those laid down by Chief Justice Dillon in *Good v. Norley*, and by Mr. Justice Field in *Mohr v. Manierre*, 37 L.R.A. (N.S.)

*supra*, namely, that the subsequent notices required by the statute are directory merely, or that they are intended for the convenience and protection of the parties in interest, and are not jurisdictional. The heirs may be numerous, and may live in different parts of this, or even in some other, country. When their names and places of residence are thus given, or when the fact is made to appear that they are unknown, as it must be, in the petition for letters of administration, the probate court is fully advised with respect to the true situation. While the court may assume that, as a matter of law, and for the purpose of jurisdiction, both the known and the unknown heirs are before the court, yet, whether the heirs are living in different states or otherwise, it cannot be presumed that a prudent and careful judge would ordinarily proceed to distribute without notice to the heirs or to some accredited person representing them.

There are various provisions in the statute by which full power and discretion is vested in the probate court with respect to the time and manner of giving notice during the course of administration, and the court may thus, in every case, suit the notice to the circumstances and conditions confronting it. But the mere fact that such notices may be provided for does not necessarily make them jurisdictional. Even if the legislature had not so stated in express terms, the court should hesitate to declare them so, since much more mischief would result from permitting proceedings in after years, when innocent parties can no longer be placed *in statu quo*, to be collaterally assailed, than could possibly arise by holding the judgments and proceedings of courts having jurisdiction and power to proceed conclusive as against such attacks. This is the doctrine upon which § 3779, *supra*, is based. Probate proceedings being *in rem*, it was within the power of the legislature (within reasonable bounds) to say what should constitute sufficient notice to give the court jurisdiction of the estate, and what should be sufficient to apprise those interested therein that the court will administer and ultimately distribute the property among the parties in interest. Where the notice is sufficient to accomplish this purpose (and no one contends that the notice provided for by our statute is not sufficient), the courts generally hold, and especially the Supreme Court of the United States, which is the final arbiter upon this subject, expressly holds, that such a notice constitutes what is termed "due process of law." Our legislature having thus spoken upon the subject, and by what it has said, has clearly

manifested its intention that, when those who claim an interest in the property of a decedent are notified of the petition for the appointment of an administrator of the decedent's estate, they are in court for all purposes, we ought not, except for the most cogent reasons, interfere with the legislative intent as expressed in the law.

In this connection, it is a matter worthy of note that, while notices for various other hearings were expressly provided for in the several sections of our statutes, no express provision is found which required a notice on the application for distribution to be given until 1905, when § 3952 was amended. Laws 1905, p. 68, chap. 60. Such a notice was, however, implied from what is said in other parts of the statute, and expressly so from what is said in § 4037, which we have quoted. But, as we have seen, § 3779 expressly provides that a failure to give such a notice shall not affect the judgments or decrees except upon a direct proceeding; hence the effect of a failure to give the notice is expressly provided for, and had it not been for the earnestness with which able counsel have pressed the matter to our attention, and of its importance and far-reaching effects, we should have felt content to dispose of the question by referring to our statutes merely. Counsel have cited no case, and by a very careful research we have been unable to find any, where, under statutes like ours or under similar ones, any court has held a decree of distribution without special notice void and collaterally assailable. True, there are some expressions in some of the opinions in the cases cited by appellant that might lead one to infer such a result. But upon a close analysis of the opinions, such a conclusion, in our judgment, is not intended. As an instance, we refer to *Ruth v. Oberbrunner*, 40 Wis. 269, which is one of the few cases in which it is held that a notice for distribution is jurisdictional, and hence, in the absence of such notice, the decree is open to collateral attack. A careful reading of that case, however, will disclose that the supreme court of Wisconsin, in passing judgment, construed the Wisconsin statute as mandatory and jurisdictional. In the court's opinion it is in effect held that, unless the statute dispensed with such a notice, or made it non-essential in express terms, the court would not take the responsibility of declaring it to be so. But it should not be overlooked that the supreme court of Wisconsin has always held to an extreme view with respect to the giving of notices. This is apparent from the early cases in that court, as appears from *Gibbs v. Shaw*, 17 Wis. 197, 84 Am. Dec. 737, and *Breese* 37 L.R.A. (N.S.)

*v. Stiles*, 22 Wis. 120, which latter case was followed in *Ruth v. Oberbrunner*, supra. This is perhaps better illustrated in the case of *Mohr v. Tulip*, 40 Wis. 66. In that case the doctrine was carried to its extreme limits, and the decree granting the guardian of an insane person permission to sell without notice to the insane person was held subject to collateral attack upon the sole ground that the insane person was not notified of the application by the guardian. The same plaintiff was, however, taken into the Federal courts, where, under the same state of facts, it was held by the Supreme Court of the United States, in *Mohr v. Manierre*, 101 U.S. 417, 25 L. ed. 1052, that the notice was not essential nor jurisdictional, and held the decree conclusive upon a collateral attack. Subsequently the supreme court of Wisconsin, in a case by the same plaintiff, namely, *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364, modified, and in part overruled, its rulings in *Mohr v. Tulip*, supra, to conform to the rulings of the Supreme Court of the United States in *Mohr v. Manierre*, supra.

In addition to the Wisconsin case, it may be said that the case of *Shriver v. State*, 65 Md. 278, 4 Atl. 679, holds that the notice of the application for distribution is jurisdictional. But this case is also based upon a Maryland statute. Mr. Van Fleet, in his work on *Collateral Attack*, refers to the Wisconsin and Maryland cases in § 403 of his work. While it is apparent that he does not agree with those courts, nor with the views entertained by them with respect to the effect of such a notice, yet all he says with respect to them is: "The distributees were in court all the time. They had an opportunity to rectify any errors when he came to obtain his final discharge." It will thus be seen that Mr. Van Fleet holds to the general doctrine that the notice for the appointment of an administrator or executor brings not only the property, but all the parties in interest, into court for all the purposes of administering upon the estate in which the application and appointment were made. While we have carefully examined all the cases cited by counsel for appellant, it would subserve no useful purpose to refer to any of them at length. Many of the cases referred to deal with attacks by appeal, and, whatever the expressions in those may be, they are not authoritative when the question is raised upon a collateral attack. The cases, other than those upon a direct attack, to which we have been referred, generally involved a construction of some particular statute which the

courts held controlling, and which had not been followed.

It is further contended, as we understand appellant, that no one except the persons named in the decree could have appealed from it. He asserts that, if this be not conceded, an appeal would nevertheless have been of no avail, since the record would not have disclosed that anyone else had any interest except those mentioned in the decree. The contention, in our judgment, is not tenable. While the decree is not assailable on collateral attack, it, nevertheless, would have been so upon a direct attack by appeal. Indeed, § 3779 expressly authorizes a decree to be thus attacked. By application to the probate court, anyone having an interest could make his interest appear, even after judgment, and thus prosecute an appeal. True, as a general rule, only parties to the record may prosecute appeals. But this is upon the ground that, in ordinary proceedings, parties and their privies are the only persons bound by the judgment. But, as we have said, probate proceedings are proceedings *in rem*, and, when the statutory notice is given to bring the property and the persons interested therein within the jurisdiction of the court, all the interested parties are bound by the judgment and decree. Such cases, therefore, as shown by Mr. Elliott in his Appellate Procedure, § 136, constitute an exception to the general rule, and parties in interest may appeal notwithstanding the fact that they are not identified by the record. They have the right to make the record show their interest, or that they claim an interest, and when this fact is made to appear they may appeal and attack the judgment upon any ground that parties might otherwise attack it. In this case anyone interested might have shown the irregularity of the proceeding, and that by reason of that fact he was prejudiced in his rights; and the cases are numerous where the appellate courts have reversed judgments or decrees for such irregularities. We have no doubt such would have been the rule in this case upon a proper showing. In this case it is conceded that every person who claimed an interest in the estate was brought into court for the purpose of the appointment of an administrator, and that anyone could have appealed from the order of appointment, and unless the appointment was attacked on appeal, no one could have assailed it collaterally. If, therefore, the persons interested in the estate were parties for that purpose, when, how, and why did they, or any one of them, cease to be parties for the purpose of 37 L.R.A. (N.S.)

prosecuting any appeal authorized by statute? We confess our inability to perceive why any and every interested person could not have appealed from any appealable order or decree; and for the same reasons we can see no good reason why all are not bound. We remark that we do not wish to be understood as passing upon the effect of a failure to give notice upon an application for the sale of real estate by an administrator. Upon that subject our statutes speak in explicit terms, and we refrain from expressing any opinion.

It is, however, urged that a title may be good, and still not be marketable. This, no doubt, is true. It may be that there is an apparent outstanding interest in some unknown heir, who, if alive, would be entitled to claim such interest. Several questions might thus arise, namely: Is the unknown heir alive? If not, did he survive the ancestor, and, if he did not, are there any of his heirs who succeed to his rights? It may also be the case that, if it were conceded that an unknown heir may still survive, yet that his interest is barred by an adverse possession. There are numerous cases in the books where such questions are discussed.

The case of *Ferry v. Sampson*, 112 N. Y. 415, 20 N. E. 387, is a case where there was an apparent outstanding interest in an unknown heir. This heir had, however, been absent and unheard of for forty years at the time the case came on for trial, and the court held that the presumption of his death, and that he left no heirs, under the facts and circumstances of that case, was so strong as not to leave such a doubt as would make the title unmarketable. The title was therefore held marketable, and the vendee was required to complete his purchase.

In another case, decided by the same court a year later (*Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195), and cited by counsel for appellant, an opposite result was reached. The result in the latter case, however, was based upon the fact that the unknown heir had not been unheard of for a sufficient period of time to constitute a presumption sufficiently strong to remove the doubt that he might return and claim his interest.

Another illustration of this character is presented by the case of *Swayne v. Lyon*, 67 Pa. 436, also cited by appellant. In that case the title was based upon a judgment which was held to be open to collateral attack by a party who had some right to or interest in the land in question. The court therefore held the title so doubtful as to make it unmarketable.

Another illustration is found in the case

of Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527. That case involved the construction of an instrument from which it was to be determined whether an easement could or could not successfully be claimed in the property which was the subject of sale. The vendee claimed that, since it was possible that an easement could be claimed in the property, therefore the title was not marketable. The court, however, held that whether an easement could be claimed or not depended upon certain facts which were so clearly established as to leave no reasonable doubt that an easement could not be successfully claimed in the property, and hence the title was held marketable, and the vendee was required to receive it.

While the cases are very numerous, the ones we have cited above illustrate the doctrine quite as well as this could be done by citing a larger number.

It will thus be seen that, even though the title depends upon a question of fact, if the fact upon which the title rests is clearly established, or is undisputed, so as to leave no room for reasonable doubt with regard to the title, it will be held marketable. Maupin on Marketable Title, 2d ed. p. 730. But the title may be doubtful upon questions of law, and hence unmarketable, as well as upon questions of fact. If a doubt arises upon a question of law, it usually arises either by reason of the uncertainty of the meaning of some instrument which affects the title, or from the construction to be given to some general law which in some way is involved. When the doubt is based upon some instrument which directly affects the title, so that if the instrument be construed one way, some third person may have some interest in the land in question, and if construed the other, he will not have any interest, the courts usually refuse to declare the title marketable, or otherwise, unless all the parties in interest are before the court, so that the construction placed upon the instrument will be binding upon all who may be affected by the construction placed upon it. Where, however, the question depends upon the construction of a general law merely, the courts ordinarily pass upon the question regardless of whether all the parties who are alleged to have some interest are before the court or not. Ordinarily, when the question whether the title is marketable depends upon a general law of the land, the title will be held marketable if the court holds the law to be in favor of the title. Maupin, Marketable Title, 2d ed. pp. 713, 714.

If we apply the doctrine to be deduced  
37 L.R.A.(N.S.)

from the authorities to this case, how can it be said that the title to the land in question is, or ever was, doubtful so as to be unmarketable, within the meaning of that term? The only objection to the title is that the final decree of distribution made by the probate court, and upon which appellant's title rests, is not binding except upon such persons as were actually before the court and consented to that decree when it was made. It, however, is nowhere alleged, nor is it claimed, that all the parties in interest were not actually before the court. The only claim is that there is a possibility that there may be some others who were not before the court. If all the interested parties were in fact before the court, then no doubt the title would be perfect, since all the parties in interest would be bound by the decree. Can we assume, as a matter of law, that there is an unknown claimant somewhere who will hereafter assert his claim, in the absence of an allegation that such a claimant at one time existed? In all the cases that have come under the writer's observation, there was some claim that at one time at least there was some person in existence who sustained such a relation to the land in question as would give him an interest if still alive. In the case at bar we are asked, however, to assume two things: (1) That an unknown heir once existed; and (2) that he is still alive. If it were claimed that such an heir once existed, it might well be that, under the facts and circumstances of this case, he would not be presumed to be dead; but can it be assumed, without any allegation to that effect, that some heir other than those who were parties to the final distribution ever existed? It might be that if it were conceded that the probate court had not jurisdiction of all the persons who might have, or claimed to have, an interest in the land in question when the decree of final distribution was made, and that the decree was binding only upon those who consented thereto, the title would not be held, as a matter of law, to be so free from doubt that a court would declare it marketable, although there was no allegation that at one time some heir existed who did not consent to the decree, and who was not included in the distribution. But when, as in this case, it is held that the probate court had jurisdiction of all the interested persons, and that the decree of final distribution under our statute is binding upon all whether consenting thereto or not, or whether notified of the application for final distribution or not, how then can it be said that there remains a doubt re-

specting the title upon the ground before stated? If, in addition to this, it be remembered that there is neither allegation nor claim that any other heir than those named in the decree of final distribution ever existed, and, further, that we have held that, if there were such, they are, nevertheless, bound by the final decree the same as those who were actually present and consented thereto, then how can it be said that this title is any more doubtful than any other title would be that is based upon a decree of final distribution, however perfect the proceedings leading up to such a decree might be? Is it not manifest that, in view of our statute which makes the failure to publish a notice of the character in question a mere irregularity, which must be corrected, if corrected at all, in a direct proceeding, and further that there is not even an allegation or claim that there now exists, or that there ever existed, some person who is not bound by the final decree of distribution upon which the title in question is based, that there is no tangible ground upon which to base a reasonable doubt concerning the marketability of the title in question?

From what has been said, it follows that the district court committed no error in holding that the title in question is a marketable title, and hence that the respondent committed no breach of his agreement to convey a marketable title, in view that he conveyed all that he had agreed to convey.

The judgment is therefore affirmed, with costs to respondent.

McCarty, J., concurs.

Straup, Ch. J., dissenting:

I dissent. On the 17th day of October, 1908, the defendant and respondent sold and conveyed to the plaintiff and appellant certain real estate situate in Salt Lake City. It is alleged in the complaint that at the time of the sale and conveyance, and as part of the same transaction, "the defendant agreed in writing with plaintiff that, in the event the title of said real estate should not be good and marketable, then he, the said defendant, would either take the necessary steps to make the title good and marketable, at his own expense, or that he would pay plaintiff the sum of \$150, being the amount which, as estimated by plaintiff and defendant, would be sufficient to defray the expense of any proceeding necessary to render the title to said real estate good and marketable;" that the title to said real estate

was not good and marketable; that the plaintiff demanded of the defendant that he either take the necessary steps to render the title good and marketable, or pay the plaintiff the sum of \$150 for such purpose; and that the defendant refused and neglected to take any such steps, and also refused and neglected to pay plaintiff any part of the \$150. A judgment was demanded against the defendant for the sum of \$150. The defendant admitted all the allegations of the complaint except that the title was not good and marketable. Upon an agreed statement of facts, the court found the title good and marketable, and rendered a judgment in favor of the defendant, and dismissed the complaint. The real question, therefore, in the case, is that of marketable title. The agreed statement of facts shows, among other things, that the land in question was owned by Joseph Toronto at the time of his death, who died intestate in 1883. No administrator of his estate was appointed until 1900. The statute required the giving of a notice for the distribution of estates. A general provision of the Probate Code (Comp. Laws 1907, § 4037), however, provides that "if all persons interested in the estate join in any petition or signify in writing their assent thereto, notice may be dispensed with and the hearing had at any time." On the 4th day of April, 1902, certain persons, alleging that they were the heirs of the deceased, petitioned the court to distribute the estate, consisting principally of real estate, to them, and waived the giving of notice. The court thereupon, and on the same day, distributed the property of the estate to them without notice. The land in question was, under such petition, and by such a proceeding, distributed to Frank and Ernest Toronto, heirs of the deceased. They thereafter sold to Whitney, the defendant and respondent. He sold and conveyed it to the plaintiff, the appellant.

I think it is well settled that title to real estate may be good, and yet may not be marketable. It is not necessary to show that the title is bad to establish that it is not marketable. The court may consider and hold the title good, and yet hold it not marketable, if there be sufficient doubt and uncertainty in respect of the title to form the basis of litigation, or if it invites and exposes the party holding the title to litigation. The purchaser is entitled to have a title that will enable him to hold his land in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value. And if there be doubt, it cannot be thrown upon the pur-

chaser to contest that doubt and encounter the hazards of litigation. If it were otherwise, the purchaser could be compelled to buy a lawsuit, which might be a very serious loss to him both of time and money, even if he ultimately succeeded. These principles are found stated in, and are taken from, the following cases: *Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195; *Herman v. Somers*, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; *Townshend v. Goodfellow*, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; *Swayne v. Lyon*, 67 Pa. 436; *Turner v. McDonald*, 76 Cal. 179, 9 Am. St. Rep. 189, 18 Pac. 262.

When the Toronto estate was distributed, without notice, to certain persons claiming to be the heirs of the deceased, I think sufficient doubt and uncertainty as to the title arose to render it not marketable, though this court should afterward entertain the opinion in favor of the title, and should decide that the probate court was not without jurisdiction to make the distribution without notice. I do not think that the question is so clear and free from doubt that such an opinion and conclusion, until decided by the court of last resort, cannot fairly and reasonably be questioned by other competent persons. Upon the very question involved, I find, as stated by Mr. Justice Frick, that the authorities, are not in perfect harmony. If, therefore, the courts are divided upon the question, and entertain different conclusions as to the jurisdiction of the court to make such a distribution without notice, I do not see why it should be said that the title of property affected by such a distribution is neither doubtful nor uncertain in this jurisdiction, until the court of last resort has set the matter at rest.

In the next place I am not satisfied with the conclusion reached by the other members of the court, that when a court in a probate proceeding has appointed an administrator, upon proper notice, it thereby obtained jurisdiction of subject-matter and all the parties interested in the estate, for all subsequent proceedings in the course of administration, including a settlement and distribution of the estate, and that whatever action the court thereafter took, or whatever proceedings were thereafter had, though in violation of the prescribed procedure, and of the giving of notice as required by the statute, constituted but irregularities, and did not affect jurisdiction.

I do not think that the adjudged cases go to the extent of holding that when a proper notice has been given for the ap-  
37 L.R.A. (N.S.)

pointment of an administrator, the court acquired not only jurisdiction to make the appointment, but also acquired jurisdiction, after the appointment, to do all other things in the course of administration, including the distribution of the estate, notwithstanding, to do them, a notice was also required to be given as prescribed by the statute, and that such notice was not given. Neither do I think that § 3779 of the statute is open to such a construction. The first portion of the section provides that no order or decree affecting the title to real property made in any probate matter shall be held void at the suit or instance of any person claiming adversely to the title of the decedent, or under a title not derived from or through the decedent, on account of any want of notice of the decree or irregularity in the proceeding, if made to appear that the administrator was appointed by a court of competent jurisdiction, upon notice as prescribed by law. This is not a suit where a litigant is claiming adversely to the title of the decedent, or under a title not derived from or through the decedent. The latter portion of the section provides that, when a "competent court" shall have appointed an administrator upon due notice, no objection to any subsequent order or decree therein can be taken by any person claiming under the deceased, "on account of any such want of notice," in any other manner than on direct application to the same court "made at any time before distribution," or on appeal. When the statute reads that no objection to any subsequent order, etc., can be taken "on account of any such want of notice," what notice is meant? I think, the notice just mentioned and referred to in the section,—the notice given for the appointment of the administrator. If, for instance, after an administrator has been regularly appointed of an estate in which the decedent left A, B, C, and D surviving as his heirs at law, A, B, and C should thereafter petition the court, and therein allege that they are the only heirs, waive the giving of notice for distribution of the estate, ask the court to distribute all the property of the estate, consisting of real and personal property, to them, I do not think such a decree or judgment of distribution, made on the same day and at the same time of the filing and presentation of the petition, and without notice, would be binding upon D, and would divest him of all right, title, and interest in and to the property of the estate, or bar him from thereafter asserting or claiming any right, title, or interest therein, except on appeal,

or "on direct application to the same court made at any time before distribution."

When a distribution is made, as was the case in the Toronto estate, on the same day of the filing and presentation of the petition for distribution, and without notice, I do not see how anyone interested in the distribution or entitled to a distributive share of the estate, and who had no notice of such a proceeding, could "at any time before distribution" apply to the court making the distribution, for relief from such a judgment or decree of distribution. To say that he may assail the judgment on appeal (if it is his good fortune to somehow obtain information within the time, six months, in which an appeal may be taken, that proceedings of distribution had been had, and a judgment rendered) is also but to say that he may directly attack it. To say that he may not attack the judgment except on appeal, "or on direct application to the same court at any time before distribution," is to assert that the judgment has all the binding effect of any other judgment. Under our statute, when a person dies intestate, his property passes to his heirs. Of course, it is subject to debts and expenses of administration. When an administrator is appointed, the property is subject to the control of the court for the purposes of administration. But the statute directs to whom the property shall be distributed, and prescribes the proceedings to be had for distribution. After an administrator has been appointed, on proper notice, the court may not, upon his petition, or another, without notice, take the property away from the heirs and give it to a stranger; nor may the court, without notice of any kind, take it away from one heir entitled to a distributive share, and give all of it to other heirs; nor can it be successfully asserted that such action, so taken in defiance of law and of the requirements of the statute, is but an irregularity, and assailable only on direct attack. When the court takes property from one person to which he is entitled, and gives it to another, such person is entitled to notice, and to his day in court. He is entitled not only to his day in court on an appeal, but to his day in court before the tribunal that takes it away from him.

It, however, is said that the plaintiff neither alleged nor proved that the deceased left legal heirs who were entitled to a distributive share, other than those who petitioned for distribution, waiving notice, and to whom the property was distributed. That implies that if the plaintiff had shown that there was an heir who was entitled to a distributive share, and

did not join in the petition waiving notice for distribution, and had not obtained his distributive share, then the court was without jurisdiction to make the distribution. But since the plaintiff did not aver nor prove the existence of such an heir, then the court had jurisdiction. Thus the question of the court's jurisdiction is made to depend upon the further question as to whether the court correctly or incorrectly adjudged the matter brought before it, or as to whether the result reached, when considered in respect of particular facts shown, was right or wrong.

When the proceeding, as here, is a special statutory one, and not in accordance with the course of the common law, the jurisdiction of the court, though a court of general jurisdiction, must affirmatively appear upon the record, and no presumption will be indulged in support of its decree or judgment when such jurisdiction does not thus affirmatively appear. If the jurisdiction of the court is thus made to appear, then the judgment rendered, though erroneous, would be a shield to ward off any claim which an heir or his assigns or representatives might assert to the property in the hands of the plaintiff. But suppose a person who is an heir, and entitled to a distributive share, but who had not joined in the petition for distribution, asserts a claim to his distributive share of the property in the hands of the plaintiff, would the decree or judgment rendered by the court distributing all the property to others, without notice of any kind, be a shield in the hands of the plaintiff against such a claim? If it would, then why would not a judgment of settlement and distribution of an estate also be a shield to a creditor's claim asserted against the property in the hands of a distributee or his assigns, where the settlement and distribution were had without publishing or giving notice to creditors? I do not think it would in either instance. If in a case a settlement and distribution were had without notice to creditors, and the title of a distributee was questioned or assailed for the want of such a notice, it could as well be asserted that, to make the assault successful, it must be averred and shown that there were creditors, as here to assert that the plaintiff was required to aver and show that there were heirs entitled to a distributive share, who had not joined in the petition for distribution, waiving notice.

But, aside from these considerations, the title depending upon a decree of distribution rendered on proceedings without notice was, I think, sufficiently doubtful and uncertain as to expose the plaintiff to

the hazards of litigation, and thereby render the title not marketable, until the court of last resort, in a proper proceeding before it, has finally determined and adjudicated that a court in probate proceedings has jurisdiction to render a decree of distribution without notice. Suppose this court, in this proceeding between the plaintiff and the defendant, should now adjudge the title good and marketable, of what avail is the adjudication in the hands of the plaintiff in a case where an heir entitled to a distributive share, and who had not joined in the petition for distribution, waiving notice, asserted a claim against the property in the hands of the plaintiff?

I think, from the terms of the written agreement entered into between the plaintiff and the defendant, it may be fairly presumed that the parties themselves thought that sufficient doubt and uncertainty existed with respect to the title by reason of the distribution without notice, as to require some action or proceeding to clear up the title, and that such doubt and uncertainty led to the making of the agreement, by the terms of which the defendant agreed to take such steps or to pay the plaintiff the sum of \$150 for such purpose. The defendant, upon demand, refused to do either; and, when he so refused, I think a breach of his contract occurred.

I therefore think that upon the issues, and upon the agreed statement of facts, the plaintiff was entitled to recover, and that the court erred in rendering judgment in favor of the defendant, and in dismissing the complaint.

#### IOWA SUPREME COURT.

J. J. LEE, Appt.,  
v.

INDEPENDENT SCHOOL DISTRICT OF  
IOWA CITY.

(149 Iowa, 345, 128 N. W. 533.)

**Judgment — binding effect — person not party.**

1. A judgment in favor of a taxpayer, enjoining a school district from paying out

money under certain contracts alleged to be invalid, is not a bar to an action by the contractor to recover against the district on *quantum meruit* for money expended and services rendered in reliance on the contract, unless the contractor was a party to the former proceeding, or so connected therewith as to have had an opportunity to present therein an issue as to his right to recover on *quantum meruit*.

**Party — taxpayer — contractor with district.**

2. A taxpayer of a school district who has entered into a contract with it is not, unless expressly made so, a party to a suit by another taxpayer on behalf of himself and all other taxpayers, to enjoin the officers of the district from performing the contract on the ground of its invalidity, so as to be bound by a judgment entered in such proceeding, when he brings an action individually to enforce his claim under the contract.

**Same — privity with district.**

3. Persons who have contracted with a school district are not so far in privity with the district as to be bound by a judgment enjoining it from carrying out the contract on the ground of its invalidity, in a proceeding to which they are not formally made parties.

**Same — becoming witness — effect.**

4. One does not become a party to a suit so as to be bound by the judgment, even though he has an interest in the result, by appearing therein to testify as a witness at the call of one of the parties carrying on the litigation.

**Same — affecting interests — knowledge of action.**

5. One is not necessarily bound by a judgment in an action the result of which may affect his interests, by the fact that he is cognizant of the litigation and is present at the trial.

**Judgment — right of intervention — binding effect.**

6. The right to intervene in an action does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation.

(November 18, 1910.)

**A**PPEAL by plaintiff from a judgment of the District Court for Johnson County in favor of defendant in an action brought to recover compensation for services rendered in handling text-books to be used in defendant's schools. Reversed.

**Note. — Decree in taxpayers' suit restraining district from performing contract, as binding upon contractor.**

The above is apparently the only case wherein this specific question has been decided. The doctrine therein asserted, however, finds support in *Detroit v. Detroit R. Co.* 134 Mich. 11, 104 Am. St. Rep. 600, 95 N. W. 992, 99 N. W. 411, holding that 37 L.R.A. (N.S.)

a judgment in favor of a taxpayer against a city or board of public works, restraining the concreting of a street under street car tracks, on the ground that the contract with reference thereto was *ultra vires*, is not binding upon a street railway company, a party to the contract, but not a party to the taxpayer's suit. The contract in this case was one permitting the construction of a street railroad through the streets of a



Statement by McClain, J.:

Plaintiff, as surviving member of the firm of Lee & Harvat, and as assignee of the firm of Cerney & Louis, brought action to recover compensation alleged to have become due to said firms under written contracts made with them by the defendant, under which contracts defendant became bound to pay compensation to said firms for keeping and handling text-books for use in defendant's schools, furnished under alleged contracts, with the publishers of such books. The allegations of the petition in this respect were met by the defendant with averments that no books were furnished by said publishers to the respective firms under any contract with defendant, and that the contracts with said firms were invalid. By way of amendment to his petition, plaintiff alleges as an additional cause of action, that said firms, relying upon representations made by the officers of defendant, rendered services and advanced money in attempting to carry out the terms of said contracts, and recovery was also asked on that ground. A demurrer to the amendment to plaintiff's petition was overruled, whereupon defendant pleaded as a defense to plaintiff's entire cause of action, including the matter alleged in the amendment to the petition, that the whole matter had been adjudicated against this plaintiff in an action brought by a taxpayer against the president and board of directors of the defendant corporation, to enjoin them from paying to the firms now represented by plaintiff any sums of money under the contracts set out in the petition in this case. The plaintiff demurred to the portion of the answer setting up the defense of a prior adjudication, on the ground that the record of such adjudication as pleaded by the defendant, showed on its face that the former action was not between the same parties, and did not involve the same issues. This

demurrer was overruled, and plaintiff electing to stand upon his demurrer and refusing to plead further, judgment was rendered for the defendant dismissing plaintiff's action. From this judgment the plaintiff appeals.

Measrs. S. K. Stevenson and Milton Remley, for appellant:

Questions determined in a former suit are settled only so far as concerns the parties to that action and persons in privity with them.

23 Cyc. 1111; *Re Dille*, 119 Iowa, 575, 93 N. W. 571; *Woodward v. Jackson*, 85 Iowa, 432, 52 N. W. 358; *Myers v. Johnson County*, 14 Iowa, 48; *McDonald v. Gregory*, 41 Iowa, 513.

Plaintiff was not made a party to the action, and was not bound by the judgment.

23 Cyc. 1237; *Lyons v. Cooledge*, 89 Ill. 529; *Hatch v. Bartle*, 45 Pa. 166, 84 Am. Dec. 484; *Ætna Ins. Co. v. Confer*, 158 Pa. 598, 28 Atl. 153; *Mabbett v. Vick*, 53 Wis. 158, 10 N. W. 84; *Flanders v. Seelye*, 105 U. S. 718, 26 L. ed. 1217; *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 424; *Griffin v. Reynolds*, 17 How. 609, 15 L. ed. 229; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626.

That a judgment may be pleaded as a bar, it must equally estop both parties.

*Myers v. Johnson County*, 14 Iowa, 47; *McDonald v. Gregory*, 41 Iowa, 513; *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. 226; *Heins v. Wicke*, 102 Iowa, 396, 71 N. W. 345; *Woodward v. Jackson*, 85 Iowa, 432, 52 N. W. 358.

Money borrowed by the town without authority, and used for public purposes, may be recovered by the lender as money had and received.

*Luther v. Wheeler*, 73 S. C. 83, 4 L.R.A. (N.S.) 746, 52 S. E. 874, 6 A. & E. Ann. Cas. 754; *Kokomo v. Harness*, 35 Ind. App.

city, requiring the city at its own expense to lay and concrete the foundation of the tracks.

It has been held that a judgment entered in a suit by a taxpayer against a city and a contractor with the city, in which the validity of a contract was sustained, is conclusive as to all the issues in the suit, in a subsequent suit between the contractor and the city. And this is true, although in the former suit the contractor and city occupied toward each other no adversary position. *El Reno v. Cleveland-Trinidad Paving Co.* 25 Okla. 648, 27 L.R.A. (N.S.) 650, 107 Pac. 163.

Another line of apparently analogous cases is that holding that bondholders or creditors of a municipality, not made parties to a suit by taxpayers against a municipality, involving the question of the validity of the bonds or other indebtedness 37 L.R.A. (N.S.)

of the municipality, are not bound by any judgment entered in such suit unfavorable to the indebtedness. Among such cases are the following: *Lyons v. Cooledge*, 89 Ill. 529; *Mail v. Maxwell*, 107 Ill. 554; *Atchison, T. & S. F. R. Co. v. Jefferson County*, 12 Kan. 127; *Morrill v. Smith County*, — Tex. Civ. App. —, 33 S. W. 899.

And a decree in a proceeding by quo warranto by some of the citizens of a city, decreeing that the city never legally existed, is not binding upon the bondholders thereof, who were not parties to the proceeding. *Laird v. De Soto*, 22 Fed. 421.

But a decree or judgment in a suit involving the validity of bonds given by a county is binding upon holders thereof who acquired the bonds with notice of the suit. *Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692, 5 Sup. Ct. Rep. 93. A. G. S.

384, 74 N. E. 270; Bodewig v. Port Huron, 141 Mich. 564, 104 N. W. 769; Alten v. LaFayette, 89 Ala. 641, 9 L.R.A. 497, 8 So. 30; Memphis Gaslight Co. v. Memphis, 93 Tenn. 612, 30 S. W. 25; Lincoln Land Co. v. Grant, 57 Neb. 70, 77 N. W. 349; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Kagy v. Independent Dist. 117 Iowa, 694, 89 N. W. 972; Pimental v. San Francisco, 21 Cal. 352; Ward v. Forest Grove, 20 Or. 355, 25 Pac. 1020; Chapman v. Douglas County, 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; Marsh v. Fulton County, 10 Wall. 676, 19 L. ed. 1040; Livingston v. School Dist. No. 7, 11 S. D. 150, 76 N. W. 305; Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954.

Messrs. Baker, Ball, & Ball, for appellee:

The principle of estoppel by judgment includes all persons who are substantially parties, although not parties to the record.

1 Greenl. Ev. 11th ed. p. 710, §§ 534-536; *McNamee v. Moreland*, 26 Iowa, 111; *Stoddard v. Thompson*, 31 Iowa, 80; *Strong v. Phoenix Ins. Co.* 62 Mo. 289, 21 Am. Rep. 422; *Robbins v. Chicago*, 4 Wall. 657, 18 L. ed. 427, s. c. 2 Black, 418, 17 L. ed. 298; *Hill v. Bain*, 2 Am. St. Rep. 877, and note, 15 R. I. 75, 23 Atl. 44.

A judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, is binding not only on the official representatives of the county named in the proceedings as defendant, but upon all the citizens thereof, though not made parties defendant by name.

*Clark v. Wolf*, 29 Iowa, 197; *Lyman v. Faria*, 53 Iowa, 498, 5 N. W. 621; *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Dicken v. Morgan*, 59 Iowa, 157, 13 N. W. 57; *Kane v. Independent School Dist.* 82 Iowa, 5, 47 N. W. 1076; *State ex rel. Wilson v. Rainey*, 74 Mo. 229; 2 Black, Judgm. § 584; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525; *Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692, 5 Sup. Ct. Rep. 93; *Harmon v. Auditor*, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; *Shanahan v. South Omaha*, 2 Neb. (Unof.) 466, 89 N. W. 285; *Herman, Estoppel & Res Judicata*, 166; *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334; *Bear v. Brunswick County*, 122 N. C. 434, 65 Am. St. Rep. 711, 29 S. E. 719; *People ex rel. Bryant v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 195, 29 Pac. 54; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L.R.A. 835, 71 Am. St. Rep. 926, 45 Pac. 494; *Stallcup v. Tacoma*, 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541; *Tredway v. Sioux City & P. R. Co.* 39 Iowa, 663; *Courtney v. William Knabe & Co. Mfg. Co.* 97 Md. 499, 99 37 L.R.A. (N.S.)

Am. St. Rep. 456, 55 Atl. 614; *Henderson County v. Henderson Bridge Co.* 116 Ky. 164, 105 Am. St. Rep. 197, 75 S. W. 239.

McClain, J., delivered the opinion of the court:

The nature of the former adjudication relied upon by defendant as a bar to this action, and held sufficient on demurrer, will be apparent by reference to the report of the case on appeal to this court. See *Ries v. Hemmer*, 127 Iowa, 408, 103 N. W. 346. In that case *Ries*, suing as taxpayer, asked that the officers of defendant be restrained from paying any money under the assumed contracts which plaintiff now sets out in his petition, and this court, holding the contracts to be invalid, reversed the action of the lower court in entering a decree in favor of the defendants.

1. In the former action the issues were whether the officers of the defendant corporation could lawfully pay to the respective firms of booksellers with whom defendant had entered into contract relations, the compensation provided for in such contracts. One of the issues presented in the case now before us was whether the plaintiff, representing said contracting firms, could recover from the defendant, by way of *quantum meruit*, compensation for money expended and services rendered in reliance upon such contracts. This cause of action was held by the lower court, on demurrer, to be properly pleaded, and, for the purposes of the present appeal, we must assume that, if the plaintiff could prove the facts alleged, he was entitled to recover. This issue was plainly a wholly different issue from that determined in the former case, which related entirely to the validity of the contracts made between defendant and the respective firms of booksellers, whom plaintiff now represents. We are not now called upon to decide whether in law the allegations of the plaintiff's petition, if true, entitled the plaintiff to recover from the defendant in *quantum meruit*, notwithstanding the invalidity of the contracts under which money was expended and services were rendered by the firms of booksellers represented by plaintiff. That question was determined by the lower court in favor of the plaintiff, and no appeal from the action of the court in this respect has been taken. Under this state of the record we cannot hold that the adjudication in the former case on the issue involved therein constituted a bar to the recovery by plaintiff under the issues presented by the amendment to plaintiff's petition based upon *quantum meruit*. It may well be that if the firms represented by plaintiff were parties to the former suit of *Ries v. Hemmer*, or were so con-

nected with such suit as that they could have had their right to recover on *quantum meruit* adjudicated therein, then the adjudication was binding on them as to the issue which they might then have presented. It will be necessary, therefore, to consider whether said firms of booksellers were so connected with the former case that the adjudication therein was binding upon them.

2. The plaintiff in the former suit was successful in securing an adjudication against the officers of this defendant, that the contracts made between defendant and the firms represented by plaintiffs were invalid, and no money should be paid to said firms in pursuance with said contracts. The question now to be considered is whether the contracting firms were so related to the former suit that they were bound by the adjudication, for it is conceded that they were not in form made parties to such suit, were not notified of its pendency, and did not take charge of or control the defense. From the record in the former case it plainly appears that the defense was made by the officers of this defendant in its behalf, and that they resisted for defendant the appeal which resulted in a reversal.

It is contended, however, that the firms represented by plaintiff, although not formally parties to the prior adjudication, were bound thereby for two reasons: First, it is said that in the former action, Ries, suing as a taxpayer, represented all the taxpayers of the school district, and an adjudication in his favor was binding upon all the taxpayers, including the members of the contracting firms. Many cases are cited in support of this contention, and of these the following may be here mentioned as typical on the proposition presented: *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Clark v. Wolf*, 29 Iowa, 197; *State ex rel. Wilson v. Rainey*, 74 Mo. 220; *Harmon v. Auditor*, 123 Ill. 122, 5 Am. St. Rep. 502, 13 N. E. 161; *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, 4 So. 525. And see note to *Henderson County v. Henderson Bridge Co.* 105 Am. St. Rep. 213, where other cases are cited. These cases are predicated upon the thought that, where a taxpayer secures an adjudication in the interest of all taxpayers as to the invalidity of an alleged indebtedness of a public corporation, enforcement of which would affect him and all other such taxpayers alike, the question cannot again be litigated in a suit brought by another taxpayer seeking the same relief. As stated in *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033, the rule is that "a judgment against a county or its legal representatives in a matter of general interest to all the people thereof—as one respecting the levy and collection of a tax—is binding not only

on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name." Applying that rule to this case, the adjudication in the action brought by Ries was binding upon this defendant and upon all the taxpayers of the defendant corporation, with the result that no other taxpayer suing as such could maintain another action with reference to the right or duty of the defendant to pay claims founded upon the contracts in question.

But it is plain that this plaintiff is not suing as a taxpayer, and that neither he nor the firms whom he represents have now, or ever had, any claims which they were asserting as taxpayers either in their own right or in behalf of the public. Certainly it is not true that an adjudication in an action by a taxpayer against a public corporation to which an alleged creditor of the corporation is not made a party can bind such creditor as to the validity of his claim. *Lyons v. Cooleage*, 89 Ill. 529. The case of *Scotland County v. Hill*, 112 U. S. 183, 28 L. ed. 692, 5 Sup. Ct. Rep. 93, relied upon by counsel for appellee, is not in point, for in that case, involving the right of the plaintiff to recover on county bonds, it was found that there was a prior adjudication in an action to which a holder of other bonds was expressly made a party, that such bonds were invalid, and the court therefore held that plaintiff, having acquired his bonds with notice of the pendency of the prior suit affecting their validity, could not again litigate that question. We reach the conclusion without difficulty or doubt that the adjudication in behalf of Ries as taxpayer against the officers of the defendant determining the invalidity of the contracts in question, and enjoining the payment of money by defendant under such contracts, was not binding upon the other parties to such contracts, unless such parties were in fact so related to the suit as to be bound by the result in consequence of such relation. The fact that such contracting parties were also taxpayers, even if alleged, would be wholly immaterial and without bearing upon the question as to the effect upon them of such prior adjudication.

3. It may be conceded that an adjudication binds not only the parties thereto, but others who are in privity with them. It is not necessary to enter into an elaborate discussion as to who may be deemed privity in this sense; for, under the facts of this case, privity between plaintiff and either party to the prior adjudication is clearly negatived. There was no privity of interest between this plaintiff and the plaintiff in the injunction suit, for their interests were

plainly and confessedly hostile. Neither was there any privity between this plaintiff and the officers of this defendant, who were the defendants in the injunction suit; for, while such officers did make a defense, the maintenance of which would have been to the advantage of the parties whom this plaintiff represents, they were not employed by such parties to do so, nor were they under any obligations to them in that respect. Such parties and the defendant corporation, represented in that suit by its officers, were mutually contracting parties, and, as to the question respecting the validity of the contracts, there was necessarily hostility of interest between them. Failure of the defendant in that suit to maintain the defense that the contracts were valid, or, indeed, failure to interpose any such defense, could not plainly be binding upon other parties to the contracts, unless they had been made parties to the litigation or had voluntarily associated themselves with the officers of this defendant in attempting to sustain the validity of the contracts.

The case is very well illustrated by those cases in which it has been held that, in a suit by stockholders against a corporation to enjoin its officers from carrying out a contract alleged to be illegal and prejudicial to the stockholders, the other party to the alleged illegal contract is a necessary party to the suit. *Central R. Co. v. Mills*, 113 U. S. 249, 28 L. ed. 949, 5 Sup. Ct. Rep. 456; *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 30 L. ed. 382, 7 Sup. Ct. Rep. 190. Thus, in *Russell v. Wakefield Waterworks Co.* L. R. 20 Eq. 474, a suit by shareholders in an incorporated company to restrain its officers from making alleged illegal payments to the officers of another company, it was said: "If the subject-matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation, or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit, because that other corporation or person has an interest, and a great interest, in arguing the question and having it decided once for all, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member. So that in these cases you must always bring before the court the other corporation." As illustrating the want of privity between the officers and one who is making a claim against the corporation, which a stockholder seeks to enjoin the corporation from paying, it is pertinent to refer to the case of *Mexican Ore Co. v. Mexican Guadalupe* 37 L.R.A. (N.S.)

*Min. Co. (C. C.)* 47 Fed. 351, in which it was held that, while an injunction in such a case was binding upon an officer of the defendant corporation acting as such, so that he might be punished for violating it, although not made a party in name, yet, after resignation as an officer, he might with impunity proceed to litigate his claim with the corporation.

The only actual connection which the parties represented by plaintiff are alleged to have had with the litigation between Ries and the officers of this defendant is that resulting from the fact that one of the members of each of the firms now represented by plaintiff was called as a witness and testified in behalf of the defendants in that suit in relation to the validity of the contracts involved, and that each of said witnesses was present during a part or all of the trial of said case and fully cognizant of the proceedings therein. No cases are cited by counsel for appellee in support of the proposition that one becomes party to a suit, even though he may have an interest in the result, by appearing therein to testify as a witness at the call of one of the parties carrying on the litigation; and we venture to think that no such cases can be found. The proposition is manifestly unsound and unreasonable. Equally without support in any adjudicated case to which our attention has been called is the contention for appellee that one who is cognizant of litigation, the result of which may affect his interests, and is present at the trial, will be bound by the result. Plainly there must be some obligation imposed upon one who is not party or privy to a suit, and who does not in fact actively maintain or defend it, or take some charge or control of it, to see that the prosecution is carried on or the defense made, before he will be charged with the result as binding upon him. 1 Freeman, Judgm. 4th ed. § 189. The case of *Tredway v. Sioux City & P. R. Co.* 39 Iowa, 663, when considered with reference to the issues actually involved, gives no support to the contention made for appellee. That was a case in which a taxpayer of the county asked to have set aside a decree rendered against the county in an action brought by a railroad company awarding specific performance of a contract to convey swamp land, and to have the board of supervisors of the county enjoined from disposing of such land in accordance with the terms of the decree. The actual decision of the court was that the taxpayer was bound by the decree, and what is said in the opinion of the court with reference to the effect of a party sitting by and allowing an adjudication to be made against

his interest without objection must be confined to the facts of the case. In the case before us, the plaintiff is not asserting any right as taxpayer or member of the general public, but is an individual claimant seeking to enforce obligations of the defendant corporation, and there is nothing in the circumstances of the case to indicate that he or those whom he represents were under obligation to take charge of or control the defense, or that they in fact attempted to do so. They might very well have been made parties in the first suit, but, not having been in fact made parties, they were not bound to so connect themselves with the litigation that the result would be binding upon them. It is true they might perhaps have intervened and asked to join in the defense, but the right to intervene does not involve the duty to do so, and it was plainly competent for them, if they saw fit, to abstain from participation in that case, and thus preserve the right to have their claims under their alleged contracts litigated in an action brought by them, or to which they were properly made parties. That the right to intervene does not, in the absence of its exercise, charge persons who have such right with the result of the litigation, is well settled. *Dalhoff v. Coffman*, 37 Iowa, 283; *Woodward v. Jackson*, 85 Iowa, 432, 52 N. W. 358; *Guinn v. Iowa & St. L. R. Co.* 125 Iowa, 301, 101 N. W. 94.

The action of the court in overruling the demurrer to the divisions of the answer in which defendant sought to interpose the plea of a prior adjudication, and in rendering judgment for the defendant, was erroneous, and the judgment is reversed.

#### OKLAHOMA SUPREME COURT.

BOARD OF COMMISSIONERS OF MUSKOGEE COUNTY, Plff. in Err.,

v.

CHARLES E. HART.

(29 Okla. 693, 119 Pac. 132.)

Officer — deputy — change of salary.

A deputy appointed by an officer to hold

Headnote by WILLIAMS, J.

*Note.* — *Change of salary of deputy or other subordinate, as violation of constitutional provision against change of salary of public officer during term of office.*

This note includes cases not only of deputies, but of assistants and other subordinates, whatever their appellation, but it does not include cases where salaries were

during the pleasure of such principal does not hold for a term, within the meaning of § 10, art. 23, of the Constitution of this state, prohibiting the change of the salary or emoluments of any public officer after his election or appointment, or during his "term of office," except by operation of law enacted prior to such election or appointment.

(November 14, 1911.)

**E**RROR to the Superior Court of Muskogee County to review a judgment holding the increase in salary of the plaintiff valid and allowing his claim for the same. **Affirmed.**

The facts are stated in the opinion.

Mr. W. E. Disney, for plaintiff in error:

If defendant in error is a public official within the meaning of the Constitution, and was in office at the time the act went into effect, he is not entitled to such increase in salary.

*Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176, 15 Pac. 778; *State ex rel. Walker v. Bus*, 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636; *Conner v. New York*, 2 Sandf. 355; *Braithwaite v. Cameron*, 3 Okla. 630, 38 Pac. 1084.

Mr. Charles A. Moon, for defendant in error:

Defendant in error was not a public official within the meaning of the Constitution.

*Gibbs v. Morgan*, 39 N. J. Eq. 126; *Jeffries v. Harrington*, 11 Colo. 191, 17 Pac. 505; *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974; *State ex rel. Kane v. Johnson*, — Mo. —, 25 S. W. 856, 123 Mo. 43, 27 S. W. 399; *Douglas County v. Timme*, 32 Neb. 272, 49 N. W. 266; *Somers v. State*, 5 S. D. 321, 58 N. W. 804, 5 S. D. 584, 59 N. W. 963; *State ex rel. Martin v. Kalb*, 50 Wis. 178, 6 N. W. 557.

Williams, J., delivered the opinion of the court:

This proceeding in error is to review the judgment of the trial court, holding that § 16, chap. 69, Session Laws 1910, as amended by § 1, chap. 56, Session Laws 1911, entitled "An Act Amending § 16 of an Act Entitled 'An Act Relating to Certain County and District Officers,' Chapter 69 of Session

granted to such subordinates in violation of the constitutional inhibition against making any extra allowances to such officers for extra work, nor cases involving simply the right of such subordinates to a reasonable compensation, nor cases where a new or additional deputyship was created by statute, and such new or additional deputy is demanding his salary as such.

Reference must often be made to the pro-

Laws 1910, Repealing All Laws in Conflict," wherein the compensation of certain deputies was increased, applied to deputies then in office who held not for any specified time or defined term, and that it was not repugnant to § 10 of article 23 of the Constitution, which is *in hac verba*: "Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to such election or appointment; nor shall the term of any public official be extended beyond the period for which he

was elected or appointed: Provided, that all officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified."

Section 3, art. 12, of the Constitution of South Dakota (1889), provides: "The legislature shall never grant any extra compensation to any public officer, employee, agent, or contractor after the services shall have been rendered or the contract entered into, nor authorize the payment of any claims or part thereof created against the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or con-

visions of the particular Constitution or statute in question. Frequently, however, the decision is placed upon other than constitutional grounds.

This subject resolves itself into the question as to what subordinate officials are public officers within the meaning of the constitutional prohibition against changing salary of public officer during term of office. It has been stated that only such officers as receive a fixed salary, payable out of the public treasury, are included, and not that large class of officers who receive specific fees for specific services as they are from time to time required to render them. *Milwaukee County v. Hackett*, 21 Wis. 620. This was a case, however, of a county treasurer, and does not fall within the scope of this note.

The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold only at the pleasure of the appointing power.

This rule has been applied, and a change in salary held valid, in case of a deputy county surveyor (*Harrold v. Barnum*, 8 Cal. App. 21, 96 Pac. 104); steward of county jail, appointed by sheriff (*Hibbard v. Suffolk County*, 163 Mass. 34, 39 N. E. 285); chief of fire department, appointed by mayor (*State ex rel. Kane v. Johnson*, 123 Mo. 43, 27 S. W. 399); deputy county clerk (*Gibbs v. Morgan*, 39 N. J. Eq. 126); messenger to president of board of aldermen of New York city (*Smith v. New York*, 67 Barb. 223); attendant on marine court of New York city, appointed under act authorizing the appointment of extra assistants subject to confirmation by board of supervisors (*Wines v. New York*, 9 Hun, 659, affirmed in 70 N. Y. 613; see *Moser v. New York*, 21 Hun, 163, *infra*); health officer, appointed by board of health (*State ex rel. Miller v. Massillon*, 24 Ohio C. C. 249); deputy clerk (*MUSKOGEE COUNTY v. HART*); deputy superintendent of public instruction (*Somers v. State*, 5 S. D. 321, 58 N. W. 804, affirmed on rehearing in 5 S. D. 584, 59 N. W. 962).

In other cases a change in salary of a

subordinate official has also been held valid, but upon other grounds.

Where compensation for a certain office is not fixed at the time of election or appointment, it may be thereafter fixed. This was applied to a case where a board of commissioners fixed the salary of a deputy district attorney after his appointment, at an amount which was lower than what he would have received in fees under the system in force when he was appointed, but at the time of his appointment no regular salary was provided for such office. *Merwin v. Boulder County*, 29 Colo. 169, 67 Pac. 285; *Mechem*, Pub. Off. §§ 855-858.

Where the compensation of a county officer is fixed at one sum, and the clerk hire is fixed separately therefrom, while the officer's compensation cannot be changed during his term, the county board has power to change the allowance for clerk hire. *People v. Fuller*, 141 Ill. App. 374, affirmed in 238 Ill. 116, 87 N. E. 336; *Daggett v. Ford County*, 99 Ill. 334; *LaSalle County v. Milligan*, 143 Ill. 321, 32 N. E. 190.

Where a state auditor appointed a clerk as "chief of claims department" at a yearly salary, and the clerk remained in the office three years, but at the end of ten months his salary was reduced by the auditor, it was held that since the auditor could discharge such a clerk, he could impose as a condition to his retaining the place a reduction in salary, and if he continued in the place and drew the reduced salary, he would be presumed to have accepted it in full payment for his services. *Hager v. Shuck*, 120 Ky. 574, 87 S. W. 300. See *Kehn v. State*, 93 N. Y. 291, *infra*.

The clerk of the grand juries of the courts of oyer and terminer and general sessions in New York is not an officer under the judicial system of the state, but is solely a county officer, and accordingly his salary may be changed as provided in the act relating to county government. *Dolan v. New York*, 6 Hun. 506, affirmed in 67 N. Y. 609.

Where, because of small appropriation, the appointing officer was compelled at the time of making the appointment to reduce the salary of the chief clerk to the district attorney below the amount as previously fixed by law, the case does not fall within the constitutional prohibition against change

tracts shall be null and void; nor shall the compensation of any public officer be increased or diminished during his term of office: Provided, however, that the legislature may make appropriations for expenditures incurred in suppressing insurrections or repelling invasion."

In *Somers v. State*, 5 S. D. 321, 58 N. W. 804, Id. 5 S. D. 585, 59 N. W. 963, it was held: "A deputy appointed by an officer to hold during the pleasure of such principal does not hold for a 'term,' within the meaning of § 3, art. 12, of the Constitution, prohibiting any change in the compensation of any public officer 'during his term of office.'"

Section 8, art. 14, of the Constitution of Missouri (1875), provides: "The compensation or fees of no state, county, or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In *State ex rel. Kane v. Johnson*, — Mo. — 25 S. W. 855, § 1 of the syllabus is as follows: "A municipal officer subject to removal at the pleasure of the council is not an officer within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during his term of office." In the opinion it is said: "Counsel for relator concede in their brief that he is a public officer within the meaning of the general definition of a public officer, and that he

performs public duties and offices and functions of a public character; but they contend that he is not an officer within the meaning of the section of the Constitution quoted. It will be observed that this section of the Constitution only embraces within its provisions officers who are elected or appointed for some specific or definite time, and that it has no application whatever to the case in hand, when the relator's term of office is not fixed by any law or ordinance, and when he simply holds at the pleasure of the appointing power. This is manifest from the fact that it also provides that the term of office shall not be extended for a longer period than that for which such officer was elected or appointed. The relator was not elected, nor was he appointed, for any definite time." On a rehearing, the court adhered to its former decision. *State ex rel. Kane v. Johnson*, 123 Mo. 43, 27 S. W. 399.

Article 4, § 7, ¶ 11, of the Constitution of New Jersey (1844), provides: "The legislature shall not pass private, local, or special laws in any of the following enumerated cases; that is to say: . . . Creating, increasing, or decreasing the percentage or allowance of public officers during the term for which said officers were elected or appointed."

In *Gibbs v. Morgan*, 39 N. J. Eq. 126, it is said: "By the act of 1874, entitled 'An Act to Regulate the Salary of the Clerk of

of salary, especially where the appointee accepted the place and received the reduced salary for over two years without protest. *People ex rel. Bacon v. Kings County*, 105 N. Y. 180, 11 N. E. 391. See *Kehn v. State*, 93 N. Y. 291, *infra*.

In *Reid v. Smoulter*, 128 Pa. 324, 5 L.R.A. 517, 18 Atl. 445, it was held that since the office of assistant clerk of the orphans' court was created by the Constitution, and the legislature fixed the salary, although the legislature might increase or diminish the salary subject to the Constitution, they could not repeal the provision for a salary altogether, and so virtually expel such a clerk from his office.

In *Gage County v. Wright*, 86 Neb. 347, 125 N. W. 626, it was held that where an act increased the salaries of clerks and assistants in the county treasurer's office, and the previous clerks were retained and paid the increased salaries, the county could not recover of the treasurer the amount of the increase. The constitutional question does not seem to enter the discussion, but the argument implies that the act was valid. See *Kehn v. State*, 93 N. Y. 291, *infra*.

Since a deputy clerk of the board of supervisors holding office during the pleasure of the appointing power can be dismissed by the board, he cannot recover salary at the previous rate, or any salary, if he continues in office after the appropriation there-

for has been withdrawn. *Dunphy v. New York*, 8 Hun, 479.

A statute reducing the salary of the clerk of a municipal court was held valid, but it is not clear whether the reduction went into operation in the midst of a term of office or between two terms. *Stevens v. Minneapolis*, 29 Minn. 219, 12 N. W. 533.

On the other hand, applying the general rule laid down above, a change of salary has been held invalid in the case of a clerk of a board of supervisors (*Power v. May*, 114 Cal. 207, 46 Pac. 6); clerk of probate court (*Cook County v. Sennott*, 136 Ill. 314, 26 N. E. 491); clerk of circuit court (*Bright v. Stone*, 20 Ky. L. Rep. 817, 43 S. W. 207); clerk of court of appeals (*Com. v. Addams*, 95 Ky. 588, 26 S. W. 581); fireman in public building, employed by the superintendent, salary fixed by law when appointed; held, he could recover residue after accepting reduced amount for some time (*Kehn v. State*, 93 N. Y. 291; see *Hager v. Shuck*, 120 Ky. 574, 87 S. W. 300; *People ex rel. Bacon v. Kings County*, 105 N. Y. 180, 11 N. E. 391, and *Gage County v. Wright*, *supra*); deputy city comptroller, decision based on interpretation of statute rather than on constitutional grounds (*Pryor v. Rochester*, 166 N. Y. 548, 60 N. E. 252, modifying 57 App. Div. 486, 68 N. Y. Supp. 86); police surgeon appointed by board of police, holding such an officer not a clerk nor employee, but an

the County of Camden' (P. L. of 1874, p. 280), it was provided that the clerk of Camden county shall receive from the county, in lieu of fees, for his services as clerk of the criminal and civil courts of the county, a salary of \$4,000 per annum; his fees to go to the county. The act was to take effect at the expiration of the term of office of the then clerk. By the act of 1876, entitled 'An Act Concerning Clerks of Counties in this State' (P. L. of 1876, p. 289), it was enacted that the clerk of each of the counties of this state might appoint an assistant in his office, to be known and denominated as his 'deputy clerk,' and gave to such deputy power, during the absence or inability of the clerk, to exercise all his powers and perform all his duties. But it was thereby provided, also, that 'no additional compensation shall be paid to the deputy by the county.' The before-mentioned act of 1882 [P. L. 1882, p. 195], which is entitled a supplement to the last-mentioned act, if valid, in effect partially repeals the provision of the act of 1876, that deputy clerks shall receive 'no additional compensation from the county,' and gives to the deputy clerks of counties where the clerk is paid by annual salary a salary of \$2,000 per annum from the county. It is an act giving a salary out of the county treasury to a certain deputy clerk or certain deputy clerks, as the case may be, and the only question to be considered is whether it is a special or local

law. Deputy clerks are public officers, but they have no term, in the sense in which the expression is used in the paragraph above quoted [referring to paragraph 11, supra]. They are employees of the county clerks, and their employment is a matter of mere private contract. The law merely constitutes them public officers, and gives them certain powers. It does not establish any particular period of service for them. That is left to private agreement. Since they have no term, in the sense in which the word is used in the Constitution, it follows that the constitutional prohibition, when applied to legislation to create or increase their compensation, is unqualified. It must be by general law, and cannot be by local or special enactment."

Section 9, art. 11, Constitution of California (1879), provides: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

In *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, it was held that said provision did not apply to deputy county officers who had no fixed term.

*Henderson v. Boulder County*, — Colo. —, 117 Pac. 997, construing § 30, art. 5, Constitution (1876) of Colorado, is not in conflict with the foregoing authorities; for

officer within the charter of the city (*People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38); *crier of supreme court* (*Ricketts v. New York*, 12 Daly, 504, 67 How. Pr. 320); *attendant upon marine court of New York*, appointed by judges, not subject to confirmation by board of supervisors, the court saying in this case that these attendants are not in any just sense servants of the judges; their number, appointment, and salary are regulated by law, their duties are public, well defined, and by no means menial (*Moser v. New York*, 21 Hun, 163; see *Wines v. New York*, 9 Hun, 659, supra); *attendant upon the supreme court* (*Rowland v. New York*, 12 Jones & S. 559, affirmed in 83 N. Y. 372); *attendant upon court of common pleas* (*Sweeny v. New York*, 5 Daly, 274, affirmed in 58 N. Y. 625).

This rule has been expressly disaffirmed in one case, however, and another adopted, namely, that if an individual be invested with some portion of the function of the government to be exercised for the benefit of the public, he is a public officer within the constitutional prohibition against changing salary. This was applied, and a change of salary held invalid, in the case of a secretary of the board of public works, an assistant bailiff of police court, and official stenographer of city court. *Louisville v. Wilson*, 99 Ky. 598, 36 S. W. 944. *Definite L.R.A. (N.S.)*

tion of public officer in this case quoted from *Mechem, Pub. Off.* § 1.

Also, under a statute giving the board of apportionment of New York city the authority to regulate salaries of political officers, but not of judicial officers, they may not reduce the salary of the deputy clerk of the court of common pleas, who is a part of the judicial system. *Landon v. New York*, 7 Jones & S. 467, 49 How. Pr. 218.

An act purporting to place extra burdens upon the clerk of an orphans' court after his term of office has begun, and to provide additional fees for such services, is unconstitutional as to services already rendered, as increasing salary or emoluments of office. *Shiffert v. Montgomery County*, 17 Pa. Co. Ct. 241.

In *Com. v. Carter*, 21 Ky. L. Rep. 1509, 55 S. W. 701, it was held that since an act changing the fees of clerks of circuit court was invalid, the state could recover back from such clerks the fee thus paid by mistake of law.

But under a statute providing that all fees of clerks of courts above the amounts of salaries shall be paid into the county treasury, an act increasing the amount of costs to be paid to such clerks is constitutional, for it does not increase the salary. *People ex rel. Russey v. Gault*, 149 Ill. 39, 36 N. E. 576. H. C. Sh.



there the statute fixing the county judge's salary provided that the compensation for his clerk should be paid by him out of his fixed salary.

The deputy clerk here is without any "term," as the same is used in § 10, art. 23, *supra*. It follows that that portion of the provision which prohibits the change of the salary or emoluments of a public officer during his term of office does not apply to the defendant in error. The question further arises, Does that part which prohibits the changing of such salary or emoluments after his election or appointment apply? Article 24 of the Constitution of Connecticut (1818), as adopted by amendment in October, 1877, provides: "Neither the general assembly nor any county, city, borough, town, or school district shall have power to pay or grant any extra compensation to any public officer, employee, agent, or servant, or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby, or increase the pay or compensation of any public contractor above the amount specified in the contract."

The Connecticut provision does not depend upon the public officers having a fixed term, and it includes deputies. The Oklahoma provision prohibits the changing, either increasing or decreasing, of the salary or emoluments of a public officer after his election or appointment or during his term of office. If this provision is to be construed to mean that after an officer has received his appointment or been elected his salary or emoluments shall not be changed, either increased or decreased, then why the necessity of adding the clause "or during his term of office?" It is a rule of construction that, if reasonably practicable, effect is to be given to the entire provision, and no part shall be nullified. If this section be construed to mean that after an officer has been elected or appointed, and prior to the time that his term begins, no change, either by increasing or decreasing, shall be made in his salary or emoluments, and, further, after his term has begun, during such term no change shall be made, either by increasing or decreasing such salary or emoluments, then effect is given to all of this provision. But it may be urged that then the clause "or during his term of office" was unnecessary, and that the clause "after his election or appointment" would have covered not only the period prior to his being installed in office and beginning his term, but also subsequent thereto to the end of this term. That may be true; but some framers of provisions prefer to use specific language, and cover the entire grounds in specific detail, rather than in general terms, and it is not for us to de-

termine which is preferable. Then, again, mark the language, "after his election or appointment, or during his term of office." "During his term of office," construed with what goes before, indicates that it was intended that this provision applied to public officials that had a term of office, and the defendant in error has no term of office. He serves at the pleasure of his principal.

We conclude that the judgment of the lower court should be affirmed.

All the Justices concur.

#### UNITED STATES SUPREME COURT.

RE GEORGE F. HARDING, Petitioner.

(219 U. S. 363, 55 L. ed. 252, 31 Sup. Ct. Rep. 324.)

**Mandamus — to review judicial action — remand of cause to state court.**

The refusal of a Federal circuit court to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states cannot be reviewed by mandamus, which may not be used to perform the office of an appeal or writ of error.

(February 20, 1911.)

**Note. — Mandamus: to compel removal of case to Federal court or remanding of case to state court.**

For a treatment of the general question of superintending control and supervisory jurisdiction of the superior over the inferior or subordinate tribunal, see the note to *State ex rel. Fourth Nat. Bank v. Johnson*, 51 L.R.A. 33.

RE HARDING is a case of especial importance as it sets out at length and discusses all the cases which seem to have passed directly upon the question whether the Supreme Court of the United States may issue a mandamus to an inferior Federal court to compel it to remand a case pending therein to the state courts, after denial by the inferior Federal tribunal of a motion so to remand, deducing therefrom not only the general rule applicable in such case, and the exception thereto, but clearing up an admitted conflict among the authorities. These cases are as follows:

Ex parte Hoard, 105 U. S. 578, 26 L. ed. 1176; *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581; and *Ex parte Gruetter*, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690, which established the broad doctrine that the extraordinary remedy of mandamus cannot be resorted to in a civil proceeding to subserve the purpose of an appeal or a writ of error, which amounts, in most cases, to an assertion that the circuit court of the United States has power to decide

**P**ETITION for a writ of mandamus to compel the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states. Denied.

The facts are stated in the opinion.

Messrs. George F. Harding and William J. Ammen for petitioner.

Mr. Chief Justice White delivered the opinion of the court:

By a motion for leave to file a petition for mandamus, George F. Harding seeks the reversal of the action of the circuit court of the United States for the northern district of Illinois, eastern division, in taking

jurisdiction over a cause as the result of a refusal to grant a request of Harding to remand the case to a state court. The facts shown on the face of the motion papers are these:

On October 19, 1907, George F. Harding, the petitioner, alleging himself to be a resident of the state of California, sued in an Illinois state court various corporations alleged to be created by and citizens of the state of New Jersey, and fourteen individuals whose citizenship and residence were not given. The suit was brought by Harding as a stockholder in the Corn Products Company, one of the defendants, and the object of the suit was to annul an alleged unlawful merger of that company, and for relief in respect of an asserted misappropriation

whether or not it has jurisdiction to try a civil cause properly brought before it, and that such decisions are not open to collateral attack; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; and *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692, which establish an exception to the general doctrine above stated, in holding that in criminal proceedings the extraordinary process of mandamus does not lie to control judicial discretion, except when that discretion has been abused, but that it is a remedy when the case is outside the jurisdiction of the court or officer to which or to whom the writ is addressed; and *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Re Moore*, 209 U. S. 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164; and *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515, which are disapproved in so far as they conflict with the general rule announced in the *Hoard*, *Pollitz*, *Nebraska*, and *Gruetter* Cases, and the exception established in the *Rives*, *Paul*, and *Powers* Cases.

But the question whether or not a Federal court may compel a state court to remove a case to the Federal court, and whether or not an appellate state court may compel an inferior state court to remove a cause to the Federal court, by the extraordinary remedy of mandamus, has often arisen. In connection with such cases, which are set out hereafter, however, it should be stated, that the question of the appropriateness of the remedy in, and the jurisdiction of, such courts to issue the writ, is no longer of practical importance, as the jurisdiction of the Federal courts attaches as matter of law upon the filing of a sufficient petition and bond, if the cause is removable, even if the state or Federal courts have refused to grant an order of removal.

There is a decided conflict among the authorities as to the right of a Federal court to issue a writ of mandamus to compel a state court to remove to the former an action pending in the latter, as will be seen by 37 L.R.A. (N.S.)

an examination of the following cases: Thus, in *Spraggins v. County Ct. Brunner*, Col. Cas. 218, Fed. Cas. No. 13,246, it was held that the United States circuit court had power to enforce by mandamus the removal of a cause from a state to the Federal court, where the state court had illegally and unjustifiably refused to transmit the case, it being said that in such case, if the Federal court refused to issue the writ, the applicant would be remediless. And in *People ex rel. Kanouse v. New York C. P. Judges*, 2 Denio, 197, the court, following *Spraggins v. County Ct. supra*, refused to grant a mandamus to compel an inferior state court to permit a cause pending therein to be removed to the United States circuit court, on the ground that the latter court could itself exercise the power to award the writ when necessary to the exercise of its jurisdiction, and that for the state court to do so would be to make an officious tender of services. See also *dicta* in *Gordon v. Longest*, 16 Pet. 97, 10 L. ed. 900, and *United States ex rel. White v. Judges*, 5 Chicago Leg. News, 137, Fed. Cas. No. 15,501. And see *Ex parte Turner*, 3 Wall. Jr. 258, Fed. Cas. No. 14,245, wherein, upon motion to the United States circuit court for a mandamus to a state court to remove the cause to the Federal court, no objection was made as to the power of the court to issue the mandamus.

The doctrine announced in the *Spraggins* and *Kanouse* Cases, however, has been severely criticized, and the writ denied on the ground that no mandamus is necessary, for the applicant is not without redress, as he may take his exception, have the appellate court of the state remedy any wrong worked by the inferior court, and in case of a refusal by that court to correct, carry the issue to the Supreme Court of the United States. This was the reasoning applied in *Hough v. Western Transp. Co.* 1 Biss. 425, Fed. Cas. No. 6,724, in holding that the United States circuit court has no power to issue a writ of mandamus to a state court for the removal of a cause to it. And *Re Cromie*, 2 Biss. 160, Fed. Cas. No. 3,405, follows and adopts the reasoning of the

of its assets. On November 6, 1907, the Corn Products Company applied to remove to the circuit court of the United States for the northern district of Illinois, eastern division, on the ground that there was a separable controversy between it and Harding. By separate petitions all the other defendants united in the prayer for removal. The state court, not having acted on the petition for removal, the judge of the United States court, upon the application of the Corn Products Company, ordered the transcript of record from the state court to be filed and the case to be docketed. This being done, the Corn Products Company filed what was styled an amendment and supplement to the petition for removal, stating the residence and citizenship of the individuals named as defendants in the original bill, four of them being averred to be residents of Chicago, Illinois, one of Pekin, Illinois, and the others citizens and residents of states other than Illinois.

In December, 1907, Harding moved to remand to the state court, in substance upon the ground that there was no separable controversy, and that the requisite diversity of citizenship was not shown by the petition for removal, and especially directed attention to the fact that at the time of the commencement of the suit in the state court, he, Harding, was not a resident of

the district, and that none of the corporate defendants were such residents.

Prior to the bringing of the Harding suit, a suit had been brought in an Illinois state court by the Chicago Real Estate & Trust Company, an Illinois corporation and a stockholder in the Corn Products Company, upon substantially the same grounds as those subsequently alleged in the Harding suit, against the principal corporations and individuals who were thereafter made defendants in the Harding suit. This cause had been removed by the Corn Products Company into the circuit court of the United States for the northern district of Illinois, eastern division, and on its removal, at the instance of the Corn Products Company, the court had restrained the real estate company, its officers, agents, attorneys, etc., from further prosecuting the cause in the state court. Immediately after the bringing of the Harding suit in the state court, the Corn Products Company applied to the circuit court, in the real estate company suit, to restrain Harding from prosecuting his suit, on the ground that the bringing of the same was a violation of the previous restraining order. The court issued a temporary restraining order. Thereafter, as we have said, the Harding suit was removed on the application of the Corn Products Company to the circuit court of the United States, and the motion to

Hough Case. And the same conclusion was reached in *Fisk v. Union P. R. Co.* 6 Blatchf. 362, Fed. Cas. No. 4,827, upon the ground that no mandamus was necessary, and that therefore the United States court had no jurisdiction to issue the writ to the state court. And in *Ladd v. Tudor*, 3 Woodb. & M. 325, Fed. Cas. No. 7,975, although not expressly deciding the point, it was said that where a discretion is given by law to the state court, to decide the matter in issue, the Federal court ought not to interfere by a mandamus, although the result reached might not be exactly what the Federal court would think correct,—especially if the state court has acted within the line of its discretion and with fairness, instead of clearly abusing a discretion intrusted to it.

But in *Hough v. Western Transp. Co.* supra, it was said that Congress undoubtedly could give power to United States circuit courts to issue a writ of mandamus to a state court for the removal of a cause to it, but that it had not done so.

Likewise, a conflict exists among the cases which treat the question of the right of a state court to control by mandamus the action of an inferior state tribunal. Thus, in *State ex rel. Tod v. Common Pleas Ct.* 15 Ohio St. 377, the state supreme court issued a writ of mandamus to compel an inferior court to remove a cause to the Federal court, the court saying that by so doing, it 37 L.R.A. (N.S.)

does not control a judgment of the inferior court, but the act of the court which was to follow its judgment, and that, although the first would be judicial, the latter was purely ministerial. Continuing, the court said: "It would be strange indeed if we have power to compel the proper court to take jurisdiction, and have not the power to compel the improper court to relinquish jurisdiction, or to do a necessary act in order to the exercise of jurisdiction by the proper court." But that an inferior court does not act ministerially, but judicially, see opinion of Humphreys, J., in *Kennedy v. Woolfolk*, 1 Overt. 453.

And in *Kennedy v. Woolfolk*, supra, it was held per Overton, J., that mandamus was the proper remedy where the inferior court had denied a motion to remove a cause to the Federal court.

So, in *Brown v. Crippen*, 4 Hen. & M. 173, mandamus from the higher to the inferior state court was held to be the only proper remedy where the inferior court had refused to remove a cause pending before it, which was removable as a matter of right, the court saying that the defendant could neither appeal nor obtain a writ of error until the final decision of the suit, when it might be too late. And in *Ex parte Andrews*, 40 Ala. 639, it seems to have been assumed that mandamus was the proper proceeding, but the supreme court overruled the motion for the writ upon the

which we have referred was made by Harding to remand. The motion to remand, however, in consequence of the restraining order, which had been made permanent, was not heard until the summer of 1909, after the restraining order above referred to had been dissolved by the circuit court of appeals. 94 C. C. A. 144, 168 Fed. 658. Before the motion to remand, however, was passed upon, the circuit court granted permission to the Corn Products Company to amend its removal petition by alleging that, at the time of the commencement by Harding of his suit, and continuously thereafter, he was a citizen of Illinois and a resident of Chicago, in that state. To this Harding objected on the ground that the court was without power to allow an amendment, and that its jurisdiction was to be tested by the averments of the original removal petition. The permitted amendments having been filed, the motion to remand was denied. Harding thereupon, reiterating his objection to the allowance of the amendment and to the jurisdiction of the court to do other than remand the cause, traversed the averment in the amended removal petition as to his Illinois citizenship and residence, and specially prayed "that there may be a speedy hearing and a decision of such issue of citizenship and a remand of this cause to the state court by the order of this court. . . ." The request for hearing was grant-

ed. A large amount of evidence was introduced on such hearing, which extended over a period of more than fifteen months, and the taxable costs, it is said, "ran up into several thousands of dollars." Finally, on October 25, 1910, the issue was decided against Harding. 182 Fed. 421. The court, finding from the proof that Harding was, as alleged in the amended petition, a citizen and resident of the state of Illinois, expressly refused the prayer for removal, made by Harding in his answer to the amended petition; in other words, the court reaffirmed and reiterated its previous action in refusing to remand the cause. Whether these facts give such color of right to the contention that we have jurisdiction to review the action of the trial court by the writ of mandamus as to lead us to be of opinion that further argument at bar is necessary, and therefore a rule to show cause should issue, is then the question for decision.

The doctrine that a court which has general jurisdiction over the subject-matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see *Dowell v. Applegate*, 152 U. S. 327, 337, 38 L. ed. 463, 467, 14 Sup. Ct. Rep. 611, and cases cited), and has been so recently applied (*United States use of*

ground that the action was not one the removal of which was authorized. And the same is true of *Ex parte Grome*, 40 Ala. 731, and of *State v. Common Pleas*, 3 Ohio, 49, where the motions were denied on the ground that the actions were not removable to the Federal court to which the applicants sought to remove them; and of *Orosco v. Gagliardo*, 22 Cal. 83, where the application was denied on the ground that the action was one of which the Federal court did not have jurisdiction; and of *People ex rel. Western Transp. Co. v. Superior Ct.* 34 Ill. 356, in which the petition was denied on the ground of the failure to show that the action was one of which the Federal court had jurisdiction.

And where, under the statutes, no appeal lies from an order refusing to remove a case from an inferior state court to the Federal court, it has been held that the proper remedy is by mandamus from the higher to the inferior state court. *Hopper v. Kalkman*, 17 Cal. 517.

But this is not true where an appeal or writ of error lies from a refusal of an inferior state court to remove a cause pending therein to a Federal court, it being held in such case that mandamus is not the proper remedy. *Hill v. Henderson*, 6 Smedes & M. 351 (*dictum*); *State ex rel. Combination Silver Min. Co. v. Curler*, 4 Nev. 445; *Shelby v. Hoffman*, 7 Ohio St. 450; *Campbell v. Wallen*, Mart. & Y. 266. 37 L.R.A. (N.S.)

So, it has been held that an appellate state court will not grant a writ of mandamus to compel an inferior state court to remove a case pending therein to a United States circuit court, on the ground that the latter court itself has the power to award the writ when necessary to the exercise of its jurisdiction. *People ex rel. Kanouse v. New York C. P. Judges*, *supra*. See this case as set out and discussed, *supra*.

And in *People ex rel. Glen Falls Ins. Co. v. Jackson Circuit Judge*, 21 Mich. 577, 4 Am. Rep. 504, it was held that the writ of mandamus could not be resorted to to compel an inferior state court to remove a case to the Federal court, the court approving of the reasoning of the court in *People ex rel. Kanouse v. New York C. P. Judges*, *supra*, and in addition it was remarked that the removal was a matter of right, and not within the discretion of the state courts.

So, in *Baron v. Kingsland*, 5 La. 378, it was held that the supreme court had been given none but appellate power, and that therefore it could not issue a writ of mandamus to an inferior court to compel the removal of a cause to the Federal court, even though no appeal would lie from a refusal of an inferior court so to remove the cause.

G. J. C.

*Hine v. Morse*, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37), that it may be taken as elementary and requiring no further reference to authority. Nor is there any substantial foundation for the contention that this elementary doctrine has no application to decisions of courts of the United States, refusing to remand causes to state courts since there is nothing peculiar in an order refusing to remand which differentiates it from any other order or judgment of a court of the United States concerning its jurisdiction. The importance of the subject which is involved in the contrary assertion, the apparent conflict between certain decided cases dealing with the right to review by mandamus orders of circuit courts refusing to remand, and a long and settled line of other cases relating to the same subject, the confusion and misapprehension which must result unless the conflict is reconciled or abated, and the duty to remove obscurity, as far as it may be done, concerning the review of questions of jurisdiction, all lead us to give the subject a more extended examination than it would otherwise be entitled to receive.

In *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176, the court was called upon to consider whether the judgment of a circuit court of the United States, declining to remand a civil cause to a state court from which it had been removed, was reviewable by the extraordinary process of mandamus. In refusing to exert jurisdiction by mandamus, and considering the inherent nature of the powers of a circuit court, it was declared that "jurisdiction has been given to the circuit court to determine whether the cause is one that ought to be remanded," and it was also observed that "no case can be found in which a mandamus has been used to compel a court to remand a cause after it has once refused a motion to that effect." Calling attention to the fact that the act of 1875, in § 5 [18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 511], expressly gave an appeal to or a writ of error from this court for the review of orders of circuit courts remanding causes, without regard to the amount involved, the court said: "The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final."

In *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729, the facts were these: Pollitz, a citizen of the state of New York, sued in the supreme court of that state the Wabash Railroad Company, a consolidated corporation existing under the 37 L.R.A. (N.S.)

laws of the states of Ohio, Michigan, Illinois, and Missouri, and a citizen of the state of Ohio, and various other defendants, chiefly citizens and residents of the state of New York. The Wabash Company removed the cause to the circuit court of the United States, on the ground of a separable controversy. A motion of Pollitz to remand was denied. The controversy was decided by this court on the hearing of a rule, which was granted on the application of Pollitz for a writ of mandamus to direct the remanding of the cause. The court, after stating (p. 331) the general rule that "mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error," refused to take jurisdiction and review the action of the court below, and therefore declined to issue the writ.

*Ex parte Nebraska*, 200 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581, presented the following facts: In a suit against a railway company, commenced in a court of the state of Nebraska, the state, its attorney general, the railway commission, and the members of the commission individually, were plaintiffs. The defendant railway removed the cause to the United States court, upon the ground that the state was not a proper or necessary party to the suit, and that the controversy was wholly between citizens of different states. A motion to remand having been denied by the circuit court, this court issued a rule to show cause why a mandamus should not be allowed, ordering the remanding of the cause. Upon the hearing on the return to this rule, the court declined to take jurisdiction and review the action of the trial court. It was said that the circuit court had jurisdiction to pass upon the questions raised by the motion to remand, and if error was committed in the exercise of its judicial discretion, "the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error." After declaring that "the applicable principles have been laid down in innumerable cases," the court cited *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Ex parte Loring*, 94 U. S. 418, 24 L. ed. 165; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208. The case of *Pollitz* was also cited and reviewed.

In *Ex parte Gruetter*, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690, the doctrine of *Re Pollitz* and *Ex parte Nebraska* was reaffirmed. The case was this: An action commenced by Gruetter in a state court was

removed into a circuit court of the United States, and Gruetter moved to remand. One ground of the motion was that the case was not removable because it was not an action of a civil nature, but was one to recover penalties. It was also urged that the petition and record did not show that the suit was sought to be removed to the circuit court of the United States for the district in which either the plaintiff or the defendant resided. On return to a rule to show cause why a mandamus should not be granted, the court declined to take jurisdiction of the case, saying (p. 588):

"There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky, and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the circuit court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the circuit court cannot be reviewed on this writ. *Re Pollitz, supra.*

It is patent from the review of the decided cases just made that the contention that the order of the court below, refusing to remand the cause, is susceptible of being here reviewed by the extraordinary process of a writ of mandamus,—in other words, that that writ may be used to subserve the purpose of a writ of error or an appeal,—is so completely foreclosed as not to be open to contention, unless it be that other cases which are relied upon as sustaining our jurisdiction to issue the writ of mandamus have either overruled the line of cases to which we have referred, or have so qualified them as to cause them to be here inapplicable. We therefore come to consider the cases upon which petitioner relies, to ascertain whether they sustain either of these views. The cases are *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164, and *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515. But to an elucidation of these cases it is necessary that the briefest possible recurrence be had to two leading cases which long preceded them; *viz.*, *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524, and *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536.

In *Virginia v. Rives* a prosecution of persons accused of murder was removed from a state court to a circuit court of the United States. The latter court, moreover, under a writ of habeas corpus *cum causa*, took the prisoners from the custody of the state authorities. The case in this court arose upon an application by the commonwealth 37 L.R.A. (N.S.)

of Virginia for a rule to show cause why the prisoners should not be returned to the state court for trial. On hearing, this court took jurisdiction over the cause, issued the writ of mandamus, and directed the return of the accused. Speaking of the functions of the writ of mandamus, the court said (p. 323): "It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed." It is obvious from the opinion of the court and the concurring opinion that jurisdiction over the cause was taken because of the extraordinary abuse of discretion disclosed by the power attempted to be exerted, the confusion and disregard of constitutional limitations which the asserted power implied, and because, under the law as it then stood, no power would otherwise have existed to correct the wrongful assumption of jurisdiction by the circuit court.

In *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536, a person in the custody of the state authorities, charged with murder, was released under a writ of habeas corpus issued by a district judge. Subsequently the circuit court of the United States took, by way of removal, jurisdiction over the prosecution. The commonwealth of Virginia applied to this court for a mandamus to remand the prosecution and to restore the accused to the custody of the state authorities. The court, reaffirming the doctrine of *Virginia v. Rives*, pointed out that to wrongfully deplete the state of its right to prosecute in its own courts for crimes committed against its authority was a gross abuse of discretion, which, if not corrected by mandamus, could not be done in any other form. A mandamus to remand was issued. The court, however, declined to review the order discharging on habeas corpus, on the ground that, on the face of the application for habeas corpus, issue had been presented which the judge had a right to decide, and, if error was committed, there was a remedy by appeal.

In *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, mandamus was sought to compel a circuit court of the United States to remand a civil cause to the state court from which it had been removed, and which the circuit court had refused to remand. The case was one where, although there was diversity of citizenship, neither of the parties resided in the particular district to which the suit had been removed. This court took jurisdiction. Reviewing the action of the court

below, it was observed that the absence of residence within the district of either of the parties demonstrated the absolute want of authority of the circuit court over the cause, and that even if the objection was susceptible of being waived, a waiver by both parties was essential, and the record did not disclose that there had been such waiver. Considering the right to revise by mandamus the action of the circuit court in refusing to remand, no reference whatever was made to the existence of statutory remedies to correct the error found to have been committed, and no authority was cited, it being simply observed: "Our conclusion is that the case should have been remanded; and, as the circuit court had no jurisdiction to proceed, that mandamus is the proper remedy."

Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164, was also a case of removal, where there was diversity of citizenship, but neither of the parties resided in the particular district. The circuit court had refused to remand. Taking jurisdiction to review such action, an application for a writ of mandamus, this court held that, as there was diversity of citizenship, there was general jurisdiction in the circuit court, and that the objection that neither party resided within the district was a matter susceptible of being waived by the parties, and that such waiver had taken place. The observations in *Ex Parte Wisner* to the contrary were expressly disapproved. The action of the circuit court in refusing to remand was consequently approved. No discussion was had or authority referred to upon the question of the right to review by mandamus the action of the circuit court, the right to exert such authority having in effect been assumed as the result of the decision in the *Wisner Case*.

Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515, an action commenced in a state court, had been removed into a circuit court of the United States, not upon diversity of citizenship, but upon the ground that the case stated was one arising under the laws of the United States. The circuit court denied a motion to remand. Upon application for mandamus, this court took jurisdiction to review such actions, and directed that the case be remanded, upon the ground that the cause of action, when rightly construed, did not arise under any provision of the Constitution, or under any law of the United States. Referring to some of the previous cases, and manifestly noting an apparent conflict between them, it was said that this court had declined to exert jurisdiction by mandamus in *Ex parte Nebraska* and *Re Pollitz*, because those cases

but exemplified the exercise of judicial discretion by the circuit court as to a matter within its jurisdiction, while the case in hand presented a question of a want of jurisdiction in the circuit court, clearly apparent on the face of the record, and therefore that court, when it decided that the cause of action alleged arose under a law of the United States, could not possibly have exercised a discretion to decide a matter which was within its jurisdiction. *Virginia v. Rives* and *Virginia v. Paul* were approvingly cited, and it was said that, in case of a refusal to remand, "although the aggrieved party may also be entitled to a writ of error or appeal," mandamus may be resorted to. On this subject it was further observed: "Mandamus, it is true, never lies where the party praying for it has another adequate remedy, . . . but where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it, an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy."

Comprehensively considering the two lines of cases, one beginning with *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176, and ending with *Ex parte Gruetter*, 217 U. S. 586, 54 L. ed. 892, 30 Sup. Ct. Rep. 690, and the other beginning with *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524, and ending with *Re Winn*, supra, it is to be conceded that they are apparently in conflict, both as to the assertion of power which one line upholds to review by mandamus the action of the United States circuit court in refusing to remand, and the non-existence of such power which the other line of cases expounds, and also as to much of the reasoning in the opinions in some of the cases. Thus the ruling in *Ex parte Hoard*, that where, in a civil case, statutory remedies by error or appeal are provided for the ultimate review of errors, committed by a court in determining its jurisdiction, such statutory provisions are, in their nature, exclusive, and therefore deprive of the right to resort to the remedy by mandamus, is directly in conflict with the jurisdiction which was exercised in *Ex parte Wisner*, *Re Moore*, and *Re Winn*, as those cases were civil cases, and the right to review the error, if any, committed by the circuit court in refusing to remand, was regulated by statute. So, also, the statement, by way of reasoning, in the opinion in *Re Winn*, to the effect that, in case of a refusal to remand, "the remedy by mandamus is available, although the aggrieved party may also be entitled to a writ of error or appeal," is in direct conflict with the reasoning upon which the decision in *Ex parte Hoard* was

based. The conflict just stated becomes more manifest when the ruling in *Virginia v. Paul* is considered, since in that case the court declined by mandamus to review the action of the court below in taking one accused of crime by a writ of habeas corpus from the custody of the state authorities, on the ground that prima facie there was jurisdiction to issue the writ of habeas corpus, and a remedy by appeal existed to review the action of the circuit court. Moreover, the decision in *Re Pollitz*, that there was not power to review the action of the court below in refusing to remand, because the circuit court, in passing upon the question as to whether, on the face of the papers, a separable controversy was alleged, decided a matter within its jurisdiction, and which involved the exercise of judicial discretion, cannot be harmonized with the ruling in *Ex parte Wisner* and *Re Moore*, that the action of a circuit court in refusing to remand could be reviewed by mandamus, because the court, in deciding whether the parties had waived the right to be sued in a particular district, had not been called upon to decide a matter within its jurisdiction, involving the exercise of judicial discretion. This conflict becomes more obvious when the ruling in *Re Winn* and *Ex parte Gruetter* are contrasted, the one deciding that the action of the circuit court in refusing to remand because, from an analysis of the pleadings, it was found that a claim of Federal right was presented, was reviewable by mandamus, since it was plain, as a matter of law, that the court erred, and therefore its decision involved no element of judicial discretion, and the other deciding that the denial by a circuit court of a motion to remand based upon the ground, among others, that, on the face of the papers, the suit was not removable, because it was not of a civil nature, but was for a penalty, was not reviewable by mandamus, because the decision of such a question was within the jurisdiction of the circuit court, and therefore involved the exercise of judicial discretion.

We must, then, either reconcile the cases, or, if this cannot be done, determine which line rests upon the right principle; and having so determined, overrule or qualify the others, and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty. Coming to the origin of the two lines of cases, it is manifest that it was not conceived that there was conflict between them, since *Virginia v. Rives* and *Ex parte Hoard* were practically contemporane-

ously decided, and were treated, the one as relating to an exceptional condition, that is, an effort to remove a criminal prosecution, which, if wrong was committed, no power otherwise to redress than by mandamus existed, and the other but involved the application of the well-settled rule as to civil cases, concerning which the right to review by error or appeal was generally regulated by statute. Following down the two lines of cases, it is equally manifest that it was never conceived that they conflicted with each other, because some of the cases were also practically contemporaneously decided without the suggestion that one was in conflict with the other; indeed, the decisions in *Re Moore* and *Ex parte Nebraska* were announced on the same day. When the cases are closely analyzed, we think the cause of the conflict between them becomes at once apparent. As we have previously pointed out, no authority was referred to in *Ex parte Wisner* sustaining the taking in that case of jurisdiction to review by mandamus the ruling of the circuit court, although, in the course of the opinion, the statement was made with emphasis that the face of the record disclosed an entire absence of jurisdiction in the court below. In the opinion, however, in *Re Pollitz*, the *Wisner* Case was referred to, and in pointing out why it was not apposite and controlling, it was observed that that case (the *Wisner*) presented a total absence of jurisdiction, involving no element of discretion, and *Virginia v. Rives* was cited, manifestly as indicating the basic authority on which the jurisdiction to review by mandamus had been exerted in the *Wisner* Case. Again, in *Re Winn* it is to be observed that not only was *Virginia v. Rives* cited, but the cases of *Virginia v. Paul* and *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692 (the last of which also concerned a criminal prosecution in which the doctrine of *Virginia v. Rives* had been applied), were also cited, evidently for the purpose of pointing out the source from whence came the doctrine of the right to review by mandamus under the facts presented. Bearing these matters in mind, it plainly results that the conflict presented has arisen, not because of the announcement in any of the cases of any mistaken doctrine as to jurisdiction, or of any wrongful decision of any of the cases on the merits, but has simply been occasioned, beginning with *Ex parte Wisner*, from applying the exceptional rule announced in *Virginia v. Rives* to cases not governed by such exceptional rule, but which fell under the general principle laid down in *Ex parte Hoard* and the line of cases which have followed it. Under these circumstances it



becomes our plain duty, while not questioning the general doctrine announced in any of the cases, yet to disapprove and qualify *Ex parte Wisner*, *Re Moore*, and *Re Winn* to the extent that those cases applied the exceptional rule of *Virginia v. Rives*, and thereby obscured the broad distinction between the general doctrine announced in *Ex parte Hoard* and the cases which have followed it, and the exception established by *Virginia v. Rives* and the cases which have properly applied the doctrine of that case. Our duty to take this course arises not only because of the misconception which must otherwise continue to exist, but also because it is to be observed that material portions of the act of 1875, which were made the basis of the ruling in *Ex parte Hoard*, are yet in force, and because the cogency of the considerations arising from this fact are greatly increased by the duty to give effect to the provisions of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], concerning the review of final orders and judgments or decrees of the circuit courts of the United States.

As, then, our conclusion is that the case under consideration is not controlled by the ruling in *Ex parte Wisner* or kindred cases, but is governed by the general rule expressed in *Ex parte Hoard*, and followed in *Re Pollitz* and *Ex parte Nebraska*, and, lastly, applied in *Ex parte Gruetter*, it clearly results that the application for leave is without merit, and leave to file is denied.

#### MAINE SUPREME JUDICIAL COURT.

JAMES H. FITZSIMMONS et al.  
v.  
ISABELLE C. HARMON, Exrx., etc., of  
Elizabeth Doherty, Deceased, et al.

(— Me. —, 81 Atl. 667.)

#### Will — trust — interest of legatee.

1. No personal interest is conferred on the legatee by a will giving property to one

*Note. — Bequest to one to divide as he thinks best.*

The office of this note is to present decisions involving testamentary provisions not only practically identical with that under construction in the case reported, but also those which, while differing therefrom to some extent, are so sufficiently similar as to be likely to be of use in connection therewith; the question in these cases being whether the testamentary provision is sufficiently indicative of an intention to create a trust to preclude the legatee from taking beneficially.  
37 L.R.A. (N.S.)

to divide as seems to her best, "as I have told her my wishes."

#### Same — indefinite trust — resulting.

2. Where, by statute, a will must be in writing, a devise to one "to divide as seems to her best, as I have told her my wishes," is incapable of enforcement, and establishes merely a resulting trust for the benefit of the heirs at law.

(November 27, 1911.)

**R**EPORT by the Supreme Judicial Court for Cumberland County for the determination by the Law Court of questions contained in a bill filed to obtain a construction of the will of Elizabeth Doherty, deceased. Decree for complainants.

The facts are stated in the opinion.

Messrs. Joseph B. Reed, John B. Kehoe, and Connellan & Connellan, for complainants:

Under the terms of the will the executrix, Isabelle C. Harmon, takes no beneficial interest, but there is a resulting trust for the benefit of the heirs at law, and the estate should be divided among them.

Olliffe v. Wells, 130 Mass. 221; Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Minot v. Atty. Gen. 189 Mass. 176, 75 N. E. 149; Drew v. Wakefield, 54 Me. 298.

Verbal instructions cannot be incorporated into a written will by any words of reference, however clear, since by statute the will must be in writing.

Olliffe v. Wells, 130 Mass. 224; Smith v. Smith, 54 N. J. Eq. 1, 32 Atl. 1069; Sims v. Sims, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436; Heidenheimer v. Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382.

Messrs. Reynolds & Sanborn and Charles H. Johnston, for defendant Isabelle C. Harmon:

Trusts arising from use of recommendatory words are not encouraged.

Ellis v. Ellis, 15 Ala. 296, 50 Am. Dec. 132; Re Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; Gilbert v. Chapin, 19 Conn. 342; Bryan v. Milby, 6 Del. Ch. 208, 13 L.R.A. 563, 24 Atl. 333; Lines v. Darden,

It does not fall within the scope of this note to discuss the validity of trusts held to have been intended by such testamentary provisions, or to deal with the question whether in such a case the trust can, by virtue of the understanding between the testator and the legatee, be given effect as a constructive one. The reader interested in these branches of inquiry is referred to a note to *Hadley v. Forsee*, on "Enforcement of general bequest for charity or religion," 14 L.R.A. (N.S.) 49; and the note to *Winder v. Scholey*, 33 L.R.A. (N.S.) 995, on the question "whether a constructive trust may be based upon an undertaking to

5 Fla. 51; *Leseane v. Witte*, 5 S. C. 450; *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571; *Williams v. Williams* [1897] 2 Ch. 12, 66 L. J. Ch. N. S. 485, 76 L. T. N. S. 600, 45 Week. Rep. 519.

It was the intention of testator to give her money to the executrix absolutely, trusting implicitly in her to make the use and appropriation thereof.

*Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342; *Re Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *McCreary v. Burns*, 17 S. C. 45; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *Cheston v. Cheston*, 89 Md. 465, 43 Atl. 768; *Randall v. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25

N. E. 780; *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449; *Spooner v. Lovejoy*, 108 Mass. 529; *Hess v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538; *Sturgis v. Paine*, 146 Mass. 354, 16 N. E. 21; *Lloyd v. Lloyd*, 173 Mass. 97, 53 N. E. 148; *Joslin v. Rhoades*, 150 Mass. 301, 23 N. E. 42; *Veeder v. Meader*, 157 Mass. 413, 32 N. E. 358.

Mr. Michael T. O'Brien for defendant Theresa Fitzsimmons.

Whitehouse, Ch. J., delivered the opinion of the court:

Elizabeth Doherty, of Portland, died on the 18th day of October, 1909, leaving a will which reads as follows:

"I, Elizabeth Doherty, being in my right

hold for the benefit of another property received through devise or inheritance, where no actual testamentary intention has been frustrated.

"There is a distinction," says the court in *Ralston v. Telfair*, 17 N. C. (2 Dev. Eq.) 255, "between an express trust for an indefinite purpose, and those cases where, from the indefinite nature of the purpose, the court concludes that a proper trust could not have been intended, though words may have been used which, had the objects been definite, would by construction import a trust. In the first description of cases, the devisee does not take beneficially; in the latter, he does." This statement will be found a material aid to the understanding of many of the following decisions.

In *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, it is said: "In the numerous decisions which are found in the books on this subject, curious matters have been relied on as *indicia* of intention on the one side or the other, such as the use of the words 'upon trust'; the gift of specific legacies to the executors or trustees; and the mention of the executors by their proper names. *Indicia* of this kind, on which eminent judges have relied, may no doubt afford in some cases useful aids to construction, but after all they may, and often must, be modified by the provisions and language of the particular instrument to be construed."

So, also, it is said by Lord Cottenham, in *Ellis v. Selby*, 1 Myl. & C. 286, that the construction to be given to a provision of this character "depends upon the particular language which the testator has used, and very slight expressions may make a most material difference."

The grouping of the following cases, which has been made in order to facilitate reference, is primarily with regard to the character of the testamentary provision involved, rather than to the controlling factor of decision.

Gifts "in trust" or "upon trust."

The words "upon trust" are very strong  
37 L.R.A. (N.S.)

evidence of the donor's intention not to confer a beneficial interest upon the donee; although it seems that it may be negatived by the context and the general interpretation of the whole instrument. See *Perry*, Tr. § 158.

Thus, in *Morice v. Durham*, 10 Ves. Jr. 522, 7 Revised Rep. 232, 5 Eng. Rul. Cas. 548, where a bequest was in trust for such objects of benevolence and liberality as the trustee in his own discretion should most approve, it was held that the words "in trust" precluded any implication of an intention to give a beneficial interest, but that, the trust being insufficiently expressed, a trust resulted for the next of kin.

So, also, in *Vezey v. Jamson*, 1 Sim. & Stu. 68, where testator gave the residue of his estate to his executors, upon special trust and confidence, nevertheless, to apply and dispose of the same in or toward such charitable or public uses or purposes, person or persons, or otherwise, as he might by any codicil or codicils to that his will, or by memorandums in his own handwriting, direct or appoint, and as the laws of the land would admit of; and in default of any such directions or appointment, then as to the whole residue, or such part thereof concerning which no such direction or appointment should be made, upon trust to pay and apply the same in or toward such charitable or public purposes as the laws of the land would admit of, or to any person or persons in such shares and proportions as his executors or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure think fit, or as they should think would have been agreeable to him, the said testator, if living,—it was held that, the gift being expressly upon trust, the trustees could not hold it for their own benefit; but that the purposes of the trust being so general and undefined as to be incapable of execution by the court, a trust resulted for the next of kin.

In *Buckle v. Bristow*, 10 Jur. N. S. 1095, where a testator gave the residue of his property upon trust, for his executors to

mind at this date (October 13th, 1909), wishing to dispose of property now in my name, give, devise, and bequeath my property of whatever kind to Isabelle C. Harmon to divide as seems to her best, as I have told her my wishes in the matter, mentioning all relatives including my nephews.

"I name Isabelle C. Harmon as my executor."

In this bill in equity, brought by some of the heirs of the testatrix, the plaintiffs ask the court to construe and interpret the provisions of this will, and particularly to determine, first, whether the legatee and executrix therein named takes any beneficial interest under it; second, if the legatee named takes no beneficial interest,

hold the same for such uses and purposes as he might by codicil or deed direct or appoint, and in default thereof then for the same to be expended and appropriated within three years after his decease, in such way and manner and for such purposes as they, or the majority of them, might in their judgment and discretion agree upon, it was held that, as the words "upon trust" override the whole sentence, the executors did not take beneficially, but upon a trust void for uncertainty; and it was further held that such construction was in no way altered by the fact that in a codicil, after giving unequal legacies to the five executors, testator, said: "I give such five legacies irrespective of any interest they may ultimately take in the residue of my estate," as no interest was given by the will to the trustees and executors until some further act should be done, and as the language of the codicil may be explained upon the supposition that the testator had in mind a further gift which he might make by appointment of the residue in their favor.

In *Fowler v. Garlike*, 1 Russ. & M. 232, where a testatrix bequeathed the residue of her property to certain individuals, who were her executors, "to hold to them, their heirs, executors, and administrators, according to the nature and tenure of such property, upon trust to dispose of the same at such times and in such manner and for such uses and purposes as they shall think fit, it being my will that the distribution thereof shall be left entirely to their discretion," it was held that the executors did not take an absolute beneficial interest, but upon a trust too uncertain for a court to execute.

In *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931, where a testatrix left her residuary estate "as a sacred trust" to her daughter, "knowing that she will faithfully carry out my wishes regarding it," also appointing the daughter executrix, and on a separate signed paper, written at the time of the writing of the will, stated her desires, it was held that the daughter took the property in trust for the purposes expressed.

37 L.R.A. (N.S.)

whether the will declares a trust sufficiently definite to be executed; and, third, if no such trust is declared, to whom shall the residue of the estate, after the payment of all debts and expenses of administration, be distributed.

In her answer, Mrs. Isabelle C. Harmon, named as defendant in the bill, joins in the prayer of the plaintiffs for a judicial construction of the will.

The plaintiffs contend, first, that under the terms of the will, Mrs. Harmon, the legatee and executrix therein named, takes no beneficial interest; second, that while the terms of the will clearly manifest an intention on the part of the testatrix to create a trust, the trust thereby indicated is not made sufficiently definite to be exe-

In *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382, testator gave his residuary estate to his brother "in trust, to be disposed of by him as I have heretofore or may hereafter direct him to do," it was held that, in view of the statute requiring testamentary dispositions to be in writing, oral evidence was inadmissible to show the purpose for which the trust was created; and therefore that a trust resulted for testator's heirs.

In *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436, where testator gave a share in his estate to a nephew, "to be disposed of by him as a private trust, about which I shall give him specific verbal directions, having full confidence in his honesty to carry out my wishes in regard to this bequest," it was held that the will on its face showed plainly and unequivocally that the bequest to the nephew was a gift to him upon trust, in which he was not to take any beneficial interest; and that, in view of the statute requiring testamentary provisions to be in writing, parol evidence was inadmissible to show the verbal directions upon which the trust was to be administered.

Where other provision is made for legatee.

In *Briggs v. Penny*, 3 De G. & Sm. 535, affirmed in 3 Macn. & G. 546, testatrix, after giving divers legacies, including one to the executrix for her trouble, gave the residue of her personal estate to the person named as executrix, "her executors, administrators, and assigns, well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes." It was held that both the language of the residuary clause, which was held to be such as to exclude all option or discretion, and the fact that a separate legacy was given to the executrix for her trouble, which the testatrix would not have done, knowing her estate would be abundantly sufficient to satisfy all the bequests, had she intended the residue to be taken beneficially, showed that the legatee was not entitled to take beneficially. A further

cuted; and, third, that there is a resulting trust in favor of the heirs at law of the testatrix, and that the estate should be divided among them.

The privilege of making a disposition of property by will is created, and the exercise of it definitely regulated, by the statutes of this state. The leading provision is found in § 1 of chapter 76, Rev. Stat., and is as follows:

"A person of sound mind and of the age of twenty-one years may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him, at his request and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will."

argument was drawn from the circumstance that, while the trouble which the executrix would have in the execution of the bequests in the will itself was not commensurate with the legacy given, she might be put to considerable trouble in carrying out the trusts entailed upon her by the residuary bequest.

In *Balf v. Halpenny* [1904] 1 I. R. 486, where testator by his will, besides other dispositions, left to his two executors legacies of £10 each for their trouble in administering his estate, and disposed of the residue in the following words: "I bequeath all the residue of my property of every kind to my executors, to apply the same as they shall think fit," the court held that the residuary bequest, having regard to its terms, and in view of the previous legacies to the executors for their trouble, was not a gift to them beneficially, but as trustees; the trust, however, being of so vague, uncertain, and indefinite a character that effect could not be given to it. It was further held that no constructive trust could be based on a conversation after the execution of the will, between the testator and one of the executors, in which the former indicated the direction which he desired the residue to take.

In *Re Keenan*, 107 App. Div. 234, 94 N. Y. Supp. 1099, where testator gave to a friend a sum of money "to be expended by him as I have instructed him during my lifetime," in a subsequent clause giving the same person a sum of money "for his personal use," it was held that the latter clause showed that the former was not a personal bequest, but that it was upon a trust, which was void for uncertainty.

**Gifts to executors or trustees *eo nomine*.**

In *Forster v. Winfield*, 142 N. Y. 327, 37 N. E. 111, where testator, after giving his executors a power of sale, and directing them, out of the proceeds realized by them from the execution of the power of sale, which they were to receive as trustees and in trust, to pay any debts that he might owe, gave the entire residue after payment of such debts to his executors *eo nomine*, and to the survivor of them, as joint tenants, adding,  
77 L.R.A. (N.S.)

The statute thus clearly prescribes the method of transmitting property by will, which the court is not at liberty to ignore, although in particular instances the actual intention and desire of a person respecting the disposition of his property may be defeated by adhering to the rule prescribed. A bequest of personal property, as well as a devise of real estate, in order to be effectual, is required to be made by an instrument in writing signed by the testator and subscribed by three attesting witnesses. Even a letter or other document containing explicit directions for the disposition of property cannot become part of a will by reference, unless it be shown to have been in existence at the time the will is executed, and be so clearly and precisely

"I have entire confidence that they will make such disposition of such residue as, under the circumstances, were I alive and to be consulted, they know would meet my approval," it was held that, as all the language used related to them as executors, and to them only in their official capacity, there was no evidence, either in the language of the gift or in testator's expression of confidence in them, of an intention that they should take as individuals absolutely, but that the gift was upon an undefined and void trust.

In *Gross v. Moore*, 68 Hun, 412, 22 N. Y. Supp. 1019, affirmed on opinion of the court below, in 141 N. Y. 559, 36 N. E. 343, it was held that under the following testamentary provision, "I give, devise, and bequeath unto my executor hereinafter named all the rest, remainder, and residue of my personal estate, to be distributed by him according to instructions given to him by me," having regard both to the language directing that the residuum "be distributed by him according to the instructions given him by" testatrix, and the fact that when the testatrix intended to make an absolute gift of her property in other parts of the will, she used apt and technical language to express her intention, the executor did not take an absolute interest for his own use personally, but upon a trust which was void for uncertainty.

In *Ellis v. Selby*, 1 Myl. & C. 286, testator directed that his trustees should retain to themselves what should remain from the proceeds of the sale of his freehold property after payment of legacies, upon trust to pay, apply, and distribute the same to and for such charitable or other purposes as they should think fit, without being answerable or accountable for the disposition thereof; and further provided that in the event of the failure of certain trusts, "then and in such case, my will is that my said trustees and the survivors and survivor of them, . . . his executors or administrators, do pay and apply the whole of my said funded property . . . to and for such charitable or other purposes as they" should

described and referred to in the will as an existing document, as to be readily identified as the particular paper intended by the testator. *Bryan's Appeal*, 77 Conn. 240, 1 A. & E. Ann. Cas. 393, 68 L.R.A. 353, 107 Am. St. Rep. 34, 58 Atl. 748, and cases cited.

In the case at bar it has been seen that the only wishes expressed for the guidance of the legatee in the distribution of the property had been given orally, and they were not incorporated in the will. The language of the testatrix is: "I give, devise, and bequeath my property of whatever kind to Isabelle C. Harmon to divide

as seems to her best, as I have told her my wishes in the matter."

1. The phraseology employed in making this bequest to Mrs. Harmon utterly fails to disclose any purpose on the part of the testatrix to make an absolute gift of the property to Mrs. Harmon for her personal benefit. It is not given to her to consume, but to "divide." It expressly requires her to "divide" all the property thus bequeathed to her. The fact of the division is not left to her discretion, but imposed upon her as a duty. It gives her discretionary authority only respecting the manner of the

think fit, without being accountable therefor. It was contended that, under the second clause, the executors took an absolute beneficial gift, the testator not having used in such clause the words "upon trust," with which he had prefaced his disposition of the proceeds of his real estate; but it was held that as, if the fund was intended for the executors' own benefit, the testator might have left with them the option of disposing of it; and, again, as the direction to the executors to pay and apply the fund to such charitable or other purposes as they should think fit was inconsistent with the notion that they were absolutely to be entitled to it; and as the direction that they should not be held answerable or accountable would be superfluous had it been his intention to give them the property absolutely, although it is perfectly consistent with the intention to create a general and indefinite trust, the discretion vested in them was not so large as to relieve the gift from being a trust, too indefinite, however, to be carried into effect.

In *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, the first bequest in a will vested all the property in the executors "as such," and "in trust always" for the purposes thereafter mentioned, and the residuary clause was as follows: "As regards the remainder of my real and personal property, of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper; and I direct that they, their heirs, successors, representatives, or descendants may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just." It was held that the facts that the residuary clause contained no words of gift, but a direction to the executors, and that they were mentioned by that title, and not by name, and the fact that the will as a whole manifested a desire throughout to benefit two certain families, negative the supposition that the testatrix intended to sever the residue from the trust with which the will clothed all her property in the hands of her executors, and to make an absolute gift to them as individuals; but that a trust was intended to

be created, which failed for want of adequate expression of it.

In *Fenton v. Nevin*, Ir. L. R. 31 Eq. 478, where testator, after making various legacies and directing his property to be sold, added: "I will my executors shall apply the overplus, if any, as they think fit," it was held that, there being no direct gift, and the legacy being to the executors as such, they did not take beneficially, but upon a trust too indefinite to be carried into effect.

In *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445, where testatrix gave her residuary estate to her executors and the survivor of them or their successors, if any such should be appointed, "to be by them distributed to such persons, societies, or institutions as they may consider most deserving," it was held that notwithstanding the omission of the words "in trust," yet, as the bequest contained no words tending to show that the executors were to take the property or any part of it absolutely, or for their own benefit, but on the contrary was not to them by name, but was to them and the survivor of them and to their successors, and all the property given to them was to be by them distributed, they took, not beneficially, but in trust; and that the trust declared, not being capable of being sustained as a charity, was too indefinite to be carried into effect.

*Minot v. Atty. Gen.* 189 Mass. 176, 75 N. E. 149, involved the interpretation of the following provision: "I give and devise to my executors and the survivor of them, or whomsoever shall lawfully have the execution of this my will, all the residue and remainder of my property and estate, to be distributed by them to charitable or worthy objects, or such as I may designate during my lifetime, and particularly for the purpose of giving to any relative of mine whom, without apparent reason, I may have overlooked, such sum as may seem to them or him under all the circumstances fitting, suitable, and proper. But my said executors or executor shall have full discretion in the matter of the distribution of said residue, and shall not be under any legal accountability or subject to any trust, or be liable to any person or corporation by reason of any memorandum which I may leave." It

division, having regard to the wishes orally expressed by the testatrix.

2. On the other hand, it is equally clear that the terms of the bequest do manifest an intention on the part of the testatrix to create a trust.

But the trust declared by the terms of the will is too indefinite and uncertain to be executed. Among the essentials of a valid trust are that the precise nature of the trust which the donor intended to create should appear, and that the particular persons who are to take as *cestuis que trust*, and the proportions in which they are to take, should be pointed out. If they

are not, then the trust cannot be executed, it must fail. Where the character of a trust is impressed upon the gift, and it fails because ineffectually declared, and the *cestuis que trust* are not clearly designated, the trustee is not entitled to the gift for his own benefit. It was said by Lord Eldon, in *Morice v. Durham*, 10 Ves. Jr. 521, 537, 5 Eng. Rul. Cas. 548, that, "though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law." *Briggs v. Penny*,

was held that the effect of the language used in the opening words of the clause was materially qualified by the positive direction that the property was "to be distributed by them," which was wholly inconsistent with the purpose to give the residue to them for their own benefit; that such purpose was not changed by the provision that the executors should not be under any legal accountability; that, as to hold there was an outright gift to the executors would be repugnant to and defeat the declared purpose of the testator, it must be held that it was his intention to create a trust in some form, and not to make an unlimited bequest to his executors.

On the other hand, in *Ralston v. Telfair*, 17 N. C. (2 Dev. Eq.) 255, where testator bequeathed the residue of his estate "to be paid to the executors to dispose of as they may think fit. It is my will that the remainder of my property should be disposed of as my executors think proper," it was held that, as the words used are too indeterminate to raise a trust, the executors took beneficially for themselves.

And in *Higginson v. Kerr*, 30 Ont. Rep. 62, testator made the following provision: "I desire that my executors herein named shall have full power to make such and any disposition of the residue and remainder of my property and estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relatives in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations. I also give my said executors power and desire them to dispose of any balance of my estate or property which may be in the bank or in any securities, to the best of their judgment, where they may consider it will do the most good and deserving." It was held that, as the executors were given an absolute power of appointment in respect of the residuary estate, under which they might appoint in favor of themselves, they took absolutely, and not upon trust; and that neither the fact that, in the clause appointing the executors, they are called "executors and trustees," nor the fact that they were by another clause em-

powered to hold property in trust for any of the friends of the testator, as they, the executors, might think proper, was sufficient to show that the residue mentioned in the paragraph above quoted was held by them in trust, or that there was any trust connected with the power given therein.

For other cases in which the gift was to an executor or trustee, *eo nomine*, see *Morice v. Durham*, 10 Ves. Jr. 522, 7 Revised Rep. 232, 5 Eng. Rul. Cas. 548; *Vezey v. Jamson*, 1 Sim. & Stu. 68; and *Buckle v. Bristow*, 10 Jur. N. S. 1095, under the heading "Gifts 'in trust' or 'upon trust,'" supra; also *Balfe v. Halpenny* [1904] 1 I. R. 486, under heading "Where other provision is made for legatee," supra; and also *Hill v. Fiske*, 69 Misc. 507, 125 N. Y. Supp. 1026, under heading "Gifts to persons also appointed executors," infra.

Gifts to persons also appointed executors.

In *Condit v. Reynolds*, 66 N. J. L. 242, 49 Atl. 540, where testatrix, after giving her husband a life interest in her estate, further provided: "Upon the death of my said husband I give, devise, and bequeath all my said hereinbefore-mentioned estate in such manner as he may by his last will and testament, or by an instrument in the nature of a last will and testament, devise and bequeath, or appoint to receive the same, trusting entirely to his discretion to carry into execution such charge and instruction as I may during my life have expressed to him in regard thereto," it was held, in view of the fact that the husband was appointed executor, an office which implies a trust to effectuate purposes manifested by the will, and of the fact that the power contemplated was to operate on the remainder after his death, giving rise to a strong presumption that the power was not intended to be absolute for the benefit of the donee, but was meant to be exerted only for the benefit of others, and of the explicit declaration of the testatrix that the purpose of the grant was "to carry into execution such charge and instruction as I may during my life have expressed to him in regard thereto," that the intention was to confer upon the husband not an absolute, but a fiduciary, power of disposal; and that no implication

3 Macn. & G. 546, 21 L. J. Ch. N. S. 265, 16 Jur. 93; Warner v. Bates, 98 Mass. 274; Hess v. Singler, 114 Mass. 56; 1 Perry, Tr. 83; Id. 5th ed. 46; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680.

In *Nichols v. Allen*, 130 Mass. 212, 39 Am. Rep. 445, the court said: "Two general rules are well settled: (1) When a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives,

or to the testator's residuary legatees or next of kin." *Briggs v. Penny*, 3 De G. & S. 525, 13 Jur. 909, and 3 Macn. & G. 546, 21 L. J. Ch. N. S. 265, 16 Jur. 93; *Thayer v. Wellington*, 9 Allen, 283, 85 Am. Dec. 753.

But *Olliffe v. Wells*, 130 Mass. 221, is a case strikingly analogous to the one at bar. In that case the bequest submitted to the court for construction was as follows: "To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him

to the contrary could be drawn from the fact that the objects to be subserved by the execution of the power were undefined, the terms of the gift showing that the thing given could not be used for the benefit of the donee.

But in *Gibbs v. Rumsey*, 2 Ves. & B. 294, where a testatrix, after bequeathing her property to two individuals, who were also her executors, upon trust to sell, and out of the proceeds to pay legacies, among which were legacies to each of them for their care and trouble, gave the residue "unto my said trustees and executors [naming them] to be disposed of unto such person and persons, and in such manner and form, and such sum or sums of money, as they in their discretion shall think proper and expedient," it was held that as the first words of the residuary clause amounted clearly to an absolute gift to the persons named, and the subsequent words not importing a trust (the court remarking in this connection that the testatrix had frequently in the course of her will used the words "in trust" where she intended to create a trust), the legatees took beneficially, and not as trustees. This decision has been regarded by the English courts with but little favor (see *Ellis v. Selby*, 1 Myl. & C. 286, 5 L. J. Ch. N. S. 214; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, and *Fenton v. Nevin*, Ir. L. R. 31 Eq. 478), and is characterized by *Wood, V. C.*, in *Buckle v. Bristow*, 10 Jur. N. S. 1095, as going "to the very outside of the doctrine."

So, also, in *Re Murray*, 124 App. Div. 548, 108 N. Y. Supp. 1047, where testatrix gave her residuary estate to a certain person, who was also appointed executor, "requesting that he make such distribution of the same or any portion thereof as I shall indicate by memorandum, written direction, or otherwise," it was held that, although the word "distribution" would tend strongly to indicate the absence of any intention to make an absolute gift, yet, in view of the fact that in another clause of her will she created another trust and appointed the same person trustee, using different language, and of the use of the words "or any portion thereof," showing an uncertainty whether she would make any request, or, if she made one, to what portion of the residuary estate it

might relate, the testatrix intended to give the residuary estate absolutely, imposing no obligation upon the residuary legatee whatever, but trusting entirely to him to carry out any direction she might see fit to make.

In *Re Perkins*, 68 Misc. 255, 124 N. Y. Supp. 998, the joint will of testator and his wife provided that the remainder of their personal and real estate and belongings were to be disposed of by two certain individuals "as they think best, we having advised with them thereof, and left the disposition of any residue of our estate to their judgment as may seem best to them at that time," the same persons being appointed executrices. It was held that as no direction was given to the legatees as to the disposition to be made of the estate, either secretly or by the terms of the instrument, but it was expressly provided that the property should be disposed of by them as they should see fit, the case was within statutory provisions that "a general or special power is beneficial where no person other than the grantee has, by the terms of its creation, any interest in its execution," and that "where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers, and encumbrancers;" so that the instrument in question passed an absolute title to the legatees.

So, also, in *Hill v. Fiske*, 69 Misc. 507, 125 N. Y. Supp. 1026, where a will provided "the balance of my estate to be distributed by executor in his discretion, or as may be hereafter mentioned in codicils or written additions to this will," and the testatrix died without having made any such codicils or additions, it was held that the clause conferred a general and beneficial power with respect to the residuary estate, by which an absolute title passed.

For other instances of gifts to persons also appointed executors, see *Fowler v. Garlike*, 1 Russ. & M. 232, 8 L. J. Ch. 66; *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931; *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382, under heading "Gifts 'in trust' or 'upon trust,'" supra; also *Briggs v. Penny*, 3 DeG. & Sm. 535, affirmed in 3 Macn. & G. 546, under heading

or may express to him." In the opinion the court say: "The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols v. Allen*, 130 Mass. 211, 39 Am. Rep. 445. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton v. Seaman's Friend Soc.* 130 Mass. 91, 39 Am. Rep. 433. . . . The will upon its face showing that the devisee takes the legal title only, and not the beneficial interest, and the trust not being

sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs

"Where other provision is made for legatee," supra.

#### Gifts to individuals designated by name.

In *Ingram v. Fraley*, 29 Ga. 553, where a testator made the following provision: "Owing to the peculiar condition of my property, and being desirous of keeping my negroes together as long as it can be done; and having the utmost confidence in the integrity of my long-trying friend, William Fraley, of said county, and that he will entirely carry out my wishes and desires, as they may be expressed to him by me, either verbally or in writing; and knowing that my said friend will, by this will, be able much more effectually to dispose of my estate as I wish it done, than I could at this time do myself, and with much less trouble to himself, I hereby give to the said Fraley my entire estate, real and personal, notes and other debts due me, money and property of every kind," it was held that the legatee took no beneficial interest, but took upon a trust insufficiently declared.

The case of *Olliffe v. Wells*, 130 Mass. 221, is sufficiently set out in the opinion in the case above reported, and therefore need not be restated in this place.

In *Jay v. Lee*, 41 Misc. 13, 83 N. Y. Supp. 579, a bequest to certain individuals "to distribute and make over the same to the persons to whom I indicate to them during my lifetime," it was held that the bequest was upon a trust which was valid, and not void for indefiniteness in that it does not designate the beneficiaries.

On the other hand, in *George v. George*, 186 Mass. 75, 71 N. E. 85, where testatrix, after devising her estate to her nephew, "to have and to hold the same unto him and his heirs and assigns forever," added: "I make this disposition of my estate, as I have heretofore expressed to my said nephew my desires concerning the division and disposition of my estate, and I have full confidence that he will respect my wishes, and will carry them out so far as possible," it was held that the paragraph quoted did not impose a trust on the property left to the nephew.

In *Morris v. Larkin* [1902] 1 I. R. 103, where a devise was made to a parish priest "for a Roman Catholic school, or for what-

ever other purpose he pleases," it was held that, as the devisee was not described as a trustee, or directed to hold upon any trust, but was given complete discretion to do whatever he should like with the property, he took beneficially, and not upon a trust.

In *O'Brien v. Condon* [1905] 1 I. R. 51, where a bequest of money was made to a certain person "to be distributed as he thinks right," it was held that the legatee, not being an executor of the will (in which no executor was named), and there being nothing in the word "distribute" to imply an absence of beneficial interest in the property, and no trust appearing upon the face of the will, the legatee took, so far as the will was concerned, a beneficial interest.

In *McIsaac v. Beaton*, 37 Can. S. C. 143, 3 A. & E. Ann. Cas. 612, it was held that the absolute estate granted to the testator's widow in the first part of the following devise: "I give and bequeath to my beloved wife . . . all and singular the property of which I am possessed, . . . to be by her disposed of amongst my beloved children as she may judge most beneficial to her and them," is not cut down by the subsequent words; and that those words did not constitute a trust which a court of equity would administer.

So, also, in *Sinclair v. Malay*, 40 N. S. 181, it was held that under a provision by which testator gave his wife all his property to "dispose of it to the best advantage for the support of the family, and to leave the residue as she sees fit and proper at her death," she took an absolute estate, and not in trust for the family.

In *Re McDougall*, 8 Ont. L. Rep. 640, it was held that under the following testamentary provision: "I bequeath to my wife all that I possess, with full power to dispose of part or the whole as she and the children may think wisest and best at any time," the widow clearly took absolutely.

In *Jacob v. Macon*, 20 La. Ann. 162, where testator gave to his wife a sum of money, desiring her to use it for the benefit of her brothers and sisters according to her best judgment and discretion, it was held that the wife had the absolute disposal of the money bequeathed, the desire or request of the testator being simply addressed to her conscience.



at law or next of kin. See *Lewin*, Tr. 3d ed. 75." See also *Minot v. Atty. Gen.* 189 Mass. 176, 75 N. E. 149.

In the case at bar *Mrs. Isabelle C. Harmon*, the legatee and executrix, who wrote the will herself at the request of *Mrs.*

*Doherty*, who signed it, was permitted to state in her testimony that she did not intend to use a dollar of the estate for her own benefit, and that, in writing the will, she "intended to so word it that she would not keep a dollar of it." It is not in ques-

In *Rector v. Alcorn*, 88 Miss. 788, 41 So. 370, where a testator, after making provision for his son and reciting the fact that he had in his lifetime conveyed to his daughters their portions of his estate, gave all the balance thereof to his wife, "to be hers and to be disposed of as she may think best," adding: "I have full confidence in my said wife, and have abiding faith that she will deal justly with our children and the descendants of them," it was held that if the expression quoted should be construed as not merely an expression of confidence in the wife's acting wisely, but as imperative to control her as trustee, the whole purpose of testator, as indicated by the language used with reference to her, to make an independent provision for her, would be defeated, and therefore that she took absolutely.

In *Walter v. Walter*, 60 Misc. 383, 113 N. Y. Supp. 465, affirmed without opinion in 133 App. Div. 893, 118 N. Y. Supp. 268, which is affirmed also without opinion in 197 N. Y. 606, 91 N. E. 1122, where the bequest was to a certain person of a sum of money "for the purpose of dividing the same among such needy relatives" of testator's mother "as he in his discretion and judgment may select," it was held that the words of this clause, as to the legatee's payment over to persons whom he may select in his discretion from among the members of a certain class, import an intention not to create a trust, and that, the right of the legatee to receive or hold the legacy not being made conditional upon the continuation of his life until the amount was disbursed by him, nor upon the willingness of his executors as to disburse it, his personal representatives were entitled to the legacy.

In *Bennett v. McLaughlin*, 125 App. Div. 172, 109 N. Y. Supp. 63, where testator gave his wife all his property, adding, "and I desire that my said wife at my decease shall take my place, and shall have the right to sell and dispose of all or any of my real or personal estate as she may deem proper, and for the best interest of our children; and lastly, if anything is left, it is my desire that she shall divide the same between our children as she in her good judgment may consider just and fair," it was held that the wife took the property absolutely.

In *Weller v. Weller*, 22 Tex. Civ. App. 247, 54 S. W. 652, testator gave his estate to his wife "and her heirs forever, to have and to hold in her own use and benefit until my heirs become of age, and for her to divide equally the amount due to each that she in her judgment shall be entitled to," it was held that, in view of the condition

of testator's estate at the time of making his will, the circumstances under which it was made, and the primary object of testator in executing the instrument, it should be regarded as vesting a fee simple estate in the wife, and the expression quoted as merely precatory words, which do not create a trust.

But in *Green v. Collins*, 28 N. C. (6 Ired. L.) 139, where testator left the remainder of his estate to his wife "to be divided amongst my children as she thinks proper," it was held that an express trust was created which carries the capital and the profits until a division to the children in such proportions as the mother may appoint, the court saying: "To language so unequivocal, it is vain to oppose suppositions that, as the testator ought to have provided for his wife, and as he left it to her discretion to make a division among their children, therefore he might have intended to leave it also to her discretion to keep a part or all for herself. If he had such an intention, it is not to be found in the will; but the contrary very plainly."

And in *Seefried v. Clarke*, — Va. —, 74 S. E. 204, where testatrix left a will by which she appointed her husband as executor, and bequeathed to "said husband, his heirs, executors, administrators, or assigns, all of my estate, real and personal, with one simple request, that the estate be divided with my children or its equivalents, as his better judgment may direct," it was held that the use of the word "request" was indicative of an intention to create a precatory trust; that its force was not diminished, but was rather emphasized, by the use of the word "simple," and that the use of the term "as his better judgment may direct" was not meant to clothe the husband with an arbitrary discretion with respect to the division of the estate.

And in *Carroll v. Adams*, 105 N. Y. Supp. 967, where testatrix directed her residuary estate to be divided into three shares, one share going to a niece "for her to divide as she thinks best with" her mother, sister, and four brothers, it was held that, as the whole scheme of the will seems to have been the purpose of testatrix to devise her property to her nephews and nieces, the bequest above stated was in trust for the persons mentioned.

For other instances of gifts to individuals designated by name, see *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772, 27 S. E. 436, under heading "Gifts 'in trust' or 'upon trust,'" supra; also *Re Keenan*, 107 App. Div. 234, 94 N. Y. Supp. 1099, under heading "Where other provision is made for legatee," supra.

E. S. O.

tion that in attempting to administer the trust she has adhered to that intention with scrupulous fidelity. But while the language of the will clearly manifests an intention to create a trust, it is the opinion of the court that for reasons above stated, under the salutary and time-honored rules governing the creation and execution of trusts, the terms of this bequest do not declare a trust sufficiently definite to be executed; that there is a resulting trust in favor of the heirs at law; and that the estate should be divided among them after the payment of debts and expenses of administration.

Decree for plaintiffs accordingly.

#### TEXAS SUPREME COURT.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plff. in Err.,

v.  
B. ADOUE et al.

(— Tex. —, 137 S. W. 648.)

**Subrogation — guardian's surety — one assisting defalcation.**

1. The surety on a guardian's bond, who is compelled to make good a defalcation of

*Note. — Applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character is appended to his name.*

The right to garnish money deposited in a bank in a form importing that depositor is acting as agent or fiduciary is treated in the note to Silsbee State Bank v. French Market Grocery Co. 34 L.R.A. (N.S.) 1207.

The earlier cases upon the question stated in the title are treated in the notes to Cunningham v. Bank of Nampa, 10 L.R.A. (N.S.) 706; Boyle v. Northwestern Nat. Bank, 1 L.R.A. (N.S.) 1110; and Rochester & C. Turnp. Road Co. v. Paviour, 52 L.R.A. 790. In connection with the cases discussed in these notes, see also Petty v. Dunlap Hardware Co. 99 Ga. 300, 25 S. E. 697, holding that money deposited in a bank to the credit of "P., agent," could be reached by a garnishment served upon the bank at the instance of a creditor of P., and that, if the bank knew the creditor's contention was that this money in fact belonged to P. individually, and not to another for whom he claimed to act in making the deposit, it could not, except at its peril, pay over the money, even to the alleged principal; and Citizens' Nat. Bank v. Alexander, 120 Pa. 476, 14 Atl. 402, holding that a bank in which money had been deposited under the name of "A., deputy treasurer," could not apply such money to the payment of an overdraft by another as county treasurer, it being said that, granting that the money belonged to the county, yet, as between the bank and its depositor, it was the money of the latter, and was in no sense earmarked as public money.  
37 L.R.A. (N.S.)

the guardian, is subrogated to any right which the estate has against one who aided in the defalcation.

**Same — assisting guardian's misappropriation of funds — liability.**

2. A bank which issues to its customer a certificate of deposit in his favor as guardian, the funds for which he secures from individual sources and from a loan by it on collateral furnished by him individually, which certificate he needs to make good a defalcation in his guardian's account, in order to secure a surety on his guardian's bond, is charged with notice that he thereby devotes the funds to the use of his ward, and will be liable to the estate in case it accepts a surrender of the certificate, returns the funds represented by it to their original sources, and surrenders the collateral, although it had no notice of the defalcation and acted in good faith in the transaction.

(May 24, 1911.)

**ERROR** to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court for Galveston County in defendants' favor in an action brought to hold bankers liable for participation in the misappropriation by a guar-

Later cases are Silsbee State Bank v. French Market Grocery Co. 103 Tex. 629, 34 L.R.A. (N.S.) 1207, 132 S. W. 465, holding that money on deposit in a bank in the name of a certain person, "agent," is prima facie his property, and therefore subject to garnishment for his debt, to defeat which he has the burden of showing that it in fact belonged to an undisclosed principal; Denton Nat. Bank v. Kenney, — Md. —, 81 Atl. 227, holding that the deposit of a check made payable to "W. H. D., Atty.," did not, because of the mere placing of the abbreviation "Atty." after the payee's name, give notice to the depositor that the check was impressed with a trust so as to prevent the bank applying the amount thereof to the individual indebtedness of the depositor to the bank; and First Nat. Bank v. Greene, — Ky. —, 114 S. W. 322, holding that where a bank receives a check for a ward's share of an estate, made payable to "A. W. G., guardian, and M. G.," the ward, and, knowing of the trust character of the funds, credits the deposit to the individual credit of the guardian, it cannot avoid liability to the ward, where it applies the deposit in payment of a debt due it from the guardian individually.

It will be observed that the decision in UNITED STATES FIDELITY & G. Co. v. ADOUE, that the bank was chargeable with notice that the funds had been devoted to the use of the ward, did not rest alone upon the use of the word "guardian," but upon that fact in connection with other facts in the case suggestive of the fiduciary character of the funds.

G. J. C.

dian of funds belonging to his ward. Reversed.

The facts are stated in the opinion.

Messrs. Hunt, Myer, & Townes and George G. Clough, for plaintiff in error:

Adoue & Lobit were notified by the fact that Compton made the deposit as guardian, that the money belonged to the estate of the ward, and they could not lawfully pay it to any person, except by Compton's order, and then only for the uses of the estate.

Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Anderson v. Walker, 93 Tex. 119, 53 S. W. 821; Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423; Tex. Rev. Stat. arts. 2113, 2558, 2742; Harrison v. Ilgner, 74 Tex. 88, 11 S. W. 1054; Gillespie v. Crawford, — Tex. Civ. App. —, 42 S. W. 624; Browne v. Fidelity & D. Co. 98 Tex. 62, 80 S. W. 593; Hurst v. Marshall, 75 Tex. 454, 13 S. W. 33; Dan. Neg. Inst. 4th ed. § 271; Eaton & G. Com. Paper, § 75d, p. 370; Tiedeman, Com. Paper, § 300, p. 578; Perry, Tr. § 225; Ford v. Brown, 114 Tenn. 467, 1 L.R.A. (N.S.) 188, 88 S. W. 1036; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983; Lang v. Metzger, 86 Ill. App. 117; Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; Nicholson v. Chapman, 1 La. Ann. 222; McMasters v. Dunbar, 2 La. Ann. 577; Tradesmen's Nat. Bank v. Looney, 99 Tenn. 278, 38 L.R.A. 837, 63 Am. St. Rep. 830, 42 S. W. 149; Fox v. Citizens' Bank & T. Co. — Tenn. —, 35 L.R.A. 681, 37 S. W. 1102; Geyser-Marion Gold Min. Co. v. Stark, 53 L.R.A. 688, 45 C. C. A. 467, 21 Mor. Min. Rep. 220; 7 Cyc. 951; 28 Am. & Eng. Enc. Law, 1129; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 98 Am. St. Rep. 653, 68 N. E. 141; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107.

Plaintiff, having been compelled as a surety on the bond of Compton, as guardian, to make good to the estate the misappropriation by Compton and defendants of the fund represented by the certificate of deposit, was subrogated to the rights of said estate against the defendants.

Browne v. Fidelity & D. Co. 98 Tex. 62, 80 S. W. 593; Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423; Anderson v. Walker, 93 Tex. 119, 53 S. W. 821; Gillespie v. Crawford, — Tex. Civ. App. —, 42 S. W. 624.

Messrs. Hunt, Myer, & Teagle, also for plaintiff in error:

The word "guardian" on the certificate was sufficient, under the facts in this case, to charge defendants with notice that the said certificate represented money and trust funds belonging to the estate.

37 L.R.A. (N.S.)

Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150; Gillespie v. Crawford, — Tex. Civ. App. —, 42 S. W. 624; Browne v. Fidelity & D. Co. 98 Tex. 62, 80 S. W. 593; Hurst v. Marshall, 75 Tex. 454, 13 S. W. 33; Dan. Neg. Inst. 4th ed. § 271, 789, 789a, 795b; Eaton & G. Com. Paper, § 75d p. 370; Tiedeman, Com. Paper, § 390; Perry, Tr. § 225; Ford v. Brown, 114 Tenn. 467, 1 L.R.A. (N.S.) 188, 88 S. W. 1036; Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 64 Am. St. Rep. 513, 38 Atl. 983; Lang v. Metzger, 86 Ill. App. 117; Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; Nicholson v. Chapman, 1 La. Ann. 222; Tradesmen's Nat. Bank v. Looney, 99 Tenn. 278, 38 L.R.A. 837, 63 Am. St. Rep. 830, 42 S. W. 149; Fox v. Citizens' Bank & T. Co. — Tenn. —, 35 L.R.A. 681, 37 S. W. 1102; Geyser-Marion Gold Min. Co. v. Stark, 53 L.R.A. 688, 45 C. C. A. 467, 21 Mor. Min. Rep. 220; 7 Cyc. 951; 28 Am. & Eng. Enc. Law, 1129; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 98 Am. St. Rep. 653, 68 N. E. 141; Gerard v. McCormick, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115; Shaw v. Spencer, 100 Mass. 393, 1 Am. Rep. 115, 97 Am. Dec. 107; Commercial & Agri. Bank v. Jones, 18 Tex. 811; Hill v. Fleming, 128 Ky. 201, 107 S. W. 764, 16 A. & E. Ann. Cas. 840; Prather v. Weisiger, 10 Bush, 117; Pennington v. Smith, 24 C. C. A. 145, 45 U. S. App. 409, 78 Fed. 399; Clemens v. Heckacher, 185 Pa. 476, 40 Atl. 80; Harrison v. Fleischman, 70 N. J. Eq. 301, 61 Atl. 1025; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 65 L.R.A. 820, 104 Am. St. Rep. 885, 80 S. W. 607; Duncan v. Jaudon, 15 Wall. 165, 21 L. ed. 142; Anderson v. Walker, 93 Tex. 119, 53 S. W. 821.

Mere application of deposits on a pre-existing debt is not sufficient to entitle a bank to the defense of "bona fide" purchaser.

Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed: 724, 11 Sup. Ct. Rep. 118; Van Alen v. American Nat. Bank, 52 N. Y. 1; Nichols v. Martin, 35 Hun, 168; Dickerson v. Tillinghast, 4 Paige, 221, 25 Am. Dec. 528.

Messrs. James B. & Charles J. Stubbs, for defendant in error:

The word "guardian" on the certificate of deposit was not sufficient to charge defendants with notice that it represented money belonging to the estate, and was held in a fiduciary capacity by Compton.

Roundtree v. Stone, 81 Tex. 299, 16 S. W. 1035; Crawford v. Wilcox, 68 Tex. 110, 3 S. W. 695; Abercrombie v. Stillman, 77 Tex. 589, 14 S. W. 196; Hall v. Pearman, 20 Tex. 171; Claiborne v. Yoeman, 15 Tex. 44; Rider v. Duval, 28 Tex. 623; 4 Thomp.

Corp. § 5129; 2 Morse, Banks & Bkg. § 432; Silsbee State Bank v. French Market Grocery Co. 103 Tex. 629, 34 L.R.A. (N.S.) 1207, 132 S. W. 465; Interstate Nat. Bank v. Claxton, 97 Tex. 576, 65 L.R.A. 820, 104 Am. St. Rep. 885, 80 S. W. 604; Coleman v. First Nat. Bank, 94 Tex. 605, 86 Am. St. Rep. 871, 63 S. W. 867; Prosser v. First Nat. Bank, — Tex. Civ. App. —, 134 S. W. 781; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554.

Defendants had the same right to acquire this negotiable paper as any other person had, and they are protected to the same extent, and the use of the word "guardian" did not destroy its negotiability.

Silsbee State Bank v. French Market Grocery Co. 103 Tex. 629, 132 S. W. 465; Laubach v. Leibert, 87 Pa. 55; Safe Deposit & T. Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; Nolting v. National Bank, 99 Va. 54, 37 S. E. 807; Farrell v. Reed, 46 Neb. 258, 64 N. W. 959; Sparrow v. State Exch. Bank, 103 Mo. 338, 77 S. W. 168; Kimmel v. Bean, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118; Meyers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 26 L. ed. 693; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Goodwin v. American Nat. Bank, 48 Conn. 551; Globe Sav. Bank v. National Bank, 64 Neb. 413, 89 N. W. 1030; Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423; Anderson v. Walker, 93 Tex. 130, 53 S. W. 821; Commercial & Agri. Bank v. Jones, 18 Tex. 811; Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 Am. Rep. 218; Perry v. Oerman, 63 W. Va. 566, 15 L.R.A. (N.S.) 310, 129 Am. St. Rep. 1020, 60 S. E. 604; O'Connor v. Decker, 95 Wis. 202, 70 N. W. 286.

A precedent debt is a good consideration for a transfer.

Greneaux v. Wheeler, 6 Tex. 515; Liddell v. Crain, 53 Tex. 550; Brown v. Thompson, 79 Tex. 58, 15 S. W. 168.

On petition for rehearing.

Mr. James H. Robertson, also for defendants in error:

The petition for writ of error raised only the question of the effect of the word "guardian," and this court had no jurisdiction to decide anything else.

Ellis v. Le Bow, 96 Tex. 532, 74 S. W. 528; Texas Co. v. Stephens, 100 Tex. 638, 103 S. W. 481; Southern P. Co. v. Haas, 85 Tex. 401, 20 S. W. 586; Hodo v. Mexican Nat. R. Co. 88 Tex. 524, 32 S. W. 511; International & G. N. R. Co. v. Miller, 87 Tex. 430, 29 S. W. 235; Texas & P. R. Co. 37 L.R.A. (N.S.)

v. Wilson, 85 Tex. 507, 22 S. W. 300, 385; Aspley v. Hawkins, 99 Tex. 380, 89 S. W. 972; Link v. Houston, 94 Tex. 378, 60 S. W. 664; Scalfi v. State, 96 Tex. 559, 74 S. W. 754; Desmuke v. Houston, 89 Tex. 10, 32 S. W. 1025; Willis v. Moore, 89 Tex. 20, 32 S. W. 1038; Childress v. Smith, 90 Tex. 613, 38 S. W. 518, 40 S. W. 389; Clark v. Gregory, — Tex. —, 26 S. W. 939.

This court should not determine the question as to the legal effect of the fact that the actual transaction was the issuance of the deposit certificate against a deposit of cash and of collaterals, and the redemption of the certificate by returning the deposits to Compton, the depositor.

Brown v. Elmendorf, 87 Tex. 56, 26 S. W. 1043.

Having deposited collateral for the loan, Compton did not owe the bank the sum which went into the certificate. The deposit prima facie belonged to him personally.

Silsbee State Bank v. French Market Grocery Co. 103 Tex. 629, 34 L.R.A. (N.S.) 1207, 132 S. W. 465; Prosser v. First Nat. Bank, — Tex. Civ. App. —, 134 S. W. 781.

Such words as "agent" and "assignee" affixed to a depositor's name do not earmark the fund, and do not protect it from his debts.

Silsbee State Bank v. French Market Grocery Co. supra; Roundtree v. Stone, 81 Tex. 299, 16 S. W. 1035; Crawford v. Wilcox, 68 Tex. 110, 3 S. W. 695; Abercrombie v. Stillman, 77 Tex. 589, 14 S. W. 196; Hall v. Pearman, 20 Tex. 171; Rider v. Duval, 28 Tex. 623; Morrison v. Hodges, 25 Tex. Supp. 177; Claiborne v. Yoeman, 15 Tex. 44; Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152; Gibson v. Irby, 17 Tex. 174.

Ramsey, J., delivered the opinion of the court:

For the purposes of this opinion, we adopt the statement of the case made by the court of civil appeals. While quite lengthy, it cannot be well abbreviated. It is as follows:

"This suit was brought by the appellant against the appellees, Adoue & Lobit, a banking firm composed of B. Adoue and Joseph Lobit, to recover of said firm and of the individual members thereof the sum of \$11,939.83, with interest thereon at the rate of 6 per cent per annum from March 7, 1903, together with the court costs paid by appellant in a suit brought in the district court of Galveston county by S. S. Hanscom, guardian, against appellant and other parties upon the bond of A. J. Compton, guardian of the estate of Menard James. The petition alleges, in substance,

that on March 3, 1903, the appellant became surety upon the bond of A. J. Compton, guardian of the estate of Menard James, a lunatic, said guardianship being then pending in the county court of Galveston county; that prior to the time appellant became such surety, the said guardian had deposited with the appellee bank the sum of \$11,913.83, which was all of the cash assets of said estate, and as evidence of such deposit appellee bank on October 20, 1902, executed and delivered a certificate of deposit in said amount in favor of A. J. Compton, guardian, and payable to his order; that, after appellant became surety for said guardian, he indorsed and delivered said certificate to appellees on or about March 7, 1903, and they canceled same, and appropriated the proceeds thereof to the payment and satisfaction of an individual indebtedness due them by said Compton; that appellees at the time of the deposit of said money and the issuance of said certificate to A. J. Compton, guardian, and at all times thereafter, had full knowledge and notice that the said deposit and said money represented by the certificate was not the individual property of A. J. Compton, but that it was, and continued to be, the property of said estate, of which A. J. Compton was the duly qualified and acting guardian, and that, by reason of the premises, Adoue & Lobit, when they knowingly applied said sum as before stated, knowingly misapplied, misappropriated, and converted the same to their uses, and thereby became indebted, liable to, and bound to pay, said estate the said sum so converted, together with 6 per cent interest from date of conversion, and that, upon the death of said Menard James, they became liable and bound to pay the temporary administrator as aforesaid, but they have failed and refused to pay same; that said sum of money was never restored to or repaid said estate by the said Compton, and after the death of said guardian and of said lunatic, in a suit against appellant and other sureties of said guardian, judgment was rendered against appellant for said sum, and in satisfaction of said judgment appellant has paid to the administrator of said estate said sum of \$11,913.85, with legal interest thereon from the date of its conversion by appellees, as aforesaid, and that, by reason of such payment, appellant has become and is subrogated to the rights of said estate against appellees.' The defendants answered by a general exception, various special exceptions (which were overruled), a general denial, and special pleas, in substance, as follows:

"(1) That said certificate and the mon-

37 L.R.A. (N.S.)

ey or credit it represented were not the assets of said estate, nor were same deposited with defendants as such, nor were they deposited by A. J. Compton as guardian of said estate, or in his capacity as such, nor were defendants ever notified by any person, or in any manner, that Compton made such deposit or any deposit as guardian of said estate, nor that the certificate or what it represented belonged to said estate, or was claimed to belong thereto, and that they deny that they ever had any knowledge or notice, actual or constructive, that such certificate, or what it represented, was the money or property of said ward's estate, or was claimed to be such, or in any manner concerned therewith, until about March, 1905, or later. That said certificate was issued under the following circumstances: A. J. Compton placed with, or caused to be sent to, defendants \$5,000, loaned him by his brother, and arranged with defendants for a credit of about \$6,913.85, to secure which he deposited collaterals and securities sufficient in amount and value to protect them in said loan, and, based upon said two transactions, defendants issued the certificate described in plaintiff's petition. That upon the return, surrender, and cancellation of said certificate, about March 7, 1903, defendants delivered to said Compton said securities, and shortly after paid his check for \$5,000, without any knowledge or notice, actual or constructive, that either said certificate or the money or credit represented by it, or the \$5,000 deposited by or for said Compton and paid out as above stated, and the credit or loan advanced by defendants, were the property and assets of any person or estate other than of the defendants or A. J. Compton, as the case may be. That they did not know that he was guardian of an estate, or that he was a guardian of any kind, or in any capacity, nor did they know, actually or constructively, that any claim other than by or through Compton individually was, or would be, asserted to said certificate or said funds and credit, and that said certificate issued by them was reacquired by them for a valuable consideration, without notice of any adverse claim thereto, or to that which it represented, and that they were innocent purchasers thereof at or before maturity, and entitled to protection as such. That, so far as the certificate or the money which it represented being the property of said estate, that same was or represented in law and equity defendants' property, or that of Compton, or person other than James, as none of it ever came from said estate directly or indirectly, or was ever owned by it, but that, if same was in le-

gal contemplation the property of said estate, then they say that they had no information, knowledge, or information of such fact, and were not put upon inquiry, and were not only justified, but required, by law to redeem said certificate and pay out said \$5,000, as was done, and return to said Compton that which they had received from him; and that they cannot and should not be required to pay the same a second time, as Compton's estate is insolvent, and that they would have lost their debt and securities if they had pursued any other course.

"(2) That, if said Compton was ever short in his account with said estate, the same occurred long before any of the transactions before described, and that they never knew, actually or constructively, that the same was claimed or was the fact, until several years after they had redeemed said certificate and paid out the money and returned said securities, and that it would be unjust and inequitable, after they had parted with a valuable consideration in the redemption of same, to require them, without the return of such cash and collaterals, to again pay the amount of said certificate, and that they are entitled to be restored to the position they occupied prior to the redemption or payment of said certificate.

"(3) That they deny they ever knew or were informed, directly or indirectly, that said Compton had represented to plaintiff or its agent that the certificate or fund represented by it was the property of said estate, or was ever held by him in his capacity as guardian thereof, and they deny that Compton as guardian of said estate ever had any account with them, or any credit extended to him in such capacity, and that the word "Guardian" following his name upon said certificate and upon any entry in their books was a mere *descriptio personae*, and did not and could not advise them of any of the matters alleged as constituting knowledge or notice that the money or certificate or both belonged to said estate or were assets thereof.

"(4) That the plaintiff in the former suit described in its petition asserted that the shortage occurred long prior to the issuance of said certificate, and that no restitution was ever made by Compton, and that plaintiff should not now be allowed to assume an inconsistent and contrary position, but held to such assertion.

"(5) They plead the two-year and four-year statutes of limitation against plaintiff's demand.

"(6) That plaintiff is a bonding and guaranty company for compensation."

"The plaintiff replied to the foregoing answer by a general exception, special exceptions, general denial, and specially, in substance, as follows:

"(1) That on October 20, 1902, said Compton was short in his guardianship accounts to the amount of \$11,913.83, and that said certificate was obtained for the purpose of replacing the funds theretofore embezzled by him, and that said certificate, together with other assets of said estate, were thereupon delivered to said Marx and Moore to be held by them while sureties upon the guardianship bond of said Compton, and on said same day, after being indorsed to them by said Compton as guardian of said estate, said certificate, together with all the assets of said estate, were delivered to Adoue & Lobit as trustees, who held same as such until about March 7, 1903. That, by the issuance of said certificate, Adoue & Lobit placed it in the power of said Compton to repay the money which he had theretofore embezzled from said estate, and said Compton did so replace same, and by reason thereof said certificate and its proceeds became the property of said estate. That, at all times after the execution and delivery of said certificate, said defendants, and each of them, had both actual and constructive knowledge and notice of the ownership of said certificate, and of the money it represented, and, if not, that they had notice of such facts as would have put a person of ordinary care and prudence upon notice and investigation of the true facts, and from an investigation of such facts they would have learned that said certificate and the money represented thereby was the property of said estate; and they are now estopped to claim that they did not know that said certificate and the money it represented was the property of said estate.

"(2) That at the time of the conversion of said certificate and the money it represented, and long prior thereto, the said Menard James was *non compos mentis*, and a lunatic, and continued to be such until his death, about March 19, 1906, and that under the statutes of limitation, neither the two nor the four years nor any other statutes of limitation run against lunatics or persons of unsound mind, and that after the death of said Menard James the statutes of limitation were suspended for one year, or until the appointment and qualification of his administrator. That the instrument herein sued upon was payable to A. J. Compton as guardian, and that the real beneficiary was the said Menard James, as aforesaid, and no statute of limitation, if ever put in operation, had run in favor of defendants prior to the

filing of this suit. That the statutes of limitation could not begin to run against plaintiff's cause of action, because same is based upon a trust, and that defendant held said money in trust for the benefit of said estate. That the statutes of limitation did not begin to run against plaintiff until it was forced to pay the indebtedness which is the basis of this action, which was done about March 14, 1908. That plaintiff is subrogated to all the rights of said Menard James, *non compos mentis*, and his estate, and, by reason thereof it is entitled to the benefit of the exception made in the statute with reference to persons of unsound mind.'

"The cause was tried in the court below without a jury, and resulted in a judgment in favor of defendants.

"The following findings of fact by the trial court are supported by the evidence, and are adopted as our fact conclusions:

"On the 20th of October, 1902, A. J. Compton obtained from Adoue & Lobit, bankers at Galveston, a cash advance of about \$7,000 on open account against collaterals regarded by them as of sufficient value to secure the amount. On the same day, against the \$7,000 so advanced, and upon the faith of a despatch to them from the cashier of a bank in Houston, to the effect that the Houston bank had forwarded them their check for \$5,000, payable to Compton's order, he procured from them a certificate of deposit, reading as follows:

"'Adoue & Lobit, Bankers.  
"\$11,913.83.

Galveston, Tex. Oct. 20, 1902.

"'A. J. Compton, guardian, has deposited with us in cy. eleven thousand nine hundred thirteen and  $\frac{83}{100}$  dollars, payable to the order of himself on return of this certificate, properly indorsed.  
No. 1895.

[Signed] Adoue & Lobit.

"Indorsed: A. J. Compton Gdn.

"The certificate was charged by Adoue & Lobit to Compton's personal account, absorbing the credit items named. Compton had only two accounts with them, one as county treasurer and the other personal. He at no time had any account with them as guardian of any estate. No other entry was made on the books of Adoue & Lobit of the certificate, save as above, except its notation in the list of certificates of deposit, showing that a certificate of deposit, payable to A. J. Compton, guardian, was an outstanding liability of the bank.

"Compton was, and had been for a year or more before this transaction, a defaulter in his account as guardian of the estate of Menard James, *non compos mentis*, an es-

tate being administered in the county court of Galveston county for about \$12,000. His purpose in obtaining the certificate was to cover up the defalcation. Pursuant to this purpose, on the day of its issuance, he exhibited the certificate to the county judge to procure the approval of his account showing a corresponding cash balance on hand. His bond as guardian had been originally fixed by the county judge at \$20,000, and afterwards raised to \$76,113.66, which he had not given at the time of the issuance of the certificate. He contemplated at the time securing its reduction to about \$30,000, and procuring plaintiff's suretyship on his bond when it should be thus reduced. On the same day, 20th of October, he exhibited the certificate to the local agent of the plaintiff, a surety company, in verification of the correctness of his account as guardian. He exhibited the certificate, also on the same day, to M. Marx and C. H. Moore, to give them assurance of the correctness of his accounts, and procure their signatures as sureties on the \$76,113.66 bond, pending the application for its reduction. He, at the same time, exhibited to Marx and Moore all the other personal property of the estate, consisting of wharf and gas company stock issued to Menard James, estate of Menard James, and Compton, guardian; and upon his indorsing the certificate of deposit to them, and agreeing to deposit it, together with the certificates of stock, with Adoue & Lobit, subject to the order of Marx and Moore, they signed his bond. Mr. Moore accompanied Mr. Compton to Adoue & Lobit's bank, having first prepared a receipt for them to sign. Moore and Compton stated to Mr. Lobit that they wished to leave the papers with them for safe-keeping, or as a special deposit, and asked him to sign the receipt. He did so, and placed the envelop containing the securities in their safe. The receipt is as follows:

"Galveston, Tex. Oct. 20, 1902.

"Received of C. H. Moore and M. Marx one unsealed envelop containing one certificate of deposit, No. 1895, signed by Adoue & Lobit, to the order of A. J. Compton, Gdn., properly indorsed for amount of eleven thousand nine hundred thirteen and  $\frac{83}{100}$  dollars; also certificate No. 1335 for twenty-six shares of Galveston Gas Company stock and certificates Nos. 3254, 73 shares; 820, 2 shares; 845, 31 shares; 876, 20 shares; 998, 10 shares; 562, 17 shares; and 1045, 20 shares, representing in all 173 shares of Galveston Wharf Company stock, to be delivered only on an order signed by C. H. Moore and M. Marx, or their administrators. (Original.) Adoue & Lobit.

"On the 20th of February, 1903, Compton obtained the reduction of his bond to \$30,000, and the signatures thereto of the plaintiff as his surety, which was approved by the county judge on the 3d day of March, 1903. On the 7th day of March, 1903, he presented to Adoue & Lobit the order of Marx and Moore for the delivery to him of the package of securities left with them, as above stated. The order is in the following form:

"Galveston, Texas, March 4th, 1903.

"Messrs. Adoue & Lobit,

Galveston, Texas,

"Gentlemen:—

"Please deliver to Mr. A. J. Compton the following papers left with you for our account, *viz.*: Certificate of deposit No. 1895 for \$11,913.83. Certificate No. 1335, 20 shares Gas Company stock. Certificates Nos. 3524, 820, 845, 998, 562, and 1045, Wharf Company stock, aggregating 173 shares.

Yours truly,

"C. H. Moore, M. Marx.

"Adoue & Lobit thereupon delivered the package to Compton, and he, having first erased the names of Marx and Moore from his indorsement, leaving thereon his indorsement, "A. J. Compton, Guardian," requested them to cash it by crediting it to his account. They did so, thus repaying themselves their advance of \$7,000, and leaving a balance of proceeds to Compton's credit of \$5,000, which he shortly afterwards withdrew by check. At the same time they returned to him his collaterals.

"There was no agreement that the money called for by the certificate was to remain in the hands of Adoue & Lobit, or that the certificate was to be returned to their custody, or that it was not to be negotiated. Adoue & Lobit would have paid it at any time over the counter in cash on its presentation, indorsed by Compton in the words, "A. J. Compton, Guardian."

"Adoue & Lobit did not know at any time of the events stated that Compton was guardian of the estate of Menard James, as above stated, in obtaining the certificate of deposit; and when presented for payment, March 7, 1903, knew nothing of the use he had made of it, either its exhibition to the county judge, to plaintiff's local agent, or the agreement with Marx and Moore. They had no knowledge or information on these subjects until the facts were developed by the suit against Compton's sureties as guardian of the estate of Menard James, in 1905. When the package was brought them for safe-keeping by Moore and Compton, Mr. Lobit did not

take the papers out of the unsealed envelop, but glanced at the corners sufficiently to satisfy himself that the shares of stock called for by the receipt were there. He also recognized their certificate of deposit. He made no inquiry. His suspicions were not in any way aroused. The relations of Adoue & Lobit to the transaction were exclusively through Mr. Lobit. They received no pecuniary profit from it, and contemplated none. They charged no interest on the \$7,000 advanced, and acted throughout to oblige a customer whose account as county treasurer was valuable to them as bankers. Compton died on the 1st day of November, 1904. His estate is notoriously insolvent. Suit was instituted by the legal representatives of the estate of Menard James against Compton's estate, and against three sets of sureties on his bond as guardian, and judgment recovered against the plaintiff as surety on the last bond on the 22d day of January, 1908, in the supreme court. *Moore v. Hancock*, 101 Tex. 293, 106 S. W. 876, 108 S. W. 150. Plaintiff has since paid the judgment, amounting to \$14,361.00.

"The plaintiff sues Adoue & Lobit, alleging the appropriation and conversion of the certificates; also, that it had not been paid, and was due the estate of James, and claiming subrogation to the rights of the estate of Menard James against them. I find that Adoue & Lobit acted throughout the transaction in good faith; that they regarded the certificate of deposit as the private property of A. J. Compton; that the facts known to them were not such as to affect them with notice, or excite the suspicion of a person of reasonable or ordinary prudence, and put him on inquiry. If the defendants are affected with notice that the certificate was or represented fiduciary funds, proper inquiry would have developed that Compton was the legally appointed guardian of the estate of Menard James, and that his accounts on file showed he should have on hand the amount of money called for by the certificate." [— *Tex. Civ. App.* —, 128 S. W. 638.]

To get the questions before our minds in order, it may be well to briefly restate some of the dates of the happenings above set out and other matters apparent of record, and not at all in dispute. The original certificate of deposit issued by Adoue & Lobit to A. J. Compton, guardian, was dated on October 20, 1902. The receipt issued by them to C. H. Moore and M. Marx for this certificate, payable to Compton as guardian, and for certain stocks therein described, was dated the same day. On the next day, October 21, 1902, Moore and Marx became sureties on Compton's guar-



dianship bond in the sum of \$76,113.66. On March 3, 1903, the plaintiff in error became surety on said guardian's bond in the sum of \$30,000. On March 7th thereafter, the certificate of deposit issued to Compton as guardian was surrendered to Adoue & Lobit, and in part extinguishment of the liability therein recognized and thereby created, his personal debt to the bank was extinguished, his securities returned to him, and his personal account was credited with the balance thereof, to wit, \$5,000. It also appeared from the testimony of Compton's brother that his debt of \$5,000 was repaid to him on that day. It was shown that Compton represented, not only to Moore and Marx, but also to the county judge of Galveston county, that all the cash belonging to his ward's estate was on hand and intact, and as evidence thereof produced the certificate of deposit in question. This was a restoration of the funds of the ward which had theretofore, it seems, been dissipated, and these acts of Compton unequivocally stamped such fund with a trust character. On March 3, 1903, when plaintiff in error became his surety, the condition of the ward's estate, at least as to the fund in question, was unchanged. The ward's money was on hand and on deposit to his credit as guardian in a solvent bank. On March 7, 1903, it was all gone, and had by him been misapplied to the payment of his personal debts. The question before us is whether under the facts stated plaintiff in error can recover of the bank.

1. It was correctly held by the trial court that limitation had not, at the time of the institution of the suit, barred the company's claim, if such right of recovery existed. This seems so clear that we do not feel called on to discuss that question.

2. We think the conclusion of the learned trial court equally sound that the plaintiff in error was subrogated to all the rights of the ward or his estate, and that, if the administrator of the estate of the ward could, under the facts in the case, recover against Adoue & Lobit, that a recovery should also be adjudged in its favor.

3. The principal question in the case is, Were Adoue & Lobit charged with notice of the trust character of the funds in question, and were their acts and conduct in relation to same such as to render them liable? This, we think, must be answered in the affirmative. Such was clearly the effect and fair purport of the decision of this court rendered on the 22d of January, 1908, in the case of *Moore v. Hanscom*, supra.

The facts of that case, so far as essential to a decision by us now, are practically identical with the facts in the present record.

It was there said: "When Compton deposited in the bank of Adoue & Lobit the sum of money due to the estate of Menard James, and the money was entered to the credit of A. J. Compton, guardian, the fund so deposited became the money and property of the ward's estate. *Anderson v. Walker*, 93 Tex. 119, 53 S. W. 821; *Skipwith v. Hurt*, 94 Tex. 322, 60 S. W. 423. Lobit testified that the bank would have paid the money on presentation of the certificate of deposit by Compton, or by any person holding it with Compton's indorsement on it. Adoue & Lobit were notified by the fact that Compton made the deposit as guardian, that the money belonged to the estate of the ward, and they could not lawfully pay it to any person except by Compton's order, and then only for the uses of the estate; that is, they could not have knowingly applied the money in their hands to the payment of any order made by Compton in any other character than that of guardian, nor could they have applied the money to the payment of any debt due from Compton personally to them or to any other person. The fact that the certificate of deposit, with the stocks mentioned, was placed in the hands of Moore and Marx to be preserved for the estate so long as they were upon the bond, did not affect the title of the estate to the money, but, on the contrary, evinces a purpose to preserve it for the benefit of the estate, and in their hands as such securities the money was in law in the possession of the estate and belonged to the estate. *Johnson v. Jones*, 24 Ky. L. Rep. 16, 68 S. W. 14." This is in accordance with the rule which obtains generally, and which is thus stated in vol. 2, § 1612a, *Daniel on Negotiable Instruments*: "If a deposit be made in bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation. It would have no lien upon them for the private debts of the depositor, and, if it permitted them to be used for his private purposes in transactions with the bank, it would be bound." The same doctrine is recognized by 1 *Perry on Trusts*, 4th ed. p. 289, where it is said: "But if a purchaser takes securities from a trustee, with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the purchaser may be held as a trustee." In support of the text the author refers to the leading case of *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115, where it was held that if a certificate of stock expressed in the name of "A B, trustee," is by him pledged to secure his own debt, the pledgee

is by the terms of the certificate put on inquiry as to the character and limitations of the trust, and, if he accepts the pledge without inquiry, does so at his peril. The rule is thus expressed in 7 Cyc. p. 951: "Expression of Fiduciary Relationship in Signature or Indorsement.—The expression of a fiduciary character of a holder or transferrer on the face of a negotiable instrument is notice to the purchaser of a probable limited or restricted authority to negotiate the same. This is so where paper is signed or indorsed by an agent as such, especially where the paper is made payable to him as agent, or where it appears on the face of the paper by the indorsement to the holder, or by other papers or orders accompanying the note, that the transferrer has the instrument as trustee or guardian or in some other official capacity, although it has been held that where it is not shown either by the note or otherwise, that a fiduciary relationship exists, except by a word or phrase descriptive of the person, such terms should be considered as *descriptio personæ*, and will not constitute notice to the purchaser of a probable limited authority to make the transfer." It will be noted that the rule of *descriptio personæ* seems limited to Missouri. A very clear statement of the law is contained in 28 Am. & Eng. Enc. of Law, 2d ed. p. 1129, where the author says: "The circumstances sufficient to affect a purchaser with constructive notice are scarcely susceptible of classification, since each case is recognized as determined by its own fact. It is, however, generally admitted that where the instrument of transfer or a paper which constitutes evidence of property, such as a check, note, or stock certificate, indicates on its face that the property transferred is held in trust, a purchaser or pledgee takes with notice of the trust. Use of word 'trustee.' Ordinarily the words 'trustee' or 'in trust' or 'guardian,' contained in a deed, mortgage, assignment, or indorsement, are deemed sufficient to put a transferee on inquiry. It has, however, been held that such words alone are not sufficient to give notice that a breach of trust is about to be committed, and that it is necessary for the purchaser to inquire whether the circumstances of the case constitute reasonable ground to conclude that a fraud is contemplated."

Indeed, the law seems well settled, both in England and America, in accordance with the holding of this court in *Moore v. Hanscom*, supra. But it is contended that the doctrine of the law merchant in respect to negotiable instruments has in the case a controlling effect. That *Adoue & Lobit* were by law compelled to pay the certificate

when presented by Compton, or if presented by another with his proper indorsement, and that, as such payment could be enforced, they were authorized in paying same, should be protected in so doing, and would not be liable for a subsequent misappropriation of the fund by Compton. This general rule is recognized in the decisions which hold that a bank cannot apply such trust fund to the payment of the personal debts of the trustee or guardian, or permit its diversion to the personal use of such guardian. Thus, in *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983, it was said: "It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely, and to return it to the proper person, or to pay it to his order. If it be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversation of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge, a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check, and therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable. In support of these general principles, if support they need at all, we may refer to *Munierlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554; *State Nat. Bank v. Reilly*, 124 Ill. 464, 14 S. E. 657; *Essex County v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185, all

cited in 3 Am. & Eng. Enc. Law, 2d ed. pages 833, 834; Walker v. Manhattan Bank (C. C.) 25 Fed. 255; 1 Morse, Banks & Bkg. ¶ 317; Swift v. Williams, 68 Md. 237, 11 Atl. 835." And then, in full recognition of the general rule contended for by defendants in error, the same court further says: "Precisely for the reasons that the bank is not responsible for the misappropriation of the proceeds of the first check, it is liable to the new trustees for the misapplication by Clagett of the funds collected by it on the second check. The second or Duckett check in terms directed the cashier of the Mechanics' Bank 'to deposit' the \$2,024.30 'to the credit of Henry W. Clagett, trustee.' This was an explicit notification to the bank that Clagett was not the actual owner of the money. Bundy v. Monticello, 84 Ind. 119; 3 Am. & Eng. Enc. Law, 2d ed. p. 832. It was an equally explicit instruction to the bank not to place the funds to the credit of Clagett's personal account. It was consequently more than a mere memorandum made for the convenience of the drawer of the check. Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit (American Exch. Nat. Bank v. Loretta Gold & S. Min. Co. 165 Ill. 109, 56 Am. St. Rep. 233, 46 N. E. 202); and, if loss ensued by reason of Clagett drawing the fund out by checks on his personal account, the bank is liable to make restitution to the trust estate. The bank, in the eye of the law, participated in the breach of trust of which Clagett was guilty. In fact, the bank took the first step that ended in the spoliation of the trust. Its act in placing distinctly marked trust funds to the personal credit of Clagett was obviously wrongful, and it must bear the resulting consequences." So that, to the suggestion of the court of civil appeals that a bank which pays trust funds on the order of a guardian, in the customary way in which such business is conducted, "should not be held liable for the misappropriation by the guardian of the funds so paid by the bank," the answer is obvious that such rule can have no application where the bank, visited as it was, as a matter of law, with the trust nature of the funds in its possession, participated actively in the transaction with the guardian in paying a large portion of the fund to itself in payment of the guardian's personal debt, thus securing a personal benefit to itself, and aiding in placing the remainder of such trust funds to the personal credit of

37 L.R.A. (N.S.)

such guardian so that same could be, as in fact they were, immediately misapplied by him. Again it is said that, "they (Adoue & Lobit) could not, on surrender of the certificate properly indorsed, have refused to pay him the money therein called for, and they would not be required to see that the money so paid was not misappropriated by him. It seems to us that this conclusion overlooks the fact that in the transaction here the payment and the misappropriation were not only contemporaneous, but constituted part and parcel of the same act, and that the misappropriation was in the act of payment of Compton's debt to the bank."

Here, by express representation and by designation in the certificate, the fund in question was made and stamped with the fixed character of part of his ward's estate. In Moore v. Hanscom plaintiff in error was held liable on Compton's bond on the theory and express holding that there had, by the acts in question, been a complete restitution by the guardian, and that such money was the money of the ward. This being true, and since as a matter of law Adoue & Lobit were visited with notice of the nature and trust character of the fund, it follows that, to the extent necessary to reimburse the bonding company, it is entitled to be subrogated to all the rights of the *cestui que trust*, and all the facts appearing in the record, it results that the judgments of the District Court and of the Court of Civil Appeals should be and the same are hereby reversed, and judgment is now and here rendered in favor of the plaintiff in error, the United States Fidelity & Guaranty Company, against the defendants in error, Adoue & Lobit, for the sum of \$14,361.60 (that being a sum sufficient to indemnify plaintiff in error for the amount paid out by it as surety aforesaid), with interest from March 14, 1908, together with all cost incurred in this and the other courts.

Petition for rehearing denied.

#### ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY, Appt.,

v.

LINDSAY JONES, by Next Friend.

(96 Ark. 558, 132 S. W. 636.)

Master — freight conductor — employment of assistants.

1. In the absence of a sudden or unexpected emergency, the conductor of a freight train has no implied authority to enter into a contract to carry a person to a certain

place in consideration of the rendition of service in handling freight.

**Carrier — assistant to crew — volunteer.**

2. One taking passage upon a freight train under an agreement with the conductor to render services for his transportation is a mere volunteer, and assumes the risk of injury incident to the undertaking.

**Same — custom — binding effect.**

3. To bind a railroad company by a custom of conductors to carry persons on their trains in consideration of the rendition of services, it must be shown to have been known by the officers who conduct the affairs of the company, or to have been so general and long continued that they must be presumed to have had notice of it.

(Kirby, J., dissents.)

(November 28, 1910.)

**Note. — Liability of railroad company for injury to person wrongfully on train by collusion with a train employee.**

The cases collected in this note are limited strictly to those where the person is on the train by virtue of an agreement with the train employees, and do not include cases where the person has a ticket, but is permitted to ride on an improper train.

As to degree of care owed to free passenger rightfully on carrier's conveyance, in absence of stipulation upon the subject, see note to Indianapolis Traction & Terminal Co. v. Lawson, 5 L.R.A. (N.S.) 721.

As to duty of carrier to one who enters its cars upon his own business, and not as a passenger, see notes to Peterson v. South & Western R. Co. 8 L.R.A. (N.S.) 1240, and McElvane v. Central R. Co. 34 L.R.A. (N.S.) 715.

As to duty and liability of street railway company to newsboys who board cars to sell papers, see note to Lebov v. Consolidated R. Co. 26 L.R.A. (N.S.) 265.

A conductor of a railroad train has no implied authority to invite persons to ride without the payment of fare, and one so riding is not entitled to the rights of a passenger. Likewise persons riding upon the invitations of employees not having the control of the train, or any apparent authority to grant permission to ride thereon, such as brakemen, engineers, baggage men, yard masters, etc., are not entitled to the rights of passengers. 6 Cyc. 541; 33 Cyc. 817.

**Riding on passenger train.**

In Pennsylvania R. Co. v. Books, 57 Pa. 346, 98 Am. Dec. 229, it was said that one riding on a passenger car is presumed to be there lawfully as a passenger, and the onus is upon the carrier to prove affirmatively that he was a trespasser.

In Stalcup v. Louisville, N. A. & C. R. Co. 16 Ind. App. 584, 45 N. E. 802, it was held that one riding upon a train by the invitation of the conductor, and without pay-

**A** PPEAL by defendant from a judgment of the Circuit Court for White County in plaintiff's favor in an action brought to recover damages for personal injuries received by him while attempting to board one of defendant's freight trains. Reversed.

**Statement by Hart, J.:**

Lindsay Jones by N. A. Ford, his mother and next friend, brought this suit against the St. Louis, Iron Mountain, & Southern Railway Company to recover damages for injuries received by him while attempting to board one of defendant's local freight trains.

Lindsay Jones testified in his own behalf, and stated the circumstances connected with the happening of the accident,

ing fare, was not entitled to the rights of a passenger, so as to recover for injuries received, in the absence of a showing that the conductor was empowered with authority to permit him to so ride.

And in Higgins v. Cherokee R. Co. 73 Ga. 149, it was said that one riding upon a passenger train by the invitation of the conductor, without paying fare, could not claim the rights of a passenger in case of injury.

And so in Reary v. Louisville, N. O. & T. R. Co. 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. 390, it was held that the railroad company was not liable for an injury to a child who boarded a passenger train by the permission of the baggage master, who had no authority or control over the train.

So, a person who knowingly induces the conductor to permit him to ride without paying fare, contrary to the rules of the company, combines with the conductor to defraud the railroad company, which will preclude a recovery for personal injuries caused by mere negligence. Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245; Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 292. To the same effect is McVeety v. St. Paul, M. & M. R. Co. 45 Minn. 268, 11 L.R.A. 174, 22 Am. St. Rep. 728, 47 N. W. 809 (passenger riding in the caboose attached to a freight train).

And such conduct on the part of the husband, inducing the conductor to permit the wife to ride without paying fare, will preclude the wife from recovering for injuries caused by mere negligence of the railroad company, even though she had no knowledge that they were riding in violation of the rules of the company, since her husband was her agent, and what he knew in reference to the matter is the same as if it had actually come to her knowledge. Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 292.

One who, having money with him with which he could pay his fare, falsely and fraudulently represents to the conductor that he is without means, and thereby induces the conductor to permit him to remain on the train without paying his fare.

substantially, as follows: He was a white person and was nineteen years old when he was injured. He had been at Bald Knob, a station on defendant's line of railroad in Arkansas, hunting work. He ran out of money, and failing to obtain employment, he decided to return home. Higginson was the station on defendant's line of road nearest his home. He asked the conductor of one of defendant's local freight trains if he would let him ride and work his way to Higginson. The conductor answered: "I will see about it directly," and directly came back and said: "Get on; you can work your way." The first stop was made at Judsonia, and he helped load and unload some freight. The conductor was standing around while the freight was

unloaded. The next stop was at Kensett. Jones worked there, helping to load and unload the freight. While he was carrying a piece of freight from one of the cars to the freight house, the train, without notice or warning of any kind, was put in motion. Jones, after depositing the piece of freight in the freight room, turned around to get on the departing train. The train was running and Jones reached up to get the handle of the front end of the caboose to get on it. His foot slipped and fell under the wheels of the caboose. It was mashed so badly that it was necessary to amputate it. On the part of the defendant, it was shown that the conductor had no authority to employ anyone to assist the train crew in the operation of the

takes upon himself all risk, and, if injured by accident happening to the train not due to recklessness or wilfulness on the part of the company, cannot recover. *Condran v. Chicago, M. & St. P. R. Co.* 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522

One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows up such instructions, is not entitled to the rights of a passenger, since it must be presumed that the directions to ride upon the platform and keep out of sight informed him, even if he would not otherwise have known it, that he was not received or considered as a passenger by the carrier or its authorized agents. *Mendenhall v. Atchison, T. & S. F. R. Co.* 66 Kan. 438, 61 L.R.A. 120, 97 Am. St. Rep. 380, 71 Pac. 846.

Allegations that a minor, fifteen years of age, did not know that he was doing wrong in making such an arrangement as that referred to in the preceding paragraph, and did not know that he was exposing himself to any great danger in following up such directions, are insufficient to take the case out of the rule stated, or to relieve the minor from responsibility for his own negligence, where it is not alleged that he had not ordinary intelligence for his age, or lacked capacity to understand the nature of the transaction, or that he believed that the brakeman took the money in behalf of the company, or that he did not know that the reason he was told to ride upon the platform and keep out of sight was in order that the conductor should not see him. *Ibid.*

One riding on the platform of the express car of a passenger train, without invitation and against the rules of the company, is a trespasser, and may rightfully be ejected by the conductor, though he has paid the amount of the regular fare to the brakeman, since he had no right to suppose that such employee could bind the company with such an arrangement. *Chicago & E. R. Co. v. 57 L.R.A.(N.S.)*

*Field, 7 Ind. App. 172, 52 Am. St. Rep. 444, 34 N. E. 406.*

But in *Louisville & N. R. Co. v. Scott* (*Louisville & N. R. Co. v. Weaver*) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674, it was held that one traveling on a train by courtesy of the conductor, without paying fare, is not deprived of the character and rights of a passenger by the fact that the conductor, in carrying him free, is violating a rule of the company, especially where there is no proof of a design to defraud the company.

And in *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861, it was held that a night watchman at a railroad depot, who boards a train near his home to ride to the depot and report his readiness to return to duty the coming night, after being off duty a few days, has the rights of a passenger in case he is injured by the carrier's negligence, although he is riding in violation of a rule of the company, without a pass or payment of fare, but with the implied permission of the conductor, who has neglected to enforce the rule.

#### Riding on street car.

One on a street car with the knowledge and permission of the person in charge thereof is a passenger, although he has paid no fare, and is entitled to the same care and protection as if he had paid his fare. *Muehlhausen v. St. Louis R. Co.* 91 Mo. 332, 2 S. W. 315.

A street railway company is liable for negligent operation of its car to one riding upon the front platform without paying fare at the invitation of the driver, where there is no evidence of collusion with him to defraud the company, since such action by the driver was within the general scope of his employment, and it was immaterial that he was acting contrary to his instructions. *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11 (action by minor); *Wilton v. Middlesex R. Co.* 125 Mass. 130 (action by parents).

To the same effect is *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark 494,

train, or in loading or unloading freight. The conductor, on behalf of the defendant, testified that he did not contract with the plaintiff to carry him from Bald Knob to Higginson in consideration of any services performed by him. He did testify to the fact that he saw the plaintiff on the train and that he intended to collect his fare later, but that he overlooked or neglected to take up his fare. On cross-examination, in response to the question: "Isn't it a fact that people are carried free by the conductors on the local freight trains up and down the Iron Mountain Road to assist the crew in the loading and unloading of freight at the stations?" he answered, "Colored men only."

The jury returned a verdict for the plain-

52 S. W. 7, holding a boy ten years of age riding upon a street car without paying fare, at invitation of a motorman in charge, who has authority to receive and let off passengers, not a trespasser, since the invitation of the motorman is an act within the general scope of his employment, and when the boy accepts it innocently, the company owes to him the diligence due to a passenger of his age and discretion.

And so also in the following cases the railway company has been held liable for negligent injury to children while riding upon the cars without paying fare, upon the invitation of those in charge: *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 179, 18 S. W. 1090, affirming 46 Mo. App. 555; *Evansville Street R. Co. v. Meadows*, 13 Ind. App. 155, 41 N. E. 398 (child riding by the invitation of the driver); *Brennan v. Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Danbeck v. New Jersey Traction Co.* 57 N. J. L. 463, 31 Atl. 1038.

Likewise the railroad company was liable for an injury to a boy due to the negligence of the motorman in compelling him to leave the car while it was in motion, though in giving the permission to enter the car in return for a service to the motorman in turning the trolley, he was acting without authority from the master, since the negligent conduct which caused the injury was done while he was acting within his authority in managing and moving the car. *Denison & S. R. Co. v. Carter*, 98 Tex. 196, 107 Am. St. Rep. 626, 82 S. W. 782.

And in *Hestonville, M. & F. Pass. R. Co. v. Biddle*, 1 Monaghan (Pa.) 553, 16 Atl. 488, it was held that the railway company was liable for the death of a boy due to the conduct of the conductor in compelling him to jump off while the car was in motion, though he was a trespasser and was riding by the invitation of another boy who was driving the car. (*Biddle v. Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551, 4 Atl. 485, was the same case on a former appeal, which held that it was error for the trial court to enter a compulsory nonsuit.)

To the same effect are *Drogmund v.* 37 L.R.A. (N.S.)

tiff, and from the judgment the defendant has duly prosecuted an appeal to this court.

Messrs. W. E. Hemingway, E. B. Kinsworthy, P. R. Andrews, and James H. Stevenson, for appellant:

Plaintiff's position is no better than that of a trespasser.

*O'Donnell v. Kansas City, St. L. & C. R. Co.* 197 Mo. 110, 114 Am. St. Rep. 753, 95 S. W. 196; *Doyle v. Kansas City, St. L. & C. R. Co.* — Mo. —, 95 S. W. 200.

The conductor had no authority to create the relationship of carrier and passenger.

*Hot Springs R. Co. v. Dial*, 58 Ark. 318, 24 S. W. 500; *Clark v. Colorado & N. W. R. Co.* 19 L.R.A. (N.S.) 988, 91 C. C. A.

*Metropolitan Street R. Co.* 122 Mo. App. 154, 98 S. W. 1091; *Hestonville Pass. R. Co. v. Grey*, 1 Walk. (Pa.) 513.

In *Finley v. Hudson Electric R. Co.* 64 Hun, 373, 19 N. Y. Supp. 621, it was held that a boy riding on an electric car in violation of the rules of the company, without paying fare, but in return for his services in opening a switch at the request of the motorman who was in charge of the car, and also acting as conductor, is not entitled to the rights of a passenger, as the motorman was not acting within the line of his duty, nor in the furtherance of the master's interest or benefit.

#### Riding on freight trains.

In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train of a common carrier, not designed for the transportation of passengers, is unlawfully there, and is a trespasser. *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. G. A. 564, 114 Fed. 123; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Smith v. Louisville, E. & St. L. R. Co.* 124 Ind. 394, 24 N. E. 753; *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98; *St. Louis, I. M. & S. R. Co. v. Reed*, 76 Ark. 106, 113 Am. St. Rep. 78, 88 S. W. 836.

For additional cases passing upon the rights of persons riding upon freight trains by permission or collusion of the train employees, see notes to *Grahn v. International & G. N. R. Co.* 5 L.R.A. (N.S.) 1025, and *Vassor v. Atlantic Coast Line R. Co.* 7 L.R.A. 950.

#### —by permission of conductor.

In accord with *St. Louis, I. M. & S. R. Co. v. Jones* is *Cooper v. Lake Erie & W. R. Co.* 136 Ind. 366, 36 N. E. 272, holding one riding upon a freight train under an arrangement with the conductor and brakeman in charge of the train that he should assist the brakeman so far as he could in consideration of being entitled to ride, not a passenger so as to be entitled to recover

358, 165 Fed. 408; *Condran v. Chicago, M. & St. P. R. Co.* 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Grahn v. International & G. N. R. Co.* 100 Tex. 27, 5 L.R.A. (N.S.) 1025, 123 Am. St. Rep. 767, 93 S. W. 104; *Alabama & V. R. Co. v. McAfee*, 71 Miss. 70, 14 So. 260.

Messrs. S. Brundidge, Jr., and Harry Neelly, for appellee:

Plaintiff was a passenger.

*Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 198; *Wilton v. Middlesex R. Co.* 107 Mass. 108, 9 Am. Rep. 11; *Wagner v. Missouri P. R. Co.* 97 Mo. 512, 3 L.R.A. 156, 10 S. W. 487; *Dunn v. Grand Trunk R. Co.* 58 Me. 187, 4 Am. Rep. 267; *Muehlhausen v. St.*

*Louis R. Co.* 91 Mo. 344, 2 S. W. 315; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 63, 37 Am. Rep. 423; *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Prince v. International & G. N. R. Co.* 64 Tex. 144; *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371, 11 L.R.A. 486, 23 Am. St. Rep. 345, 15 S. W. 280; *Indianapolis Traction & Terminal Co. v. Lawson*, 5 L.R.A. (N.S.) 721, 74 C. C. A. 630, 143 Fed. 834, 6 Ann. Cas. 666; *Florida Southern R. Co. v. Hirst*, 30 Fla. 1, 16 L.R.A. 631, 32 Am. St. Rep. 17, 11 So. 506; *Murphy v. St. Louis, I. M. & S. R. Co.* 43 Mo. App. 342; *Pennsylvania R. Co. v. Price*, 96 Pa. 256.

for injuries sustained by being thrown from the top of a freight car, due to the negligence of the train employees while switching the cars, where it did not appear that those in charge of the train had authority to employ assistants in its management, that there was an emergency for his employment, or that there was a custom or rule of the company that persons might pay their way by working on the train, since at most such person was upon the train by the sufferance of the conductor and brakeman, and assumed the risk to dangers to which he thus became exposed.

So, in *Stalcup v. Louisville, N. A. & C. R. Co.* 16 Ind. App. 584, 45 N. E. 802, it was held that an averment that plaintiff was working for the defendant, loading and unloading freight and doing the general work of a brakeman, with the permission of the conductor, was insufficient to show that he was an employee and entitled to protection as such, in the absence of an averment that the conductor or those operating the train were authorized to employ him, or that an emergency or necessity existed for his employment.

A person has no right to assume that a conductor of a freight train was not violating his duty by allowing him to ride in the caboose without paying fare, even though he had no knowledge of the rule prohibiting conductors of freight trains from carrying passengers, especially where he does not enter the car at a passenger station or any place apparently designed for the reception of passengers, so as to entitle him to the rights of a passenger in case of injury. *Cleveland, C. C. & St. L. R. Co. v. Best*, 169 Ill. 301, 48 N. E. 684.

In *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513, it was said that no act of a conductor of a freight train will bind the company as to carrying passengers, unless the company in some way assents to it.

Accordingly, it has been held that one riding upon a freight train without paying fare, by the invitation of the conductor, is not a passenger, and cannot recover for injuries due to negligent operation, since he 37 L.R.A. (N.S.)

could not have supposed that the conductor was acting within the general scope of his employment, or that, independently of the rules of the company, the conductor had any authority to extend such an invitation, as the ordinary business of conducting and managing a freight train does not involve any right to invite persons to ride upon such trains or to accept them as passengers. *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446; to the same effect are *Baltimore & O. S. W. R. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, 64 N. E. 119; *Cleveland, C. C. & St. L. R. Co.* 169 Ill. 301, 48 N. E. 684; *Simmons v. Oregon R. Co.* 41 Or. 151, 69 Pac. 440, 1022; *St. Louis, I. M. & S. R. Co. v. Reed*, 76 Ark. 106, 113 Am. St. Rep. 78, 88 S. W. 836.

A rule of a railroad prohibiting the carrying of passengers without a pass on freight trains applies to a former employee riding by the invitation of the conductor. *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446.

So, one riding on the caboose of a freight train, upon the invitation and suggestion of the conductor, for the purpose of seeking employment as a brakeman on the road, is not entitled to the protection of a passenger, where it is contrary to the rules of the company, and there is nothing in the attending circumstances, either in the condition of the caboose as fitted up for the transportation of passengers or the authority of a freight conductor, to lead one to the conclusion that the relation of carrier and passenger would be thereby created. *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513.

And one who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with a deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from wilful or reckless injury. *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123.

Hart, J., delivered the opinion of the court:

It is the contention of the plaintiff that he made a contract with the conductor of one of defendant's local freight trains to carry him from Bald Knob to Higginson, in consideration of services to be performed by him in assisting the train crew in loading and unloading freight.

The undisputed evidence shows that the conductor did not have express authority to make such contract. Did he have implied authority to make it? The general rule is that the agent has the implied authority to do all things which are reasonably necessary to effectuate the main purpose for which he is employed.

Mr. Elliott says that the authority of

the conductor ordinarily extends to the control of the movements of his trains and to the immediate direction of the movements of the employees engaged in operating the train, and does not extend to making contracts on behalf of the railway company. 1 Elliott, Railroads, § 302. Continuing, the author says: "As we have said, the conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties. In order that contracts made by him shall be obligatory upon the company, they must be made to enable him to perform the duties required of him, and must

To the same effect are Louisville & N. R. Co. v. Hailey, 94 Tenn. 383, 27 L.R.A. 549, 29 S. W. 367; Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245; and McVeety v. St. Paul, M. & M. R. Co. 45 Minn. 268, 11 L.R.A. 174, 22 Am. St. Rep. 728, 47 N. W. 809, which is cited with approval in Greenfield v. Detroit & M. R. Co. 133 Mich. 557, 95 N. W. 546.

Likewise a person attempting in bad faith to defraud the company by riding free or for less than full fare, even with the consent of the conductor of the train, is a trespasser, to whom the company is not responsible for injuries not wantonly or wilfully inflicted. Kruse v. St. Louis, I. M. & S. R. Co. 97 Ark. 137, 133 S. W. 841.

The rule that one riding upon a train by fraud or stealth, without payment of fare, cannot recover for injuries not due to recklessness or wilfulness of the company, is not modified by a statute making every railroad company liable for all damages sustained by any person in consequence of the neglect of agents, or by mismanagement of the engineers or other employees. Condran v. Chicago, M. & St. P. R. Co. 28 L.R.A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522.

On the question as to right of wrongdoer to take advantage of general statutory imposition of damages for negligent injuries, see note appended to above case, in 28 L.R.A. 749.

One who, while trespassing upon a freight train, was granted permission by the conductor to ride to a certain place if he would throw the switch at that place, upon returning to the train without permission of the conductor after throwing the switch, again became a trespasser, to whom the railroad company owed no duty except to exercise reasonable care for his protection after his peril was discovered. Cincinnati, N. O. & T. P. R. Co. v. Jackson, 22 Ky. L. Rep. 630, 58 S. W. 526.

A railroad company is not liable for an assault upon a person riding upon a freight train by permission of the conductor, unless committed by an employee in the scope of

his employment. Smith v. Louisville, E. & St. L. R. Co. 124 Ind. 394, 24 N. E. 753.

But in Wagner v. Missouri P. R. Co. 97 Mo. 512, 3 L.R.A. 156, 10 S. W. 486, it was held that one allowed to ride on a special freight train, who has no notice of any want of authority on the part of the conductor to grant the permission, whether he pays fare or not, in the absence of collusion between him and the conductor to defraud the company of its fare, becomes a passenger, and as such is entitled to have the train on which he travels managed with the care that is due from a common carrier to passengers on a train of that character. To the same effect is Everett v. Oregon Short Line & U. N. R. Co. 9 Utah, 340, 34 Pac. 289.

And it has been held that it is within the authority of the conductor of a freight train, having entire charge thereof, notwithstanding he is forbidden to carry passengers thereon, to permit a person to ride on such train, even without the payment of fare, and that the company will be liable for injuries resulting to such a person from lack of ordinary care on the part of its employees. Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751.

—by permission of brakeman.

A brakeman of a freight train has no implied authority to bind the company by contracts of passage, so as to render the railroad company liable as a carrier of passengers. Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601.

Accordingly, it has been held that a person riding on a freight train under an agreement with the brakeman to render assistance in the loading and unloading freight is a trespasser, since the brakeman was not acting within the scope of his authority, and the agreement was for a consideration personal to the brakeman, to induce him to violate his duty. O'Donnell v. Kansas City, St. L. & C. R. Co. 197 Mo. 110, 114 Am. St. Rep. 753, 95 S. W. 196.

So, the railroad company is not liable



not relate to collateral matters, nor be outside of the line of the duty assigned him. Thus, he may, where other provision has not been made, employ mechanics to repair a break of the cars or machinery which must be repaired before the train can proceed to its destination, and may engage men and teams to render the roadway or bridges secure for the passage of his train, when weakened or partially swept away by unforeseen causes; but in such cases the authority to contract does not exist, unless there is necessity for immediate action. It is the necessity which confers authority, not simply the position of conductor." *Ibid.*

In the case of *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513,

for an injury to a boy while attempting to comply with the order of the brakeman to perform certain services in consideration of the privilege of riding upon the train, where the conductor had exclusive control of the train and the persons upon it, since the control assumed by the brakeman and his directions were not within the scope of his employment. *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423.

And so, a boy who goes upon the caboose of a freight train scheduled to carry passengers at the direction of the brakeman, under an agreement with him that he could ride in consideration of helping to unload freight from the train, is a trespasser, although he was ignorant of the manner of operating and managing railroad trains; and the conductor may lawfully expel such boy from the train. *Folley v. Chicago, R. I. & P. R. Co.* 16 Okla. 32, 84 Pac. 1090.

But the railroad company is liable for injuries due to the act of the conductor, inducing such a person to alight while the train was moving rapidly, by threats of violence, since such conduct under the circumstances constitutes wanton and wilful carelessness. *Ibid.*

In *Galaviz v. International & G. N. R. Co.* 15 Tex. Civ. App. 61, 38 S. W. 234, it was held that the railroad company was not liable to a trespasser for injuries sustained by being expelled from a moving freight train upon which he was riding in violation of the rules of the company, though by the permission of the brakeman, who afterwards compelled him to get off, in the absence of a showing that the brakeman was acting within the apparent scope of his authority, which was necessary to render the company liable for his wrongful conduct.

In *Brevig v. Chicago, St. P. M. & O. R. Co.* 64 Minn. 168, 66 N. W. 401, it was held that while a freight train brakeman has implied authority to eject trespassers from a freight train, yet, where a person bribed such a brakeman to permit him to ride in a freight car, the brakeman and such person thereby became joint trespassers, and the brakeman's implied authority to represent

it is said: "There is nothing in the business of a conductor which could lead to the conclusion that he had authority to make contracts with persons to act as brakemen. His apparent duties are to carry forward a train after it is organized. The business of organizing it is in its nature wholly distinct. It is, in fact, committed to a 'train despatcher.'" In *Cooper v. Lake Erie & W. R. Co.* 136 Ind. 366, 36 N. E. 272, the court said: "While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of appellant. . . . No custom, rule, or regulation of the appellee company is shown by which appellant might

his employer in ejecting such person thereby ceased, so that, unless it appeared that the brakeman had received subsequent express authority to eject such person, his act of doing so in an improper manner was simply the assault of one joint trespasser upon another, for which the railroad company was not liable.

One riding upon a freight train with knowledge that he is violating the rules of the company, and without the knowledge or consent of the conductor, but under an unauthorized and collusive arrangement with the brakeman, to whom he paid about one third of the regular fare, is a trespasser, to whom the railroad company owes no duty except to abstain from wanton or wilful injury. *Sands v. Southern R. Co.* 108 Tenn. 1, 64 S. W. 478.

So, one riding upon a flat car of a freight train without the knowledge of the conductor, but under the direction of the brakeman, who received and appropriated his fare, is not a passenger, since it cannot be presumed that the brakeman had authority to make a contract of carriage, or that a traveler could acquire the rights of a passenger by riding on such an unusual car. *Missouri, K. & T. R. Co. v. Huff*, 98 Tex. 110, 81 S. W. 525, reversing — *Tex. Civ. App.* —, 78 S. W. 249.

Nor can the inference arise that the brakeman had authority to contract to carry passengers merely because the railroad company had knowledge of such conduct, as the company may have been exerting all reasonable means to enforce the rules while the practice was being carried on, which was all that could be required. *Ibid.*

No liability is incurred by a railroad company for injury sustained by one by being thrown from a portion of a freight train by a sudden movement of the cars while being switched in the yards, although he boarded the train at the invitation of a switch brakeman, who signaled the engineer to start as plaintiff attempted to get on, since he was neither a passenger nor licensee, but a trespasser, as the brakeman had no authority to bind the company by any agreement to carry plaintiff, and where, although

pay his way by working on the train, assisting the brakeman or other employee. . . . At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to so receive him. Any dangers to which he thus became exposed were wholly at his own risk. The company could become liable only for wilful injury to him." As bearing upon the question and recognizing this principle, we also cite the following: *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647; *Louisville & N. R. Co. v. Ginley*, 100 Tenn. 472, 45 S. W. 348; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567; *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320, 20 Am. St. Rep.

the brakeman may have discovered plaintiff's peril when he fell or after the train had started, he was without power to stop the train to prevent the injury. *Skirvin v. Louisville & N. R. Co.* 30 Ky. L. Rep. 1208, 100 S. W. 308.

—by permission of engineer, fireman, or other employee.

In *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855, it was held negligence *per se* for the servants in charge of a train to permit a child seven years of age to climb on and ride upon an open car loaded with loose earth, so as to render the railroad company liable for injuries sustained by it by being thrown off by the sliding of the earth when the train was in motion.

There was proof in the above case tending to show that the child was not only permitted, but invited, to ride by the railroad employees, and with the knowledge of the superintendent.

And in *Ecliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196, 31 N. W. 180, it was held that a boy twelve years of age riding on a freight train with the knowledge or implied invitation of the employees cannot be treated as a trespasser, so as to preclude him from recovering for injuries sustained by a collision due to the negligence of the railroad company, if he was free from contributory negligence.

But in *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632, it was held that a railroad company is not liable for the death of a boy thirteen years of age, which was caused by being struck by a platform while he was hanging on the side of a moving freight car which he had boarded by permission of the engineer, though it was alleged that the platform was improperly constructed and in dangerous proximity to the railroad track, and that the railroad company was negligent in giving the boy permission to board the moving freight train, on the ground that the giving of such permission by the engineer was an act not within the actual or apparent scope of his authority, for which his employer could be held liable. 37 L.R.A. (N.S.)

362, 10 S. E. 922; *Vassor v. Atlantic Coast Line R. Co.* 142 N. C. 68, 7 L.R.A. (N.S.) 950, 54 S. E. 849, 9 Ann. Cas. 535.

This principle was recognized and applied by this court in the case of *Hot Springs R. Co. v. Dial*, 58 Ark. 318, 24 S. W. 500. The court held (quoting syllabus): "Where a boy fifteen years of age, at the request of the conductor of a freight train, undertakes to throw off the brake on a car, and is injured by striking his head on an iron bridge, he cannot recover from the railroad company on account of its negligence in failing to warn him of the danger, if the conductor had no express or apparent authority to employ him, and there was no exigency which called for the exercise of implied authority."

And so, in *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413, it was held that a railroad company is not liable for injuries received by a child while attempting to get on the cars in consequence of an invitation extended to him by the servants in charge of the car, where it does not appear that they were engaged in carrying passengers, or had any authority to permit persons to ride on the cars, with or without compensation, or that the invitation or permission was in furtherance of the interests of the railroad company.

And in *Louisville & N. R. Co. v. Thornton*, 22 Ky. L. Rep. 778, 58 S. W. 796, it was held that a railroad company owed no duty to a boy seventeen years of age who was riding on a freight train at the invitation of the fireman, and without paying fare, to stop the train to permit him to get off, or to prevent him from jumping from the moving train after the agents in charge knew or had reasonable grounds to believe he was about to jump while the train was in motion, since, when he boarded the train and rode without paying fare, he accepted the advantage with the disadvantage that he would ride to the next regular stop.

And it has been held that the railroad company is not liable for the death of a person entirely unfamiliar with trains and railroads, which was caused by attempting to alight from a rapidly moving freight train, at the suggestion of an employee, because of the failure to stop the train, although he was assured by the employees who permitted him to ride as a matter of accommodation that the train would stop at that point, and the conductor had been informed of his presence and purpose of boarding the train. *Peak v. Louisville & N. R. Co.* 23 Ky. L. Rep. 2157, 66 S. W. 995.

Likewise one riding on a freight train upon the invitation of an employee not connected in anyway with the running of the train is not a passenger, so as to render the railroad company liable for injuries caused by negligent operation of the train. *Thompson v. Nashville, C. & St. L. R. Co.* 160 Ala. 590, 49 So. 340.

And one riding on a train devoted exclu-

It is not claimed that there was any sudden or unexpected emergency which made it necessary, for the proper operation or safety of the train, for the conductor to employ the plaintiff. There is no evidence that the injury was wanton or wilful.

Applying the general principles above announced to the facts of this case as testified to by the plaintiff himself, and upon which he bases his right of recovery, it is apparent that he is neither a passenger nor employee. He bases his right to re-

cover wholly upon the contract made with the conductor. He testified that he was performing the services usually performed by brakemen while making the trip. He could not be engaged in the immediate and direct duties of a servant, and at the same time be considered a passenger. He was not an employee because the conductor had no authority, express or implied, to make the contract of employment. He was a mere volunteer, and as such assumed the

sively to the transportation of lumber without invitation of an authorized agent, and without paying fare, is a trespasser, to whom the railroad company is not liable for an injury sustained by a collision between two trains due to negligent operation. *Illinois C. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232.

So, one riding on a logging train by invitation of those in charge assumes the risk. *Johnson v. Louisiana R. & Nav. Co.* — La. —, 36 L.R.A. (N.S.) 887, 56 So. 301.

And a person riding on a stone car without paying fare is not a passenger, to whom the carrier is liable for injuries received by derailment. *Menaugh v. Bedford Belt R. Co.* 157 Ind. 20, 60 N. E. 694.

#### Riding upon locomotive.

The presumption is that one riding on a locomotive engine is not rightfully there, whether he paid fare or not. *Robertson v. New York & E. R. Co.* 22 Barb. 91.

A person riding on the locomotive of a freight train without the conductor's knowledge or consent, by agreement with the fireman to shovel coal for the privilege of riding, is not a passenger, and the railroad company is not liable for his death caused by jumping from the train while moving at a dangerous speed, at the suggestion of the fireman of the danger of arrest, should he be found upon the train when it was stopped, where it did not appear that he was told to get off at the place he jumped, but was only told to get off before the train stopped. *Woolsey v. Chicago, B. & Q. R. Co.* 39 Neb. 798, 25 L.R.A. 79, 58 N. W. 444.

But in *Harris v. Southern R. Co.* 25 Ky. L. Rep. 559, 76 S. W. 151, it was held that the railroad company was liable to a boy for an injury sustained by jumping from a moving locomotive at the direction of the engineer or fireman, where he boarded the engine at their direction or invitation to shovel coal for their convenience while they were switching and making up the train, unless at the time he attempted to alight the speed of the train made the danger to him so imminent and obvious that an ordinarily prudent person of his age and discretion would not have incurred the risk.

Neither the conductor nor the engineer of a train, nor the master mechanic of a railroad, has the implied authority to invite a

person to ride in the cab of a locomotive without paying fare. *Clark v. Colorado & N. W. R. Co.* 19 L.R.A. (N.S.) 988, 91 C. C. A. 358, 165 Fed. 408.

Accordingly, one who, without paying fare, voluntarily attempts to ride in the cab of a locomotive at the invitation of those in charge of the train, assumes the known hazards incident to such exposed position, and cannot hold the railroad company liable for injuries caused by the collision of the cab with a car negligently left on a side track so as not to clear the main track, where the negligence was not wanton, and no injury occurred to anyone else on the train. *Ibid.*

One who induced the engineer to permit him to ride upon the engine of a passenger train without knowledge of the conductor or paying fare, after being advised that it was against the rules of the railroad company, is a wrongdoer, and cannot recover damages for injuries sustained by negligent operation. *Robertson v. New York & E. R. Co.* 22 Barb. 91.

A railroad company is not liable for injuries caused by the derailment of a switch engine, to one riding upon it by the invitation of a brakeman, while engaged in switching cars, since he was not acting within the scope of his employment, nor authorized to invite or receive persons on the engine. *Stringer v. Missouri P. R. Co.* 96 Mo. 299, 9 S. W. 905.

One riding on the engine attached to a passenger train, by the invitation of the engineer and with the knowledge of, and without the objection of, the conductor, is not a passenger, since the mere silent acquiescence of the conductor in his riding on the engine does not make the person a passenger, or charge the carrier with that high degree of care toward him which it owes to one whom it has accepted and agreed to transport as a passenger. *Radley v. Columbia R. Co.* 44 Or. 332, 75 Pac. 212, 1 Ann. Cas. 447.

And the rule that a passenger does not lose his status as such by assuming a dangerous position on the train, assigned to him by the direction or consent of the employees in charge thereof, does not apply to such a case, since by voluntarily boarding the engine in the first instance, a place obviously not designed for the carriage of passengers, such person never became a passenger. *Ibid.*

risks of the situation in which he placed himself.

There was an attempt made to prove by the cross-examination of the conductor the existence of a custom whereby persons were permitted to ride upon local freight trains in consideration of services performed by them in loading and unloading freight. The conductor says this applied to colored men only. But in order to make the company liable, there must be proof not only of the custom, but that it was actually

known by the officials who conducted the affairs of the railway company, or that it was so general and of such long continuance that it must be fairly inferred that it was known and assented to by them. *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 395, 27 L.R.A. 190, 43 Am. St. Rep. 38, 27 S. W. 492. It might be inferred from the evidence of the conductor in this case that he allowed plaintiff to ride without collecting his fare; that he, the conductor, intended later to collect it, but

So the fact that one intending to become a passenger came to the station late, and was told by the engineer that the train was about to start, and to get on the engine, does not make the relation between the railroad company and such person that of carrier and passenger, where the train was in charge of the conductor, and the engineer had no authority to direct persons to ride at any particular place. *Ibid*.

So, in the following cases it has been held that one riding upon the engine by the invitation of the engineer, and without paying fare, is a trespasser, to whom the railroad owes the duty to refrain from wanton or wilful injury, and to use ordinary care after discovering his danger: *Chicago & A. R. Co. v. Michie*, 83 Ill. 427; *Barkley v. Chicago, M. & St. P. R. Co.* 37 Ill. App. 293; *International & G. N. R. Co. v. Cooper*, 88 Tex. 607, 32 S. W. 517; *Claiborne v. Missouri, K. & T. R. Co.* 21 Tex. Civ. App. 648, 53 S. W. 837, 57 S. W. 336; *Nightingale v. Union Colliery Co.* 9 B. C. 453, affirmed in 35 Can. S. C. 65.

And in the following cases the same rule has been announced where the person was riding upon the engine by the permission of the conductor: *Morris v. Georgia R. & Bkg. Co.* 131 Ga. 475, 62 S. E. 579; *Files v. Boston & A. R. Co.* 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Wilcox v. San Antonio & A. P. R. Co.* 11 Tex. Civ. App. 487, 33 S. W. 379; *Virginia Midland R. Co. v. Roach*, 83 Va. 375, 6 S. E. 175.

#### Riding on work train.

The presumption is that one not an employee riding on a work or material train is wrongfully there; and if he is there by the permission of the servants in charge of the train, the presumption is against their authority to invite or permit persons to ride on such trains. *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018; *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123.

Accordingly, a boy not an employee, who is riding on a work or material train by the permission of the conductor and engineer, is a trespasser, and the only duty owed to him by the railroad company is not wantonly or wilfully to injure him. *Burns v. Southern R. Co.* 63 S. C. 46, 40 S. E. 1018.

So, a railroad company is not liable for 37 L.R.A. (N.S.)

the negligence of its employees in operating one of its trains, which caused the death of one riding in the caboose of its work train by permission of the employees in charge of the train, where deceased knew it was in violation of the rules of the company, and there was nothing to show that the rule had been abrogated, that the company knew that its employees had been in the habit of carrying the deceased, or that deceased was rightfully on the train. *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875.

And a person riding for his own convenience and comfort, by the acquiescence of the superintendent on a car, which he knew was for the use of employees of the railroad only, was at most a mere licensee, and assumed all risk of carriage, except such as might result from wanton or intentional wrong. *McCauley v. Tennessee Coal, Iron & R. Co.* 93 Ala. 356, 9 So. 611.

But where it is customary to carry passengers on construction or work trains, persons who have no knowledge of the rules of the company to the contrary have a right to assume that permission granted by the conductor to ride on such trains is within the scope of his authority as manager of the train. *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Chicago, K. & W. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923.

Accordingly, it has been held that a railroad company is liable for the death of a boy in consequence of a collision caused by the negligence of its employees while he was riding in the caboose attached to a work or construction train, by the permission of the conductor, and without paying fare, where he had no knowledge of the company's instructions to the conductor not to carry passengers upon the construction train, and it appeared that passengers were frequently carried on that and other construction trains. *St. Joseph & W. R. Co. v. Wheeler*, *supra*.

#### Riding on hand car.

The presumption is that one riding on a hand car is not legally a passenger. *Willie v. Atlantic & D. R. Co.* 120 N. C. 508, 26 S. E. 784.

The permission of a section master, whose duty was to keep the road and bridges in repair, to allow one to ride gratuitously upon a hand car in his control, but which was used exclusively to carry workmen and tools

that he overlooked it, or neglected to collect it, owing to his mind being occupied with other duties. But whatever would be the rights of a person riding gratuitously in a coach provided for passengers, by permission of the conductor, without any evidence of his right to do so, such as a pass, that question has passed out of the case; for plaintiff was not injured while on the train, but according to his own testimony, he had left the train and was injured while attempting to re-enter it and be car-

ried according to the terms of the contract which we have held the conductor had no authority, either express or implied, to make.

It follows that the court should have directed a verdict for the defendant as requested by it, and for the error in not doing so, the judgment must be reversed, and the cause will be dismissed.

Kirby, J., dissents.

to and from work, does not thereby establish the relation of passenger and carrier between such person and the railroad company, so as to render the company liable for injuries sustained by a collision with a train, due to negligent operation, since the section master had general authority only as was incidental to the business in which he was engaged, and notice of his limited authority will be implied from the division of the business of the railroad company by operating separate trains for the carriage of passengers, freight, and workmen. *Ibid.*

To the same effect are *International & G. N. R. Co. v. Cock*, 68 Tex. 713, 2 Am. St. Rep. 521, 5 S. W. 635; *Rathbone v. Oregon R. Co.* 40 Or. 225, 66 Pac. 909; *Hoar v. Maine C. R. Co.* 70 Me. 65, 35 Am. Rep. 299.

And a railroad company is not liable for an injury to a child riding on a hand car on invitation of its employees, contrary to the rules, and not in accordance with any custom acquiesced in by the officers, of the company. *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 395, 27 L.R.A. 190, 43 Am. St. Rep. 38, 27 S. W. 492; *St. Louis, I. M. & S. R. Co. v. Robinson*, 95 Ark. 39, 128 S. W. 60; *Lake Shore & M. S. R. Co. v. Duer*, 21 Ohio C. C. 512, 11 Ohio C. D. 761; *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982.

But in *Missouri, K. & T. R. Co. v. Rodgers*, — Tex. Civ. App. —, 35 S. W. 412, it was held that a railroad company is liable for injuries to a boy, due to the negligent operation of a hand car upon which he was riding by the invitation of the employees in charge, though in violation of the rules of the company, upon the ground that the servants did not fulfill the master's duty to the public to avoid injury to children when operating dangerous machinery of such a character as may reasonably be supposed to allure them into danger, and that it cannot discharge such duty or avoid the consequences of its breach by the adoption of rules and regulations. The court said that the question in such a case was not whether the servant, in inviting the child unto dangerous machinery, was acting in the scope of his employment, but was whether the master, through him, discharged his duty.

And in the following cases the railroad company has been held liable for an injury to a child while riding on a hand car in vio-

lation of the rules of the company, but upon the invitation of those in charge: *Missouri, K. & T. R. Co. v. Rodgers*, 89 Tex. 675, 36 S. W. 243, — Tex. Civ. App. —; *Davidson v. Pittsburg, C. C. & St. L. R. Co.* 41 W. Va. 407, 23 S. E. 593.

In *Missouri, K. & T. R. Co. v. Rodgers*, — Tex. Civ. App. —, 39 S. W. 383, it was held that the railroad company was liable for injuries to a boy twelve years of age who was riding on a hand car at the suggestion of the employees in charge, in violation of the rules of the company, where the boy was without mental capacity to understand the danger of riding on such a car, whether the employees knew of the incapacity or not.

But it was said that if the jury should find that the boy was possessed of such intelligence that he ought to have appreciated the danger of his position on the car, then he could not recover for injuries sustained while riding on the car, no matter whether the employees had authority or not to invite him upon the car. *Ibid.*

In *Dougherty v. Chicago, M. & St. P. R. Co.* 137 Iowa, 257, 14 L.R.A. (N.S.) 590, 126 Am. St. Rep. 282, 114 N. W. 902, it was held, however, that a railroad company is not liable for the unauthorized act of its section foreman and other employees in permitting a seven-year-old boy to ride with them in a dangerous position on a hand car from which he is negligently allowed to fall and get hurt; that the rule rendering a master liable for the acts of his servant in the use of a dangerous agency of which he is placed in charge does not apply to render him liable for injury to a boy invited by the servant to ride upon a hand car, which is due, not to the dangerous character of the car, but to the personal negligence of those in charge of it.

The railroad company is liable for injuries caused by the negligence of its employees to one traveling upon a hand car by the invitation of the agent in charge, and without paying fare, where it appears that hand cars were sometimes used by the railroad company for the transportation of passengers, and there were no regulations prohibiting traveling upon them, and there is nothing to show that the agent was not authorized to give the railroad company's consent thereto. *Prince v. International & G. N. R. Co.* 64 Tex. 144. A. L. R.

## UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

PAULINE A. SMITH, Plff. in Err.,  
v.

BOSTON ELEVATED RAILWAY COMPANY.

(106 C. C. A. 497, 184 Fed. 387.)

**Evidence — sufficient to support judgment — change of plaintiff's testimony.**

A judgment in favor of plaintiff cannot, in the absence of any explanation of the inconsistency, be based on evidence given by him which is materially inconsistent with his testimony on a former trial, upon a matter within his personal knowledge, and which supplies a weakness in the case as first made.

(January 31, 1911.)

**Note. — Effect of party's changing testimony on second trial, to supply defects in the case made on the first trial.**

In *Edall v. New England R. Co.* 40 App. Div. 617, 57 N. Y. Supp. 914, it was held that a verdict for a plaintiff was against the weight of the evidence where plaintiff's testimony on the second trial was directly contradictory of his testimony on the previous trial, and also was directly contradicted by evidence for the defendant, and there was no satisfactory explanation of such contradiction. In this case, which was an action for personal injuries resulting while coupling cars, the plaintiff had testified at the first trial that the drawheads of the cars came together. Upon review the court said that there was no cause to complain, because the cars had acted exactly as they would be expected to act, and a judgment for the plaintiff was reversed. On the second trial plaintiff testified that one drawhead passed under the drawhead on the other car, so that the bumpers came together unexpectedly and caused the injury. Judgment was reversed and new trial ordered.

In *McCarty v. Interurban Street R. Co.* 47 Misc. 345, 93 N. Y. Supp. 548, a judgment for the plaintiff had been reversed for the reason that there was no evidence that the plaintiff had given any signal to the conductor, or that the conductor knew or had reason to know that the plaintiff intended to alight; and for the reason that the plaintiff had wholly failed to show notice to the conductor either in the particular manner alleged in the complaint or in any other manner; on the second trial the plaintiff testified that the conductor was apprised of her desire to alight, and that he informed her upon attempting to alight at another street that that was not the street she desired. In speaking of this evidence the court says that it was apparently given with the sole desire to fit the facts to suit the case regardless of truth or consistency, and fur-

**E**RROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Argued before Colt and Putnam, Circuit Judges, and Brown, District Judge.

Mr. Julian C. Woodman for plaintiff in error.

Messrs. M. F. Dickinson and Walter Bates Farr for defendant in error.

Brown, District Judge, delivered the opinion of the court:

This is a writ of error brought after the direction of a verdict for the defendant on the second jury trial of an action of tort for personal injuries.

ther that no satisfactory explanation of the omission to bring out the important proof necessary for the maintenance of the plaintiff's case on the first trial, and of her reawakened recollection, was made, nor were any reasons consistent with a desire to state fairly the facts with reference to other changes in testimony given. A judgment for the plaintiff was reversed and a new trial ordered.

So, in *Adams v. New York City R. Co.* 125 App. Div. 551, 109 N. Y. Supp. 1019, a judgment for the plaintiff was reversed and a new trial ordered, where on the first trial the judgment had been reversed on account of the failure of proof that the car gave a sudden or violent jerk or lurch forward, sufficient to throw the plaintiff to the ground while he himself was exercising due care, and on this question the location of the car at the time of the accident, as testified to by the plaintiff, was regarded as important, and on the second trial the plaintiff placed the location of the accident at a different place, so as to obviate the above weakness. Another witness also changed his testimony, and the court seems to make no distinction, saying that credibility of the witnesses in the first instance is for the jury, but that testimony upon a vital point in a case materially changed to obviate objections pointed out by the court on a former appeal, unless a sufficient and legitimate explanation is given, is discredited testimony.

In *Fisher v. Central Vermont R. Co.* 118 App. Div. 446, 103 N. Y. Supp. 513, a judgment for the plaintiff had been reversed on the ground of contributory negligence, at the second trial the plaintiff changed the facts on which the court had based its finding of contributory negligence so as to show that he had not been negligent; there was no satisfactory explanation of this change, and no corroboration. The court says that these two conflicting statements should be clearly placed in juxtaposition before the minds of the jury and their attention should pointedly be called to their apparent contradic-

A verdict for the plaintiff at the first trial was set aside for reasons set forth in our opinion of March 16, 1909. 23 L.R.A. (N.S.) 890, 94 C. C. A. 84, 168 Fed. 628. At the second trial, though the plaintiff made changes in her testimony, a verdict was directed for the defendant.

At the first trial it appeared that the plaintiff fell while entering the defendant's car. At the argument before us on the former writ of error, it was contended that the testimony showed negligence of the defendant in two particulars: That the car was started with unusual violence, and that the conductor was guilty of negligence in starting the car too soon.

The charge of negligence in starting the car too soon was based upon the contention that the plaintiff "was just in that unstable equilibrium which would make a start very dangerous for a woman in her situation, and that the conductor knew it or recklessly took the chances."

Upon the hearing of the present writ of error, it was contended in her behalf: "She was holding her umbrella and small

hand bag and skirt in her left hand, and had a good hold on the side of the framework of the doorway with her right hand, and was leaning hard against it with her shoulder."

While the present record hardly justifies this version of the plaintiff's testimony, it does contain testimony of the plaintiff to the effect that her right hand and right shoulder were braced against the facing of the door.

Having found in our previous opinion that, under the authorities cited, the car was not started prematurely though the plaintiff was not braced against the door, it follows that the changed testimony to the effect that she was braced can have no effect to modify our opinion as to the insufficiency of the testimony to show negligence in giving the starting signal too soon. As the present testimony upon this point is less favorable to the plaintiff than her previous testimony, our former opinion is conclusive upon this question.

As to the charge that the car was started with unusual violence, the changed

tion and to the circumstances under which they were respectively given, and in such a manner that the question thus presented is not minimized or obscured by other questions in the case, so that the verdict of the jury, if in plaintiff's favor, may clearly and beyond peradventure carry with it the expression of their belief that the latest statement of the plaintiff is the true one, notwithstanding the apparent probabilities to the contrary. Judgment for the plaintiff was reversed and a new trial ordered.

So, in *Scherl v. Flam*, 133 App. Div. 274, 117 N. Y. Supp. 654, it is stated that a party who has recovered judgment on a written contract, which has been reversed because the contract is void, should not be suffered to succeed on a new trial by swearing to an oral agreement differing from the written agreement in a respect essential to meet the decision on appeal. The judgment in favor of the plaintiff in this case, however, seems to have been reversed on other grounds, and the question annotated was not raised in a subsequent appeal of the same case in 136 App. Div. 753, 121 N. Y. Supp. 522.

In *Hamilton v. Frothingham*, 71 Mich. 619, 40 N. W. 15, it was held that a real estate agent who has sought a recovery on a contract by which he was to have all over a certain amount for the sale of property cannot, after the reviewing court has indicated a doubt as to the sufficiency of the evidence to sustain such a contract, under the same bill of particulars, claim under a contract to pay a certain stated sum.

But in *Pacific Coast Biscuit Co. v. Dugger*, 42 Or. 513, 70 Pac. 523, it was held that the fact that a party on the second trial testified materially different from his testimony on the first trial only affected the credibility, and that it was for 57 L.R.A. (N.S.)

the jury to say as to the truth of the statements, and a judgment for the defendant was affirmed. In this action, which was against an alleged principal for goods purchased by her alleged agent, the principal testified that the agency was limited and did not warrant the purchase in question. On the appeal the appellate court held that the agency in question was general and the purchase within the scope of the apparent authority. On the new trial the alleged principal testified that the transaction was a mortgage. On this point the court says that testimony given by a witness varying from that given theretofore, at the retrial of a cause, is not equivalent to assuming inconsistent positions, though such testimony should contradict that previously given, for the former, while not true, may have been based upon a mistake of fact, which the witness on the second trial ought to have been permitted to correct.

The facts in *Chance v. Southern R. Co.* — Ga. App. —, 73 S. E. 1076, do not clearly appear. The action was one for damages against a railroad company for scaring the plaintiff's mule and causing it to run away, thereby injuring the plaintiff. The plaintiff's testimony on the first trial showed nothing that was not usual and necessary in the management of the locomotive, and for this reason a judgment for the plaintiff was reversed (7 Ga. App. 650, 67 S. E. 836). On the second appeal a nonsuit was held improper as the evidence on the new trial was substantially different, and was such that the jury might find that the noise made by the engine was both unusual and unnecessary. Nothing is said in the case as to the testimony being that of the plaintiff on the second trial, or that it was given to bolster up his case.

W. A. E.

testimony is apparently directed to meet that part of our former opinion which said that her position was such that any ordinary jerk of the car in starting would be likely to throw her down, and that the plaintiff's testimony as to the manner in which she fell was consistent with the ordinary jerk of the car in starting, and inconsistent with any sudden or violent jerk.

It is now urged that, although the plaintiff was holding on to the side of the framework of the door, and bracing herself against it with her shoulder, the start was so violent as to throw her down. The following Massachusetts cases are cited: *Nolan v. Newton Street R. Co.* Banker & Tradesman (1910) 206 Mass. 384, 92 N. E. 505; *Lacour v. Springfield Street R. Co.* 200 Mass. 34, 85 N. E. 868; *Black v. Boston Elev. R. Co.* 206 Mass. 80, 91 N. E. 891; *Cutts v. Boston Elev. R. Co.* 202 Mass. 450, 89 N. E. 21.

In the former trial the plaintiff's whole testimony, as well as the argument of counsel thereon, shows that she was not braced. Her former statement, "I tried to reach forward to catch the door or something to hold myself, but I couldn't," is directly inconsistent with the statement that "I held on to the side of the door and leaned against it, and I leaned hard against it with my shoulder."

Upon a consideration of her testimony in the two trials, it is apparent that there is a complete departure from the original claim that the plaintiff was in such unstable equilibrium that it was negligent to give a starting signal, to the present claim that she was so well braced and had such a good hold that only a violent jerk of the car of an unusual character could have caused her to fall.

We have before us two inconsistent versions given by the plaintiff of the same occurrence.

As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations, or admissions, as to facts resting upon his own knowledge, is of such solemn character that, in the absence of a clear showing of mistake, inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an incon-

sistent state of facts. While it is true that upon a second trial the plaintiff's case may be changed or strengthened by new testimony, yet the right of a plaintiff at a second trial, to make by his own testimony a complete departure from the case presented at the first trial, is not unlimited.

A plaintiff, we think, after having sworn to facts resting in his own observation and knowledge before one jury, should not be permitted to swear to facts directly inconsistent, and to obtain from a second jury a verdict in his favor which will involve the conclusion that his testimony at the first trial was knowingly false. A party testifying under oath is more than a mere witness. He is an actor seeking the intervention of the judicial power in his behalf, and thus subject to the rule *allegans contraria non est audiendus*, which, as stated in *Broom's Legal Maxims*, p. 130, "expresses in technical language the trite saying of Lord Kenyon that a man should not be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interest." This principle is illustrated in *Harriman v. Northern Securities Co.* 197 U. S. 244-294, 49 L. ed. 739-763, 25 Sup. Ct. Rep. 493; *Davis v. Wakelee*, 156 U. S. 680, 689, et seq. 39 L. ed. 578, 584, 15 Sup. Ct. Rep. 555; *Sturm v. Boker*, 150 U. S. 312-334, 37 L. ed. 1093-1102, 14 Sup. Ct. Rep. 99; *National S. S. Co. v. Tugman*, 143 U. S. 28-32, 36 L. ed. 63, 64, 12 Sup. Ct. Rep. 361; *Pope v. Allis*, 115 U. S. 370, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 267, 24 L. ed. 695.

In the present case, the plaintiff, upon the former writ of error, had a full hearing upon the question of her legal rights upon the state of facts upon which she rested, before a jury and before this court. If, after an adverse decision of this court, she is at liberty to change her own testimony at will, then there is no practical limit to litigation. In *Hamilton v. Frothingham*, 71 Mich. 616, 40 N. W. 15, it was said: "The plaintiff cannot be permitted to take a position now wholly inconsistent with that taken on the former trials. The contract now claimed under is wholly inconsistent with that claimed upon the former trials. If this contract was made, then the one upon which the former recovery was had did not exist, and no recovery could have been had thereunder. If the contract was to pay all over \$8,000, then an express contract to pay a certain and specific sum did not exist."

"If such inconsistent positions were al-



lowed to be taken in courts of justice, there would be no end to litigation. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of this court, and squaring their case with it."

As the plaintiff was not corroborated, and as she was discredited by her former inconsistent testimony, we are of the opinion that, in the absence of any substantial explanation of this inconsistency, the trial judge was justified in concluding that, if the plaintiff should have a verdict, it would be his duty to set it aside, and therefore in directing a verdict for the defendant.

We have considered, of course, whether the testimony at the two trials is reconcilable upon the view that the changes were merely in supplying details inadvertently omitted upon the first trial, but are unable to avoid the conclusion that the statements are directly inconsistent and cannot be reconciled.

Recognizing the rule that upon a new trial a party should be afforded a large and liberal opportunity for supplying omissions and for explanations, this does not avail the plaintiff in error, since the most liberal application of this rule cannot justify the present substitution of a new and inconsistent case by the uncorroborated testimony of a party.

Upon the whole it seems apparent that at the second trial the plaintiff's testimony was directed to meeting the statement in our former opinion that the plaintiff was in such a position "that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door," by showing that she did this by bracing her shoulder heavily against the door, and also by showing that she had a good hold with her hand, thus bringing herself within those cases above cited, in which it was held that the fact that a good hand-hold was broken is evidence of a violent and negligent starting of the car.

The plaintiff also assigns error in the exclusion of expert testimony, but, as each of the questions excluded was predicated upon the plaintiff's changed testimony, and upon an assumption that the plaintiff was braced or leaning against the frame of the door when the car started, we need not consider them, since our finding that the plaintiff is precluded from asserting these 57 L.R.A.(N.S.)

facts cuts under all questions which assume the existence of these facts.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers its costs of appeal.

#### WASHINGTON SUPREME COURT.

WILLIAM HAYTON and Wife, Respts.,

v.

SEATTLE BREWING & MALTING COMPANY, Appt.

(66 Wash. 248, 119 Pac. 739.)

#### Landlord and tenant — saloon — adoption of prohibition — effect.

A lease of property permitting its use for saloon business in accordance with law is not nullified by the adoption of a statute forbidding further sales of liquor in the locality.

(December 16, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for King county in plaintiffs' favor in an action brought to recover rent alleged to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. William A. Greene and George McKay for appellant.

Messrs. Thomas Smith and J. L. Corrigan, for respondents:

Where premises are leased for the purpose of being used for the sale of liquor, and before the expiration of the time fixed in the lease, the sale of liquor is prohibited by law, such prohibition does not relieve the tenant from his obligation to pay rent, in the absence of an agreement contained in the lease itself.

Lawrence v. White, 131 Ga. 840, 19 L.R.A. (N.S.) 966, 63 S. E. 631, 15 A. & E. Ann. Cas. 1097; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966; Teller v. Boyle, 132 Pa. 56, 18 Atl. 1069; Barghman v. Portman, 12 Ky. L. Rep. 342, 14 S. W. 342; Koen v. Fairmount Brewing Co. — W. Va. —, 70 S. E. 1098; Shreveport Ice & Brewing Co. v. Mandel Bros. 128 La. 314, 54 So. 831; Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346; Notes in Lawrence v. White, 19 L.R.A. (N.S.) 966; J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co. 26 L.R.A. (N.S.) 498; and O'Byrne v. Henley, 23 L.R.A. (N.S.) 497; Kellogg v. Lowe, 38 Wash. 293.

**Note.** — As to effect upon lease for saloon purposes. of passage of prohibitory laws during the term, see notes to Heart v. East Tennessee Brewing Co. 19 L.R.A. (N.S.) 964, and Hecht v. Acme Coal Co. 34 L.R.A. (N.S.) 773.

70 L.R.A. 510, 80 Pac. 458; *Oldfield v. Angeles Brewing & Malting Co.* 62 Wash. 260, 35 L.R.A.(N.S.) 426, 113 Pac. 630.

**Parker, J.**, delivered the opinion of the court:

This is an action to recover two months rent, claimed to be due to the plaintiffs from the defendant under a lease to it of a lot and building in Mt. Vernon. From a judgment in favor of the plaintiffs, the defendant has appealed.

The questions here presented arise upon appellant's affirmative defense, the demurrer thereto of the respondents, and the sustaining of that demurrer by the trial court. The affirmative defense thus excluded was, in substance, as follows: The term of the lease is five years, being from November 9, 1907, to November 9, 1912, at an agreed monthly rental of \$100. The only provision of the lease relating to the use of the premises by appellant, is the following: "It is further understood and agreed that the said party of the second part may, during the life of this lease, carry on and conduct a retail saloon business in the building now on the north part of said lot four, provided that the conducting of said business is done in conformity with all ordinances of the city of Mt. Vernon, now in force or that may hereafter be enacted, as well as all laws of the state of Washington now in force or that may hereafter be enacted." Under the local option law of 1909, Rem. & Bal. Code, §§ 6292-6314, there was submitted to the electors of the city of Mt. Vernon, in November, 1910, the question of whether or not the sale of intoxicating liquors should be licensed in that city. Thereupon the electors voted against such licensing, thereby rendering the sale of intoxicating liquors unlawful in that city thereafter. The rent sued for accrued thereafter. Appellant abandoned the premises, and tendered possession thereof to respondents, after the accruing of these rent instalments sued upon.

It is contended that the trial court erred in holding that these facts did not constitute a defense to respondent's claim of rent due under the lease. It is argued that, the purpose for which the premises were leased becoming unlawful upon the result of the local option election being ascertained, the lease contract thereby ceased to be binding upon appellant. It seems to us that this argument is rested upon an erroneous view of the effect of the language of the lease, relating to the use of the premises by appellant. It is apparently assumed by counsel for appellant that the provisions of the lease above quoted restricts the use of the premises to saloon business. We think that

provision does not have such an effect. It is only permissive in that respect, and clearly does not prevent appellant from using the premises for any lawful purpose. The decisions of the courts appear to be harmonious in support of the view that, under such circumstances as are disclosed by this defense, the lessee cannot regard the lease as terminated by the changed legal status of the liquor traffic, and thus avoid payment of the rent agreed upon by the terms of the lease. The following appear to be directly in point, involving leases where the use of the premises for saloon purposes was merely permissive, as in this lease. *Kerley v. Mayer*, 10 Misc. 718, 31 N. Y. Supp. 818, affirmed by the Court of Appeals in 155 N. Y. 636, 49 N. E. 1099; *O'Byrne v. Henley*, 161 Ala. 620, 23 L.R.A.(N.S.) 496, 50 So. 83; *San Antonio Brewing Asso. v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368. In the following cases the courts express the view that the lessee would be held liable for the payment of the rent under such circumstances as we have here, even though, by the terms of the lease, the use of the premises be restricted to the saloon business. *J. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.* 133 Ga. 776, 26 L.R.A.(N.S.) 498, 66 S. E. 1081; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *Hecht v. Acme Coal Co.* — Wyo. —, 34 L.R.A.(N.S.) 773, 113 Pac. 788. The last-cited case, decided in February, 1911, contains an exhaustive review of the law upon the subject.

Counsel for appellant rely upon *Heart v. East Tennessee Brewing Co.* 121 Tenn. 69, 19 L.R.A.(N.S.) 964, 130 Am. St. Rep. 753, 113 S. W. 364. This is the only decision coming to our notice which seems to be not wholly in harmony with those above cited. It is not plain from the language of that decision just what the provisions of the lease were as to the use of the premises by the lessee, but it may be inferred from the language of the court that it regarded the lease as restricting the use of the premises to saloon purposes. If we are correct in this assumption, that decision would not necessarily be out of harmony with an affirmance of this judgment, since we conclude that this lease did not so restrict the use of the premises, but that its provisions in that respect were merely permissive. That decision, however, does not seem to be in accord with the weight of authority upon this subject, even though it may be distinguishable from the case before us. The result reached by this court in *Oldfield v. Angeles Brewing & Malting Co.* 62 Wash. 260, 35 L.R.A.(N.S.) 426, 113 Pac. 630, is in harmony with the result reached by the trial court in this case,

though this exact question was not there involved. We are of the opinion that the learned trial court was not in error in declining to entertain appellant's affirmative defense.

The judgment is affirmed.

**Dunbar, Ch. J., and Mount, Fullerton.**  
and Gose, JJ., concur.

### CALIFORNIA SUPREME COURT. (In Banc.)

PEOPLE OF THE STATE OF CALIFORNIA, Resp.,  
v.

AGOSTINO BORELLO, Appt.

(— Cal. —, 119 Pac. 500.)

**Evidence — confession — threats — admissibility.**

An alleged confession secured from one suspected of crime, by a protracted searching examination of public officials, who assumed a menacing and browbeating attitude, accompanied by threats, invective and false statements, and profanity, is not admissible in evidence against him.

(November 23, 1911.)

**A** PPEAL by defendant from a judgment of the Superior Court for Amador County convicting him of arson, and from an order denying a motion for new trial. Reversed.

The facts are stated in the opinion.

Messrs. **James H. Creely, Alfred H. Cohen, and Milton Shepardson**, for appellant:

The confession obtained from defendant is not admissible in evidence against him.

*Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *People v. Silvers*, 6 Cal. App. 69, 92 Pac. 506.

Messrs. **U. S. Webb, Attorney General, and J. Charles Jones**, for the State:

The confession made by defendant was freely and voluntarily made, and was admissible in evidence.

*Sparf v. United States*, 156 U. S. 55, 39 L. ed. 345, 15 Sup. Ct. Rep. 273, 10 Am. Crim. Rep. 168; *People v. Ramirez*, 56 Cal. 535, 38 Am. Rep. 73; *People v. Miller*, 135 Cal. 71, 67 Pac. 12, 12 Am. Crim. Rep. 183.

Messrs. **C. P. Vicini and Benjamin P. Tabor** also for the State.

**Note.** — As to when confession is voluntary, see note to *Ammons v. State*, 18 L.R.A. (N.S.) 768.  
37 L.R.A. (N.S.)

**Lorigan, J.**, delivered the opinion of the court:

This appeal was ordered here for further consideration after judgment rendered by the district court of appeal for the third appellate district, affirming the judgment of conviction and the order of the trial court denying a motion for a new trial, from both of which the defendant appealed.

Defendant was accused and convicted of the crime of arson, and during his trial a purported confession made by him was admitted in evidence, and the principal point on this appeal is as to the correctness of the ruling of the court in that respect.

The crime of which the defendant was accused was the felonious burning, on February 5, 1908, of the "Summit House Hotel," situated on the road leading from the town of Jackson to the town of Sutter Creek, Amador county. It appears that this property was, for several years and at the date of its destruction, owned by one G. B. Vicini, who, in April, 1905, leased it at a monthly rental of \$60, and for a term of six years, to C. Lepori and L. C. Bertin, who then, and at the time of the fire, were engaged in business in San Francisco under the firm style of Bertin & Lepori. These lessees placed this defendant and a man named Faracone in possession of the property, who thereafter conducted it as a hotel and saloon. In July, 1906, defendant executed a chattel mortgage covering all the hotel and kitchen furniture, bar fixtures, etc., in the hotel and saloon, in favor of said Bertin & Lepori, to secure a promissory note for \$500 executed by defendant to them. In March, 1907, defendant took out two policies of insurance on the personal property in the hotel for \$1,000 each, one of which, however, expired by its terms before the fire. Thereafter defendant sold his interest in the hotel and saloon business to one Rossi, who alone seems to have thereafter conducted it until a few days before the fire, when he abandoned the business, closed the hotel, and left that part of the country. A few days afterward, and while the hotel premises were vacant, they were destroyed by fire. The defendant for several months before the fire had been living in San Francisco, but, a few days before it occurred, had been seen in the vicinity of the Summit House, once in company with Lepori of the firm, heretofore mentioned, lessees of the hotel; another time with one Manzo, a resident of San Francisco; and some eleven months prior to the fire, defendant had endeavored, but unsuccessfully, to prevail on one James Bryant to burn the hotel, offering him \$200 to do so.

There was considerable other evidence in

the case—conduct on the part of the defendant and circumstantial evidence—relied on by the people to establish the guilt of the defendant, but no positive evidence except his alleged confession directly connecting him with the commission of the crime. We make no further reference to the evidence because our purpose has been to only state such of it as will make intelligible the matters to which the confession of defendant is claimed to have been addressed, and the condition and circumstances under which it was made.

It was not claimed by the people that the defendant himself actually set the hotel on fire. The theory was that the defendant, at the instigation of Lepori, engaged a man named Manzo to go from San Francisco to burn it, and that he actually did so; the motive prompting Lepori being that, by the destruction of the property, the firm of which he was a member would be relieved from further payments on their lease, which still had three years to run and was an unprofitable investment, and the motive of defendant was to secure the insurance money on his personal property situated in the hotel.

Now as to the conditions and circumstances under which the confession of defendant was made:

On February 8, 1908, three days after the hotel was burned down, the defendant, who had left San Francisco for Jackson, Amador county, was arrested by the sheriff of that county at Martell, a railroad station a short distance from Jackson, and taken to the county jail. The next evening, Sunday, February 9th, he was brought from the county jail to the office of the district attorney of the county, where were present the district attorney, the sheriff of the county, a deputy sheriff, the official stenographer of the superior court, and a constable of Amador county, the latter being present at the request of the district attorney, to act as interpreter, the defendant being an Italian, who, though able to speak the English language, did so brokenly. This interview in the district attorney's office lasted at least two hours and a half, although some of the parties present testified that it lasted nearly five hours. It resulted, after defendant had been interrogated by both the district attorney and the sheriff, in what purported to be a confession of the defendant. The statement made by him was dictated to the stenographic reporter, who transcribed it at once. It was this statement which was admitted in evidence as the confession of defendant, and in which he admitted having taken part in the burning of the building, having, at the instigation and request of Lepori, em-

ployed a man whose name is not disclosed in the written confession, who agreed to and did burn it.

On the preliminary showing the sheriff, district attorney, and the deputy sheriff testified generally that no promises were held out to defendant, or any threats or intimidation or other improper means used, to procure him to make the confession. As to what took place at the interview the district attorney testified: "I was in that meeting or investigation for a period of about two hours. Both Mr. Gregory and myself asked defendant, Borello, some questions. Of course he willingly made the statement, the whole statement, himself, and then we asked him as to little points and one thing and another that we wanted to find out, and that took up about two hours. . . ." Mr. Willis, the stenographer, who was present during all the interview which culminated in the making of the alleged confession, was not called by the prosecution at the preliminary showing, and his presence as a witness had not been required by it.

On the part of defendant, he himself testified, among other things, that both the sheriff and district attorney told him that it would be better for him if he would tell the truth about the burning of the hotel; also, that if he would do so, both he and his brother Marco (who was then under arrest also accused of burning the hotel) would be allowed to "go free," that the district attorney told him that he did not want to keep him in jail, but that he wanted to get Lepori. He stated further that the sheriff had told him that his brother Marco had made a full statement of the cause and origin of the fire, and that the sheriff stated other facts tending to convey the impression that, in this statement so claimed to have been made, his brother had implicated defendant in the crime, and that, if defendant would not tell the truth and sign a statement, his brother Marco could get fourteen years. Other matters were testified to by defendant and other witnesses on the preliminary showing tending to support the claim of defendant that his confession had not been procured from him freely and voluntarily. All these statements of defendant and the other witnesses in his behalf were specifically denied by the sheriff and district attorney.

The prosecution then offered the confession of the defendant in evidence, to which the defendant objected on the ground that it had not been shown to have been freely and voluntarily made. Before a ruling thereon, the defendant asked for a continuance in order to procure the testimony of Mr. Willis, the stenographer, who was

present when the interview between the sheriff, district attorney, and the defendant was had, and the alleged confession was obtained. The court refused the continuance and said: "If you gentlemen want to argue upon the evidence that is in, you can do that, with the understanding that hereafter, if Mr. Willis comes, you can introduce his evidence. If the court should sustain your objection, there will be no necessity for the evidence of Mr. Willis. If the court should overrule your objection and admit the confession, you can have Mr. Willis hereafter in rebuttal on your case, and the court then can get the benefit of his evidence as well as the jury; and if necessary, after such a showing is made, the court can rule at that time, withdraw the confession from the jury, and instruct them not to entertain it. I think that is the only way out of it."

After argument, the court, over the objection of defendant, admitted the confession in evidence, which confession consisted of but three pages of the record, and amounted only to a declaration by defendant, as heretofore stated, that Lepori had engaged him to employ a man, to be paid by Lepori, to burn up the hotel, and that defendant employed such a man and the hotel was burned.

At a subsequent session of the court, the defendant, in the meantime, having procured the attendance of Mr. Willis, the official stenographer of the court (not then, however, reporting the trial of defendant), called him as a witness. While the testimony on the preliminary showing on the part of the prosecution was that, in the interview with the defendant on the 9th of February, the defendant made his statement freely and willingly, and that the sheriff and district attorney "then would ask him as to little points and one thing and another that we wanted to find out," the notes taken by the stenographer and from which he testified show very clearly just what took place, and how the interview with or investigation of the defendant was held as far as the notes speak on the subject. What the stenographer took down he had not been requested to do by anyone, but did it of his own volition. He testified that all the public officers heretofore named were present in the office of the district attorney with the defendant, and that the latter was questioned by both the district attorney and the sheriff directly, and also through the medium of an interpreter, and that they were all in the office of the district attorney engaged in that matter from about a quarter to 7 in the evening until half past 10 or 11 o'clock that night. All the conversation which was

had between the officers, the interpreter, and the defendant was not taken down by the stenographer: but the greater and more important part of it was, and shall be referred to as the undisputed evidence in the case of what actually took place at the interview, and bearing on the question whether the confession was freely and voluntarily obtained from the defendant or not. Before doing so, it is to be said that, when this appeal was before the district court of appeal for determination, that court, as appears from its opinion, was strongly persuaded that if the confession of defendant had been obtained solely through the declarations of the sheriff, and his conduct and that of the district attorney on the evening of the 9th, as disclosed by the stenographer Willis, such confession would have been shown to have been improperly obtained, and inadmissible in evidence. That court was of the opinion, however, that the declarations of the defendant on the evening of the 9th of February, when the notes were taken and the confession signed by the defendant, were but repetitions of admissions of guilt which he had made to the officers, (the sheriff and district attorney) the night previous (February 8th), and, having voluntarily confessed the crime on the previous evening, the subsequent conduct of the sheriff and the district attorney on the night of February 9th, however threatening or otherwise reprehensible it might have been, could not be said to have anything to do with causing defendant to then admit his guilt, because he had already admitted it on the previous evening. But there is not a particle of evidence in the record that the defendant made any confession of guilt or stated any circumstances of an incriminatory nature on the evening of February 8th or at any other time than during the interview of February 9th. No such claim is made in the brief of respondent. Nowhere in the record is there even a suggestion that he had done anything of the kind excepting as might appear from some declarations of the sheriff and district attorney in questions they asked him on the evening of the 9th, and which imported that the defendant had made them the previous evening. But, in as far as any questions by the sheriff or district attorney stated or implied that defendant had made any incriminatory admissions on the evening previous to February 9th, such statement or assumption was untrue, and was a species of deception employed to embarrass, disconcert, and entrap the defendant, because it affirmatively appears from testimony directed specifically to the fact that the defendant made no admissions of guilt or statements of any incriminatory

character at any time previous to the evening of the 9th of February. This is directly shown by the testimony of the sheriff and district attorney themselves, who explicitly state that on the evening of the 8th the defendant would not talk about the burning of the hotel, denied any knowledge about it; the district attorney testifying that, while he asked and the defendant answered some unimportant questions, the important ones which he asked him were not answered by the defendant at all.

Recurring now to the testimony of Willis as to the actual occurrences and the true situation and circumstances under which the alleged confession was obtained: Reasonable limits of an opinion preclude a detailed statement of all that occurred. It appears that on the afternoon of the 9th the district attorney had visited the defendant in jail; that the defendant made no statement to him, but said, "I will see you to-night;" and that it was on account of this statement that defendant was subsequently brought to the district attorney's office, where the various officers of the county heretofore referred to were assembled. If defendant intended by the expression, "I will see you to-night," to convey the impression that he would then make a confession to the officers of any connection with the offense charged, it is quite apparent that he abandoned any such intention before he was brought before them. It does not appear that he was then asked to make, nor did he make, any spontaneous statement of his connection with the burning of the building, but, on the contrary, the sheriff and district attorney at once proceeded to interrogate him respecting the matter, and this investigation on their part continued for a long period of time before he made any confession respecting his connection with the commission of the offense. His general attitude when he was brought in, and which continued during the examination and while he was being subjected to examination by the officers, is stated by the district attorney himself: "He would hem and haw about it. . . . When I say he hemmed and hawed, I mean he would not say anything. He was holding his head down a great deal. One minute he would want to tell and the next minute he did not want to tell. . . . The reason why he wanted to tell, I could not tell you. I would say it was because he was scared, and then he would want to tell and hem and haw about it, and finally came out and told the whole story. . . . Mr. Gregory (the sheriff) and I just kept on asking questions relating to the matter."

But it is these very questions put by the sheriff and district attorney, the con-

tinuous and searching examination to which the defendant was put by both of them, in an endeavor to wring out a confession when it was apparent that he was not disposed to make one, and their statements and conduct toward him, which showed that the confession was not freely and voluntarily made, but was the result of threats, intimidation, invective, accompanied with coarse profanity, mental coercion, and false statements used to procure it, the employment of which the law absolutely discountenances and prohibits.

The notes of Willis—the correctness of which are not questioned—show that the sheriff and district attorney, principally the former, in English, and through the medium of the Italian interpreter, interrogated the defendant persistently for upwards of an hour, if not for several hours; that they persisted in making repeated inquiries on the same matters to which the defendant gave them what in their judgment were unsatisfactory replies to such an extent as to elicit from the defendant through the interpreter this declaration to the sheriff, his interrogator: "He says he cannot say anything more than he knows. It looks as if you are not satisfied with what he says." Responded to by the sheriff with, "He says one thing and then he wants to take it back."

During the long inquisitorial ordeal through which he was put by the officers and before he had made any admission of guilt, he was told by the sheriff that he would have to tell all he knew and was accused by both the sheriff and district attorney of not telling the truth in the answers he was giving. The sheriff declared to him that he had absolute proof of his guilt and could convict him before a jury; charged him with another crime in connection with the crime of arson; declared that he could prove he had offered a man money to burn the hotel and could prove that fact whether it was so or not; stated that they had sufficient proof without any confession on his part to convict him; that his brother Marco had made statements in which he implicated the defendant in the burning of the hotel, and if his brother went back on it he would go to the penitentiary for 14 years; they asserted that he had made statements to them the night before of an incriminatory character, when in fact he had made no such statements at all; charged him with repudiating in his answers the statements declared to have been so previously made; and indulged in coarse profanity throughout their examination relative to the statements he was making, and to emphasize their disbelief in their truth.

Supplementing these references to the conduct of the officers during the examination with a few extracts from the notes of Willis: Almost at the beginning of his examination, when the defendant had stated, among other things, that he did not know the name of the man who it was assumed by the officers had actually burned the hotel, the district attorney declared: "Don't you think if I told you those things, then you would ask me what was the man's name, and I would say, 'I don't know,' you would tell me I was a damned liar. That is what you would say. You would tell any reasonable man under the sun; you can't tell any man that has got a damned ounce of sense, and tell them that state of facts, that you don't know a man's name, he would be a God damned fool if he believed you."

Following a large number of interrogatories by both the officers, based on purported statements made the night before by the defendant, which questions however elicited no answer from the defendant incriminating himself, he was further asked why he had said his brother Marco had gone to San Francisco with him, to which he answered, "It don't make any difference."

The district attorney then said:

I understand you now, that you don't want to tell the truth; that is the way I understand you.

A. I am telling the truth.

Q. You don't want to when you say it is none of your business, when your brother go to San Francisco. Suppose my brother and I go to San Francisco, and a man asked me whether I knew. You know damned well I would lie if I said I didn't know.

A. You ask my brother.

Q. Does he tell the truth? You don't. Can't you tell the truth?

A. Yes.

Q. Don't you know whether he went down with you? It is the God damndest proposition I ever heard of.

It also appears from a consideration of the notes of Willis that, after an unremitting, searching, and protracted questioning by the officers in regard to the burning of the hotel had failed to draw any admission from defendant of his connection with it, he was finally asked who had telegraphed to Lepori at San Francisco that the hotel had been burned. Defendant made no answer. Asked if he knew the name of the person who had done so, and, answering in the negative, the sheriff addressed him as follows: "I ain't going to let you go. I won't lie to you. I got too much

proof. I am not going to let you go; that is all there is about it. You are going to stand trial as I told you last night, and you don't have to tell me anything if you don't want to; but, if you want to tell me anything, it must be free and voluntary. I want the truth. I want to know the truth. That is all I do want. Now, do you think that when I can prove that you offered a man \$200—I can prove it whether it is so or not—that you offered a man \$200 to burn that place, that you told him that you had got the coal oil, that you went down to Rose's and had the place insured, and you came back and told a man it was all right, and he told you that you were crazy? Now, I can prove that, and when I can prove that you came up here and shipped away the goods, and I can prove that you said Lepori told you to ship the goods away, and I can prove to you that you told other people that Lepori told you there was going to be a fire, and if your brother goes back on it, he will go to the penitentiary for fourteen years; I don't lie to anybody. I don't lie to anybody. I am telling you what he said. But he said that. I am not telling you all that your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that, and your brother swore that you told him that Lepori was going to have a man come up here to set that house afire. I can prove that by every man in this room. They all heard it, by God, every man in this room heard that. Now, I can prove that you went to work and you did ship this stuff as Lepori told you. I can prove that man came up here from San Francisco with you, and that you stayed here with him and stayed until your brother came up and you,—at the Summit House,—and when your brother came up here, then you took your brother into his bedroom, the first night, and told him this story. Now, you shipped this stuff away, and you shipped stuff that didn't belong to you,—not a God damned bit of it. That cash register didn't belong to you or Lepori. It belonged to Rossi. You said this that you sold it to Rossi; and you shipped the wine and you shipped the bedding and you shipped the mineral water, and, by God, it is selling goods that don't belong to you. That belongs to Rossi, and Rossi has got a bill of sale for that."

Here the district attorney intervened with: "When you went to San Francisco, you went with Rossi and your brother, and they got off at Galt for Sacramento. You told us that Lepori told you to pack that stuff, and that Lepori didn't own it any

more than you did. You told us that Lepori told that when you went back to San Francisco. You went down to Lepori's store to tell him that you had shipped that stuff, and you was also going to tell him that the man that went up with you was at your brother's house. Do you suppose that when I can prove that—"

Here the sheriff, interrupting the district attorney proceeded: "Do you suppose now that when I can prove that to you that any jury in the world is going to let you go? You have got to show where you got all this news. That is all there is about it. You have already told us that Lepori told you, but that won't clear you. You asked me if you could go, and I told you no. I am telling you I can't turn you loose. Suppose I turned you loose with all that evidence against you, what would people say about me? Here is a God damned pretty sheriff and a God damned pretty district attorney, to have all this proof against a man and turn him loose.

... If he (defendant) wants to say anything, he can say it now, because if he don't I am going to strike out to-morrow morning, and I am going to round up this whole God damned bunch. I can't stay here for a week, and I am not going to do it. If he wants to say anything, he can say it now. I want to say to you right now, Borello, that if you don't want to say anything, you don't have to. If you don't want to make any statement, you don't have to, but if you do, it must be free and voluntary on your part, without any concessions, promises, rewards, or anything else. Now, if you want to do it, you can."

Immediately following these declarations by the sheriff and district attorney, the defendant, in response to further questions, stated that Lepori had instigated the burning of the hotel, and had asked him to employ a man to do it, Lepori agreeing to pay the man a hundred dollars if the destruction was successful; that the defendant employed one Dominico Morazi, or a man having some such similar name—defendant could not tell exactly—to do it; that he took him to the Summit House from San Francisco for that purpose, left him there, and the hotel was burned.

Additional excerpts from the notes of Willis might be given showing highly improper conduct on the part of the officers to procure a confession from defendant, but the above will suffice. In this connection it is to be observed that in the lengthy and forceful declaration of the sheriff to the defendant last above quoted, the sheriff did not specifically state to the defendant how far the statement of his brother impli-

cated him in the burning of the hotel; but there can be no reasonable doubt but that the sheriff intended to convey the idea and have the defendant believe, as he naturally would, that his brother had made a statement to the sheriff directly implicating him in it. The defendant knew that his brother Marco was under arrest and had made a statement, but did not know what it contained. No other meaning or intention could be taken by defendant from the language of the sheriff when referring to the statement made by Marco: "I am not telling you all your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that, and your brother swore that you told him that Lepori was going to have a man up there and set that house on fire,"—except that its emphatically reiterated character was to suggestively and insinuatingly impress the defendant with the belief that his brother's statement had in fact implicated him.

No attempt was made on the part of the prosecution to question the accuracy of what is shown by the testimony of Willis to be the exact circumstances and method employed by the officers to procure the confession.

On this showing made, the defendant moved the court to set aside the order theretofore made admitting the confession in evidence, under the right reserved to him by the court to do so at the time the confession was originally admitted in evidence, and on the ground that it was not freely and voluntarily made, which motion the court denied. This was error. The court should have granted the motion. While, upon the preliminary showing made by the prosecution, and upon which the admission of the confession was made, it appeared in answers to general questions that the confession had been obtained freely and voluntarily, the uncontradicted testimony of the stenographer showed exactly how it was obtained, and by what method and conduct on the part of those who had testified to its free and voluntary character, and conclusively showed that it was not so made, but was obtained by a method inquisitorial in its nature and of the "third degree" in character; the assumption of a dominating and browbeating attitude of the officers toward the defendant, and the employment of deceptions, threats, and intimidations, emphasized with coarse profanity.

That a confession so extorted cannot be admitted in evidence is firmly established in the jurisprudence of this country. *Bram v. United States*, 168 U. S. 532, 42 L. ed.



568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547; *People v. Loper*, 159 Cal. 6, 112 Pac. 720.

The judgment and order appealed from are reversed.

We concur: Beatty, Ch. J.; Henshaw, J.; Melvin, J.; Shaw, J.

Sloss, J.: I concur.

The methods employed to induce the defendant to confess were, I think, more extreme and unfair than those which were held by a majority of the court in the *Loper* Case to require the exclusion of the confession there obtained. It is impossible in the present case to avoid the conclusion that the confession was forced from the defendant by means of intimidation. Apart from anything else, there was a direct threat that defendant's brother would be subjected to a long term of imprisonment for perjury, if he did not so testify as to fasten upon the defendant the guilt of the crime with which he was charged. A confession resulting from the use of such means cannot, in any fair sense, be said to have been free and voluntary.

Angellotti, J.: I concur.

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

LEROY MARK, Plff. in Err.,

DISTRICT OF COLUMBIA.

(37 App. D. C. 563.)

#### Tax — enforcement — prosecution.

1. An excise tax on vehicles may be enforced by criminal prosecution.

#### Note. — Validity of excise or license tax upon automobiles.

The early cases upon the question here considered are gathered in the note to *Christy v. Elliott*, 1 L.R.A. (N.S.) 215, and the present note includes only the subsequent decisions upon the point indicated in the title.

#### Legislative acts.

The legislature has plenary power as to the subjects and objects from which it will exact revenue, except as it is limited by the Constitution, and a constitutional provision giving the legislature power to provide such revenue as is necessary by levying a tax by valuation, and giving it power to tax peddlers, auctioneers, etc., by general law "uniform as to the class upon which it operates," and providing further that the specification of objects and subjects of taxation should not deprive the legislature of 37 L.R.A. (N.S.)

#### Same — double — property and excise.

2. That a property tax has been paid upon motor vehicles does not prevent the imposition upon them of an excise tax.

#### Same — motor vehicles — seating capacity.

3. An excise tax upon motor vehicles is not invalid because graduated according to seating capacity.

(December 4, 1911.)

**E**RROR to the Police Court to review a judgment overruling a motion to quash an information charging defendant with failing to pay the wheel tax on an automobile owned and operated by him. Affirmed. The facts are stated in the opinion.

Mr. W. S. Duvall, for plaintiff in error: The wheel-tax law is invalid.

Cooley, Taxn. § 394; 27 Am. & Eng. Enc. Law, 609; *State v. Cumberland & P. R. Co.* 40 Md. 51; *Downes v. Bidwell*, 182 U. S. 261, 45 L. ed. 1096, 21 Sup. Ct. Rep. 770; *Re Ah Fong*, 3 Sawy. 157, Fed. Cas. No. 102; *Boyd v. Nebraska*, 143 U. S. 169, 36 L. ed. 112, 12 Sup. Ct. Rep. 375; Cooley, Const. Lim. 7th ed. 246 et seq.; *United States ex rel. Kerr v. Ross*, 5 App. D. C. 241; *Curry v. District of Columbia*, 14 App. D. C. 432; *Lappin v. District of Columbia*, 22 App. D. C. 68; *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430; *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 160, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *State v. Cumberland & P. R. Co.* 40 Md. 51.

Messrs. Edward H. Thomas and Francis H. Stephens, for defendant in error:

Congress is justified in putting automobiles into a class by themselves for the

the power to require other objects or subjects to be taxed in such manner as might be consistent with the principles of taxation of the Constitution, does not deprive the legislature of power to authorize a municipality to pass an ordinance regulating the use of its streets by vehicles, and imposing a license tax on such vehicles for revenue purposes. *Harder's Fire Proof Storage & Van Co. v. Chicago*, 235 Ill. 53, 85 N. E. 245, 14 A. & E. Ann. Cas. 536.

So, a legislative act requiring every resident or nonresident owner of an automobile to file a verified declaration that he is competent to drive a motor vehicle, and a statement containing his name and address and a description of his automobile, and providing for a registration fee of \$1, is within the exercise of the police power of the state. *Unwen v. State*, 73 N. J. L. 529, 64 Atl. 163.

And such fee does not infringe the state or Federal Constitutions on the ground that it constitutes double or special taxation,

purpose of subjecting them to a double tax not imposed upon other classes of personal property.

*Mark v. District of Columbia*, 35 App. D. C. 574; *Berry, Automobiles*, § 41; *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. ed. 1015, 1020, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; *Barbier v. Connolly*, 113 U. S. 27-32, 28 L. ed. 923-925, 5 Sup. Ct. Rep. 357; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Huddy, Automobiles*, 72, 73, 75; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E.

1035, 3 A. & E. Ann. Cas. 487; *Com. v. Hawkins*, 14 Pa. Dist. R. 592; *Kersey v. Terre Haute*, 161 Ind. 471, 68 N. E. 1027; *New York ex rel. Brooklyn City R. Co. v. New York State Tax Comrs.* 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. Rep. 713; *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560.

While the court will not infer an intention to impose a double tax, but rather will uphold that construction of a statute which relieves property from a double taxation, when the statute is susceptible of such a construction without forcing, still the power of the legislature in that respect is undoubted.

*Gray, Limitations of Taxing Power*, § 1362; *Judson, Taxn.* § 426; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 155, 41

or infringes upon the privileges or immunities of any citizen of another state. *Ibid.*

And such act, being a legitimate exercise of the police power, is unaffected by the provisions of the 14th Amendment of the Federal Constitution. *Ibid.*

And a special provision in the act relating to dealers, and imposing an increased fee upon them, does not create an injurious distinction, since the limited period covered by the license to dealers in respect to any one machine, and other circumstances, distinguish the dealer from the private owner. *Ibid.*

And there being nothing to show that the fee of \$1 is in excess of the expense of registration and regulation, the fee is a license, and not a tax. *Ibid.*

This case was affirmed in 75 N. J. L. 500, 68 Atl. 110, where the court said that they concurred in the former decision, except that they did not consider it necessary to determine whether the registration fee of \$1 was in the nature of a license fee, or simply a fee exacted as a reasonable charge for issuing the certificate and the registering of it, as in either case it was clearly not a tax upon property, but a valid exercise of the police power.

And a legislative act fixing a fee for registration at \$3 for each motor vehicle having a rating of 30 horse power or more, and providing for a fee of \$1 for a license to drive a car less than 30 horse power, and \$2 for a license to drive cars over that, and providing that the money received for license fees, etc., should be paid to the state treasurer, to be appropriated for use in repairing or improving the roads of the state, is a valid exercise of the police power, and does not impose a tax for revenue, but merely fixes a reasonable fee for regulating and supervising motor vehicles. *State, Cleary, Prosecutor, v. Johnston*, 79 N. J. L. 49, 74 Atl. 538.

And the fact that the public treasury is augmented by such fees does not have the effect of making such fee a tax. *Ibid.*

But if such fees be regarded as license fees 27 L.R.A. (N.S.)

imposed for revenue, the legislature has power to exact them. *Ibid.*

This case was relied upon in *Kane v. Titus*, — N. J. —, — L.R.A. (N.S.) —, 80 Atl. 453, where a statute imposing a registration fee in excess of the cost of registration was held to be a revenue measure, and within the power of the legislature.

And in this case the charging of an annual sum for the use of the highways by automobiles, instead of a mileage fee, was held a matter within the discretion of the state, the only limitation upon such power being that the amount charged should be reasonable. *Ibid.*

And it was held that a statute fixing registration fees according to the horse power of the machine used was not a property tax, and was not invalid because it was imposed without regard to the value of the property upon which it was laid, since such imposition was a license or privilege tax, which was properly based upon the destruction to the highway done by the machine used. *Ibid.*

And it was further held that the provisions of the act requiring residents and non-residents who used the highways to pay registration fees based upon the horse power of their automobiles, which fees were to be used to defray the expenses of maintaining the highway, did not constitute a discrimination against nonresidents, and did not contravene the commerce clause of the Federal Constitution. *Ibid.*

#### Municipal ordinances.

A city cannot levy a license on automobiles except under authority from the legislature. *Mobile v. Gentry*, 170 Ala. 234, 54 So. 488.

A license may be imposed and a fee collected with a view to revenue only, and the fact that a license fee exacted from vehicles, including automobiles, is set aside as a special fund, to be used for improving and repairing the city streets, does not render an ordinance or the statute authorizing its passage unconstitutional. *Harder's Fire Proof Storage & Van Co. v. Chicago*, supra.

L. ed. 668, 17 Sup. Ct. Rep. 255; *Chicago v. Collins*, 175 Ill. 445, 49 L.R.A. 408, 67 Am. St. Rep. 224, 51 N. E. 907; *Western U. Teleg. Co. v. State*, 9 Baxt. 509, 40 Am. Rep. 99; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. 361; *United States v. Benzon*, 2 Cliff. 512, Fed. Cas. No. 14,577; *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Pittsburg, Ft. W. & C. R. Co. v. Com.* 66 Pa. 73, 5 Am. Rep. 344; *New York v. Chicago*, B. & Q. R. Co. 56 Neb. 572, 76 N. W. 1065; *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23, 23 S. E. 120; *Frankfort v. Gaines*, 88 Ky. 59, 10 S. W. 123; *Lott v. Hubbard*, 44 Ala. 593.

Robb, J., delivered the opinion of the court:

This is a writ of error from the police court, and involves the validity of the so-called wheel-tax law of May 18, 1910 (36 Stat. at L. 379, chap. 248).

In the act of March 3, 1909 (35 Stat. at L. 693, chap. 250), making appropriations for the expenses for the government of the District of Columbia, provision was made for a secretary or acting secretary of the automobile board, and it was further provided that thereafter there should be "assessed and collected an annual wheel tax on all automobiles, or other motor vehicles, owned and operated in the District of Co-

lumbia, having seats for only two persons, the sum of \$3; and on all such vehicles having seats for more than two persons, an additional tax of \$2 for each additional seat." No provision was made for the enforcement of the collection of this tax. Consequently, in the next District appropriation act, May 18, 1910 (36 Stat. at L. 379, chap. 248), the act of July 1, 1902 (32 Stat. at L. 617, chap. 1352), providing, *inter alia*, for local real estate, personal property, and license taxes, was amended by adding to § 7 of said act the following: "That hereafter there shall be assessed and collected an annual wheel tax on all automobiles or other motor vehicles owned or operated in the District of Columbia, having seats for only two persons, the sum of \$3; and on all such vehicles having seats for more than two persons, an additional tax of \$2 for each additional seat."

After the going into effect of said act of 1910, there was filed in the police court, under the authority of said act of July 1, 1902, an information charging the plaintiff in error, hereinafter called the defendant, with failing to pay the wheel tax of \$5 on a certain two-seated, three-passenger automobile owned and operated by him. The defendant filed a motion to quash the information, the grounds of the motion being the alleged indefiniteness of said wheel-

And the fact that an ad valorem tax has already been paid upon vehicles, or that the owner of vehicles has paid an occupation tax, does not exempt him from paying a license for the use of the public streets, and the ordinance referred to in the above paragraph is not unconstitutional on the ground that it constitutes double taxation. *Ibid.*

A provision of a municipal act giving power "to regulate and license the use of carts, drays, wagons, coaches, omnibuses, and every description of carriages and vehicles kept for hire, and to license and regulate the use of the streets of the town or city by persons who use vehicles or solicit or transact business thereon," empowers a municipality to levy a license fee on users of automobiles for pleasure, as well as upon vehicles kept for hire and for business purposes. *Mobile v. Gentry*, *supra*.

Where the right of a city to license vehicles is conceded, and the charter expressly authorizes it to enact ordinances, and to enforce them by fine and imprisonment, the city has power to enact an ordinance providing for taxing vehicles used upon its streets, and providing for the use of tags thereon, and punishing a violation of the ordinance by fine or imprisonment. *Kellaher v. Portland*, 57 Or. 578, 110 Pac. 492, 112 Pac. 1076.

Although a city is given power to license vehicles, the classification must be on some reasonable basis, and all vehicles within the

class sought to be taxed must be included. *Ibid.*

An ordinance taxing vehicles used on city streets is not discriminatory in that it expressly exempts from its operation vehicles used for pleasure, and also out of town vehicles. *Ibid.*

And an ordinance providing for the licensing of motor vehicles of two or more seats, which was valid when passed, cannot be rendered invalid, on the ground of unjust discrimination, by the subsequent introduction of motor vehicles of only one seat. *Ayres v. Chicago*, 239 Ill. 237, 87 N. E. 1073. The court said that if it was conceded that there were motor vehicles of but one seat in use when the above ordinance was passed, they were not prepared to say that this would render it invalid, since there may have been reasons known to the city council in regard to the character and use of the excluded vehicles for exempting them from the operation of the ordinance. *Ibid.*

But an ordinance licensing vehicles, which imposes a fee on vehicles drawn by horses which are used for business purposes, but omits from its terms automobiles used for like purposes, is void, since such classification is not made on a reasonable basis. *Kellaher v. Portland*, *supra*.

The word "automobile" in an ordinance regulating the licensing of vehicles is sufficiently broad to include auto trucks, so that the ordinance cannot be avoided because of a failure to include them. *Ibid.*

tax law; the alleged conflict between said law and the organic act of Congress of June 11, 1878 (20 Stat. at L. 102, chap. 180); because it includes for taxation all automobiles operated in the District, irrespective of whether they may be taxed as personal property elsewhere; because the payment of said wheel tax, it is asserted, may not be enforced by criminal proceedings; because said wheel-tax law, if an occupation tax, is an attempt to enforce collection of a second license tax for the privilege of operating an automobile on the streets; and because said wheel-tax law, the defendant asserts, is "so arbitrary, unequal, discriminating, and unusual, as to render it void."

We will first endeavor to determine the nature of the tax from the payment of which the defendant seeks to escape. Under the act of June 29, 1906 (34 Stat. at L. 621, chap. 3615), the speed of automobiles in the District was regulated. In the following year, March 2, 1907 (34 Stat. at L. 1126, chap. 2510), provision was made for identification number tags. This was clearly a police regulation in aid of the prior act. The act under consideration bears no relation to these police measures,—it is a revenue-producing measure, and imposes a charge upon all automobiles owned or operated in this District.

A similar tax on carriages, authorized by

the act of June 5, 1794 (1 Stat. at L. 374, chap. 45), was sustained as an indirect tax or excise (*Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556). A tax on expense, the court said, is an indirect tax, and a tax on a consumable commodity like a carriage is a tax on the expense of the owner.

In *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, a similar excise on tobacco manufactured for consumption was also sustained. In *Thomas v. United States*, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, a stamp tax on sales of shares of stock was sustained as an excise duty.

It is probable that Congress entertained the view that automobiles, theoretically, at least, are owned or operated by persons most able to bear the burdens of taxation; and that the operation of such vehicles is attended with increased expense to the municipality. Congress, therefore, acting as a local legislature for the District (*Gibbons v. District of Columbia*, 116 U. S. 407, 29 L. ed. 681, 6 Sup. Ct. Rep. 427), followed the lead of state legislatures and distinguished automobiles as a proper class to bear an excise duty in addition to other taxes. There is nothing indefinite about the law. It distinguishes a class and imposes an excise thereon. Such classification "need not be either logically appropriate or

Where a state motor vehicle law provides that, with certain exceptions, local authorities shall have no power to pass any ordinance requiring of the owner of motor vehicles any license or permit to use the streets, and enacts that all ordinances in force are to be inoperative, and that all acts inconsistent with the motor vehicle law are repealed, a city has no power to enact an ordinance in pursuance of a prior statute authorizing it to enact an ordinance imposing a tax upon owners of automobiles, for the privilege of operating them along the city streets. *Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809.

And an ordinance prohibiting the use of the public streets to the owners of automobiles and other motor vehicles named, unless the owners of automobiles should pay the city an annual tax of \$5, the tax to be applied to the fund for the repair of streets, imposes a license, and not a tax to raise revenue for the municipal expenses, and is in conflict with the state motor vehicle law. *Ibid.*

And where the state act regulating the licensing of automobiles and chauffeurs provides that "local authorities shall have no power to pass, enforce, or maintain any ordinance, rule, or regulation requiring from any owner or chauffeur to whom this article is applicable, any tax, fee, license, or permit for the use of the public highways, or excluding any such owner or chauffeur from the free use of such public highways" 37 L.R.A.(N.S.)

... and no ordinance, rule, or regulation contrary to, or in any wise inconsistent with, the provisions of this article, now in force or hereafter enacted, shall have any effect,"—a municipality cannot require licenses for vehicles and drivers in addition to the licenses issued by the state. *Barrett v. New York*, 189 Fed. 268.

But in *Ayres v. Chicago*, supra, it was held that the provision of a state motor vehicle act, that no owner of a motor vehicle who had obtained a certificate from the secretary of state, as provided for in the motor vehicle act, should be required to obtain any other license or permit to use or operate his vehicle, and that such owner should not be required to display upon his vehicle any other number than that furnished by the secretary of state, is not violated by a city ordinance requiring owners of motor vehicles to pay an annual license to the city on their machines, since the word "license," as used, meant tax, and the issuing of the license was merely the giving of a receipt by the city for the payment of the tax.

The general subject of license fees on vehicles for the use of streets is considered in the note to *Tomlinson v. Indianapolis*, 36 L.R.A. 413, and that note is supplemented by the note to *Waters-Pierce Oil Co. v. Hot Springs*, 16 L.R.A.(N.S.) 1035, as to the particular phase of the subject presented by the question of the validity of license fees, as affected by discrimination between different classes of vehicles. J. T. W.

scientifically accurate." It is enough if it is impartial within the class. *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560. That case is also a direct answer to the contention that payment of the tax may not be enforced by criminal prosecution.

This wheel-tax act being an excise measure, as above pointed out, is not inconsistent with the organic act of 1878; and if it was, it would not, for that reason, be invalid, since both acts emanating from Congress, the later would govern.

The contention that because the defendant has paid a personal-property tax upon the value of his automobile, Congress may not require him to pay this excise tax, must also fail. Property that has been charged with a general tax may also be charged with an excise, and either or both forms of taxation may be repeated or increased within the will of the legislature, subject, of course, to the limitation that such legislation must be reasonable. *Patton v. Brady*, supra.

The defendant further contends that this law is void because there is no justification for the subdivision of the class. He does not deny that the law is uniform within the subdivisions of the class, but he says there is no logical reason for grading the tax according to a progressive rate. This last vehicle affected. As we have seen, that was a question for Congress. Moreover, similar statutes have received judicial sanction. *Harder's Fire-Proof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245, 14 A. & E. Ann. Cas. 536; *Babbitt, Motor Vehicles*, § 91; *State v. Swagerty*, 203 Mo. 517, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 102 S. W. 483, 11 A. & E. Ann. Cas. 725; *Opinion of Justices*, 195 Mass. 607; *Hylton v. United States*, 3 Dall. 171, 1 L. ed. 556.

In *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, a Federal inheritance-tax law was sustained. That law discriminated between relatives, and again between relatives and strangers, granted exemptions, and imposed the tax according to a progressive rate. This last feature was attacked as repugnant to fundamental principles of equality. The court, without intimating any opinion as to its right to declare the law void for such a reason, disposed of the contention in these words: "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers and a number of economic writers contend that a progressive tax is more just and equal than a proportional 37 L.R.A.(N.S.)

one." The court was careful to add, however, that if a case should ever arise "where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so." In the same opinion Mr. Justice (now Mr. Chief Justice) White, at page 94, set forth a partial list of excise acts during Washington's administration. Almost all of those acts were open to the objection raised against the act under consideration. See also, *Campbell v. California*, 200 U. S. 87, 50 L. ed. 382, 26 Sup. Ct. Rep. 182.

In the light of the foregoing, it is our conclusion that this wheel tax is within the power of Congress to enact, and that the judgment of the Police Court must be affirmed.

#### MAINE SUPREME JUDICIAL COURT.

##### STATE OF MAINE

v.

HENRY C. PARSHLEY.

(— Me. —, 81 Atl. 484.)

#### Intoxicating liquors — Importation — constructive delivery — seizure.

Paying the express charges and signing the receipt book for intoxicating liquors imported from another state do not constitute a constructive delivery, so as to subject them to seizure under the state law, in view of the Wilson act, where the consignee stated that he was uncertain whether or not the liquors were his, and requested the carrier, which had not tendered them to him, to hold them until he ascertained if they were, and only seven hours elapsed between that time and the attempted seizure.

(November 14, 1911.)

**R**EPORT by the Supreme Judicial Court for Sagadahoc County for the determination by the Law Court of a question arising upon appeal from a judgment of the Bath Municipal Court finding respondent guilty of storing intoxicating liquors for the purpose of illegal sale. Judgment for respondent.

**Note.**—As to when interstate transportation of intoxicating liquors is deemed to have terminated, see notes to *State v. Intoxicating Liquors*, 11 L.R.A.(N.S.) 550; *State v. Intoxicating Liquors*, 23 L.R.A.(N.S.) 1020; and *State v. Intoxicating Liquors*, 29 L.R.A.(N.S.) 745.

The report of **Savage**, Presiding Justice, is as follows:

"This was a process for the seizure of intoxicating liquors alleged to be stored for the purpose of illegal sale in the office of the American Express Company in the city of Bath. It was issued by the Bath municipal court, and is dated August 5, 1910.

"The following facts appear in evidence:

"A barrel containing intoxicating liquors was shipped from Boston, Massachusetts, to Bath, Maine, the barrel, according to the marks thereon, being consigned to H. C. Parshley. The driver for the express company called at the respondent's shop about 10 o'clock A. M., notified him of the arrival of this barrel, and asked if it was for him and what he wanted done with it. Respondent said he did not know whether it was for him or not, but that he would pay the express charges, which he did, and signed the express receipt book, and told the driver to keep the liquors until he (Parshley) found out about it.

"The liquors remained in the storeroom of the express company until about 5 o'clock in the afternoon of the same day, when they were seized under this warrant. Between the time the notice was given by the driver and time of the seizure, no notice had been received by the express company from Parshley, or anyone representing him, as to the disposition of the liquors. But the driver testifies that, if any direction had been given by Parshley, he understood that it would have been his duty to carry and deliver the barrel to the respondent, as directed.

"Upon the foregoing statement of facts the case is, by agreement of parties, reported to the law court for its determination. Only a single question is reserved. All others necessary for the state to prove are admitted by the respondent. If the court is of opinion that the barrel of liquors seized had been sufficiently delivered by the express company to the respondent, so that it was no longer under the protection of the interstate commerce provision of the United States Constitution and of the Federal statutes relating to the same, judgment is to be rendered for the state as follows: 'Judgment of the Bath municipal court affirmed' otherwise, a *nol. pros.* is to be entered."

Mr. Arthur H. Stetson, for the State:

The act of the express company in notifying the respondent of the arrival of the goods, and the act of the respondent in signing the express book and paying the charges, constituted a constructive delivery of the goods, made the express company the agent of the respondent in holding them, and rendered them liable to seizure 37 L.R.A.(N.S.)

under the laws of the United States and of the state of Maine.

State v. Intoxicating Liquors, 94 Me. 335, 47 Atl. 531, 15 Am. Crim. Rep. 475; State v. Intoxicating Liquors, 95 Me. 140, 49 Atl. 670; State v. Intoxicating Liquors, 96 Me. 415, 52 Atl. 911; State v. Intoxicating Liquors, 102 Me. 206, 11 L.R.A.(N.S.) 550, 66 Atl. 393; State v. Intoxicating Liquors, 102 Me. 385, 120 Am. St. Rep. 504, 67 Atl. 312; State v. Intoxicating Liquors, 104 Me. 463, 23 L.R.A.(N.S.) 1020, 72 Atl. 331; State v. Intoxicating Liquors, 106 Me. 138, 76 Atl. 268.

Mr. Frank L. Staples, for respondent:

Delivery is an essential element in determining whether the goods have arrived in the receiving state; without a delivery of some sort, there is no arrival, within the meaning of the word as used in the Wilson act.

Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 445, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; State v. Intoxicating Liquors, 102 Me. 206, 11 L.R.A.(N.S.) 550, 66 Atl. 393; State v. Intoxicating Liquors, 102 Me. 385, 120 Am. St. Rep. 504, 67 Atl. 312; State v. Intoxicating Liquors, 104 Me. 463, 23 L.R.A.(N.S.) 1020, 72 Atl. 331; State v. Intoxicating Liquors, 106 Me. 138, 29 L.R.A.(N.S.) 745, 76 Atl. 265, 20 A. & E. Ann. Cas. 668; State v. Intoxicating Liquors, 106 Me. 142, 76 Atl. 267.

If the package be a "C. O. D." package, transported by express into the receiving state, there must be an actual delivery; and the protection of the Federal laws remains over it until such delivery takes place.

American Exp. Co. v. Iowa, 190 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Foppiano v. Speed, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; State v. Intoxicating Liquors, 102 Me. 385, 120 Am. St. Rep. 504, 67 Atl. 312.

Bird, J., delivered the opinion of the court:

There being no claim of an actual delivery, the sole question for determination is whether the liquors were constructively delivered before seizure under process.

The act of Congress of August 8, 1890

(26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), known as the "Wilson act," provided that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The meaning of the word "arrival" as employed in this act was authoritatively settled in *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130. The conclusions reached in that case have been summarized by this court as follows:

1. The elementary and long-settled doctrine is reiterated that, prior to the Wilson act, in case of interstate shipments, "delivery and sale in the original packages was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned."

2. That the Wilson act manifested no attempt on the part of Congress to delegate to the states the right to forbid the transportation of merchandise from one state to another, "since it merely provided, in the case of intoxicating liquors, that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package."

3. That the state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but that, after such delivery, the state has power to prevent the sale of the liquors, even in the original package.

4. That the question whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, is immaterial. *State v. Intoxicating Liquors*, 102 Me. 385, 395, 120 Am. St. Rep. 504, 67 Atl. 312.

In the case under consideration, as already seen, there is no pretense of an actual delivery; but it is urged by the state that there was a constructive delivery, and that such is sufficient to meet the requirement of the Wilson act. In *Heyman v. Southern R. Co.* *ubi supra*, there were no facts justifying the passing upon the question of constructive delivery; but the court in its opinion says: "Of course, we are not called upon in this case, and do not decide, if

goods of the character referred to in the Wilson act, moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify, if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson act, because constructively delivered." *Id.* 203 U. S. 276, 51 L. ed. 180, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130.

This language of the Supreme Court of the United States has already been considered by this court in *State v. Intoxicating Liquors*, 102 Me. 385, 395, 120 Am. St. Rep. 504, 67 Atl. 312, in which it is held that the point, if tenable, is unimportant from lack of facts to render it applicable to the cases under consideration, and in *State v. Intoxicating Liquors*, 104 Me. 463, 23 L.R.A. (N.S.) 1020, 72 Atl. 331, and again in *State v. Intoxicating Liquors*, 106 Me. 138, 29 L.R.A. (N.S.) 745, 76 Atl. 265, 20 A. & E. Ann. Cas. 668.

In the case in 104 Me. 463, it is said: "In this paragraph the court seems to have undertaken to state, but not to decide, the three essential elements of constructive delivery to be notice to the consignee of the arrival of the goods, a reasonable time on his part after notice to receive them, and a mutual design or arrangement with the carrier to hold them for the consignee." And, referring to the words "designedly left in the hands of the carrier for an unreasonable time," the court says: "This phrase was undoubtedly intended to allude to a passive or silent understanding between the shippers of liquors, the carriers, and the consignees, with reference to those transactions which operate to enable an evasion of the law and assist consignees in obtaining a safe delivery of their contraband goods. . . . The rule is well established that a constructive delivery can be effected only by an agreement between the carrier or middleman and the buyer or person claiming under him, whereby the former agrees to hold goods for the latter for some purpose other than that of carriage to and delivery at their original destination. In the absence of an agreement with the buyer to the contrary, the carrier will be presumed to hold the goods in his original capacity. The carrier cannot constitute himself the buyer's agent for the custody of the goods, nor can the buyer make the carrier his agent for custody without the carrier's consent. . . . The relation of carrier to the shipper, the consignee, and the goods is originally fixed by law, and by a contract

between the parties, which is that the carrier shall safely carry the goods to their place of destination and there deliver them to the consignee. This contract, once existing, can be changed only by the operation of law or by an agreement between the parties. When the goods arrive at their journey's end, it is the duty of the carrier to store them. This duty is imposed by law. When stored, they are still in the possession and custody of the carrier, and the only change in his relation to the goods is the extent of his liability. The goods are still in transit. . . . The contract is still binding upon the carrier to deliver the goods to the consignee, and this obligation can be terminated only by actual or constructive delivery, or by a new contract with the consignee in place of the contract of carriage."

In 106 Me. 138, this court says: "In *Heyman v. Southern R. Co.* 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130, the court was careful to say that it did not decide that the Federal protection would not be lost where the consignee, after notice, designedly left the liquors in the hands of the carrier for an unreasonable time. The locality of the liquors is not made the test. All that the Federal courts seem to require is that the liquors shall once have been turned over to and accepted by the consignee. This may occur without any removal of the liquors themselves from the freight sheds of the carrier." This case and that in 104 Me. 463, 23 L.R.A. (N.S.) 1020, 72 Atl. 331, were contracts for the carriage of goods as freight, and not by express. In the latter case it was held there was no constructive delivery, and in the former that there was; but in that case not only had all the goods been receipted for, but part of them had been delivered from the freight shed of the carrier to the agent of the consignee.

Was there constructive delivery of the liquors in the case at bar? As has been noted, the contract between the shipper and carrier provided for carriage by express. Such contract includes the delivery of the goods to the consignee personally, or at his residence or place of business, and until such delivery the liability of the carrier continues. *State v. Intoxicating Liquors*, 101 Me. 430, 64 Atl. 812, Id., 102 Me. 211, 11 L.R.A. (N.S.) 550, 66 Atl. 393; *Atchison, T. & S. F. R. Co. v. Interstate Commerce Commission* (Com. C.) 188 Fed. 229, 237. The record in the case at bar does not show that the liquors were ever tendered to the plaintiff personally or at his place of business. Notice was given him at 10 o'clock of the forenoon of a certain day that the liquors

had arrived, and inquiry made if they were for him, and what he wanted done with them. He replied that he was uncertain if his or not, and said that he would pay the express charges, and directed the driver of the carrier to keep the liquors until he ascertained. He paid the charges and signed the express receipt book.

We do not think that the facts present a case within the exception from the rule as to delivery suggested in *Heyman v. Southern R. Co.* *ubi supra*. There is no evidence that the liquors were designedly left in the hands of the carrier. At most, there is but a suspicion or surmise arising from the character of the goods; but there is no evidence contradicting the statement of plaintiff that he was not informed as to their ownership and that he asked opportunity to learn. Neither do we think they were held by the carrier an unreasonable length of time. If, instead of liquors, the goods had been any other commodity, would seven hours have been an unreasonable delay? And to hold that a delay reasonable as to other commodities is unreasonable with respect to intoxicating liquors would be to refuse to the latter before delivery the same protection which the commerce clause of the Constitution affords to other goods. See *Heyman v. Southern R. Co.* 203 U. S. 270, 276, 277, 51 L. ed. 178, 180, 181, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 135, 136, 51 L. ed. 987, 991, 992, 27 Sup. Ct. Rep. 606.

Until delivery, commerce in intoxicating liquors is left by the Wilson act as free and untrammelled, and subject to the same regulations, as other commodities; but to hold unreasonable delay in case of the former to be different from that of the latter would be discrimination, and would permit the police laws of the state to affect the regulation of commerce. *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 222, 53 L. ed. 972, 973, 29 Sup. Ct. Rep. 633; *Ex parte Eaglesfield* (D. C.) 180 Fed. 558, 562. The regulation of commerce adopted by the Wilson act is one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. *Re Rahrer*, 140 U. S. 545, 559, 561, 35 L. ed. 572, 575, 576, 11 Sup. Ct. Rep. 865; *Heyman v. Southern R. Co.* 203 U. S. 270, 274, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130. Yet, if unreasonable delay is to be interpreted in view of the police laws of the states, no uniform rule is established, and delay reasonable in a license state will be unreasonable in a state where prohibition prevails. The receipt is not conclusive, but may be modified in its terms or wholly contradicted by evidence. Plaintiff, neverthe-



less, had a right, under the contract of carriage, to delivery either to him personally or where he should direct, and we find no evidence of waiver of this right. Indeed, it does not appear that the liquors bore any address, except the name of defendant and the words "Bath, Maine," and, until directed where to make it, the express company could make no delivery. Finally, not only is a designed leaving in the hands of the carrier for unreasonable time not proven, but it is nowhere affirmatively alleged.

Applying the test of our own decisions, we do not find constructive delivery proven by the facts presented in the reported case. There is no satisfactory evidence of a change of the contract of carriage by agreement of the parties, nor was such a change effected by operation of law. *State v. Intoxicating Liquors*, 104 Me. 463, 468, 23 L.R.A.(N.S.) 1020, 72 Atl. 331. Nor is there evidence that, either contemporaneously with or subsequent to the giving of the receipt, there was delivery of a part of the goods, as in *State v. Intoxicating Liquors*, 106 Me. 138, 140, 29 L.R.A.(N.S.) 745, 76 Atl. 265, 20 A. & E. Ann. Cas. 668.

A *not. pros.* may be entered.

Spear and Cornish, JJ., concur in the result only.

#### MISSOURI SUPREME COURT. (In Banc.)

STATE OF MISSOURI EX REL. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

v.

DANIEL O'CONNELL TRACY, Judge, et al.

(237 Mo. 109, 140 S. W. 888.)

**Prohibition — failure to state cause of action — jurisdiction.**

That informations against a railroad company for alleged violation of a municipal or-

*Note. — Prohibition to prevent numerous unfounded prosecutions for alleged violation of statute or ordinance.*

There is a difference of opinion among the courts as to whether the mere fact that a prosecution is for the violation of an invalid statute or ordinance in and of itself furnishes ground for invoking a writ of prohibition to prohibit the prosecution, although in substantially all the cases it is conceded that a writ of prohibition is not the proper remedy if there is some other adequate remedy. It is not the purpose of this note, however, to discuss the general question as to when a writ of prohibition will issue, the 37 L.R.A.(N.S.)

dinance in running its cars across streets, filed in a court which has jurisdiction of the subject-matter, fail to state a cause of action, will not justify the issuance of a writ of prohibition against the prosecutions, although the number is so great as to be oppressive.

(Graves and Lamm, JJ., dissent.)

(July 3, 1911.)

**P**ETITION for a writ of prohibition to restrain respondents from prosecuting relator for alleged violations of a certain ordinance. Writ denied.

The facts are stated in the opinion.

Messrs. T. M. Pierce and J. L. Howell for relator.

Messrs. Lambert E. Walther and William E. Baird, for respondents:

Where the inferior court has jurisdiction, prohibition will not lie, unless it appears that the court has abused its powers, or has entertained the case for improper purposes.

High, Extr. Legal Rem. 3d ed. § 767; *State ex rel. Johnson v. Withrow*, 108 Mo. 7, 18 S. W. 41; *State ex rel. Union Depot R. Co. v. Southern R. Co.* 100 Mo. 60, 13 S. W. 398; *State ex rel. Hoffmann v. Scarritt*, 128 Mo. 331, 30 S. W. 1026; *Delaney v. Police Court*, 167 Mo. 679, 67 S. W. 589; *State ex rel. McNamee v. Stobie*, 194 Mo. 14, 92 S. W. 191; *State ex rel. Merriam v. Ross*, 122 Mo. 435, 23 L.R.A. 534, 25 S. W. 947.

The inferior court has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, in no way affects the jurisdiction of the court.

High, Extr. Legal Rem. 3d ed. § 767a; *State ex rel. Union Depot R. Co. v. Southern R. Co.* 100 Mo. 59, 13 S. W. 398; *Dowdy v. Wamble*, 110 Mo. 285, 19 S. W. 489; *State ex rel. Hoffmann v. Scarritt*, 128 Mo. 340, 30 S. W. 1026; *Schubach v.*

question here raised being limited to the question whether the aid of this writ may be invoked to prevent numerous or multifarious prosecutions for violation of an invalid statute or ordinance. In other words, the question is whether the fact that a person is being subjected to several prosecutions for the violation of an invalid statute or ordinance entitles him to a writ of prohibition, on the theory that he has no adequate remedy at law. The courts considering the matter are in harmony in holding that whenever an inferior court proceeds to act in excess of its jurisdiction, and when, as incidental to its action, it involves the submission to multitudinous and persecuting prosecutions in such a way as to make its acts

McDonald, 179 Mo. 182, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020.

Kennish, J., delivered the opinion of the court:

This is an original proceeding in prohibition brought by the relator, Terminal Railroad Association of St. Louis, against the respondents, Daniel O'Connell Tracy, judge of the first district police court of the city of St. Louis, and the city of St. Louis. Relator filed its petition in this court on the 28th day of June, 1910. A preliminary rule in prohibition was issued against respondents as prayed, and made returnable to the October term, 1910. In due time the respondents filed their return to the writ. The relator moved for judgment on the pleadings, and the cause, being thus at issue, is submitted for decision.

The pleadings are lengthy, and we do not deem it necessary that they should be set

forth in this statement. The facts determinative of the case stand admitted by the respondents' return and by the relator's motion for judgment on the pleadings.

The allegations of the petition are substantially as follows: That relator is a railway corporation, organized under the laws of this state, and in accordance with said laws and the ordinances of the city of St. Louis is engaged in the business of a terminal railway company within the limits of said city, receiving, transporting, and delivering cars and trains of cars from the various railway companies connected with its terminal lines, and in switching cars to and from industries and manufacturing companies within said city, and to and from the Union Station, which station is owned and controlled by relator. That the respondent the city of St. Louis is a municipal corporation, organized and existing under a special charter adopted by its citizens in accordance with the Consti-

oppressive, a writ of prohibition is the proper remedy.

Said the court in *Crittenden v. Booneville*, 92 Miss. 277, 131 Am. St. Rep. 518, 45 So. 723: "A writ of prohibition is an extraordinary writ, and is proper to be issued only in cases of extreme necessity. It should appear to the judge issuing the writ that it is the only adequate remedy of the party making the application therefor. It will not lie in a case which may be redressed in the ordinary course of judicial proceeding, and is not to be made a substitute for any other method of obtaining the relief sought. If a complete remedy lies by appeal, certiorari, mandamus, or in any other manner, this writ should be denied. It is different from an injunction, in that the injunction is addressed to the litigating parties, while a writ of prohibition is addressed to the inferior court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim. . . . The object of the writ is to restrain an inferior court from acting without authority of law in cases where wrong, damage, and injustice will follow such action. If the entire proceedings of the inferior court are without authority of law, and void, the remedy to be obtained by appeal, which could only follow fruitless and expensive trials, and particularly in the case where a party is being prosecuted under a void ordinance, and at the same time prohibited from the use of his property while these prosecutions are being conducted, an appeal in such a case cannot be said to be an adequate remedy."

The foregoing doctrine was asserted in holding that a writ of prohibition was the proper remedy where a person was being made the subject of many prosecutions for the violation of an invalid ordinance.

This was also regarded as a sufficient ground to justify the issuance of a writ of 37 L.R.A. (N.S.)

prohibition in *Hughes v. Detroit Recorder's Ct.* 75 Mich. 574, 4 L.R.A. 863, 13 Am. St. Rep. 475, 42 N. W. 984, holding that the writ of prohibition will lie to prevent numerous prosecutions for the violation of an invalid city ordinance relating to hawkers and peddlers, where the refusal of such relief will have the effect of destroying the season's business for the persons being prosecuted, as well as to leave them open to multitudinous and persecuting prosecutions.

Numerous prosecutions for the violation of an unconstitutional statute have also been restrained by a writ of prohibition on the theory that the number of the prosecutions renders any other relief inadequate. Thus in *State ex rel. Anheuser-Busch Brewing Asso. v. Eby*, 170 Mo. 597, 71 S. W. 52, in giving relief of this character to prevent numerous prosecutions for the violation of an unconstitutional statute, the court pointed out that if the relators could not have the relief prayed for, they would have to go to trial in twelve hundred and three cases, and if defeated would have to give bond in each case, take an appeal in each case, pay for a transcript in each case, pay a docket fee in each case of \$10, such fees amounting in the aggregate to \$12,030, and would also have to pay counsel fees in each case; and it is said that it is conspicuously obvious that a remedy by different appeals, although available, would be inadequate to meet the emergencies of the case, or afford the redress to which the injured party is entitled.

It has, however, been held that it is not sufficient that a person has been prosecuted in one action for an alleged offense that is unfounded, and that he is also threatened with other similar prosecutions, which, however, have not yet been begun, and hence are not pending. *Darnell v. Vandine*, 64 W. Va. 53, 60 S. E. 996.

A. G. S.

tution and laws of this state. That the respondent Tracy, at the times mentioned, was and is the acting justice of the first district police court of said city, possessing jurisdiction of all suits for the recovery of any fine, forfeiture, or penalty imposed for the violation of any ordinance of said city. That there are pending before respondent Tracy, as acting justice of said police court, against relator, about 200 separate cases for alleged violations of a certain ordinance, instituted by the respondent city and set for trial. That 17 cases for such alleged violations of said ordinance have been prosecuted to final judgment against relator in said police court, and fines imposed amounting to the total sum of \$7,050, from which judgments appeals have been taken to the court of criminal correction of said city. That in some of the cases so appealed to the latter court, judgments have been rendered against relator, and fines imposed aggregating the sum of \$1,800. That all of said prosecutions are based upon alleged violations of ordinance No. 22,902, § 1224, of the ordinances of said city, which section is as follows: "Whoever shall himself, or by another, place upon any highway or other public place any obstruction not authorized by ordinance, or make any excavation in such place without lawful authority, or displace or remove any stones, stakes, or other landmark placed by any officer of this city under authority thereof, or injure or deface any property, or violate any provisions of this ordinance for violation of which no specific penalty is provided, shall forfeit and pay not less than \$10." That said prosecutions were instituted by the city attorney of the respondent city by filing informations identical in form, except where there is a difference in the streets alleged to have been obstructed, and that many of the informations relate to the same streets and portions thereof. That the said informations, omitting caption and signature, are in the following form, to wit:

"Terminal Railroad Association of St. Louis, a corporation. To the city of St. Louis, dr.

"To \$500 for the violation of an ordinance of said city, entitled, 'An Ordinance in Revision of the General Ordinances of the City of St. Louis, Being Ordinance No. 22,902, § 1224, Approved March 19th, 1907.'

"In this, to wit:

"In the city of St. Louis and state of Missouri, on the \_\_\_\_\_ day of \_\_\_\_\_, 1909, and on divers other days and times prior thereto, the said Terminal Railroad Association of St. Louis, a corporation, did then and there place and cause to be

placed upon the public highway known as \_\_\_\_\_ street, at or near city block \_\_\_\_\_, an obstruction not authorized by ordinance, consisting of engines, cars, and trains of cars, operated and run over tracks lying across \_\_\_\_\_ street aforesaid.

"Contrary to the ordinance in such case made and provided."

It is further alleged that no charge or allegation is contained in any of said informations that the tracks of relator were not laid, constructed, or maintained upon or across said streets with authority of law and with the consent of said city; that there is not now and was not at any of the times mentioned any ordinance of said city forbidding the operation or movement of engines, cars, or trains of cars across any street of said city, as appears from the printed and published ordinances of said city, which ordinances are exhibited with and made a part of the petition; that the said city has now printed 1,000 blank informations, and is filling and filing the same, and if not prohibited from so doing by this court will continue to file other and further informations of the same character, and will continue such prosecutions, to the great and irreparable injury of the relator, and to the destruction of its business; that relator has presented the jurisdictional questions against said prosecutions both to said police court and to the court of criminal correction, and its motions and objections have been overruled and disregarded; that the respondent court, being without jurisdiction in the premises, is wrongfully, illegally, and oppressively asserting and exercising jurisdiction in such causes against relator's constitutional rights, and will continue to do so unless prohibited by this court; that by reason of said prosecutions relator is compelled, at great cost and expense, to keep its attorneys almost constantly engaged in the defense thereof and in filing bonds and perfecting appeals therein; that the remedy of appeal is wholly inadequate; and that relator has endeavored in vain to obtain the consent of said city to stop the bringing of said suits and the prosecution of all except one, in order that the rights of the parties may be finally determined by the result of an appeal to this court.

It is further alleged that said § 1224 of the ordinances of said city, against the provisions whereof the relator is alleged to have offended, relates solely to objects placed and at rest in the public highways in said city, and not to vehicles in motion, operated along, upon, or across the same, and has no reference to or bearing upon the right to operate engines, cars, or trains of cars upon, along, or across the city's

streets; that the regulation and operation of steam cars or steam railroads in said city are controlled and governed by the provisions of article 5, chapter 23, of said ordinances, embracing §§ 1852 to 1862, inclusive; that in proceeding against relator under said informations said police court "is acting in excess of its jurisdiction and powers, and is proceeding in grievous abuse of its powers, in holding your relator, under the circumstances hereinbefore recited, to defend against all or any number of said alleged informations; and it prays this court to protect it against the hardships, injustice, and oppression involved in requiring it to defend against all of said 210 alleged informations."

Relator has filed as exhibits with its petition copies of the sections of the ordinances of said city fixing and defining the jurisdiction of the police court, together with a descriptive list of the cases now pending against it in the said police court and the court of criminal correction.

The facts set forth in relator's petition are substantially admitted in respondents' return. Respondents affirmatively pleaded in the return, and it stands admitted by the motion for judgment on the pleadings, that by the charter of the city of St. Louis the first district police court is vested with exclusive original jurisdiction over all cases involving the violation of the ordinances of said city, including jurisdiction over offenses for the placing of obstructions in the highways of said city, and that, in entertaining jurisdiction of the cases referred to in the relator's petition, said police court acted by virtue of the authority and power so conferred by said charter, and not otherwise.

The foregoing is deemed a sufficient statement of the facts for the purposes of this opinion.

The remedy by writ of prohibition is of ancient origin in our system of jurisprudence. The principles of law governing its issuance and the facts necessary to warrant relief by that extraordinary writ have frequently been the subject of adjudication in this and other courts of last resort, as well as the theme of much learning by the text writers. It has been likened to the equitable remedy by injunction against proceedings at law. The object in each case is the restraining of legal proceedings; but, as has been said: "This vital difference is, however, to be observed between them: An injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the court, while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which

it has no legal claim." High, Extr. Legal Rem. 3d ed. § 763. There is this further similarity between the two remedies thus compared, which is of importance in the consideration of the case in hand; namely, that, as the right to the remedy by injunction implies a wrong threatened by the parties litigant against whom the relief is sought, so the right to the writ of prohibition implies that a wrong is about to be committed, not by the parties litigant, as in the case of injunction, but by the person or court assuming the exercise of judicial power and against whom the writ is asked. Indeed, it may be said generally of all procedure in courts of justice for the enforcement of civil rights, that the existence of a remedy on the one hand implies actionable wrong on the other. It follows that, to entitle a relator to a writ of prohibition, it should be made to appear that it is within the power, and that it is the duty, of the person or court proceeded against, to refrain from taking the threatened judicial action which is made the basis of the complaint. The judicial wrong or fault which calls for the writ of prohibition does not mean an infraction of personal rights only, but rather an offending of the court by an assumption of judicial power and jurisdiction not authorized by law.

Relator states in its brief that the writ of prohibition will be ordered by a superior court to curb and restrain an inferior court in the following instances: "First, when the lower court has no jurisdiction. Second, when the lower court is proceeding in excess of its jurisdiction. Third, when the instrumentalities of the lower court are being used for the purposes of oppression, and the jurisdiction of the court abused."

The first two grounds thus stated are recognized as settled law in the adjudged cases, and if the facts of a given case show either want of jurisdiction or excess thereof, together with an absence of an adequate remedy at law or in equity, a case is made warranting the issuance of the writ. It should be observed that, although want of jurisdiction and excess of jurisdiction are commonly referred to and considered as separate grounds for the issuance of the writ, there is in principle little distinction between them, as each means an attempt by a court or person to take judicial action without judicial power or authority for such action.

The third ground, as stated by relator, is rather vague and indefinite, and seems to assert the proposition that there exists a basis for the issuance of the writ independent of and not comprehended within either

of the first two grounds. This contention is the main question before us for decision, and a consideration of the admitted facts of this case makes obvious the importance and necessity to relator of its ability to maintain that proposition.

An examination of the authorities upon the law governing the issuance of this extraordinary writ has brought to our attention, among others, the following: "The sole question for determination upon an application for the writ of prohibition is whether or not the inferior court has usurped jurisdiction or exceeded its lawful powers; and the writ is always refused where it appears that the court has jurisdiction over the matter complained of." 16 Enc. Pl. & Pr. 1125.

"Upon an application for a writ of prohibition to stay the action of an inferior court, the sole question to be determined is the jurisdiction of that court." High, Extr. Legal Rem. 3d ed. § 767b. ". . . In all cases, therefore, where the inferior court has jurisdiction of the matter in controversy, the superior court will refuse to interfere by prohibition, and will leave the party aggrieved to pursue the ordinary remedies for the correction of errors, such as the writ of error or certiorari. In the application of the principle it matters not whether the court below has decided correctly or erroneously; its jurisdiction being conceded, prohibition will not go to prevent an erroneous exercise of that jurisdiction. . . ." High, Extr. Legal Rem. 3d ed. § 772.

"The court will exercise its authority to issue writs of prohibition to courts of inferior jurisdiction only in cases where such courts clearly exceed their jurisdiction, or attempt to usurp a jurisdiction belonging to some other forum." 2 Spelling, Inj. & Extr. Rem. 2d ed. § 1723.

"The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it; or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine. But a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decision may be upon any point." Shortt, Mandamus & Prohibition, § 436.

"Where the lower tribunal has jurisdiction of the parties and of the subject-matter, prohibition will not lie." 32 Cyc. 605.

See also 16 Enc. Pl. & Pr. 1094; High, Extr. Legal Rem. 3d ed. §§ 762, 764a, 771a; 2 Spelling, Inj. & Extr. Rem. 2d ed. §§ 1716 37 L.R.A. (N.S.)

and 1752; Wood, Mandamus, Prohibition, 147; Lloyd, Prohibition, 48.

And from the decisions of this court the following:

"A writ of prohibition issues from a superior to an inferior court to restrain the latter from exceeding its jurisdiction. 5 Bacon, Abr. 446, title, 'Prohibition.' The justice clearly had jurisdiction here, and the writ was improvidently issued." Morris v. Lenox, 8 Mo., loc. cit. 253.

"Such jurisdiction being conceded, it clearly follows that a writ of prohibition will not issue to prevent its erroneous exercise. Some other remedy must be resorted to." Wilson v. Berkstresser, 45 Mo., loc. cit. 286.

"The question is not whether the court was authorized to render the judgment entered, but whether it had jurisdiction to enter any judgment at all." State ex rel. Morse v. Burckhardt, 87 Mo., loc. cit. 538.

"The purpose of the writ is to prevent the inferior tribunal from assuming a jurisdiction with which it is not legally vested. If the lower court has jurisdiction to determine the question before it, prohibition will not lie." State ex rel. Dawson v. St. Louis Court of Appeals, 99 Mo., loc. cit. 221, 12 S. W. 662.

"The question for decision is whether this court can properly and lawfully prohibit the circuit court from further taking cognizance of the application made to it by the plaintiff in said injunction case. This depends upon whether that court was entirely wanting in jurisdiction to grant said injunction on the showing made in the petition, or whether, granting it had jurisdiction in that class of cases, it has not exceeded its jurisdiction." State ex rel. Kenamore v. Wood, 155 Mo., loc. cit. 445, 48 L.R.A. 596, 56 S. W. 476.

"The jurisdiction of the police court to try cases for violation of municipal police regulations, leveled at disorderly conduct and drunkenness on the streets, is exclusive. Its procedure in the exercise of its jurisdiction may or may not be erroneous, but so long as it has jurisdiction, and acts within its jurisdiction, its rulings and proceedings cannot be reviewed or corrected by means of a writ of prohibition, no matter how erroneous such rulings and proceedings may be. Mere error or irregularity or mistake, be it ever so manifest, which does not amount to an excess of jurisdiction, will not be ground for a prohibition." Delaney v. Police Court, 167 Mo., loc. cit. 679, 67 S. W. 592.

See also State ex rel. Brown v. Klein, 116 Mo. 259, 22 S. W. 693; State ex rel. Hofmann v. Scarritt, 128 Mo. 331, 30 S. W. 1026; State ex rel. Alderson v. Moeh-

lenkamp, 133 Mo. 134, 34 S. W. 468; Wand v. Ryan, 166 Mo. 646, 65 S. W. 1025; Schubach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; and State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191.

Upon the foregoing authorities it may be safely asserted as settled law, and without exception, that unless the court sought to be prohibited is wanting in jurisdiction over the class of cases to which the pending case belongs, or is attempting to act in excess of its jurisdiction in a case of which it rightfully has cognizance, the writ will be denied.

It is contended by relator that the information fails to state a cause of action, and therefore that the court is without jurisdiction, and the writ should be issued for that reason, especially in view of the number of informations pending and about to be filed. This position is clearly untenable, and no authority is cited in its support. If the lower court has jurisdiction of the class of cases to which the said prosecutions belong, then there can be no doubt of its jurisdiction to determine the sufficiency of the information, leaving the losing party the right to have such judgment reviewed on appeal. It stands admitted in this record that the police court has exclusive jurisdiction of all cases for the violation of city ordinances, and that the prosecutions complained of are for the alleged violations of said ordinances. It follows that said court must have the right to determine whether the informations coming before it charge or fail to charge a violation of said ordinances, and the writ of prohibition "cannot rightly be employed to compel a judicial officer, having full jurisdiction over the parties and a cause, to steer his official course by the judgment of some other judge, or to substitute the opinion of another court for his own in dealing with topics committed by the law to his decision."

"Where jurisdiction over the parties and the subject of the cause is (as in this instance) clear, any error of the trial court in ruling on the sufficiency of the pleading forming the basis of the suit cannot be corrected by resort to a writ of prohibition." State ex rel. Hofmann v. Scarritt, 128 Mo., loc. cit. 338, 340, 30 S. W. 1028.

In State ex rel. McNamee v. Stobie, 194 Mo., loc. cit. 52, 92 S. W. 199, this court said: "That if the court has jurisdiction of the class of cases to which the proceeding sought to be prohibited belongs, and acquires jurisdiction of the subject-matter, the mere fact of defects in the petition or complaint by which the proceeding was inaugurated will not authorize the issuance 37 L.R.A.(N.S.)

of a writ of prohibition." And see State ex rel. Union Depot R. Co. v. Southern R. Co. 100 Mo., loc. cit. 61, 13 S. W. 398; Schubach v. McDonald, 179 Mo., loc. cit. 182, 65 L.R.A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020; High, Extr. Legal Rem. 3d ed. § 767a; State ex rel. Kansas City v. Lucas, 236 Mo. 18, 139 S. W. 348.

Relator states in its brief: "An example of the third ground of prohibition is when a court permits multitudinous and innumerable prosecutions to be urged for purposes of coercion and embarrassment, as in State ex rel. Anheuser-Busch Brewing Assn. v. Eby, 170 Mo., loc. cit. 526, 71 S. W. 62, wherein the court said: 'It has, however, been urged by counsel for respondent, that inasmuch as relators have a remedy by appeal, etc., in consequence of this, prohibition cannot be granted. But this is an erroneous view, because in a case like this, where relators, if they could not have the relief prayed, would be compelled to go to trial in 1,203 cases; then, if defeated, would have to give bond in each case, take an appeal in each case, pay for transcript fee in each case, pay docket fee in each case of \$10, such fees amounting in the aggregate to \$12,030, as well as counsel fees in each court. Consequently, it must be conspicuously obvious that such appeals would be, although available, "inadequate to meet the emergencies of the case, or to afford the redress to which the injured party is entitled." 2 Spelling, Inj. & Extr. Rem. 2d ed. § 1725, and cases cited.'

Relator has misinterpreted the language quoted from the Eby Case. It is apparent that the court was not there dealing with the question as to the grounds upon which the writ should be issued, but the question whether (one of the necessary grounds existing) the court should deny the writ for the reason that the relator had an adequate remedy by appeal. In the preceding part of the opinion the court had held that the law upon which the prosecution in the trial court was based was unconstitutional and had been repealed, and the court (170 Mo., loc. cit. 522) said: "Under the foregoing authorities, does this record present on its face the posture of there being an absolute want of jurisdiction in the lower court to try the 1,203 informations filed against relators in the Pike circuit court? That it does, we entertain no doubt." And again (170 Mo., loc. cit. 526): "Of course, if the law is unconstitutional which is made the basis of the proceedings, the case is one where it is obvious on the face of such proceedings that the trial court has no jurisdiction, and prohibition will consequently lie."

Respondents in that case had urged that,

even if the trial court was without jurisdiction, the writ should not be granted, for the reason that the trial court had power to pass upon the question of its own jurisdiction; that that was a proper matter of defense, and there was an adequate remedy by appeal. Responding to that contention, in the language quoted by the relator, this court held that the remedy by appeal was not adequate, and that, as the trial court was without jurisdiction, the facts of the case warranted the issuance of the writ. In so holding this court was within the general law, as shown by the foregoing authorities, and as applied to the facts of the case before it.

The case of *State ex rel. Merriam v. Ross*, 122 Mo. 435, 23 L.R.A. 534, 25 S. W. 947, is also cited and relied upon to sustain the contention that the writ may properly be granted when want of jurisdiction or excess of jurisdiction is not shown as a basis therefor. In the *Ross* Case it was held that when a circuit court had acquired jurisdiction and appointed a receiver in a proceeding pending therein, another court of concurrent jurisdiction would be prohibited by this court from entertaining jurisdiction in a suit subsequently brought for the same purpose. A construction has been placed upon that case as holding that, since the court in which the second proceeding was instituted had jurisdiction of the subject-matter and of the person, it follows that this court countenanced the issuance of the writ where neither want nor excess of jurisdiction was shown in the court prohibited. An examination of the decision in that case will disclose that this court based its action in issuing the writ upon the ground of want of jurisdiction in the lower court, for, as stated in the syllabus, "where, in the foregoing action, a receiver has been appointed, the petitioner is entitled to a writ of prohibition against interference by another court and by its receiver appointed without jurisdiction." But the exclusive character of the jurisdiction of the court in which the receivership action is first brought, and which also shows the ground upon which the writ was issued in the *Ross* Case, *supra*, has been clearly stated in a recent decision of this court. In the case of *State ex rel. Sullivan v. Reynolds*, 209 Mo. loc. cit. 182, 15 L.R.A. (N.S.) 963, 123 Am. St. Rep. 468, 107 S. W. 493, 14 A. & E. Ann. Cas. 198, Woodson, J., voicing the unanimous opinion of this court said: "Whenever the jurisdiction of a court of competent authority takes jurisdiction of a case, that fact must of necessity and in the very nature of things exclude the jurisdiction of all other courts 37 L.R.A. (N.S.)

over the same case, as well as all the incidents thereto, excepting only such courts as are given appellate and supervising control over them. The reason for this rule seems to be that when such a court takes jurisdiction of a particular case, with all the incidents thereto, there remains nothing of it to which the jurisdiction of another court can attach,—no case, no parties, no subject-matter is left exposed to the authority of the latter court."

In the case before us it appears from the admitted facts that the respondent Tracy, as judge of the police court, possessed not only jurisdiction, but exclusive jurisdiction, of the prosecutions pending and threatened against relator in that court. There is no fact alleged tending to show the exercise or threatened exercise of jurisdiction in excess of his judicial power and authority, or that he has assumed or is about to assume any power other than that conferred upon him by the charter of the city and required of him by his oath of office. While so acting in the line of his duty and within the scope of his judicial power, as prescribed by the charter, it cannot be maintained, in the light of the authorities heretofore cited, that he should be restrained and prohibited by the extraordinary writ of prohibition, which issues only to prevent the usurpation of judicial power. The prosecutions complained of by relator may be vexatious because of their multiplicity, but it is not alleged that respondent, as judge of said police court, is in any manner responsible for the number of cases so instituted by the prosecuting officers of the city, or that he has any authority to prevent the filing of such cases. If the police court was possessed of jurisdiction to hear and determine one of said prosecutions against relator, it could not be guilty of an abuse of judicial power or excess of jurisdiction solely because it entertained jurisdiction of a larger number. And it does not appear what respondent, as such judge, could have done in the premises, other than what he has done, to have avoided being visited by the extraordinary writ of this court.

In the earlier part of this opinion it is suggested that if relator is entitled to relief against the respondent, as judge of the police court, it must be because he has taken, or is about to take, some action which would be in violation of relator's rights. And the wrong which would warrant the issuance of this writ can be only such a wrong or fault as amounts to usurpation of judicial power. In the case of *State ex rel. McNamee v. Stobie*, 194 Mo. 14, loc. cit. 62, 92 S. W. 203, it was contended that

the prosecution pending before the justice of the peace against whom the writ was asked was instituted in bad faith by the prosecuting witness, and that the writ should be issued to prohibit the respondent justice of the peace from entertaining further jurisdiction in the cause. Answering that contention, this court (l. c. 62) said: "It is immaterial, so far as conferring jurisdiction upon the justice, what the objects and purposes of the prosecution were. William Mathews was the complainant in said cause before the justice, and filed the charge against the relators, and must be treated, so far as the disclosure of the petition are concerned, as the prosecuting witness; hence the allegations upon which this contention is predicated are directed solely to the respondent Mathews. He made the charge, and the petition avers the improper object and purpose in making it. The said allegations apply to the prosecution of the charge, and Mathews is the complainant and prosecuting witness; hence these allegations are exclusively directed to Mathews. There is an entire absence of any charge in the petition that the justice of the peace acquired and assumed jurisdiction of said cause for the objects and purposes attributed to Mathews in making the charge, and in his prosecution of it, or that the justice had any knowledge of such objects and purposes. The objects and purposes of Mathews or anyone else, in making a charge and prosecuting it against relators for the commission of a misdemeanor, absolutely have nothing to do with the jurisdiction acquired by the justice, and can in no way affect such jurisdiction. Even though the justice entertained the purposes attributed to Mathews, while it would be reprehensible in him as an officer, and would furnish a sufficient reason to the relators to invoke the aid of the provisions of the statute providing for changes of venue, it does not go to the jurisdiction of the justice, and furnish a basis for the issuance of the writ of prohibition."

After a full and careful consideration of this cause, we are convinced that this court would not be warranted in issuing its extraordinary writ of prohibition against the respondents, and we hold that the preliminary rule should be quashed and the writ denied. It is so ordered.

All concur, except Graves and Lamm, JJ., who dissent.

Petition for rehearing denied, October 24, 1911.  
37 L.R.A. (N.S.)

## NEBRASKA SUPREME COURT.

DAVID H. HARDING

v.

BOARD OF EQUALIZATION OF DOUGLAS COUNTY.

C. E. FIELDS, Intervener, Appt.

(90 Neb. 232, 133 N. W. 191.)

### Tax — liquor license.

The privilege granted a licensee to sell in—  
Headnote by Root, J.

*Note. — Privilege or license to sell intoxicating liquors as subject of taxation.*

In *HARDING v. BOARD OF EQUALIZATION*, it was held that the privilege granted a licensee to sell liquors was not subject to assessment for taxation, on the ground that the licensee did not become vested with any property right within the meaning of the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law."

The question of whether the privilege or license to sell intoxicating liquors is a subject of taxation appears to have been previously passed upon but twice, and these cases reached the conclusion that a license was property and therefore subject to taxation.

Thus, in *Coulson v. Harria*, 43 Miss. 728, a tax on a license to sell spirituous liquors was held valid on the ground that the license was a franchise, and a franchise was property and therefore subject to taxation. The court said: "The first of these grounds of objection raises the question whether the license granted to the appellant to retail vinous and spirituous liquors is property. The license is a franchise, and a franchise is recognized by the best authority as property, and is therefore the subject of taxation. *Armington v. Barnet*, 15 Vt. 745, 40 Am. Dec. 705. There are many persons who pay for license to pursue a certain business, the income of which is taxed. Such is the case with the keepers of inns and taverns, hawkers and peddlers, and others, who pay for license to follow their respective occupations, and afterward pay a tax upon the gross receipts of their business or income, or upon the gross amount of their sales, and no good reason can be assigned why the retail dealer in vinous and spirituous liquors should be exempt from the operation of such laws. The difficulty of ascertaining with any degree of certainty the extent of his business, no doubt, induced the legislature to tax the license instead of the gross amount of his sales under it. The principle, however, is the same, whether the tax be on the license or on the proceeds of the business done under its authority."

And this case was followed in *Drysdale v. Pradat*, 45 Miss. 445, where a tax on liquor licenses was also upheld on the ground that licenses were property.

J. T. W.



toxicating liquors is not subject to assessment for taxation under the provisions of chapter 77 of the Compiled Statutes of 1911, which in substance provide for ad valorem taxation.

(November 14, 1911.)

**A**PPEAL by intervener from a judgment of the District Court for Douglas County sustaining the order and finding of the board of equalization that plaintiff's liquor license is not subject to taxation. Affirmed.

The facts are stated in the opinion.

Mr. James B. Kelkenney, for appellant:

A license to sell malt, spirituous, and vinous liquors is subject to taxation.

Coulson v. Harris, 43 Miss. 728; Drysdale v. Pradat, 45 Miss. 445; 2 Cooley, Taxn. 3d ed. 1093.

Messrs. Thomas F. Lee and Benjamin S. Baker, for appellee Harding:

A license to sell malt, spirituous, and vinous liquors is not a thing of property, and is not subject to taxation.

Martin v. State, 23 Neb. 371, 36 N. W. 554; Dinuzzo v. State, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309.

Mr. J. P. English for appellee Board of Equalization.

Root, J., delivered the opinion of the court:

But one question is presented in this case, and that is whether a privilege granted by a license to sell intoxicating liquors is subject to ad valorem taxation. The district court held that it is not. Such licenses are but mere temporary permits to the licensee to do that which without it would be unlawful. The licensee does not thereby become vested with any property right, within the meaning of § 3, art. 1, of the Constitution, which provides: "No person shall be deprived of life, liberty, or property without due process of law." Pleuler v. State, 11 Neb. 547, 10 N. W. 481; Martin v. State, 23 Neb. 371, 36 N. W. 554; Dinuzzo v. State, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309. The privilege is purely personal; it may not be transferred by the act of the licensee or by operation of law; it may be canceled by a repeal of the statute authorizing the granting of licenses, or by an amendment thereto requiring the payment of a greater sum than formerly; and it may be summarily revoked for any cause provided by statute or by the ordinance under which it was used.

In San Francisco v. Anderson, 103 Cal. 69, 42 Am. St. Rep. 98, 36 Pac. 1034, it was held that the right to a seat in a voluntary association, known as the "Stock Ex-

change," does not contain such elements of property as to be subject to taxation. To the same effect is Baltimore v. Johnson, 96 Md. 737, 61 L.R.A. 568, 54 Atl. 646. The reasons underlying the district court's decision that the privilege granted by the license is not taxable by valuation are stronger than those sustaining the last-cited cases. There is no statute specifically authorizing the levy of a tax by value in addition to the payment of the license money, and we are of opinion that no such right exists.

The judgment of the District Court is affirmed.

#### UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

DAYTON COAL & IRON COMPANY, Limited, Plff. in Err.,  
v.

J. B. DODD, Admr., etc., of Elijah Huff, Deceased.

(110 C. C. A. 395, 188 Fed. 597.)

**Court — recital of jurisdiction — collateral attack.**

1. Lack of jurisdiction does not appear on the face of an order appointing an administrator, by a court of general jurisdiction over the appointment, so as to render it subject to collateral attack, by a recital that the court "was opened and held" on a certain day, whereas the statute required the regular term to begin on the preceding day, the court to sit from day to day so long as business should require, since it will be assumed that the court regularly convened on the day required by statute, and that the recital in the order referred merely to the opening of the court for the transaction of business on the day when it was entered.

**Master and servant — relation of employee being transported to work.**

2. Employees in a mine who are gratuitously carried by the mine owner between their homes and place of work on a railroad which he operates as a private road to transport coal and supplies between the mine, his manufacturing establishment, and

**Note.** — The question whether an employee of a railroad or street railway is to be regarded as a passenger while being carried to or from work is treated in notes to Texas & P. R. Co. v. Smith, 31 L.R.A. 321, and Birmingham R. Light & P. Co. v. Sawyer, 19 L.R.A.(N.S.) 717; and the question as to relationship of master and servant where the servant goes on the master's premises before, after, or between hours of actual labor, in the notes to Taylor v. Bush & Sons Co. 12 L.R.A.(N.S.) 853, and Thomas v. Wisconsin C. R. Co. 23 L.R.A.(N.S.) 954.

shipping terminals, are, while so in process of transportation, employees, and not passengers; and the employer is therefore not liable for their injury through the negligence of other employees in failing to set derailing devices, and in putting standing cars in motion so that they run down an incline and collide with the miners' train.

**Same — safety devices — failure to instruct as to use — liability.**

3. A mine owner who gratuitously transports by train employees between their homes and place of work may be liable for injury to them through collision of the train with runaway cars, where a derailing device is necessary, and has been provided to prevent such accidents, but superior officers of the plant have failed to instruct employees as to the use of the device, and to exercise proper supervision over them with respect to such use.

**Same — advanced devices — failure to use — negligence.**

4. That a derailing switch installed on a private railroad to a mine in advance of operations as usually conducted in such plants does not, as matter of law, relieve the owner from liability for failure to keep it in use, if experience has shown him the necessity for it.

**Same — transporting employees on railroad — measure of care.**

5. One operating a private railroad on which his employees are permitted to ride gratuitously between their homes and work must exercise for their safety the measure of care which a prudent, cautious man experienced in the business of managing and running railroads, and accustomed to the use of trains under similar circumstances, in the exercise of care and skill, would use.

(June 6, 1911.)

**E**RROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover damages for the wrongful killing of his intestate, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Severens and Knappen, Circuit Judges, and Sater, District Judge.

Messrs. W. B. Miller and Paxton, Warrington, & Seasongood, for plaintiff in error:

Huff, while riding home from work on the coke rack, was exercising a privilege incident to, and accorded him only by reason of, his contract of service, and assumed the risk of injury from the negligence of fellow employees.

Dayton v. Dayton Coal & I. Co. 99 Tenn. 578, 42 S. W. 444; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 37 L.R.A.(N.S.)

17 Sup. Ct. Rep. 603; Texas & P. R. Co. v. Bourman, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319; The New World v. King, 16 How. 469, 14 L. ed. 1019; Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705; Northern P. R. Co. v. Adams, 192 U. S. 440, 452, 48 L. ed. 513, 517, 24 Sup. Ct. Rep. 408; Wilmarth v. Cardoza, 27 L.R.A.(N.S.) 376, 99 C. C. A. 475, 176 Fed. 1; Louisville & N. R. Co. v. Stuber, 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934; Winters v. Baltimore & O. R. Co. 100 C. C. A. 462, 177 Fed. 44; Dishon v. Cincinnati, N. O. & T. P. R. Co. 126 Fed. 194, 66 C. C. A. 345, 133 Fed. 477; Huntzicker v. Illinois C. R. Co. 64 C. C. A. 78, 129 Fed. 548; O'Neil v. Pittsburg, C. C. & St. L. R. Co. 130 Fed. 204; Orman v. Salvo, 54 C. C. A. 265, 117 Fed. 233; Albion Lumber Co. v. DeNobra, 19 C. C. A. 168, 44 U. S. App. 347, 72 Fed. 739; United States v. Illinois C. R. Co. 180 Fed. 630; Gillshannon v. Stony Brook R. Corp. 10 Cush. 228; Seaver v. Boston & M. R. Co. 14 Gray, 466; Gilman v. Eastern R. Corp. 10 Allen, 233, 87 Am. Dec. 635; McGuirk v. Shattuck, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; Kilduff v. Boston Elev. R. Co. 195 Mass. 307, 9 L.R.A.(N.S.) 873, 81 N. E. 191; Dickinson v. West End Street R. Co. 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60; Boyle v. Columbian Fireproofing Co. 182 Mass. 102, 64 N. E. 726; Doyle v. Fitchburg R. Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611; Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850; Wright v. Northampton & H. R. Co. 122 N. C. 852, 29 S. E. 100; Ionnone v. New York, N. H. & H. R. Co. 21 R. I. 452, 46 L.R.A. 730, 79 Am. St. Rep. 812, 44 Atl. 592; Enos v. Rhode Island Suburban R. Co. 28 R. I. 291, 12 L.R.A.(N.S.) 244, 67 Atl. 5; Kansas P. R. Co. v. Salmon, 11 Kan. 92; Vick v. New York C. & H. R. R. Co. 95 N. Y. 271, 47 Am. Rep. 36; Vroom v. New York C. & H. R. R. Co. 129 App. Div. 858, 115 N. Y. Supp. 1063; Roland v. Tift, 131 Ga. 685, 20 L.R.A.(N.S.) 354, 63 S. E. 133; Birmingham R. Light & P. Co. v. Sawyer, 156 Ala. 199, 19 L.R.A.(N.S.) 717, 47 So. 67; Indianapolis & G. Rapid Transit Co. v. Foreman, 162 Ind. 92, 102 Am. St. Rep. 185, 69 N. E. 672; Indianapolis & G. Rapid Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 147; Walsh v. Cullen, 235 Ill. 91, 18 L.R.A.(N.S.) 911, 85 N. E. 233; Cicalase v. Lehigh Valley R. Co. 75 N. J. L. 900, 69 Atl. 166; McDonough v. Lanpher, 55 Minn. 501, 43 Am. St. Rep. 541, 57 N. W. 152; Arkadelphia Lumber Co. v. Smith, 78 Ark. 510, 95 N. W. 800; Cremins v.

Guest [1908] 1 K. B. 469, 77 L. J. K. B. N. S. 326, 98 L. T. N. S. 335, 24 Times L. R. 189; Tunney v. Midland R. Co. L. R. 1 C. P. 291, 12 Jur. N. S. 691; Gane v. Norton Hill Colliery Co. [1909] 2 K. B. 544, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640; Sharp v. Johnson [1905] 2 K. B. 139, 74 L. J. K. B. N. S. 566, 53 Week. Rep. 597, 92 L. T. N. S. 675, 21 Times L. R. 482; Holmes v. Great Northern R. Co. [1900] 2 Q. B. 409, 69 L. J. Q. B. N. S. 854, 64 J. P. 532, 48 Week. Rep. 681, 83 L. T. N. S. 44, 16 Times L. R. 412; Labatt, Mast. & S. §§ 827-830; Bailey, Master's Liability for Injuries to Servant, pp. 360, 361; 2 White, Personal Injuries on Railroads, § 563; 3 Elliott, Railroads, 2d ed. § 1303a, p. 748.

There was no sufficient proof of the representative capacity of plaintiff, and the court should have directed a verdict for the defendant on that ground.

McCullough v. Moore, 9 Yerg. 307; Linnville v. Darby, 1 Baxt. 307; Cannon v. McAdams, 7 Heisk. 377.

Any negligence in connection with the nonuse of the derailing switch was not failure to furnish, but failure to operate.

American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 611; Kinnear Mfg. Co. v. Carlisle, 82 C. C. A. 81, 152 Fed. 937; Pennsylvania Co. v. Fishack, 59 C. C. A. 269, 123 Fed. 465; Central R. Co. v. Keegan, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; Martin v. Atchison, T. & S. F. R. Co. 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; Kentucky Block Cannel Coal Co. v. Nance, 91 C. C. A. 82, 165 Fed. 44; Deye v. Lodge & S. Mach. Tool Co. 70 C. C. A. 64, 137 Fed. 480.

Messrs. Foster V. Brown, Frank Spurlock, and Joe Brown, for defendant in error:

Plaintiff was entitled to recover as a passenger.

The New World v. King, 16 How. 469, 472, 14 L. ed. 1019, 1021; Philadelphia & R. R. Co. v. Derby, 14 How. 486, 14 L. ed. 502; Doyle v. Fitchburg Power Co. 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611; McNulty v. Pennsylvania R. Co. 182 Pa. 479, 38 L.R.A. 376, 61 Am. St. Rep. 721, 38 Atl. 524; State use of Abell v. Western Maryland R. Co. 63 Md. 433; Seaver v. Boston & M. R. Co. 14 Gray, 466; Gillshannon v. Stony Brook R. Corp. 10 Cush. 228; Chattanooga Rapid Transit Co. v. 37 L.R.A. (N.S.)

Venable, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861; O'Donnell v. Allegheny Valley R. Co. 59 Pa. 246, 98 Am. Dec. 336; Fitzpatrick v. New Albany & S. R. Co. 7 Ind. 436; New York, L. E. & W. R. Co. v. Burns, 51 N. J. L. 340, 17 Atl. 630; Dickinson v. West End Street R. Co. 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60; Louisville & N. R. Co. v. Scott (Louisville & N. R. Co. v. Weaver) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674.

The risk which the master has created by doing or permitting something to be done which ought not to have been done, or by omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as risk assumed even by employees.

George v. Clark, 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Hutchinson, Carr. 963; Shoemaker v. Kingsbury, 12 Wall. 378, 20 L. ed. 434.

The plaintiff was appointed administrator of the estate of Elijah Huff, deceased, by the county court of Rhea county, and was duly qualified as such.

State v. Anderson, 16 Lea, 321; Linnville v. Darby, 1 Baxt. 307; Brien v. Hart, 6 Humph. 131; Venable v. Curd, 2 Head, 582; Henslie v. State, 3 Heisk. 202; Eller v. Richardson, 89 Tenn. 575, 15 S. W. 650; Johnson v. Gaines, 1 Coldw. 289; Townsend v. Townsend, 4 Coldw. 79, 94 Am. Dec. 185; Ex parte Williams, 1 Lea, 530; Carr v. Lowe, 7 Heisk. 93; Varnell v. Loague, 9 Lea, 160; Posey v. Eaton, 9 Lea, 504.

Knappen, Circuit Judge, delivered the opinion of the court:

The writ of error is brought in this case to review a judgment in favor of defendant in error for personal injuries to plaintiff's intestate, resulting in death. The prominent facts are these:

The plaintiff in error (hereinafter called the defendant) was at the time of the accident engaged in operating a furnace at Dayton, Tennessee, for the manufacture of pig iron, purchasing ore used for that purpose, also maintaining coal mines and coke ovens about 3 miles from Dayton, together with a small railroad system consisting of a line from the Dayton yards to the coal mines, and another, about 2 miles long, from the Dayton yards to the river, and connecting with traffic thereon. There was also connection at Dayton with the tracks of the Cincinnati Southern Railway. The operating of the furnaces (which was the principal business), the railroad, the mines, and coke ovens (coke being required in the manufacture of pig

iron) constituted one business, over which there was a general superintendent, there being also a yard master or foreman of the railroad department. The train running between Dayton and the mines was manned by a locomotive engineer, a fireman, a head brakeman, and an assistant brakeman, there being no conductor. The business of this railroad was largely the hauling of coal and coke from the mines to Dayton, and the hauling of empty coal and coke cars, as well as supplies of various kinds, from Dayton to the mines and ovens. Day and night train shifts were maintained. The first train, which left Dayton at 6 o'clock in the morning and was the first run of the day shift, was called the "miners' train." It consisted largely of empty coal and coke cars to be filled at the mines and ovens, and in which coal and coke cars the miners rode to the mines, supplies being sometimes carried in the train. The company had houses at Dayton, Morgantown, and elsewhere along the railroad, which it rented to its employees. Some of the latter, including deceased, did not rent company houses. The greater part of the miners lived at Dayton and at Morgantown, the latter being a mile or less from the mines. The miners were allowed to ride on this train free, and most of them did so ride, the wages being the same whether they rode or not. They were not, however, required to ride.

The whistle was blown at Dayton as a notice to the miners that the train was about to start. Those living at Morgantown took the train at a certain customary meeting point. At about 4:30 in the afternoon, after the last blast, the miners took the train at Hanging Rock for the return home; that run being the last made by the day shift, and this return train consisting largely, but not always exclusively, of empty coal and coke cars. The miners had nothing to do with either the operation of the morning or the evening train, their actual work having ended when the last blast was fired. The railroad was entirely a private road, and did no commercial business whatever. It carried no passengers, unless the miners are to be regarded such. No passenger cars were carried. From a point at or near Hanging Rock on the main track (where the miners left the train), a spur or tail track, about 300 feet in length, extended to the coal tippie. This tail track had been extended several months before the accident, and in connection therewith a derailing switch put in, in order to throw off the track any runaway car which might escape from the

vicinity of the tippie, and thus prevent the car running upon the main track. Until a few weeks before the accident in question it had been customary to operate the derailing switch in connection with trains passing over it. A few weeks before the accident, however, a new head brakeman was installed. He was not instructed to use the derailing switch, and did not make a practice of doing so during his employment, which covered the time of the accident to the deceased. On the evening in question the train brought in from Dayton two cars (one fully, the other partly, loaded) which it left at the coal tippie, in connection with a third car standing thereat. On leaving these cars the train passed over the tail track and onto the main track; the derailing switch not having been set after the passage of the train. The miners (between 200 and 400) boarded the train at Hanging Rock. A few minutes after the train left, the stable boss at the mines, who was also engaged that day in loading coal cars, in company with another employee, pinched two of the cars at the tippie apart from the third, in order to make room for the passage of the mules between the mines and the stables, with the result that the two cars referred to became unmanageable and ran away down the incline of the tail track and upon the main track, overtaking and colliding with the miners' train, killing the plaintiff's intestate and several others. Had the derailing switch been set, the accident could not have happened. The plaintiff relied upon several grounds of negligence, not necessary to be here stated, in addition to those submitted to the jury. Upon the trial the defendant contended that the relation between defendant and deceased was that of master and servant. The plaintiff contended that the defendant's relation was that of a carrier of passengers. The trial court held that the defendant was, as concerned the deceased, not a common carrier of passengers, but a private carrier, bound only to "exercise such a degree of care and skill in the management and running of its train as a prudent, cautious man, experienced in the business, would be expected to use under the circumstances, that is to say, in reference to the means of transportation employed and the character of the train being operated." The court submitted to the jury three alleged grounds of negligence: First, the failure of the defendant's superior officers or agents to "instruct the brakeman in reference to the use or operation of the derailing switch; that is, the alleged failure to see that the use of that derailing switch

was kept up by the train crew." Second, the alleged negligence of the head brakeman in failing to set the derailing switch. And, third, the alleged negligence of the employees in so handling the cars at the tipples as to permit them to run away and collide with the miners' train. At the close of the testimony the defendant moved for peremptory instruction, which was denied.

1. A preliminary question arises over the authority of the administrator appointed by the county court of Rhea county, Tennessee. Section 6023 of Shannon's Code of Tennessee provides that "the county court, to be held by the county judge, shall have its regular sessions on the first Monday of each month."

The order appointing the administrator was made on July 2, 1907. The caption of the order of appointment is as follows: "Be it remembered that a quorum court was opened and held for Rhea county, at the courthouse in the city of Dayton, Tennessee, on the 2d day of July, 1907, . . . when the following business was had and entered of record."

It seems to be conceded that the 2d of July, 1907, was Tuesday, and it is urged that the order thus shows upon its face a lack of jurisdiction. The section of the Code above quoted contains, however, this provision: "And the court shall sit from day to day so long as the business thereof may require."

The county court being one of general jurisdiction over the appointment of administrators, all possible intendments will be made in support of the order of appointment, and only jurisdictional defects appearing on the face of the record can be attacked collaterally. *Brien v. Hart*, 6 Humph. 131; *State v. Anderson*, 16 Lea, 321; *Curtis v. Charlevoix County*, 154 Mich. 646, 656, 118 N. W. 618.

To exclude an intendment that the regular session was opened on Monday, July 1st, and continued on Tuesday, July 2d, as the statute permits, it is necessary to construe the language "a quorum court was opened and held" as if it read "a regular session of the quorum court was begun and opened;" for only thus would the lack of jurisdiction appear upon the face of the record. It is clear, to our minds, that the language of the order should not be so construed, and that lack of jurisdiction does not appear upon the face of the order.

2. The fundamental question presented is whether the relation of the deceased to the defendant while on the train in question was that of a passenger or servant. This question gains special importance from the fact that two of the grounds of liability 37 L.R.A. (N.S.)

submitted to the jury relate to negligence of employees of defendant who, it is insisted, were fellow servants of the deceased; it being the settled rule in the Federal courts that an employer is not liable for an injury to an employee occasioned by the negligence of another employee engaged in the same general undertaking, and that it is not necessary to the application of this rule that the employees should be engaged in the same operation or particular work; it being sufficient if the two are in the employment of the same master and engaged in the same common enterprise, both performing duties tending to accomplish the same general purpose, although they may be in different departments. *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Louisville & N. R. Co. v. Stuber* (sixth circuit) 54 L.R.A. 696, 48 C. C. A. 149, 103 Fed. 934, 938; *Illinois C. R. Co. v. Hart* (sixth circuit) — L.R.A. (N.S.) —, 100 C. C. A. 49, 176 Fed. 245, 247. That defendant was not a commercial carrier, or a carrier of passengers for hire, is clear, and the circuit court was right in so holding. *E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.* 95 C. C. A. 436, 170 Fed. 240; *Dayton v. Dayton Coal & I. Co.* 99 Tenn. 578, 42 S. W. 444. The specific question is whether the defendant's relation to deceased was that of a private carrier, or whether the riding of the deceased on the train in question from the mine to his home was an incident of the employment, to the extent that the relation of employer and employee continued during such carriage.

The general rule is, in our opinion, settled by the weight of authority, that employees, while being carried as part of their contract of service to and from their place of work, are fellow servants, and not passengers. This is the general rule even as to railway employees, and the application of this rule does not necessarily fail from the mere fact that the carriage is had after the day's work has ceased. Nor is it necessary that the agreement for such carriage be expressed. It is sufficient if it be an implied term of the contract of employment, or contemplated thereby as an incident thereof and a privilege connected therewith, for the sole purpose of facilitating the work of the employer and the employee. Nor is the mere fact that it is not necessary that the employee ride upon the train controlling of his status as employee. This rule is supported by a long

line of authorities, including the following: *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635; *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Kilduff v. Boston Elev. R. Co.* 195 Mass. 307, 9 L.R.A. (N.S.) 873, 81 N. E. 191; *Kansas P. R. Co. v. Salmon*, 11 Kan. 83; *Bowles v. Indiana R. Co.* 27 Ind. App. 672, 87 Am. St. Rep. 279, 62 N. E. 94; *Ionnone v. New York, N. H. & H. R. Co.* 21 R. I. 452, 46 L.R.A. 730, 79 Am. St. Rep. 812, 44 Atl. 592; *Vick v. New York C. & H. R. Co.* 95 N. Y. 267, 274, 47 Am. Rep. 36; *Cicalese v. Lehigh Valley R. Co.* 75 N. J. L. 897, 900, 69 Atl. 166; *Wright v. Northampton & H. R. Co.* 122 N. C. 852, 29 S. E. 100; *Roland v. Tift*, 131 Ga. 683, 20 L.R.A. (N.S.) 354, 63 S. E. 133; *Tunney v. Midland R. Co.* L. R. 1 C. P. 291, 12 Jur. N. S. 691; *Cremins v. Guest* [1908] 1 K. B. 469, 77 L. J. K. B. N. S. 326, 98 L. T. N. S. 335, 24 Times L. R. 189; *Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640; *Birmingham R. Light & P. Co. v. Sawyer*, 156 Ala. 199, 19 L.R.A. (N.S.) 717, 47 So. 67.

In *Gillshannon v. Stony Brook R. Corp.* a common laborer on a railroad, while riding on a gravel train to his place of labor, was injured by a collision. It was held that the relation of master and servant existed between the plaintiff and the railroad company; the court saying: "If the plaintiff was by the contract of service to be carried by the defendants to the place for his labor, then the injury was received while engaged in the service for which he was employed. . . . If it be not properly inferable from evidence that the contract between the parties actually embraced this transportation to the place of labor, it leaves the case to stand as a permissive privilege granted to the plaintiff, of which he availed himself, to facilitate his labors and service, and is equally connected with it, and the relation of master and servant, and therefore furnishes no ground for maintaining this action."

In *Seaver v. Boston & M. R. Co.* a carpenter employed by the day by a railroad corporation to work on the line of its road, and carried on its cars to the place of such work without any fare, was held not entitled to maintain an action against the corporation for injuries occasioned to him while being so carried, by the negligence of those managing the train or charged with the duty of keeping in repair the equipment of the train.

In *Gilman v. Eastern R. Corp.* where the 37 L.R.A. (N.S.)

railroad company was held not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman upon a track over which he is carried by the company free of charge, between his home and the place of his work, Justice Gray, speaking of the *Gillshannon* and *Seaver* Cases, said: "In each of those two, as in this, the plaintiff's work did not begin until his arrival at his destination; and in this, as in those, the work was upon the structures, means, or instruments with which the defendants were to carry on their business of common carriers, the workman paid nothing for his passage, and the object of the defendants in carrying him was to get him to his place of work."

In *McGuirk v. Shattuck*, a woman who was employed by a person as a laundress, and who was being conveyed either gratuitously or as a part of a contract of employment, from her home to that of her employer in his wagon, was held to be in the service of the employer.

In *Kilduff v. Boston Elev. R. Co.* a workman employed by a street railway company as a laborer in the construction of a new line of track, was killed while being transported with other workmen back from the place of work after his day's work was finished. Mr. Justice Morton said: "Although at the time of the accident the plaintiff's intestate had finished his work for the day, and was under no obligation to do any more work for the defendant on that day, it seems to us plain that he was being transported by the defendant as an incident of his employment, and that the relation between him and the defendant was therefore that of master and servant, and not that of carrier and passenger. The car was a special car in which only the laborers who were working on that particular job were allowed to ride, and was furnished for the mutual accommodation of the company and the laborers, and the plaintiff's intestate paid no fare. The portion of the track where the accident occurred was not open to the public, and transportation over that and the rest of the route was plainly furnished by the defendant to the deceased as a laborer in its employment, and not as a passenger. It cannot reasonably be referred to any other relation."

In *Ionnone v. New York, N. H. & H. R. Co.* where an employee of the defendant railroad company, upon the completion of his work, was invited to ride in the defendant's car to a point near his home, the carriage being gratuitous, it was said: "The carrying of the deceased after his day's work was done, to a point near his home, is, we

think, to be regarded not as creating the relation of a passenger, but rather as a privilege incidental to his contract of service, granted to him by the defendant, of which he availed himself to facilitate his return to his home, and that it was a privilege accorded to him merely by reason of his contract of service."

In *Bowles v. Indiana R. Co.* it is said: "The general rule may be said to be that, where an employee is being carried by his employer in the conveyance of the latter to and from the work for which the former is employed, he is regarded not as a passenger, but as an employee; though if he is being carried merely for his own convenience, pleasure, or business, he is a passenger."

In *Kansas, P. R. Co. v. Salmon*, the rule of master and servant was applied to the case of a person in the employ of the railroad company riding from his home to his employment in the caboose car attached to a freight train, without paying fare, according to the custom and understanding of the parties, from which cars and trains all persons except the employees of the company were excluded.

In *Wright v. Northampton & H. R. Co.*, the rule was applied to the case of a section master who, after his day's work, rode on a train to his lodging place without paying or being expected to pay his fare. In all or nearly all of the cases we have thus far cited, one or more of the Massachusetts cases referred to are cited with approval.

In *Birmingham R. Light & P. Co. v. Sawyer*, it was held that a section hand, injured while riding back and forth to work on a car, without charge, pursuant to a rule of the company, is not a passenger, but is in the exercise of a mere privilege connected with his employment.

In *Tunney v. Midland R. Co.*, the rule was applied to the case of a laborer employed by a railway company to assist in loading a "pickup train" with materials left by plate layers and others upon the line; one of the terms of his employment being that he should be carried from his home to the place at which his work for the day was to be done by the train, and to be brought back to his home at the end of each day.

*Cremins v. Guest and Gane v. Norton Hill Colliery Co.* involved awards under the workmen's compensation act, and in both the question whether plaintiff was in the course of his employment was involved. The *Cremins* Case turned upon an implied agreement with the colliery company that he should have the right to travel between his home and the colliery free of charge. 37 L.R.A. (N.S.)

In the *Gane* Case, among the acts enumerated as within the contract of employment, was "taking a train, which he (the collier) is entitled to use by virtue of his contract of service."

The Supreme Court of the United States has not passed upon the specific question involved here, although some of its decisions have more or less bearing thereon.

In *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603, the fellow-servant rule was applied to the case of a common laborer who was injured by being run into by a train while on a hand car on the road proceeding to his place of work.

In *Texas & P. R. Co. v. Bourman*, 212 U. S. 536, 53 L. ed. 641, 29 Sup. Ct. Rep. 319, the fellow-servant rule was applied to a section hand who, after being engaged in clearing up a wreck, was taken aboard an express train to be conveyed to the station at which he lived, and being injured while on the train by the alleged negligence of the engineer of the train and his own foreman.

In 4 *Elliott, Railroads*, § 1578a, it is said: "As to whether an employee riding on a train is a passenger, there is some conflict; but the rule seems to be that if he is being carried to and from his working place, he is not a passenger, but if he is carried for his own convenience or business, he is a passenger." See also *Labatt, Mast. & S.* § 624.

Several cases are cited in support of the contention that the deceased occupied the relation of passenger. All but one of these cases are distinguishable in their facts from the case presented here, and nearly all are reconcilable with the authorities we have cited. For example: In *Whitney v. New York, N. H. & H. R. Co.* (first circuit) 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850, in which the employee was held a passenger, it was said: "He [the employee] stipulated not only for an increase of wages, but also for free transportation to Boston from the city where he was to be employed, for his own convenience, and not in connection with going to or from his work. He was injured while on one of these trips to Boston, and while not going to and from his work, and while he was not employed; that is to say, during the hours when he was free for recreation or to visit his family, or to use his time for any purpose of his own."

*Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, does not involve the status of an employee while riding gratuitously.

The case of *The New World v. King*, 16 How. 469, 14 L. ed. 1019, involved the case

of one accepted as a passenger under a custom to permit those whose usual employment is on board of steamboats to go from place to place free of charge.

In *Northwestern Union Packet Co. v. McCue*, 17 Wall. 508, 21 L. ed. 705, a man standing on a wharf was hailed by the mate of a boat to assist in loading goods upon it. After completing his work he was paid at the office on the boat. While going ashore he was injured by the negligence of the boat's employees handling the gang plank. Whether the employment ceased after payment for the service was made, and before the wharf was reached, was held a question of fact for the jury.

In *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, and *Id.*, 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611, the injury occurred while the employee was riding upon his own personal business, on a ticket given him as part of his compensation, under which he was at liberty to use the ticket whether going to and from his work or not.

In *Dickinson v. West End Street R. Co.* 177 Mass. 365, 52 L.R.A. 326, 83 Am. St. Rep. 284, 59 N. E. 60, the motorman who was held to be a passenger was traveling free at a time when he was not on actual duty, under a rule permitting such employees to ride at any time or place, and for any purpose, if in uniform.

In *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336, the carpenter who was held a passenger while traveling between his home and his place of work received a less price per day than if he had paid his fare.

In *McNulty v. Pennsylvania R. Co.* 182 Pa. 479, 38 L.R.A. 376, 61 Am. St. Rep. 721, 38 Atl. 524, the case was said to be in its controlling features "on all fours with *O'Donnell v. Allegheny Valley R. Co.*"

The case of *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674, seems to have turned largely upon the proposition that the conductor accepted the deceased as a passenger.

In *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, 445, the deceased was riding on a pass which, as said by the court, "was no part of the contract between Abell and the railroad. The contract between them was to pay a certain sum for a day's work. It was given as a mere gratuity, and as other passes are given."

In *Enos v. Rhode Island Suburban R. Co.* 28 R. I. 291, 12 L.R.A. (N.S.) 244, 67 Atl. 5, in which a railroad flagman who received for his services a weekly sum of money 37 L.R.A. (N.S.)

plus fourteen transportation tickets good on the defendant's road was held a passenger while riding to his home upon one of the tickets, it is fairly inferable from the opinion, although not expressly stated, that the tickets were good elsewhere than between the place of work and the home, and that they were not limited to use while going to or returning from work. Nor does it affirmatively appear that the wages would be the same were the tickets not given; the court saying: "The plaintiff earned fourteen tickets as well as \$8 per week, and the fact that the tickets were purchased by work, instead of cash, is unimportant."

Two cases decided by the supreme court of Tennessee are directly in conflict with what we have stated to be the general rule as to the status of an employee while being carried gratuitously to and from his working place. These cases are *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 51 L.R.A. 886, 58 S. W. 861, and *New Etna Coal Co. v. Bailey*, recently decided and not yet reported. In the first of these cases it was held that a railroad employee having nothing to do with the operation of trains, but the performing of service at a station, who is permitted by the carrier to travel to and from the place of service on a train without payment of fare, is not a trespasser, but a passenger while on its trains. The question whether the relation of master and servant existed was not expressly raised in that case; but the court said that "the weight of authority and of sound policy, we think, is that where a servant performs all his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger."

We think, however, that the authorities do not sustain this proposition as applied to the case we are considering.

The facts in the *New Etna Coal Company Case* are substantially the same as those in the case before us; and were we to follow that decision we should be compelled to hold that the deceased was a passenger. The decision in the *New Etna Case* seems to rest largely upon two propositions: First, that an employee traveling for a purpose wholly disconnected with his employment, and while not engaged in the master's service, upon free transportation furnished him by the master in consideration of his being an employee, occupies, while so traveling, not the position of a servant, but a passenger; and, second, that there is a clear distinction between cases where the servant performs all his duties



at a given place, and cases where the servant in the necessary performance of his duties, and while in the performance thereof, is transported by the master from place to place, wherever his services may be required. We think that, under the authority we have cited and the facts of this case, the carriage of the deceased cannot be said to have been wholly disconnected from his employment, but that it was, on the other hand, in a very proper sense, connected therewith, contemplated thereby, and incident thereto; and while the case of the servant who is being transported by the master from place to place, wherever his services may be required (such as section hands, employees on work trains, and those having charge of structures or operations along the line of the road), is not identical with that of one who performs all his duties at a given point, yet we think the legal distinction referred to is not recognized by the authorities generally.

In *Louisville & N. R. Co. v. Stuber*, 54 L.R.A. 697, 48 C. C. A. 151, 108 Fed. at page 936, Judge (now Mr. Justice) Lurton, speaking for this court, called attention to the fact that "under the decisions of the Tennessee supreme court, the liability of a railroad company to one servant who has sustained injury through the negligence of another has been made to depend upon the subordination of the one to the other, as well as upon refinements in respect to different departments of service."

We, of course, do not know to what extent, if at all, the rule so prevailing in Tennessee may have affected the decisions in the two cases we have just discussed.

There is, in our opinion, nothing in the decisions of this court in *Ellsworth v. Metheney*, 51 L.R.A. 389, 44 C. C. A. 484, 104 Fed. 119; *Winters v. Baltimore & O. R. Co.* 100 C. C. A. 462, 177 Fed. 44; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 66 C. C. A. 345, 133 Fed. 471; or *Huntzicker v. Illinois C. R. Co.* 64 C. C. A. 78, 129 Fed. 548, supporting the proposition that the status of the deceased in the case we are considering was that of passenger. On the contrary, there are expressions in *Ellsworth v. Metheney* and *Huntzicker v. Illinois C. R. Co.* not in harmony with such conception. For an interesting review of decisions upon the question before us, see the opinion of Judge Cochran in *Dishon v. Cincinnati, N. O. & T. P. R. Co.* (C. C.) 126 Fed. 194, and the reference thereto in the opinion of this court, 66 C. C. A. 345, 133 Fed. at page 477.

In *Louisville & N. R. Co. v. Stuber*, supra, the plaintiff was foreman of water supply on a division of the defendant's railroad; his business being to supervise

the tanks and pumping machinery at the water stations and keep the same in repair, in the performance of which duties he was required to ride over the road from station to station, being furnished with a pass good on all trains. While he was riding on a detached engine to a station where his services were required, he was injured in a collision caused by the negligence of the engineer in charge of such engine. In holding that the plaintiff was not a passenger, Judge Lurton said: "His transportation to and from his [place of] work was part of his contract of service, and while being thus transported he was as much in the service of the company as when engaged in the repair or construction of a water tank or pump. He was traveling at the time under a single contract of service, and his right to be carried free to and from his work is inseparable from the contract to do the work, and no valid ground exists for saying that he paid his own fare, or was in any sense a passenger."

The facts in the *Stuber* Case are thus not identical with those presented here. But, following the proposition just quoted, Judge Lurton said: "The rule is now well settled that railway employees, while being carried as part of their contract of service, to and from their place of work, are fellow servants, and not passengers,"—citing with approval, among other cases, *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228; *Seaver v. Boston & M. R. Co.* 14 Gray, 466; *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36, and *Tunney v. Midland R. Co.* L. R. 1 C. P. 291, 12 Jur. N. S. 691.

The cases of *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L.R.A. 157, 44 Am. St. Rep. 335, 37 N. E. 770, Id. 166 Mass. 492, 33 L.R.A. 844, 55 Am. St. Rep. 417, 44 N. E. 611; *McNulty v. Pennsylvania R. Co.* 182 Pa. 479, 38 L.R.A. 376, 61 Am. St. Rep. 721, 38 Atl. 524, and *State use of Abell v. Western Maryland R. Co.* 63 Md. 433, were there distinguished by Judge Lurton as "cases in which it appeared that at the time of the injury the employee was not in the service of the company, but was traveling for his own purposes, and therefore a passenger." The right to ride on the train in question was, in our opinion, an implied term of the miners' employment. Such carriage was for the benefit both of the miners and of the company, and was a privilege given for the purpose of facilitating the employment and labor thereunder. The fact that the renting of houses to miners was facilitated by the maintaining of the miners' train does not impress us as important. The houses were presumably

maintained, in part, at least, to facilitate the employment of laborers. In fact, deceased did not rent from defendant, and no distinction as respects the carriage was made between those who did and those who did not so rent. Where an employee is, by contract expressed or implied, carried to and from his work in a passenger car of a common carrier, there is more or less room for argument that the contract contemplated his carriage as a passenger; but, with the exception of *New Etna Coal Co. v. Bailey*, we have been cited to no case in which an employee riding gratuitously to and from his work, as an incident of his employment by an employer other than a common carrier, has been held to be a passenger.

We are constrained to hold that the deceased while being transported to his home by virtue of his employment as a miner, and upon this private miners' train, was not a passenger of defendant.

It follows from this conclusion that the case was submitted to the jury upon an erroneous theory, under which recovery was permissible for the negligent acts of co-employees. This error requires a reversal of the judgment.

3. The court did not err, however, in our opinion, in refusing to direct a verdict for defendant. The first ground of negligence submitted was "the alleged failure of the defendant's superior officers or agents to instruct the brakeman in reference to the use and operation of the derailing switch, that is, the alleged failure to see that the use of that derailing switch was kept up by the train crew." This ground did not involve the negligent conduct of a fellow servant. It was predicated upon the nondelegable duty which a master owes to the servant. It is true that, with respect to the operation of its road, the defendant's duty to the deceased extended no further, with respect to the complaint under consideration, than to exercise ordinary care to provide a sufficient number of reasonably competent employees, make proper rules for their government, and exercise proper supervision over them; and if that had been done the defendant would not be liable for an injury to an employee in the operation of the road through the negligence of other employees in the operating department, or their failure to observe the rules, notwithstanding such negligence made the place unsafe to work in. *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Pennsylvania Co. v. Fishack* (sixth circuit) 59 C. C. A. 269, 123 Fed. 465; *Kinnear Mfg. Co. v. Carlisle* (sixth circuit) 82 C. C. A. 81, 152 Fed. 933; 37 L.R.A. (N.S.)

*Illinois C. R. Co. v. Hart* (sixth circuit) — L.R.A. (N.S.) —, 100 C. C. A. 49, 176 Fed. 245, 251. But the negligence aimed at by the proposition we are considering is the failure of the defendant to properly instruct its operatives, and to exercise proper supervision over them. There was evidence tending to show that due care required the installation and use of the derailing switch. Its installation was suggested by the defendant's actual experience with a runaway car. The use of this derailing switch had been maintained until a few weeks previous to the accident. There was testimony that its use was discontinued by reason of the failure of defendant to instruct the new head brakeman to use the same. The general superintendent testified that he did not know that the switch was not being operated, and that, had he known, he would have issued such instructions as would have caused it to be used; also, that the accident in question is evidence that the situation required the maintaining of the derailing switch. In view of this testimony, the court would not have been justified in holding, as matter of law, that the fact that the use of such switch was in advance of operations as usually conducted in plants of this character relieved defendant of the charge of negligence. Such proposition was, at best, addressed to the consideration of the jury. Nor would the court have been justified, under the evidence, in holding that the deceased had assumed the risk arising from the nonuse of the derailing switch. He was not engaged in the operation of the road. While the evidence showed that he passed daily in sight of the switch, and while there was evidence from which the jury might have found that he knew the switch was not being regularly used, the testimony was not, in our judgment, such as to require a finding that he knew of the discontinuance of the use of the switch, and that he knew and appreciated the dangers to ensue from such disuse.

4. The jury were instructed that the measure of care owing by defendant to deceased was what "a prudent, cautious man experienced in the business of managing and running trains, and accustomed to the use of trains under similar circumstances as these, in the exercise of care and skill, would have used. . . ." The defendant presented a request the effect of which, if given, would have been to exclude from a consideration the ground of negligence relating to the alleged failure of instruction and supervision with reference to the derailing switch. The charge as given is in accordance with that approved in *Shoe-*

maker v. Kingsbury, 12 Wall. 369, 20 L. ed. 432, as relating to the duty resting upon a private carrier. The criticism is made that the instruction imposed too high a degree of care upon the employer. We think the criticism is not well made. The deceased was not a mere licensee, as would seem, from the authorities cited, to be defendant's view.

5. Upon the subject of the assumption of risk, the jury was instructed that, if the officers and agents of the company were negligent in the discontinuance of the use of the derailing switch, then the inquiry would be "whether the deceased, Huff, knew of the discontinuance of this switch, and whether a man of ordinary intelligence should have appreciated the dangers that would result from a failure to keep up the use of the derailing switch. If you find from the weight of the proof that the deceased, Huff, knew that the use of the derailing switch was not kept up, and knew, as a man of ordinary intelligence, and appreciated, the dangers to be apprehended from the fact, . . ." such fact would be a complete defense to the allegation of negligence relating to the failure to maintain the use of the derailing switch. To this instruction the criticism is made that it is not necessary that the deceased should have actually appreciated the dangers, provided he, as a reasonable man, should have appreciated them. The instruction which we have quoted may, we think, fairly be construed as conforming to the definition contended for by defendant's counsel.

For the errors above pointed out, the judgment will be reversed, and a new trial ordered.

**WASHINGTON SUPREME COURT.**  
(In Banc.)

STATE OF WASHINGTON EX REL.  
DAVIS-SMITH COMPANY  
v.

C. W. CLAUSEN, State Auditor.

(65 Wash. 156, 117 Pac. 1101.)

**Mandamus — enforcement of statute — defense of unconstitutionality.**

1. A public officer may raise the question of the constitutionality of a statute in de-

fense of a mandamus proceeding to compel him to make expenditures of public money in accordance with its terms.

**Master and servant — employees' indemnity — constitutionality of statute.**

2. A statute creating an employees' indemnity fund by assessments upon employers in hazardous callings, being within the police power, is not invalid under the due process of law clauses of the Constitutions, as interfering with freedom of contract, creating liability without fault, or taking the property of one employer to pay the obligations of another.

**Same — class legislation.**

3. That an employees' indemnity act made applicable only to hazardous occupations entitled to its benefit workmen injured when outside the line of their duties, or in a branch of the business not peculiarly hazardous, does not render the entire act invalid as class legislation, if provision is made for an elimination from the act of parts which may be found to be invalid, without affecting the remainder.

**Same — application to particular class of workmen.**

4. An employees' indemnity act is not invalid as class legislation because the fund collected by assessments upon certain hazardous business is to be expended in the relief of employees of such businesses, instead of being applied to the relief of workmen generally, or to the use of the state at large.

**Tax — uniformity — employees' indemnity fund.**

5. An assessment levied on those conducting hazardous occupations, to provide an indemnity fund for their employees, is not within a constitutional provision requiring taxes to be equal and uniform, since it is in the nature of a license tax.

**Jury — employees' indemnity — administration by commission — validity.**

6. A statute fixing an indemnity to be awarded employees injured in hazardous occupations, to be administered by a commission, is not invalid, as interfering with the constitutional right of trial by jury.

**Statute — setting aside for expediency.**

7. The court will not set aside an employees' indemnity act on the ground that it will prove unnecessarily costly and burdensome to those whose interests will be affected by it, and will lead to public and private abuses, where it was adopted by the legislature after expert advice and careful consideration of the objections urged against it.

(September 27, 1911.)

**Note. — Constitutionality of compulsory industrial insurance.**

The constitutionality of workmen's compensation legislation of various sorts has already been discussed in a note to Ives v. South Buffalo R. Co. 34 L.R.A.(N.S.) 162, which contains a summary of the provisions 37 L.R.A.(N.S.)

of the Massachusetts statute of July 28th, 1911, establishing a scheme for providing, through the instrumentality of a corporation established for that purpose, and a subscription of employers thereto, for compensation to employees engaged in employments other than domestic service and farm labor, for personal injuries received by them in

**A**PPPLICATION for writ of mandamus to compel defendant to issue a warrant on the State Treasurer in payment of an obligation incurred by the Industrial Insurance Department. Writ issued.

The facts are stated in the opinion.

Messrs. Harold Preston and George A. Lee, with Mr. W. V. Tanner, Attorney General, for the State.

Messrs. Denman & Fishburne, for defendant:

This statute interferes with the right of trial by jury.

Dacres v. Oregon R. & Nav. Co. 1 Wash. 529, 20 Pac. 601; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 27 Mont. 536, 71 Pac. 1005; Chessman v. Hale, 31 Mont. 577, 68 L.R.A. 410, 79

Pac. 254, 3 A. & E. Ann. Cas. 1038; Bradford v. Territory, 1 Okla. 366, 34 Pac. 66; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; East Kingston v. Towle, 48 N. H. 58, 97 Am. Dec. 575, 2 Am. Rep. 174; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 438; Graves v. Northern P. R. Co. 5 Mont. 556, 51 Am. Rep. 81, 6 Pac. 16; Fairchild v. Rich, 68 Vt. 202, 34 Atl. 692.

The court has no power to order the reference of an action at law without the consent of both parties.

6 Am. & Eng. Enc. Law, 2d ed. 985; North Pennsylvania Coal Co. v. Snowden, 42 Pa. 488, 82 Am. Dec. 530, 14 Mor. Min. Rep. 294; Plimpton v. Somerset, 33 Vt. 283; King v. Hopkins, 57 N. H. 334; Wyne-

the course of their employment, and not due to serious and wilful misconduct; and of the opinion of the justices of the supreme court of that state, to whom the statute was submitted before its passage, affirming its constitutionality; which statute and opinion therefore need not be again reviewed in the present connection. The opinion referred to has since been reported in 209 Mass. 607, 96 N. E. 308.

In Montana, provision has been made by statute (chap. 67, Laws 1909) for the creation of a state accident insurance and total permanent disability fund to insure all workmen, laborers, and employees employed in and around any coal mines or coal washers, except office employees, superintendents, and general managers, against accidents occurring in the course of their occupations; such fund to arise from the payment to the state auditor, by operators of coal mines of 1 cent per ton of coal mined and 1 per cent of the gross monthly earnings of persons entitled to the benefit of the provisions of the act, to be deducted by the employer from such earnings. The act goes on to provide that, in the event of death by accident of an employee insured thereunder who shall have come to his death in the course of his employment and by causes arising therein, the state auditor, upon being satisfied by adequate evidence of such death, shall issue his warrant in the sum of \$3,000, (1) to surviving wife and child or children in equal shares; if none, then (2) to surviving parents who are dependent or partially so upon the deceased; if none, then (3) to other dependent relatives. It is further provided that a workman receiving injuries permanently incapacitating him shall receive a compensation monthly, not to exceed \$1 a day for each working day, upon filing with the auditor his application therefor, together with a certificate from the county physician of the county wherein he resides, attested before a notary public, the auditor being authorized to procure medical examination or treatment when, in his judgment, he may deem it advisable. Loss of a limb or eye caused by accident to a workman in the course of his occupation is to be com-

pensated by the payment of the sum of \$1,000. Provision is also made for the investigation by the secretary of the state board of health of any claim believed to be fraudulent, upon the request of any contributor toward the insurance fund. The act further provides for the payment in lieu of monthly compensation, of a lump sum upon application by or in behalf of the workman, which in no instance shall exceed the amount specified as death indemnity. The auditor is further given plenary power to determine all disputed cases which may arise in the administration of the act, not otherwise provided for, and to define the insurance provisions thereof by regulations not inconsistent therewith, and to make all other orders and rules necessary to carry out its true intent. The act, after rendering money payable thereunder nonassignable, and exempting from execution or attachment, further provides that the acceptance of pecuniary benefit thereunder shall operate to release the person or persons, corporation, partnerships, or associations causing such injuries or death for which benefits are so claimed, who shall have paid the assessment therein provided for, and also the employer, officers, and agents thereof, from all liability and claim arising from such injuries or death, and that the commencement of a suit to recover for such injuries or death shall operate as a forfeiture of the right to benefit thereunder.

The constitutionality of this act is considered in *Cunningham v. Northwestern Improv. Co.* — Mont. —, 119 Pac. 554, in which it is held that as the act has a tendency to minimize indigency and to reduce the amount of personal-injury litigation in the courts, it is to be considered as a proper exercise of the police power; that, in singling out the employment of coal mining, it is not obnoxious as class legislation, all persons operating coal mines and all coal miners being therein treated alike; that the impost laid by the act upon coal operators and miners is to be considered as an employment tax upon persons operating and working coal mines; and that the fact that the act operates to the direct benefit of the

hamer v. People, 13 N. Y. 426; People v. Kennedy, 2 Park. Crim. Rep. 312.

The statute takes property without due process of law.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Ex parte Wall, 107 U. S. 289, 27 L. ed. 562; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Holden v. Hardy, 169 U. S. 366, 388, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 438; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; Re Aubrey, 36 Wash. 317, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927; State v.

Brown, 37 Wash. 103, 68 L.R.A. 889, 107 Am. St. Rep. 798, 79 Pac. 635.

No civil liability can be imposed upon a man who is not himself at fault.

Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206, 22 Am. St. Rep. 143, 23 Pac. 1008; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Catril v. Union P. R. Co. 2 Idaho, 576, 21 Pac. 416; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Denver & R. G. R. Co. v. Davidson, 2 Colo. App. 443, 31 Pac. 181; Wadsworth v. Union P. R. Co. 18 Colo. 600, 23

injured employee or his dependents does not, of itself, render the tax one for private purposes only, but that the legislature must, in view of the considerations accompanying the enactment, be deemed to have declared by implication that the purpose for which the tax is imposed is a public one; that the right to trial by jury guaranteed by the Federal and state Constitutions is not thereby denied, since the provision of the Federal Constitution does not guarantee a trial by jury in a civil action in a state court, and since the right of trial by jury, secured by the state Constitution, refers to the trial of cases, actions, or suits at law, and has no reference to claims against an indemnity fund, such as are provided for by the act, or demands by the state auditor for occupation taxes; that the provision for the collection of an occupation tax in the summary manner provided by the act does not contravene the constitutional guaranties of due process of law, as such guaranties do not require the collection of taxes by judicial proceedings, and since the person aggrieved by an illegal tax has his remedy by injunction against its collection, or by an action at law for its recovery where paid under protest. In replying to the contention that the provision for payment to an injured employee, of his compensation in a lump sum, defeats the purpose of the act, viewed as a police regulation, by putting it within the power of the employee to dissipate and waste the money so paid, the court said that there is no presumption that the employee would render himself indigent, and that the expediency of the provision was one for legislative determination exclusively. It was further held that the act is not unconstitutional as failing to differentiate between a careful and a careless employer; that it is not objectionable as lodging judicial power in the state auditor, the act being almost, if not completely, automatic in practical working, and the auditor's powers thereunder relating to details of administration. Further discussing the objection last stated, the court said: "The fact 37 L.R.A.(N.S.)

that one who has a cause of action at common law may elect to take under the act, and the suggestion that as to him the auditor may be called upon to exercise judicial power, has no persuasive force when we consider that such election is altogether voluntary, and he may resort to the courts if he so desires. If the tax provided for in the act can legally be exacted from the employer, and, as is the case, the acceptance of its benefits by the claimant *ipso facto* operates to release the employer from liability, it is difficult to see how the latter has any further concern in the matter of distribution of the fund than to be assured, as the act provides he may be, that it is not paid out on improper or fraudulent claims. If the summary method of administration provided may not be resorted to, then one of the paramount reasons for this class of legislation must be entirely eliminated from consideration." But the act was held to be fatally defective as denying to the mine operator the equal protection of the laws, inasmuch as, after full compliance with the terms of the act, he is not exonerated from liability, but still may be sued and compelled to pay damages in a proper case, and no provision being made for reimbursement, in whole or in part, of his contributions toward the indemnity fund.

The Wisconsin act providing for the payment of compensation without litigation to an employee for injury sustained in the performance of service growing out of and incidental to his employment, and not caused by wilful misconduct, the acceptance of the benefits of the provisions of which is optional with both the employee and the employer, who, in case of his nonacceptance, is deprived of the benefit of the defenses of assumption of risk or, where he has in a common employment four or more employees, that the injury was caused in whole or in part by the negligence of a fellow servant, has been held constitutional in *Borgnis v. Falk Co.* 147 Wis. 327, post, 489, 133 N. W. 209, which, being reported herewith, need not here be summarized.

E. S. O.

L.R.A. 812, 36 Am. St. Rep. 309, 33 Pac. 515; Union P. R. Co. v. Kerr, 19 Colo. 273, 35 Pac. 47; Rio Grande Western R. Co. v. Vaughn, 3 Colo. App. 465, 34 Pac. 264; Rio Grande Western R. Co. v. Chamberlin, 4 Colo. App. 149, 34 Pac. 1113; Rio Grande Western R. Co. v. Whitson, 4 Colo. App. 426, 36 Pac. 159; Thompson v. Northern P. R. Co. 8 Mont. 279, 21 Pac. 25; Ohio & M. R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259.

The police power cannot be used as a cloak for the invasion of personal rights or private property.

22 Am. & Eng. Enc. Law, 2d ed. 938; State v. Brown, 37 Wash. 99, 68 L.R.A. 889, 107 Am. St. Rep. 798, 79 Pac. 635; Lochner v. New York, 198 U. S. 45, 57, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Buchanan, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927; Armstrong v. T aylor, 87 Tex. 598, 30 S. W. 440.

Messrs. Graves, Kizer, & Graves, also for defendant:

There is nothing new in the legislative attempt to impose a liability where no fault exists. But it has not met the approval of the courts.

Ohio & M. R. Co. v. Lackey, 78 Ill. 55; Louisville & N. R. Co. v. Baldwin, 85 Ala. 619, 7 L.R.A. 266, 5 So. 311; Gibbs v. Tally, 133 Cal. 373, 60 L.R.A. 815, 65 Pac. 970; Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395, 31 Pac. 177; Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; South & North Ala. R. Co. v. Morris, 65 Ala. 193; Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641; Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662, 27 L.R.A. 263, 46 Am. St. Rep. 92, 13 So. 602; Jensen v. Union P. R. Co. 6 Utah, 253, 4 L.R.A. 724, 21 Pac. 994; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 2 L.R.A. 813, 20 Pac. 314; Nitro-glycerine Case (Parrott v. Wells), 15 Wall. 537, 21 L. ed. 211; Bennett v. Ford, 47 Ind. 264; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; Steffen v. Chicago & N. W. R. Co. 46 Wis. 259, 50 N. W. 348.

The power of taxation can only be exercised for a public purpose, which means, for the benefit of all the citizens of the state. The true test for classification is not what occupation employers may be engaged in, but whether the work is such that em-

ployees are exposed to dangers in the course of their employments.

Ballard v. Mississippi Cotton Oil Co. 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954; Cleveland, C. C. & St. L. R. Co. v. Foland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165; Chicago, M. & St. P. R. Co. v. Westby, — L.R.A. (N.S.) —, 102 C. C. A. 65, 178 Fed. 619; Cooley, Taxn. 2d ed. 103; Citizens' Sav. & L. Assn. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Patty v. Colgan, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 246; Lucas County v. State (Davies v. State), 75 Ohio St. 114, 7 L.R.A.(N.S.) 1196, 78 N. E. 955; Kingman v. Brockton, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998; Mead v. Acton, 139 Mass. 341, 1 N. E. 413; Weismer v. Douglas, 64 N. Y. 100, 21 Am. Rep. 586; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208; Genesee v. Genesee Natural Gas, Coal, Oil, Salt & Mineral Co. 55 Kan. 358, 40 Pac. 655; Opinion of Justices, 204 Mass. 607, 27 L.R.A. (N.S.) 483, 91 N. E. 405.

Fullerton, J., delivered the opinion of the court:

This is an original proceeding in mandamus, brought by the relator to compel the state auditor to issue a warrant on the state treasurer in payment of an obligation incurred by the industrial insurance department. The application was in the form required by the statute governing the practice in such cases, and sets forth facts which, on their face, show that the applicant is entitled to the warrant demanded. The auditor demurred generally to the application, and at the hearing his counsel argued that the act purporting to authorize the expenditure for which the warrant was demanded was unconstitutional and void.

It was suggested at the argument that the question of the constitutionality of the act could not be raised by the auditor in this form of proceeding, but to do so is in

accord with the practice in this state. In *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99, 57 Pac. 351, the relator sought by mandamus to compel the county treasurer of Spokane to collect an assessment levied to pay the cost of a street improvement, and, on the demurrer of the treasurer to the application for the writ, we inquired into the constitutionality of the act authorizing the assessment to be made. To the same effect are *State ex rel. Port Townsend v. Clausen*, 40 Wash. 95, 82 Pac. 187, and *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609. In the latter case it was acknowledged that the authorities on the question were in conflict; but it was said that the preferable rule was with the cases holding that the question could be thus raised. On principle the ruling seems to be sound. If it be true that an act of the legislature authorizing the disbursement of public money is unconstitutional, to inquire into it on the objection of an officer having in charge such disbursement may save an expenditure that would be otherwise lost to the state were the court to await the suggestion of the question by some private litigant injuriously affected by the act. There is no merit in the objection that the officer is without interest in the proceeding. He is charged with the duty of conserving the public funds, and consequently must be held to have an interest in any proceeding which directly tends to that end.

The act thought to be unconstitutional by the auditor is the act of the legislature of March 14, 1911, commonly known as the "workmen's compensation act." Laws 1911, p. 345. The act is of too great length to be set forth here in full; but the following epitome of its several provisions will give an understanding of its salient features, and of the questions involved on this hearing:

Section 1 contains a declaration of the policy of the act. It recites that the common-law system governing remedies of workmen against employers for injuries received in hazardous employments is inconsistent with modern industrial conditions; that in practice such remedies have proven economically unwise and unfair; that their administration has produced the result that little of the cost thereof to the employer has reached the workmen, and that little, only at a great expense to the public; that the remedy to the individual workman is uncertain, slow, and inadequate; that injuries in such employments formerly occasional have become frequent and inevitable; that the welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. And it thereupon declares that the state of Washing-

ton, exercising its sovereign powers, withdraws all phases of the premises from private controversies and provides sure and certain relief for workmen injured in extrahazardous work, and their families and dependents, regardless of questions of fault, to the exclusion of "every other remedy, proceeding, or compensation, except as otherwise provided in this act." It thereupon abolishes civil actions and civil causes of action for personal injuries incurred in extrahazardous employments, and the jurisdiction of the courts thereover, except as in the act provided.

Section 2 enumerates what the legislature deems extrahazardous employments. It is provided, however, that if there be found to be, or if there subsequently arise, any hazardous employments not enumerated, the same shall nevertheless come within the provisions of the act, and the rate or contribution to the accident fund to be exacted from such employments shall be fixed by the department therein created until the legislature itself shall have acted thereon. The enumeration includes all classes of business and employments in which machinery is employed, whether conducted by corporations or by individuals, and whether they are affected by a public interest or are purely of a private nature.

Section 3 defines certain of the words and terms used in the act. Concerning the word "workman" is the following: "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in § 4, whether by way of manual labor or otherwise, and whether upon the premises or at the time, or, he being in the course of his employment, away from the plant of his employer: Provided, however, that if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another not in the same employ, the injured workman, or, if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case. Any such cause of action assigned to the state may be prosecuted, or compromised by the de-

partment, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department. Any individual employer or any member or officer of any corporate employer who shall be carried upon the pay roll at a salary or wage not less than the average salary or wage named in such pay roll, and who shall be injured, shall be entitled to the benefit of this act as, and under the same circumstances as, and subject to the same obligations as, a workman."

Section 4 contains a schedule of contributions. It recites that, in so much as industry should bear the greater proportion of the burden of the costs of its accidents, each employer shall, prior to January 15th of each year, pay into the state treasury, in accordance with a schedule provided, a sum equal to a percentage of his total pay roll of that year. Then follows a classification of the different industries and the rate per centum each several class shall be required to pay; the amounts varying as the legislature deemed the risk of injury therefrom varied, and the greater hazard contributing the larger percentage. The fund created is termed the "accident fund," and it is provided that it shall be devoted exclusively to the purposes specified in the act. A scheme is provided for replenishing the fund in case an amount collected shall be insufficient to meet the demands upon it. It is also provided: "If a single establishment or work comprises several occupations listed in this section in different risk classes, the premium shall be computed according to the pay roll of each occupation, if clearly separable; otherwise an average rate of premium shall be charged for the entire establishment, taking into consideration the number of employees and the relative hazards. If an employer, besides employing workmen in extrahazardous employment, shall also employ workmen in employments not extrahazardous, the provisions of this act shall apply only to the extrahazardous departments and employments and the workmen employed therein. In computing the pay roll the entire compensation received by every workman employed in extrahazardous employment shall be included, whether it be in form of salary, wage, piece-work, overtime, or any allowance in the way of profit-sharing premium, or otherwise, and whether payable in money, board, or otherwise."

Section 5 contains the compensation schedule. It provides that each workman who shall be injured, whether upon the premises or at the plant, or being in the course of his employment away from the

plant of his employer, or his family or dependents, in case of the death of the workman, shall receive out of the accident fund compensation in accordance with the schedule provided, and except as in the act otherwise provided such compensation shall be in lieu of any and all rights of action whatsoever against any person whomsoever. This schedule provides for monthly payments to dependents of the workman in case the injury results in death, varying according to their number and degree of relationship, and to the workman direct in case the injury results only in disability; the amount varying according to the proportion the extent of such disability bears to a fixed maximum.

Section 6 relates to intentional injuries and the status of minors engaged in hazardous employments. It is provided that, if injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, no compensation shall be made either to the workman or his dependents out of the accident fund. If, however, the injury or death results to a workman from the deliberate intention of his employer, such workman, or in case of his death, a widow, widower, child, or dependent of the workman, shall have the privilege to take under the act, and shall also have a cause of action against the employer, as if the act had not been enacted, for any excess of damage over the amount received, if receivable under the act. A minor working at an age legally permitted under the laws of the state shall be deemed *sui juris*, for the purposes of the act, and no other person shall have any cause of action or right to compensation for his injury.

Section 7 provides for converting the monthly payments into corresponding lump sums according to the American mortality tables. Section 8 provides penalties for defaulting employers. Section 9 relates to injuries caused by the absence of safeguards required by statute.

Section 10 exempts awards made under it from assignment, or from seizure under legal proceedings.

Section 11 provides that no employer of workmen shall exempt himself from the burden or waive the benefits of the act by any contract, agreement, rule, or regulation; and that any such contract, agreement, rule, or regulation shall be *pro tanto* void.

Section 12 relates to the filing of claims; § 13 to medical examinations; § 14 to the notice required of the happening of accidents; § 15 to an inspection of any employer's books. Section 16 provides a penalty for misrepresentation as to the amount of the pay roll. Section 17 relates to pub-



lie contract work. Section 18 contains provisions relating to interstate and intrastate commerce, and § 19 provides that the provisions of the act may be adopted by employers and employees engaged in non-hazardous employments.

Section 20 relates to court reviews. It provides that any employer, workman, beneficiary, or person feeling aggrieved in any decision of the department created to administer the terms of the act, affecting his interest, may have the same reviewed by a proceeding for that purpose in the nature of an appeal, initiated in the superior court of the county of his residence, in so far as such decision rests upon questions of fact or of the proper application of the provisions of the act; "it being the intent that matters resting in the discretion of the department shall not be subject to review." It is provided further that the appeal shall be informal and summary. No bond shall be required, and any decision of the superior court may be referred to the supreme court for review according to existing laws applicable to other civil causes. The calling of a jury is within the discretion of the court, except that, in cases occurring under §§ 9, 15, and 16, of the act, each party shall be entitled to a trial by jury on demand.

Section 21 vests the administration of the act in a department to be known as the "Industrial Insurance Department," to consist of three commissioners to be appointed by the governor. It is provided that a decision of any question arising under the act, concurred in by two commissioners, shall be deemed the decision of the department, and each member thereof is given power to issue subpoenas requiring the attendance of witnesses and the production of books and documents.

Section 22 relates to the salary of the commissioners, and § 23 to the appointment of deputies and assistants. Section 24 further defines the duties of the commissioners in relation to the administration of the act. Section 25 relates to medical examinations, and § 26 to the manner in which funds appropriated to the use of the department shall be disbursed.

Section 27 provides: "If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman; or if any workman shall be adjudicated to be outside the lawful scope of this act because of remoteness of his work from the hazard of his employer's work, any such adjudication shall not impair the validity of this act in other respects; and in every such case an accounting in accordance with the justice of the case shall be had of moneys received. If the provisions of § 4 of this act for the crea-

tion of the accident fund, or the provisions of this act making the compensation to the workman provided in it exclusive of any other remedy on the part of the workman, shall be held invalid, the entire act shall be thereby invalidated except the provisions of § 31, and an accounting according to the justice of the case shall be had of moneys received. In other respects an adjudication of invalidity of any part of this act shall not affect the validity of the act as a whole or any other part thereof."

Section 29 appropriates out of the general fund in the state treasury the sum of \$150,000, to be known as an "administration fund," out of which the salaries, traveling, and office expenses of the department shall be paid, together with all the expenses of administration of the accident fund; and out of the accident fund is appropriated \$1,500,000, to be applied to the purposes for which such fund is applicable. The remaining sections relate to the administration, and define and limit the effect and operation of the act, and need no special reference to their contents.

The foregoing summary makes clear the theory and purpose of the act. It is founded on the basic principle that certain defined industries called in the act extra-hazardous should be made to bear the financial losses sustained by the workmen engaged therein through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by a workman engaged in any such industries, and make a sure and certain award therefor, bearing a just proportion to the loss sustained, regardless of the manner in which the injury was received. With the economic questions thus suggested, the auditor's learned counsel object only to the wisdom of the scheme formulated. They concede that the evil is one calling for a remedy, and direct their arguments solely against the constitutionality of the scheme adopted. In our discussion we shall confine ourselves to the question thus suggested, noticing the economic question only incidentally.

The act is challenged as unconstitutional on four distinct grounds: (1) That it violates § 3 of article 1 of the state Constitution and the 14th Amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law; (2) that it violates § 12 of article 1 of the state Constitution, which provides that no law shall be passed granting to any citizen, class of citizens, or corporations, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations; and the 14th Amendment to

the Constitution of the United States, which provides for the equal protection of the laws; (3) that it violates §§ 1 and 2 of article 7 of the state Constitution, which provide that property shall be taxed according to its value in money, and that all taxation shall be equal and uniform; and (4) that it violates § 21 of article 1 of the state Constitution, which provides that the right of trial by jury shall remain inviolate. But, while we shall discuss the questions suggested under the several divisions as here set out, it is obvious that no very logical segregation of the argument can be thus made, as many of the reasons advanced for or against the act under one particular division are equally applicable to one or more of the others. Any different arrangement, however, seems to be at the sacrifice of clearness, and we pass therefore directly to the first objection stated.

It is with regret that we are unable to set forth at length counsel's argument on this branch of the case, as any abbreviation of it is at the expense of its cogency and force. To do so, however, would unduly lengthen this opinion. The argument is based on two fundamental ideas: The one, that the act creates a liability without fault; and, the other, that it takes the property of one employer to pay the obligations of another. It must be conceded that these contentions have a basis in fact, and that they, on first impression, constitute a persuasive argument against the validity of the act. Since there is exacted from every employer of labor engaged in one or more of the industries termed hazardous a certain fixed sum, based upon his pay roll, which is to be used to compensate employees working in such hazardous employments who receive personal injuries, regardless of the question whether the injury was because of the fault of the employer or of the negligence of the employee, it can be said that some part of the sum so collected will be paid out on injuries in which the employer is without fault; and furthermore, since every such employer is liable to make the payments whether or not any of his own workmen are injured, and since an employer is liable under the common law for an injury to his own workmen only, it can also be said that by this act one employer is held liable for the obligations of another.

But these conditions do not furnish an absolute test of the validity of the act. In the statute books of the several states are many statutes held constitutional by the courts where liability is created without fault, and where the property of one person is taken to pay the obligations of another, and this where no compensation is made to the person who is thus made liable, or whose

property is thus taken, other than perhaps the bestowal upon him of some privilege. The test of the validity of such a law is not found in the inquiry: Does it do the objectionable things? But is found rather in the inquiry: Is there no reasonable ground to believe that the public safety, health, or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the Constitution, declare a particular industry, commonly engaged in by the people, to be unlawful, which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however, innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise. This it does under the police power,—“the power inherent in every sovereignty, . . . the power to govern men and things.” It is unnecessary to discuss the origin, nature, or extent of this power. It is sufficient to say that, by means of it, the legislature exercises a supervision over matters affecting the common weal, and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the state may “prescribe regulations promoting the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.” In fine, when reduced to its ultimate and final analysis, the police power is the power to govern. It is not meant here to be asserted that this power is above the Constitution, or that everything done in the name of the police power is lawfully done. It is meant only to be asserted that a law which interferes with personal and property rights is valid only when it tends reasonably to correct some existing evil or promote some interest of the state, and is not in violation of any direct and positive mandate of the Constitution. The clause of the Constitution now under consideration was intended to prevent the arbitrary exercise of power, or undue, unjust, and capricious interference with personal rights; not to prevent those reasonable regulations that all must submit to as a condition of remaining a member of society. In other words, the test of a police regulation, when measured by this clause of the Constitution, is reasonableness, as contradistinguished from arbitrary or capricious action.

The authorities, as we view them, abun-

dantly support the foregoing principles. Of statutes upheld by the court which can be said to create liability without fault, and take the property of one person to pay the obligations of another, the most conspicuous examples are, perhaps, §§ 4585 and 4803 of the Revised Statutes of the United States, which provide:

"Sec. 4585. There shall be assessed and collected by the collectors of customs at the ports of the United States, from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel employed in the coasting trade, and before such vessel shall be admitted to entry, the sum of forty cents per month for each and every seaman who shall have been employed on such vessel since she was last entered at any port of the United States; such sum such master or owner may collect and retain from the wages of such seamen."

"Sec. 4803. The several collectors of the customs shall respectively deposit, without abatement or reduction, the sums collected by them under the provisions of law imposing a tax upon seamen for hospital purposes, with the nearest depository of public moneys, and shall make returns of the same, with proper vouchers, monthly, to the Secretary of the Treasury, upon forms to be furnished by him. All such moneys shall be placed to the credit of 'the fund for the relief of sick and disabled seamen;' of which fund separate accounts shall be kept in the Treasury. Such fund is appropriated for the expenses of the marine-hospital service, and shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States." U. S. Comp. Stat. 1901, p. 3322.

This statute clearly does everything that is charged against the statute at bar. It creates liability without fault, since it obligates the master or owner of every vessel of the United States to pay into a given fund, controlled by the government, a fixed sum for the benefit of sick and disabled seamen, regardless of the fact whether or not the vessel of the master or owner making the payment has any sick or disabled seamen who take advantage of the fund; and it takes the property of the one to pay the obligations of another, since the fund is disbursed in the cure of sick and disabled American seamen generally, regardless of the fact whether or not the expense of their cure exceeds the sum paid in by the master or owner of the vessel from which they came. Whatever may be said as to the foundation of the liability of the master or

the owner of a vessel, or the vessel itself, to answer for the expenses of the cure of sick and disabled seamen while in service on the ship, the foundation of this liability is purely statutory, and, if the objection that is made to the present statute were sufficient to condemn it, the statute is in violation of the 5th Amendment to the Constitution of the United States. The statute had its inception in the act of Congress of July 16, 1798, chap. 77, 1 Stat. at L. 606, U. S. Comp. Stat. 1901, p. 3321, and was on the statute books for nearly one hundred years, during which time it was continuously enforced. It is true our attention has been called to no case where the statute was directly attacked; but there are numerous cases in which it has been specifically mentioned and given force, and it would seem that, if it were thought inimical to the Constitution, it would not have escaped the attention of the astute counsel whose client's interests were adversely affected by it. *Buckley v. Brown*, 3 Wall. Jr. 199, Fed. Cas. No. 2,092; *Reed v. Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641; *Peterson v. The Chandos (D. C.)* 4 Fed. 645; *Holt v. Cummings*, 102 Pa. 212, 48 Am. Rep. 199. See also 3 Ops. Atty. Gen. 683; 13 Ops. Atty. Gen. 330.

Statutes making railroad corporations absolutely liable, without regard to negligence, for injuries to property caused by fires escaping from their locomotive engines, are clearly statutes creating liability without fault, yet these statutes have been upheld by all the courts of the states in which they have been enacted, as well as by the Supreme Court of the United States. *Chapman v. Atlantic & St. L. R. Co.* 37 Me. 92; *Sherman v. Maine C. R. Co.* 86 Me. 422, 30 Atl. 69; *Hooksett v. Concord R. Co.* 38 N. H. 242; *Smith v. Boston & M. R. Co.* 63 N. H. 25; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 278, 25 L.R.A. 161, 24 S. W. 591; *Emerson v. Gardiner*, 8 Kan. 452; *Jensen v. South Dakota C. R. Co.* 25 S. D. 506, 35 L.R.A.(N.S.) 1015, 127 N. W. 650; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. Other statutes are those providing that any landlord who knowingly leases his premises for saloon purposes shall be liable for losses resulting from intoxication caused by the sale of liquor by his lessee. Such a statute was formerly in force in this state, and was given effect by this court. *Delfel v. Hanson*,

2 Wash. 194, 26 Pac. 220; *Burkman v. Jamieson*, 25 Wash. 606, 66 Pac. 48. And in *Bertholf v. O'Reilly*, 74 N. Y. 500, 30 Am. Rep. 323, the constitutionality of a like statute was maintained in an opinion by Judge Andrews, renowned for its ability and learning. In the course of his opinion, the learned judge noted the fact that the liability of the landlord could not be sustained on the theory that such liability was a condition of a privilege granted by the statute, but rested the decision on the principle that the state, under its police power, could impose upon the landlord liability for the acts of his tenants. In the course of the opinion this language was used: "And the act of 1873 is not invalid because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offenses, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legislature may impose upon one man liability for an injury suffered by another, with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. . . . The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts connected with the use of the leased property."

Statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the states of New York and Illinois. *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *Fire Dept. v. Wright*, 3 E. D. Smith, 453; *Exempt Fireman's Benev. Fund v. Roome*, 29 Hun, 391, 394; *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115. Clearly these are statutes creating liability without fault. A similar statute relating to agents of foreign fire insurance companies was upheld in Wisconsin. *Fire Dept. v. Helfenstein*, 16 Wis. 136.

The statute of Nebraska makes a railroad company liable in damages for injuries sustained by a passenger, regardless of the question of negligence on the part of the

company, except where the injury is caused by the passenger's criminal negligence, or by his violation of some express rule of the company, actually brought to his attention. This statute was upheld against a challenge on the ground that it violated the due process of law clauses of the state and Federal Constitutions, by the state court, in *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Neb. 689, 55 L.R.A. 610, 82 N. W. 26, and by the Supreme Court of the United States in *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229. The Supreme Court of the United States, vindicating the statute against the attack made upon it, used the following language: "In *Omaha & R. Valley R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114, the words of the statute exempting railroad companies from liability, 'where the injury done arose from the criminal negligence of the persons injured,' were defined to mean 'gross negligence,' 'such negligence as would amount to a flagrant and reckless disregard' by the passenger of his own safety, and 'amount to a wilful indifference to the injury liable to follow.' This definition was approved in subsequent cases. It was also approved in the case at bar, and the plaintiff in error, it was in effect declared, was precluded from any defense but that of negligence as defined, or that the injury resulted from the violation of some rule of the company by the passenger, brought to his actual notice, and the company, as we have said, was not permitted to introduce evidence that the derailment of its train was caused by the felonious act of a third person. The statute, thus interpreted and enforced, it is asserted, impairs the constitutional rights of plaintiff in error. The specific contention is that the company is deprived of its defense, and not only declared guilty of negligence and wrongdoing without a hearing, but adjudged to suffer without wrongdoing; indeed, even for the crimes of others, which the company could not have foreseen or have prevented. Thus described, the statute seems objectionable. Regarded as extending the rule of liability for injury to persons which the common law makes for the loss of or injury to things, the statute seems defensible. And it was upon this ground that the supreme court of the state defended and vindicated the statute. The court said: 'The legislation is justifiable under the police power of the state, so it has been held. It was enacted to make railroad companies insurers of the safe transportation of their passengers as they were of baggage and freight; and no good reason is suggested why a railroad company should be released from liability for in-

juries received by a passenger while being transported over its line, while the corporation must respond for any damages to his baggage or freight.' Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of the master for the acts of his servants. In *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, a statute of Kansas abrogating the common-law rule exempting a master from liability to a servant for the negligence of a fellow servant was sustained against the contention that such statute violated the 14th Amendment of the Constitution of the United States. And in *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176, a statute of Iowa which extended liability for the 'wilful wrongs, whether of commission or omission,' of the 'agents, engineers, or other employees' of railroad companies, was vindicated against the double attack of being an unjust discrimination against railroad corporations and the deprivation of property without due process of law."

The latest illustration of such a statute is found in the Oklahoma depositors' guaranty law, which authorizes the assessment and collection of a certain per centum on the daily average deposit of each and every bank organized under the laws of the state, as a fund to pay the losses caused by failing and insolvent banks. This act was challenged in the state court on the ground that it violated the 14th Amendment to the Constitution of the United States, and the due process of law clause of the state Constitution, but was upheld by the state court, and on writ of error to the Supreme Court of the United States the judgment of the state court was affirmed. *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590; *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186. Answering the objection that the act takes private property for a private use, and creates a liability without fault, the Supreme Court of the United States said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby*

*Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return, to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; *Bacon v. Walker*, 204 U. S. 311, 315, 51 L. ed. 499, 501, 27 Sup. Ct. Rep. 289. And, in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

Illustrations of the nature and all-pervading extent of the police power are shown somewhat in the cases already cited. Other illustrations abound almost without number in the decisions of the state and Federal courts. It will be sufficient for our purposes, however, to call attention to a few of those which most clearly, as we believe, illustrate the doctrine. In *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, the court used this language: "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation

of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Again, in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, it was said: "An examination of both these classes of cases under the 14th Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country, at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though, so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies let it be said that so oppressive a doctrine had never obtained a foothold there. The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination

of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the 14th Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that, while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

So, in *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Mr. Justice Holmes said: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponder-

ant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits; to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited, of a ditch for irrigation, or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort to depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. *Danby Bank v. State Treasurer*, 39 Vt. 92; *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496, 53 L. ed. 205, 300, 29 Sup. Ct. Rep. 174; *Kidd, D. & P. Co. v. Musselman Grocer Co.* 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606. It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 580. It will 57 L.R.A. (N.S.)

serve as a datum on this side that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39."

It is argued, however, that the statutes above referred to can be supported on principles not applicable to the statute before us. First, it is said that the statutes creating absolute liability on railroad companies for losses caused by fires from their locomotive engines are in themselves but a return to the common law as it originally existed. But this does not meet the objection. At the time the common law becomes a rule of action for the American states, the doctrine that negligence or fault of some kind was a necessary element of liability was as firmly imbedded in it as was any other of its tenets, and to create liability regardless of negligence is now as fundamental a change in the common law as it would be had the rule always remained as it now is. Again, it is said that the right to use the agencies of fire and steam in the movement of trains is derived from legislation by the state, and the state can, for that reason, prescribe such limitations upon and annex such conditions to its use as it may deem fit and necessary to protect from injury those who come in contact with it. But the premise here assumed is not strictly accurate. The use of fire and steam to propel trains is not in itself unlawful. On the contrary, it is as much a natural right as is the right to propel them by any other means, or to engage in any other lawful enterprise. Hence the power to regulate and interfere with the right must come from some source other than the inherent unlawfulness of the act itself. It is not meant to be said, of course, that the state, when it grants a charter to a railroad company empowering it to construct and operate a railroad within its boundaries, may not annex to the charter such conditions as it pleases. But that is not the question here. The question is: Whence comes the power to impose these additional burdens upon a railroad corporation by legislative fiat after it has received its charter and has constructed and is operating its road thereunder? Unless the constitution or the act granting the charter itself expressly reserves such right, the legislature cannot materially change the charters of railroad companies after it has once granted them. The power to annex additional conditions thereto must therefore be found in some other power than the one

here alluded to. Then, again, it is said with reference to these and the bank guaranty statutes that the corporations named therein are affected with a public interest, and that this fact renders them subject to regulations that they would not otherwise be subject to. But again we say that the legislature, because of this public interest, may be warranted in imposing such a condition as a precedent right to engage in the business of railroading or banking, but it furnishes no reason for imposing additional conditions after the business has been entered upon with the consent of the state. The property of such institutions is private property, and its ownership is as secure and free from arbitrary exactions as is the property invested in enterprises of a more private nature. Of the statutes making the landlord liable for damages caused by the sale of intoxicating liquors by his tenant, it is said that the traffic is unlawful in itself; that "whisky is an outlaw," and hence the legislature, if it permits its sale at all, may prescribe the terms upon which sales shall be made. But here again the assumption is not in accord with the fact. The sale of liquor was not unlawful at common law. On the contrary, it has been said by as high an authority as the Supreme Court of the United States that the state could no more exclude its importation and sale in original packages without the consent of Congress than it could exclude the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products natural or manufactured of any state. *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725. It refused to classify intoxicating liquors with rags or other goods infected with disease, or with cattle or meat or other provisions which, from their condition, are unfit for human use or consumption, as it was conceded that the state could prohibit the importation and use of these in any form, with or without the consent of Congress. It seems to us, therefore, that it cannot be successfully controverted that all of these statutes rest upon the same basic principle on which the statute at bar rests; that is to say, they have their foundation in the police power of the state.

Nor is it sufficient to exclude the industries mentioned in the act before us from the operation of these principles to say that they are lawful callings, not subject to absolute prohibition. As we have said in another place, lawful trades and businesses, although private in their nature, are subject to the police power, and may be controlled and regulated under it whenever

the welfare of the state requires it. This is well illustrated by the laws of our own state. For example, the statute requiring employers of labor to pay their employees in lawful money; the statute requiring employers of female help in stores or offices to provide each of them with a chair or stool on which to rest when their duties permit; the statute prohibiting the employment of females in any mechanical or mercantile establishment, laundry, hotel, or restaurant, for more than ten hours in any one day; the statute limiting the number of hours an employee will be permitted in any one day to work underground in a coal mine; the statute requiring machinery in factories, mills, and workshops, the openings of all hoistways, hatchways, elevators, and well holes, to be guarded; the statute appointing a commissioner of labor, and empowering him to inspect mills and factories and charge the cost thereof to the mill or factory inspected,—are all statutes regulating lawful trades or businesses not affected with public interests, yet each and all of them have been upheld and enforced in a long line of cases by this court. *State v. Buchanan*, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; *Kirkham v. Wheeler-Osgood Co.* 39 Wash. 415, 81 Pac. 869, 4 A. & E. Ann. Cas. 532; *Shortall v. Puget Sound Bridge & Dredging Co.* 45 Wash. 290, 122 Am. St. Rep. 899, 88 Pac. 212; *Hall v. West & S. Mill Co.* 39 Wash. 447, 81 Pac. 915, 4 A. & E. Ann. Cas. 587; *Whelan v. Washington Lumber Co.* 41 Wash. 153, 111 Am. St. Rep. 1006, 83 Pac. 98.

The Supreme Court of the United States, in *Sentell v. New Orleans & C. R. Co.* 106 U. S. 698, 41 L. ed. 1160, 17 Sup. Ct. Rep. 693, speaking of the power of the state to interfere with private property, used this language: "That a state, in a bona fide exercise of its police power, may interfere with private property, and even order its destruction, is as well settled as any legislative power can be, which has for its objects the welfare and comfort of the citizen. For instance, meats, fruits, and vegetables do not cease to become private property by their decay; but it is clearly within the power of the state to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health. There is also property in rags and clothing; but that does not stand in the way of their destruction in case they become infected and dangerous to the public health. No property is more sacred than one's home, and yet a house may be pulled down or blown up by the public authorities, if necessary to avert or stay a general conflagration, and that, too, without re-



course against such authorities for the trespass."

The power to regulate, therefore, applies alike to all employments. The test of the power is found in the effect the pursuit of the calling has upon the public weal rather than in the inherent nature of the calling itself.

In *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, the court, referring to the 14th Amendment to the Constitution of the United States, said: "The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

It is thought the act at bar interferes with certain of the personal rights here defined, particularly with the right of contract, and is for that reason violative of this provision of the Constitution. But it is recognized in the case cited, and in many others, that these rights are not absolute. On the contrary, it has been many times said that there is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses; that the term "liberty" means absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. The principle was thus stated in *Frisbie v. United States*, 157 U. S. 180, 39 L. ed. 657, 15 Sup. Ct. Rep. 586: "A second objection, insisted upon now as it was by demurrer to the indictment, is that the act under which the indictment was found is unconstitutional, because interfering with the price of labor and the freedom of contract. This objection also is untenable. While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may re-

strain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

Again, in the case of *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, the court, holding constitutional the statute of the state of Utah fixing the number of hours a workingman should be permitted to work continuously in underground mines, used this language: "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, and *Yick Wo v. Hopkins*, 113 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

So, in *State v. Buchanan*, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52, this court, holding constitutional the act limiting the number of hours women could be required to work in one day in mechanical and mercantile establishments, said: "Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government. In the early history of the law, when employments were few and simple, the relative conditions of the citizen and the state were different, and many employments and uses which were then considered inalienable rights have since, from the very necessity of changed conditions, been subjected to legislative control, restriction, and restraint. This all flows from the old announcement made by

Blackstone, that when man enters into society, as a compensation for the protection which society gives to him, he must yield up some of his natural rights; and, as the responsibilities of the government increase, and a greater degree of protection is afforded to the citizen, the recompense is the yielding of more individual rights. Transportation companies are now controlled and restricted, where a few years ago they claimed the right to transact their business exactly as it suited their private interests. The practice of medicine is restricted and controlled. Laws against quackery and empiricism are enforced without question. The sale of liquor, which formerly was a legitimate business, and which the citizen had a right to enter into, as he did any other business, without any restrictions, has now become subject to the control of the state, or to actual prohibition at the will of the state. The changing conditions of society have made an imperative call upon the state for the exercise of these additional powers, and the welfare of society demands that the state should assume these powers, and it is the duty of the court to sustain them whenever it is found that they are based upon the idea of the promotion and protection of society."

If, therefore, the act in controversy has a reasonable relation to the protection of the public health, morals, safety, or welfare, it is not to be set aside because it may incidentally deprive some person of his property without fault, or take the property of one person to pay the obligations of another. To be fatally defective in these respects, the regulation must be so utterly unreasonable and so extravagant in nature and purpose as to capriciously interfere with and destroy private rights.

That the statute here in question has the attribute of reasonableness, rather than that of capriciousness, seems incontrovertible. The evil it seeks to remedy is one that calls loudly for action. Accidents to workmen engaged in the industries enumerated in it are all but inevitable. It seems that no matter how carefully laws for the prevention of accidents in such industries may be framed, or how rigidly they may be enforced, there is an element of human equation that enters into the problem which cannot be eliminated and which invariably causes personal injuries and consequent financial losses to workmen engaged therein. Heretofore these losses have been borne by the injured workmen themselves, by their dependents, or by the state at large. It was the belief of the legislature that they should be borne by the industries causing them, or, perhaps more accurately, by the consumers of the products of such industries.

That the principle thus sought to be put into effect is economically, sociologically, and morally sound, we think must be conceded. It is so treated by the learned counsel who have filed briefs in support of the auditor's contentions; it is so conceded by all modern statesmen, jurists, and economic writers who have voiced their opinions on the subject; and the principle has been enacted into law by nearly all of the civilized countries of Europe, by Australia, by New Zealand, by the Transvaal, by the principal provinces of the Dominion of Canada, and in a partial form, at least, by one or more of South American republics. Indeed, so universal is the conception that to assert to the contrary is to turn the face against the enlightened opinion of mankind. The common law does not purport to afford a remedy for the condition here found to exist. It affords relief to an injured workman in only a limited number of cases,—cases where the injury is the result of fault on the part of the employer and there is want of fault on the part of the workman. For the greater number of injuries traceable to the dangers incident to industry, no remedy at all is afforded. The act, therefore, having in its support these economic and moral considerations, is not unconstitutional for the reasons suggested upon this branch of the argument.

Passing to the second objection, it is well settled that neither the clause of the state Constitution prohibiting class legislation, nor the clause of the 14th Amendment to the Constitution of the United States relating to the equal protection of the laws, takes from the state the power to classify in the adoption of police regulations. The limitations imposed admit of a wide discretion in this respect, and avoid only what is done without any reasonable basis; that is, such regulations as are in their nature arbitrary. The learned counsel for the auditor recognize this distinction, and consequently do not attack the act because it is confined to extrahazardous occupations as its field of regulation, but complain because its benefits are not confined to workmen injured while engaged in such occupations. It is claimed that the act allows workmen employed in such industries the benefit of the act when injured outside of the line of their duties, or when engaged in the business of the concern in a capacity not affected by the peculiar hazards of the business. We have quoted enough of the statute to show that it is somewhat obscure in these respects, but we are not inclined to think the point fatal to the act, even though we concede counsel's interpretation of it to be the correct one.

In § 27, the legislature has made it

clear that it did not intend the provisions relating to those who are entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part without destroying the act in its entirety. It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole, or any other part thereof. This means that the legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the legislature so to provide. Anything it could have eliminated itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination. So here, if it be true that the legislature has gone too far in this direction, and has attempted to include within its benefits certain employees who cannot be included without including employees generally, these can be omitted in the administration of the act without the necessity of nullifying the entire act. But whether any such workmen are so improperly included we shall not here determine. The question can best be met when it arises during the course of the act's administration.

Again, it is said that the act violates the provisions relating to class legislation because it diverts the contributions exacted from the numerous industries to the relief of a particular class of injured and disabled workmen, instead of applying it to the relief of injured workmen generally, or applying it to the use of the state at large. But to divert the money collected in this manner to a special use is one of the prerogatives of legislation. The right of the state to regulate any form of industry arises from the fact that its pursuit affects injuriously the health, safety, morals, or welfare of the persons engaged in it, or is inimical in some form to some portion of the individuals of the community. It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it, or those brought in direct contact with it, even though its pursuit may benefit generally the people of the state at large. Nor is there any particular form which the regulation must take. The conduct of the business may be prohibited entirely in a particular place or in a particular manner; its pursuit may be restricted to certain hours of the day; it may be permitted to be conducted only in case protective devices are used; or it may be permitted in certain forms, and a sum of money exacted from the individuals 37 L.R.A. (N.S.)

carrying it on, for the purpose of recompensing those who suffer losses because thereof.

So, in this instance, if the legislature believed that, to permit the pursuit of the industries named after the present manner of conducting them was generally for the public good in spite of the losses the method of pursuit entailed, there is no reason why it should not confine its regulations to compelling the owners and conductors of such industries to create a fund out of which the losses caused thereby should be made good. That legislation in this form is not class legislation, nor a denial to owners of property of the equal protection of the laws, is well sustained by authority.

In *Jensen v. South Dakota* C. R. Co. 25 S. D. 506, 35 L.R.A. (N.S.) 1015, 127 N. W. 650, the court, discussing the question, used this language: "The exercise of the police power in this class of cases is based upon the ground that, where persons are engaged in a calling or business attended with danger to other persons and their property, then the legislature may step in and impose conditions upon the exercise of such calling or business for the general good and welfare of society, and may prescribe the terms on which such dangerous calling or business will be permitted to be carried on by persons in charge thereof, whether such persons happen to be private individuals or railway corporations. The fact that such legislative exercise of the police power applies alike to all persons and all corporations engaging in such dangerous calling or business relieves it from the charge and contention that there is a denial of equal protection under the law by reason of such enactments."

In *Firemen's Benev. Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115, the court had under consideration a statute of the state of Illinois which created a corporation called the Firemen's Benevolent Association, and required every insurance agent in the city of Chicago to pay to the association a fixed percentage upon the amount of fire insurance premiums collected by him per year from fire insurance effected upon property in the city, to be used solely for the relief of distressed, sick, injured, or disabled firemen and their immediate families. Answering the objection that the act was void as class legislation, the court said: "There is nothing to be found in the Constitution which can be held to inhibit the legislature from imposing burdens, or raising money from citizens of the state, which is not for the direct benefit of the state, and is never designed to belong to the state. To deprive the legislature of this power would to a great extent destroy its useful-

ness,— while it would to a certain extent deprive it of the power of abuse, it would destroy its power to regulate by law a thousand things which the public good requires should be regulated by law. . . . Let us once hold that the legislature could not compel any citizen to submit to a burden, except for the benefit of the state aggregate, or for some subdivision of it, as a county, city, or town, or to pay any money except it shall go into the state or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy itself,—we should tie up the hands of the legislature, it is true, so that they might not do some evils which they have hitherto had the power of doing; but we should also let loose upon society 10,000 evils which, in every well-regulated community, it has always been the duty of the legislature to suppress. It is in the exercise of this indispensable power that ferries, toll bridges, and the like are licensed or chartered. The legislature, finding it necessary to afford especial encouragement to private enterprise to erect a bridge or a ferry, has ever exercised the power of imposing a burden on some, for the benefit of others. Who ever doubted the right of the legislature to charter a bridge, and to require all persons crossing the stream within certain limits, to pay the tolls, whether they cross on the bridge or not? It is the exercise of the same power which fixes the fees of officers for the performance of certain services. It is the power which the legislature possesses, of imposing burdens upon certain members of the community who are supposed to be benefited, by the efforts or acts of certain other members of the community, as a reward or compensation for such acts. . . . It would fill a volume to enumerate all the familiar instances of the exercise of this power,—a power which must be exercised constantly in every civilized community, or the well-being of that community must vitally suffer."

In *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765, the court sustained an act which required the venders of intoxicating liquors to pay a fixed sum per annum into the state treasury, in addition to the usual license fee, as a fund to be disbursed by a state commission in the creation and operation of a state asylum for the care and cure of inebriates. The court, in its opinion, points out that the act is an exercise of police power, saying: "It regards the traffic as one tending to produce intemperance, and as likely, by reason thereof, to entail upon the state the expense and burden of providing for a class of persons rendered incapable of self-support, the evil influence of whose presence and example upon society

is necessarily injurious to the public welfare and prosperity, and therefore calls for such legislative interposition as will operate as a restraint upon the business, and protect the community from the mischiefs, evils, and pecuniary burdens flowing from its prosecution. . . . That these provisions unmistakably partake of the nature of police regulations, and are strictly of that character, there can be no doubt, nor can it be denied that their expediency or necessity is solely a legislative, and not a judicial, question. . . . Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon the traffic, and as a protection to society against its consequent evils, the exacted fee is not unreasonable in amount, and the purpose to which it is devoted is strictly pertinent and appropriate. It could not be questioned but that a reasonable sum imposed in the way of an indemnity to the state against the expense of maintaining a police force to supervise the conduct of those engaged in the business, and to guard against the disorders and infractions of law occasioned by its prosecution, would be a legitimate exercise of the police power, and not open to the objection that it was a tax for the purpose of revenue, and therefore unconstitutional. Reclaiming the inebriate, restoring him to society, prepared again to discharge the duties of citizenship, equally promotes the public welfare, and tends to the accomplishment of like beneficial results, and it is difficult to see wherein the imposition of a reasonable license fee would be any the less a proper exercise of this power in the one case than in the other. The purpose to which the license fund created by the act is designated is more consonant to the idea of regulating the traffic and preventing its evils than is the case under the general license law, which devotes the fees received to common-school purposes, and we are not aware that any objection has ever been urged against that law on that account."

A statute of Kentucky imposed upon all dogs a tax at a fixed sum *per capita*, to be paid by their owners, for the creation of a fund to be disbursed to sheep growers whose sheep should be injured or destroyed by the ravages of dogs. In *McGlone v. Womack*, 129 Ky. 274, 17 L.R.A.(N.S.) 855, 111 S. W. 688, this statute was challenged by a number of owners of dogs on the ground that it violated the state Constitution. Answering the objection that it was class legislation, the court said: "Nor do we think the act is inimical to that portion of § 3 of the Bill of Rights which provides: ' . . . And no grant of exclusive, separate public emoluments or privileges shall be made to

any man or set of men, except in consideration of public services. . . . As we view it, the statute does not confer any special privilege on the owner of sheep. It merely protects these owners from the destruction of their property by dogs. It is the duty of the state to protect every citizen in his life, liberty, and property; and it certainly is within the competency of the legislature to exercise the police power of the state to protect all property against the ravages of destructive animals. The question as to how this is to be done and what property is to be so protected is a matter of legislative discretion. Undoubtedly the sheep industry is a most important one to the whole state. All of our citizens are interested in an industry which supplies the market with wholesome meat, provides means of obtaining warm and comfortable clothing, and at the same time furnishes labor to the otherwise unemployed. It is only necessary to allude to this phase of the question. The importance of the industry as a whole is most obvious. It is equally obvious that sheep are peculiarly liable to the ravages of dogs. They have neither the fleetness to escape nor the courage to defend themselves from attack, and their silent suffering enables the dog to prey upon them without any danger that the owner will be warned of the destruction of his property by the outcry of the dying animal.

. . . The fact that sheep are generally killed at night when it is impossible to ascertain the owner of the dog committing the ravage makes it necessary, if protection is to be had through this channel at all, that each owner of a dog should be required to contribute a small amount to a common fund dedicated to the remuneration of owners of sheep killed by unknown dogs. As said before, this is simply requiring the owners of dogs to make good the ravages of dangerous animals kept by them; and no citizen has just cause of complaint, if he keeps animals destructive to the property of others, that he is required to make good the damages done by them. The statute, in truth, is but an enforcement of the maxim, *Sic utere tuo ut alienum non laedas*, and, as such, its constitutionality is beyond successful question." See also *Leavitt v. Morris*, 105 Minn. 170, 17 L.R.A. (N.S.) 984, 117 N. W. 393, 15 A. & E. Ann. Cas. 961; *Mitchell v. Williams*, 27 Ind. 62; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159, 9 N. W. 246; *Cole v. Hall*, 103 Ill. 30; *Longyear v. Buck*, 83 Mich. 236, 10 L.R.A. 43, 47 N. W. 234; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *State v. Frame*, 39 Ohio St. 399.

The foregoing cases, while defending the statute here in question against the charge 37 L.R.A. (N.S.)

of class legislation, are interesting from another aspect also. They furnish examples of constitutional statutes creating liability without fault. To effect insurance as an agent, to sell intoxicating liquors where not forbidden by the state, or to own and keep dogs, is not of itself unlawful, and it would seem that any reason which would justify the levying of a tax on persons pursuing these occupations as business callings, or owning and keeping the species of property mentioned, would justify the levy sought to be made by the act before us.

The third principal objection to the constitutionality of the act is that it violates the provision of the Constitution designed to secure equal and uniform taxation of property for public purposes. As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority, it partakes of the nature of a tax, and, in the language of a distinguished judge discussing a similar question, "for many purposes might be so spoken of without harm." But it is manifest that it is not a "tax" in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is therefore in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally.

In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable, and if a class of trades or industries is selected from the whole, and the tax imposed upon the class selected alone rather than upon the whole, that there be some reasonable ground for making the distinction. *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796; *Fleetwood v. Read*, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; *Stull v. De Mattos*, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *Re Garfinkle*, 37 Wash. 650, 80 Pac. 188; *Oilure Mfg. Co. v. Pidduck-Ross Co.* 38 Wash. 137, 80 Pac. 276; *McKnight v. Hodges*, 55 Wash. 289, — L.R.A. (N.S.) —, 104 Pac. 504.

The general rule governing the right to

impose such license taxes is well stated by Judge Brewer in *Newton v. Atchison*, 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 288, in the following language: "Before noticing some specific objections which are made to this particular tax, we think it proper to state certain general propositions which underlie this matter of a license tax. First. In the absence of any inhibition, express or implied, in the Constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. This seems to be the concurrent voice of all the authorities. In 1 Dillon on Municipal Corporations, 3d ed. § 357, note, the author says: 'Unless specially restrained by the Constitution, the legislature may provide for the taxing of any occupation or trade, and may confer this power upon municipal corporations.' In *Burroughs on Taxation*, p. 148, is this language: 'Where the Constitution is silent on the subject, the right of the state to exact from its citizens a tax regulated by the avocations they pursue cannot be questioned.' In *Society for Savings v. Coite*, 6 Wall. 606, 18 L. ed. 902, the Supreme Court of the United States thus states the law: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government.' *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 638, 18 L. ed. 906; *Cooley, Taxn.* 384-392, 410. On page 384 the author observes: 'The same is true of occupations; government may tax one, or it may tax all. There is no restriction upon its power in this regard unless one is expressly imposed by the Constitution.' In *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. ed. 179, Field, J., among other things, speaking of the power of taxation, says: 'It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted; in professions, in commerce, in manufactures, and in transportation. Unless restrained by the Constitution, the power as to the mode, forms, and extent of taxation is unlimited.' See also the authorities collected in *Fretwell v. Troy*, 18 Kan. 274. Nor does this rest alone upon a mere matter of authority. Full legislative power is, save as specially restricted by the Constitution, vested in the legislature. Taxation is a legislative power. Full discre-

tion and control, therefore, in reference to it, are vested in the legislature, save when specially restricted. There is no inherent vice in the taxation of avocations. On the contrary, business is as legitimate an object of the taxing power as property. Oftentimes a tax on the former results in a more even and exact justice than one on the latter. Indeed, the taxing power is not limited to either property or avocations. It may, as was in fact done during the late war and the years immediately succeeding, be cast upon incomes, or placed upon deeds and other instruments. We know there is quite a prejudice against the occupation taxes. It is thought, to be really double taxation. Judge Dillon well says that (such taxes are apt to be inequitable, and the principle not free from danger of great abuse.' Yet, wisely imposed, they will go far toward equalizing public burdens. A lawyer and a merchant may, out of their respective avocations, obtain the same income. Each receives the same protection and enjoys the same benefits of society and government. Yet the one having tangible property pays taxes; the other, whose property is all in legal learning and skill, wholly intangible, pays nothing. A wisely adjusted occupation tax equalizes these inequalities. But, after all, these are questions of policy, and for legislative consideration. It is enough for the courts that both occupation and property are legitimate objects of taxation; that they are essentially dissimilar; that constitutional provisions regulating the taxation of one do not control that of the other; and that there are no constitutional inhibitions on the taxation of business, either by the legislature directly, or by municipal corporations thereto empowered by the legislature. Second. There is no inhibition, express or implied, in our Constitution, on the power of the legislature to levy and collect license taxes, or to delegate like power to municipal corporations. It is not pretended that there is any express inhibition. It has been contented that § 1, art. 11, creates an implied inhibition, and this because it reads that "the legislature shall provide for a uniform and equal rate of assessment and taxation." But that section obviously refers to property, and not to license taxes."

In *Fleetwood v. Read*, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665, this court, discussing the question whether taxation of this sort was prohibited by the Constitution, said: "It is insisted, also, that the ordinance is void because it imposes a burden upon a portion, and not the whole, of a class of merchants. We do not think this contention is tenable. The ordinance does apply to all merchants who see fit to engage

in the business of buying tickets of that kind, and the constitutional provision (art. 1, § 12) that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations, cannot be invoked against this ordinance. The adjudicated cases in this respect are so numerous that it is scarcely worth while to mention them here. The ordinance cannot be held void on account of excessive burden imposed. It is not so oppressive that it will in any way interfere with the rights of merchants. However wrong the policy may be which prompted the enactment of this ordinance, or however doubtful the propriety of passing such an ordinance, those are questions which are submitted by the legislature to the discretion of the council, and upon them it is not our province to comment. We think, without further investigation, that there is no doubt that the ordinance is warranted by legislative authority. Some question was raised by the court at the time of the argument of this case in relation to the ordinance being in conflict with §§ 1, 2, and 9 of article 7 of the state Constitution, which provide for uniformity in taxation. Counsel for the respondent was requested by the court to furnish it with a brief on that subject, which he did, and upon an examination of the cases cited and of other cases, we have become convinced that the question raised by the court was not a question pertinent in this case; that, under the great weight of authority, a tax on occupation, business, etc., is not, in legal contemplation, a tax on property, which falls within the inhibition imposed by the usual constitutional provisions in relation to uniformity of taxation; and, in consideration of the fact that the state Constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions, and occupations is, in the absence of constitutional restriction, a matter within its absolute control, and resting entirely in sound legislative discretion."

The sums exacted from the several industries named, we think may be treated as partaking both of the nature of a license for revenue and regulation; as such, however, we find nothing in the principle inimical to either the state or Federal Constitutions.

The fourth principal reason for which the act is thought to be unconstitutional is that it interferes with the right of trial by jury. It is said that the legislature cannot fix a procrustean rule for the admeasurement of damages arising from injuries re-

ceived by one in the employment of another, as the employer and the employee alike have the right to submit to a jury both the question of the right to recover for any such injury, and the question of the amount that may be recovered therefor. But we cannot think the rule absolute. It may be that the legislature cannot fix the amount of recovery, or provide for an absolute recovery, in all cases where one person is injured by another, regardless of the relation of the parties, or the question whether the injury is or is not the result of negligence; but it does not follow that it may not so provide where the injury happens in that class of employments subject to legislative regulation and control. If it be as we have attempted to show, a proper regulation of hazardous industries to compel those engaged therein as owners or operators to pay a fixed sum into a fund to be used for the purpose of compensating the employees thereof for injuries received by them, it is difficult to understand why it is not also proper regulation to require the employees of such industries to accept a given sum for any injury they may receive while so engaged. The same power that authorizes the state to regulate the participation of the one in the particular industry would seem to authorize it to regulate the participation of the other therein. Theoretically, of course, the employer and employee, on entering into a contract by which the one engages the services of the other, stand on the same plane; but in practice, as it is well known, this ideal condition very seldom exists. Greed and sagacity on the one side, and necessity and incapacity on the other, sometimes lead to contracts that create conditions little short of peonage; and our own reports abound with instances where men have been induced to work in situations so dangerous to life and limb that the wonder is not that some of them were injured, but rather that any of them escaped injury. Indeed, it is a common thing for an employer, in defense of an action of damages brought by his employee for injury received in such a situation, to urge that the dangers of the place were so obvious and apparent that the employee was guilty of contributory negligence for working therein. These conditions, we think, authorize the interference of the legislature. The grounds upon which the employer may be held to contribute to a fund for the relief of all injuries sustained by his employees, whatever the cause, we have already stated. The obligation of the employee to accept the conditions of the statute can rest on like grounds; namely, the welfare of the state. The relation being one of contract between employer and employee, the state may make

it a condition of the contract that the employee shall accept a fixed sum for any injury he may receive while engaged in the employment, whether the injury be the result of the inherent dangers of the employment or the result of some fault of his employer.

There is, of course, no direct authority supporting the contention that the right of trial by jury may be thus taken away. There are, however, cases maintaining principles more or less analogous to the principle thus involved. Of these *State v. Buchanan*, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52, and *Holden v. Hardy*, 169 U. S. 386, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, are illustrative. In these cases it is held that the legislature may limit the number of hours a workman shall be permitted to labor in certain classes of employments, on the principle that to do so is to protect the health of the individual workman and thus contribute to the public welfare. If it be within the rule of the police powers of the state to interfere with the workman's personal freedom in this regard, it would seem to be no greater stretch of power to go one step further and provide that, if he be injured while so laboring, he shall receive a sure award in a limited sum as compensation for his injury, and in lieu thereof shall forego his common-law action in damages therefor.

The common-law system of making awards for personal injuries has no such inherent merit as to make a change undesirable. While courts have often said that the question of the amount of compensation to be awarded for a personal injury is one peculiarly within the province of the jury to determine, the remark has been induced rather because no better method for solving the problem is afforded by that system, than because of the belief that no better method could be devised. No one knows better than judges of courts of *nisi prius* and of review that the common-law method of making such awards, even in those instances to which it is applicable, proves in practice most unsatisfactory. All judges have been witnesses to extravagant awards made for most trivial injuries, and trivial awards made for injuries ruinous in their nature; and perhaps no verdicts of juries are interfered with so often by the courts as verdicts making awards in such cases. There is no standard of measurement that the court can submit to the jury by which they can determine the amount of the award. The test of reasonableness means but little to the ordinary juror. Unused as he is generally to witnessing the results of injuries, he is inclined to measure his verdict by the amount of disorder he observes, rather than by the actual

amount of disablement the injury has caused. Nor is he aided in this respect by the testimony of medical experts. Conflicting as such testimony usually is, it tends rather to confuse than to enlighten him. Perhaps the whole difficulty lies in the fact that the question is too much one of opinion, and not enough of fact. It must be remembered also that the remedy afforded by the common law, as we have elsewhere remarked, can be applied only in a limited number of cases of injury,—cases where the injury is the result of negligence on the part of the employer, not contributed to by the employee. For the greater number of injuries the common law affords no remedy at all. For this unscientific system it is proposed to substitute a system which will make an award in all cases of injury, regardless of the cause or manner of its infliction; limited in amount, it is true, but commensurate in some degree to the disability suffered. The desirability of this substitution is unquestioned, and we believe that the legislature had the power to make it without violating any principle of the fundamental law.

The objection may be answered also in another way. The Constitution does not undertake to define what shall constitute a cause of action, nor to prohibit the legislature from so doing. The right of trial by jury, accorded by the Constitution, as applicable to civil cases, is incident only to causes of action recognized by law. The act here in question takes away the cause of action on the one hand, and the ground of defense on the other, and merges both in a statutory indemnity fixed and certain. If the power to do away with a cause of action in any case exists at all in the exercise of the police power of the state, then the right of trial by jury is thereafter no longer involved in such cases. The right of jury trial being incidental to the right of action, to destroy the one is to leave the other nothing upon which to operate.

The auditor also complains of the scheme adopted by the legislature for correcting the evil they have found to exist. It is said that the scheme is unduly cumbersome; that its administration will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to public and private abuses and consequent evils more dangerous to the state than the evil that it is sought to correct.

But the courts are slow to inquire into the mere wisdom of a statute. This question is so pre-eminently one of the law-making branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act. The act in



question here was framed by a commission composed of men eminent for their ability, who gave to the work extended consideration. It was selected by the legislature from among a number of proposed acts having a similar purpose, submitted for their examination, and this, too, after its supposed evil tendencies had been fully pointed out by the representatives of the different interests to be affected by it. In the light of these facts, the court cannot do otherwise than put it to the test of practice. Moreover, the question becomes one of less importance when it is remembered that the sessions of the legislature are sufficiently close together to enable that body to correct any evil influence the enforcement of the act may have before it becomes unduly harmful.

In the foregoing discussion we have not referred to the decision of the court of appeals of the state of New York in the case of *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, which holds the workmen's compensation act of that state to be in conflict with the due process of law clause of the state Constitution, and the 14th Amendment to the Constitution of the United States. The case has, however, been the subject of extended consideration in the briefs of counsel, and it is urged upon us by counsel for the auditor as conclusive of the questions at bar. The act the court there had in review is dissimilar in many respects to the act before us, and is perhaps less easily defended on economic grounds. The principle embodied in the statutes is, however, the same, and it must be conceded that the case is direct authority against the position we have here taken. We shall offer no criticism of the opinion. We will only say that notwithstanding the decision comes from the highest court of the first state of the Union, and is supported by a most persuasive argument, we have not been able to yield our consent to the view there taken.

We conclude, therefore, that the act in question violates no provision of either the state or Federal Constitutions, and that the auditor should give it effect. Let the writ issue.

**Dunbar, Ch. J., and Crow, Morris, Ellis, Mount, Parker, and Gose, JJ., concur.**

**Chadwick, J., concurring:**

This proceeding is prosecuted by the relator, a simple contract creditor of the state. There is no party in interest before us whose interest it is to challenge the act of the legislature. This is a moot case, pure and simple, and the right of the relator to recover is in no way affected by the consti-

tutional questions raised by the parties and discussed by the court. The legislature having created the industrial insurance commission, its power to organize cannot be questioned by any one who is not affected by the terms of the law, and such expenses as it may incur are proper charges against the state, and may be collected without reference to the power of the commission to levy a tribute upon certain kinds of business, or to make disbursement of the funds under the provisions of the act.

Without questioning or discussing the conclusions of the court upon the first three propositions advanced, with all of which I agree, the fourth proposition should not now be decided for the very palpable reason that our decision is binding upon no one, not even upon the court. No one will contend that it is of any concern to a furniture dealer who is seeking to collect his account whether an injured workman is to be deprived of the right to submit his cause to a jury of his peers. The principle is too important to be mooted by the court, for some day a real party in interest will be before us,—either an employer who feels aggrieved at the operation of the law, or a workman who has received injuries which the accepted schedules will not compensate. And we will be put to the duty of deciding the case without reference to our present decision, so that the Federal questions involved may pass for final hearing to the Supreme Court of the United States.

The right to recover damages for personal injuries suffered in consequence of the negligence of another was an admitted right at common law, so that the question whether the 7th Amendment to the Constitution of the United States, which preserves the right of trial by jury in all cases maintainable at common law which are begun in the courts of the United States, would not compel a Federal court to ignore our statute, and the consequent question, whether a party assessed could be compelled to contribute to the indemnity fund unless he is to be protected from all suits of like character, becomes most material, and it is to be hoped that we will have an early opportunity to meet these issues in a proper case.

That the people of the state of Washington can take away a right of action, or abolish the right of trial by jury, I have no doubt; but whether the legislature can do so without the warrant of the whole people, expressed by way of amendment or repeal of §§ 3 and 21 of article 1 of the state Constitution, is a grave question which is not discussed in the opinion of the court. The right of trial by jury has ever been regarded as the very sinew of

liberty. It was the cardinal principle of the great charter, and "it is worthy of note that all that is extant of the legislation of the Plymouth colony for the first five years consists of the single regulation 'that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority, in form of a jury, upon their oath.' 1 Palfrey's New England, 340." Cooley, Const. Lim. 6th ed. p. 389, note.

The right is asserted in every state Constitution. Section 21, *supra*, provides that "the right of trial by jury shall remain inviolate." No distinction is made between civil and criminal cases; indeed, the additional text would indicate that no distinction was intended. This guaranty has been held by this court to apply to all civil-law actions maintainable at common law. *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958. I am a firm believer in trial by jury and am of equal faith that the will of the people, as declared in their written Constitution, is binding upon legislatures as well as courts, until the people, by like adoption, express a contrary will. We should not decide otherwise except at the suit of a proper party.

The present law seems to be greatly to the advantage of the employer, for whom an easy method of discharging an obligation to his injured employee is provided, but whether the legislature can take from the workman his right to have the amount of his compensation fixed by an authority less than the very people, who have said "the right of trial by jury shall remain inviolate," is for future hearing.

I have not advanced these observations in the way of objections, for the result of the court's opinion is a consummation for which I have devoutly hoped; but to indicate merely that our decision upon the fourth proposition—the right of trial by jury—is not settled by this decision, and should not be so regarded; and further, in the event that it be finally held that a jury trial cannot be dispensed with, under our present Constitution, that the objection may be easily overcome without doing violence to the purpose or principle of the act, and without amendment to the Constitution, by providing that, in the event of a dispute as to the amount of compensation, a jury shall be called to try that issue, and that its verdict shall be conclusive.

Upon the fourth proposition, therefore, I reserve my opinion until such time as its expression will have the force of law.

There being no question that the relator

has a right to recover the amount due on its account, it follows that the writ should issue.

## WISCONSIN SUPREME COURT.

EDWARD G. BORGNIS et al., Respts.,

v.

FALK COMPANY, Appt.

(147 Wis. 327, 133 N. W. 209.)

### Courts — power to decide incidental questions.

1. The court may determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the cause, if it is involved in the suit, and the settlement of the question is one of public importance.

### Statutes — validity — public policy.

2. A constitutional statute cannot be declared inoperative because opposed to public policy.

### Same — discrimination — classification.

3. A statute is not invalid as conferring unequal privileges and immunities, which abolishes the doctrines of assumption of risk and fellow service in actions to hold employers liable for personal injuries to their servants, in cases where employers refuse to take advantage of the act, but preserves them intact to those who come under the law.

### Same — fewness of employees.

4. A statute is not invalid for unconstitutional discrimination, which abolishes the doctrines of fellow service and assumption of risk in actions to hold employers liable for negligent injuries to their employees, except in cases of persons employing less than four servants.

### Statutes — abolishing assumption of risk and fellow service doctrine — coercion.

5. A section of the workmen's compensation act, abolishing the defenses of assumption of risk and fellow service in actions to hold employers liable for personal injuries to servants, in cases where the provisions of the act are not accepted, cannot be said to make the act coercive upon every employer or employee, so as to raise the question of the constitutionality of such abolition, on the theory that the employer will be compelled to accept the statute to escape such defenses, and the employee will be compelled to do so to avoid dismissal from service.

Note. — The constitutionality of workmen's compensation legislation is discussed in the note to *State ex rel. Davis-Smith Co. v. Clausen*, ante, 466, and the note to *Ives v. South Buffalo R. Co.* 34 L.R.A. (N.S.) 162. And see *State ex rel. Davis-Smith Co. v. Clausen* and note, ante, 466, as to constitutionality of industrial insurance.

**Courts — industrial accident board — validity.**

6. Providing for the submission to an administrative board of the questions of fact in case of a dispute as to the amount to be awarded an injured employee under a workmen's compensation act, which has power to award the amount due as provided by the statute, which award, under certain circumstances, may be reviewed by the courts, does not, where the jurisdiction of the commission depends on the consent of parties, and the question of consent is subject to review by the courts, render the commission a court, and the statute void on the theory that the legislature has no constitutional power to create courts.

**Same — jurisdiction — review of action of board.**

7. Authority to test the jurisdiction of a commission, which depends upon consent of the parties to be affected by its action, is conferred by a statute empowering the court to set aside the award in case the board acted without or in excess of its powers.

**Arbitration — ousting courts of jurisdiction — validity.**

8. An employer and employee may stipulate to arbitrate the extent of injury or disability caused by a personal injury to the employee in the performance of his duties, if the question as to the fundamental rights of the parties as to recovery is left open to the courts.

**Municipal corporations — paying injured employees — due process of law.**

9. Requiring municipal corporations to compensate all workmen injured in their employ does not require taxes to be levied for other than public purposes, or deprive taxpayers of their property without due process of law.

**Master — compensation act — action of administrative board — notice.**

10. Permitting an administrative board which acts only by consent of the parties interested, to take testimony without notice to either party, and to give notices by mail, does not deprive the parties of due process of law.

**Same — determination for minor employee — validity.**

11. An employees' compensation act is not invalid because it gives the employers the right to determine whether or not minors rightfully employed by them shall have the benefit of the act, in the same way that they determine the matter for adult employees.

**Contract — impairment of obligation — option to change.**

12. No contract right is impaired by making applicable to existing contracts which are to terminate in the future, an employees' indemnity act which gives the employees an option to take advantage of it, or to stand on their common-law right, under the contract, to maintain an action to redress an injury received in the employment.

37 L.R.A. (N.S.)

**Injunction — against adoption of statutory benefit — remedy at law.**

13. Injunction will not lie to prevent an employer from accepting the benefits of an employees' indemnity act, where there is an adequate remedy at law for any injury which may come to the employees thereby.

(November 14, 1911.)

**A**PPEAL by defendant from a decree of the Circuit Court for Milwaukee County in complainants' favor in a suit to enjoin defendant from electing to become subject to the workmen's compensation act during the continuance of complainants' contracts of employment. Reversed.

**Statement by Winslow, Ch. J.:**

It appears by the complaint that the defendant is a manufacturing corporation in Milwaukee, employing at its shops many workmen, among whom are the plaintiffs; the plaintiff Borgnis is the superintendent of one of the departments in the defendant's establishment, at a salary of \$2,000 per year, under a contract extending some time in the future; the plaintiff Schumacher is an infant seventeen years of age, employed under an apprenticeship contract which has yet nearly three years to run. The complaint further alleges that the defendant threatens to file an election to become subject to the provisions of chapter 50 of the Laws of 1911, known as the "workmen's compensation act;" that such election will compel the plaintiff severally to withdraw from their said contracts, or to submit to the provisions of said act; and that hence said election will thus work irreparable injury to the plaintiffs, for which they have no adequate remedy at law. The prayer is that the defendant be enjoined from filing such election during the continuance of the contracts. By answer the defendant admitted the allegations of the complaint, except the allegations of irreparable injury and absence of an adequate remedy at law, which were denied, and as an affirmative defense alleged that the act in question was null and void, because it violates a number of specified articles of the Constitutions of the state and of the United States, and hence that the defendant's election to become subject to the act could not possibly work any injury to the plaintiffs. Upon motion, judgment was entered upon the pleadings enjoining the defendant from electing to become subject to the act during the continuance of the plaintiffs' contracts, and the defendant appeals.

Messrs. Carpenter & Poss, for appellant:

Plaintiffs could not suffer any damage by

the defendant's election, since that election would be of no effect, the law itself being unconstitutional.

Where parts of a law are unconstitutional, and the connection is such as to warrant the belief that the legislature would not have passed the valid parts alone, the whole act should be held invalid.

*Slauson v. Racine*, 13 Wis. 399; *Lynch v. The Economy*, 27 Wis. 69; *State ex rel. Walsh v. Dousman*, 28 Wis. 541; *Atkins v. Fraker*, 32 Wis. 510; *Slinger v. Henneman*, 38 Wis. 504; *State ex rel. Drake v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692; *Dells v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786, 6 N. W. 246, 381; *State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *State ex rel. LaValle v. Sauk County*, 62 Wis. 376, 22 N. W. 572; *Gilbert-Arnold Land Co. v. Superior*, 91 Wis. 357, 64 N. W. 999; *Zitske v. Goldberg*, 38 Wis. 216; *McDonald v. State*, 80 Wis. 407, 50 N. W. 185; *Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438.

The abrogation of the common-law defenses for certain employments must rest on the ground that such employments are extra-hazardous.

**Employers' Liability Cases** (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Missouri P. R. Co. v. Mackey*, 33 Kan. 302, 6 Pac. 291, 127 U. S. 205, 208, 210, 32 L. ed. 107, 108, 110, 8 Sup. Ct. Rep. 1161; *Peirce v. Van Dusen*, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 697, 55 L.R.A. 610, 82 N. W. 26; *Missouri, K. & T. R. Co. v. Medaris*, 60 Kan. 151, 55 Pac. 875; *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Jemming v. Great Northern R. Co.* 96 Minn. 302, 1 L.R.A.(N.S.) 696, 104 N. W. 1079; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Indianapolis Traction & Terminal Co. v. Kinney*, 171 Ind. 612, 23 L.R.A.(N.S.) 711, 85 N. E. 954.

All legislative regulations of human affairs interfering with personal liberty or other private rights, to be legitimate, tested by constitutional limitations, must be reasonable for the public benefit.

*State v. Redmon*, 134 Wis. 101, 14 L.R.A.(N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137, 15 Ann. Cas. 408; *State ex rel. Adams v. Burdge*, 95 Wis. 399, 37 L.R.A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *Com. v. Alger*, 7 Cush. 53.

The board is empowered to take testimony without notice to the parties interested. This is unconstitutional.

*Hagar v. Reclamation District No. 108*, 37 L.R.A.(N.S.)

111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663.

The words "without due process of law" were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

*Pinney v. Providence Loan & Invest. Co.* 106 Wis. 401, 50 L.R.A. 577, 80 Am. St. Rep. 41, 82 N. W. 308. See also *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410.

If the employer elects to come under the act, he exercises duress upon the man already in his employment.

*Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679; *Galusha v. Sherman*, 105 Wis. 277, 47 L.R.A. 417, 81 N. W. 495; *Price v. Bank of Poynette*, 144 Wis. 198, 128 N. W. 895; *Fox v. Masons' Fraternal Acci. Asso.* 90 Wis. 394, 71 N. W. 363.

A contract exempting an employer from liability for his own negligence is void as against public policy.

*Roesner v. Herman*, 10 Biss. 487, 8 Fed. 782; see also *Tarbell v. Rutland R. Co.* 73 Vt. 349, 56 L.R.A. 656, 87 Am. St. Rep. 734, 51 Atl. 6; *Johnson v. Richmond & D. R. Co.* 86 Va. 975, 11 S. E. 829; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Purdy v. Rome, W. & O. R. Co.* 125 N. Y. 209, 21 Am. St. Rep. 736, 26 N. E. 255; *Blanton v. Dold*, 109 Mo. 75, 18 S. W. 1149.

**Mr. Arthur Breslau**, for respondents:

Chapter 50, Laws of 1911, cannot apply to bona fide contracts made prior to its passage, and as to all contracts existing at the time of its passage, it must be held invalid.

36 Cyc. 1210; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *State v. Atwood*, 11 Wis. 423; *Finney v. Ackerman*, 21 Wis. 269; *Austin v. Burgess*, 36 Wis. 186; *McCracken v. Hayward*, 2 How. 608, 611, 11 L. ed. 397, 398.

If plaintiffs are forced to submit to chapter 50, Laws of 1911, the right of trial by jury will be denied them. They must, then, of necessity present their defense to the board or commission created by chapter 485 of the Laws of 1911.

*Klein v. Valerius*, 87 Wis. 60, 22 L.R.A. 609, 57 N. W. 1112; *Norval v. Rice*, 2 Wis. 22; *Gaston v. Babcock*, 6 Wis. 503; *Mead v. Walker*, 17 Wis. 190; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Crocker v. State*, 60 Wis. 555, 10 N. W. 435.

Messrs. L. H. Bancroft, Attorney General, and Russell Jackson, for the State:

The defenses of assumption of risk and fellow servant, abolished by the workmen's compensation act, are not constitutional rights, but are at most court-made, common-law defenses, or rules of public policy, which the legislature may qualify, abolish, or continue *ad libitum*.

Opinions of Justices, 209 Mass. 607, 96 N. E. 308; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431; Quackenbush v. Wisconsin & M. R. Co. 62 Wis. 411, 22 N. W. 519, 71 Wis. 472, 37 N. W. 834; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 229, 119 N. W. 309, 120 N. W. 756; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 74, 51 L. ed. 708, 716, 27 Sup. Ct. Rep. 412; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; Hall v. West & S. Mill. Co. 39 Wash. 447, 81 Pac. 915, 4 Ann. Cas. 587; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; Walker v. Carolina C. R. Co. 135 N. C. 738, 47 S. E. 675; Mott v. Southern R. Co. 131 N. C. 234, 42 S. E. 601; Cogdell v. Southern R. Co. 129 N. C. 398, 40 S. E. 202; Thomas v. Raleigh & A. Air-Line R. Co. 129 N. C. 392, 40 S. E. 201; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Odin Coal Co. v. Denman, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; D. H. Davis Coal Co. v. Pollard, 27 Ind. App. 697, 60 N. E. 1124; Island Coal Co. v. Swaggerty, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; United States Cement Co. v. Cooper, — Ind. App. —, 82 N. E. 981; Hailey v. Texas & P. R. Co. 113 La. 533, 37 So. 131; Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 106 N. W. 211; Kilpatrick v. Grand Trunk R. Co. 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531; Johnson v. Mammoth Vein Coal Co. 88 Ark. 243, 19 L.R.A.(N.S.) 646, 114 S. W. 722, 123 S. W. 1180; Coley v. North Carolina R. Co. 129 N. C. 407, 57 L.R.A. 834, 40 S. E. 195; Lore v. American Mfg. Co. 160 Mo. 608, 61 S. W. 678; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912 A, 463; Ditherner v. Chicago, M. & St. P. R. Co. 47 Wis. 138, 2 N. W. 69; Missouri P. R. Co. v. Haley, 25 Kan. 35; Missouri P. R. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291; Bucklew v. Central Iowa R. Co. 64 Iowa, 603, 21 N. W. 103; McAunich v. Mississippi & M. R. Co. 20 Iowa, 338; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 37 L.R.A.(N.S.)

313, 10 A. & E. Ann. Cas. 1108; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693; Campbell v. Cook, 86 Tex. 630, 40 Am. St. Rep. 878, 26 S. W. 486; Thompson v. Central R. & Bkg. Co. 54 Ga. 509; Georgia R. Co. v. Ivey, 73 Ga. 499; Missouri P. R. Co. v. Castle, 97 C. C. A. 124, 172 Fed. 841; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

It was entirely competent for the legislature to abolish these defenses in the manner provided, and to make the abrogation thereof conditional upon the election of the employer to accept the immunities afforded him by the compensatory provisions of the act. The influence exercised by the act in this respect is not coercive, although it may have a persuasive effect.

State ex rel. Van Alostine v. Frear, 142 Wis. 320, 125 N. W. 961, 20 A. & E. Ann. Cas. 633; Assaria State Bank v. Dolley, 219 U. S. 127, 55 L. ed. 127, 31 Sup. Ct. Rep. 189; Opinion of Justices, 209 Mass. 607, 96 N. E. 308.

Messrs. C. H. Crownhart, Joseph D. Beck, and John R. Commons, Industrial Commission, in *propria persona*.

Winslow, Ch. J., delivered the opinion of the court:

We are not certainly advised as to the exact ground on which the decision below was reached, but we assume that it was on the theory that the law in question was a valid law; and that it was retrospective in its effect; and that if the defendant elected to become subject to the act, the plaintiffs would be compelled to breach their existing contracts, or submit to the terms of the act, and thus lose valuable rights; and hence that equity might and should restrain their employer from electing to come under the law until their existing contracts had expired.

It seems to be true that this action might very well be disposed of without considering the question of the validity of the act in question. Ordinarily, under such circumstances, that course would be the proper one to pursue, for the question of the constitutionality of a statute passed by the legislature is not one to be lightly taken up, and generally such a question will not be decided unless it be necessary to decide it in order to dispose of the case. There are circumstances here present, however, which seem to call very loudly for immediate consideration of the question of the validity of the act in question, if under any view of the case it can be considered as involved. The legislature, in response to a public sentiment which cannot be mistaken, has

passed a law which attempts to solve certain very pressing problems which have arisen out of the changed industrial conditions of our time. It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as "personal injury litigation," and resort to a system by which every employee not guilty of wilful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment, under certain fixed rules, without a lawsuit and without friction.

A considerable number of employers have accepted the terms of the act, but unquestionably many are waiting until the question of the constitutionality of the act be authoritatively settled by this court. Nor is this attitude either blameworthy or surprising. If an employer elects to accept the act, and proceeds to pay out the sums which it requires for a year or more, and then the act should be declared unconstitutional, it might well be that he would have paid out considerable sums which, under the former system, he would not be required to pay at all, because he was not negligent; and that he would also be subject to suits to recover additional sums by those who, without contributory negligence, had suffered injury and had received compensation under the law. The situation is unquestionably one of much doubt and uncertainty among the great industries of the state, and it must remain such until this court has spoken. Many employers of labor who have not accepted the law have taken that course, not because they have chosen definitely to decline the terms of the law, but because they do not know whether they will be protected if they accept and act under it. Such a condition of uncertainty ought not to be allowed to exist, if it can be removed. This court cannot properly decide questions which are not legitimately involved in bona fide lawsuits, but it may properly decide all questions which are so involved, even though it be not absolutely essential to the result that all should be decided. The validity of the statute in question is a matter which may be legitimately considered in the decision of this case. If the statute be unconstitutional and void, then it is certain that the plaintiffs have no cause of action, because an election to accept the terms of a void statute could harm no one. Impressed with this view of our duty under the circumstances, we advanced the present case upon the calendar, and invited argument upon the main question as to the constitutionality of the statute, not only from the attorney general on behalf of the state, but from any attor-

ney interested in the question. In pursuance of this invitation the attorney general and the industrial commission filed briefs, and oral argument was made by the deputy attorney general. The case has been fully presented, therefore; both by brief and argument, and we are now to consider whether there be any solid foundation for the attack made upon the law. In undertaking this task, it will be necessary first to set forth in some detail its fundamental provisions.

It adds thirty-two new sections to the statutes, the first eight of which sections are as follows:

"Sec. 2394—1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

"1. That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"2. When such employer has, at the time of the accident, in a common employment four or more employees, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow servant.

"Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this section, 2394—1.

"Sec. 2394—2. No contract, rule, or regulation shall exempt the employer from any of the provisions of the preceding section of this act.

"Sec. 2394—3. Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsection 9 of § 1816 of the statutes, as amended by chapter 254 of the Laws of 1907, the term 'employer' as used in the two preceding sections of this act shall not include any railroad company as defined in subsection 7 as said § 1816 as amended, said § 1816 and amendatory acts being continued in force unaffected, except as aforesaid, by the preceding sections of this act.

"Sec. 2394—4. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

"1. Where, at the time of the accident, both the employer and employee are sub-

ject to the provisions of this act according to the succeeding sections hereof.

"2. Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment.

"3. Where the injury is proximately caused by accident, and is not so caused by wilful misconduct.

"And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of this act, and acts amendatory thereof, shall be the exclusive remedy against the employer for such injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of this act had not been passed, but shall be subject to the provisions of the preceding sections of this act.

"Sec. 2394—5. The following shall constitute employers subject to the provisions of this act, within the meaning of the preceding section:

"1. The state, and each county, city, town, village, and school district therein.

"2. Every person, firm, and private corporation (including any public service corporation) who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall, in the manner provided for in the next section, have elected to become subject to the provisions of this act, and who shall not prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.

"Sec. 2394—6. Such election on the part of the employer shall be made by filing with the industrial accident board, hereinafter provided for, a written statement to the effect that he accepts the provisions of this act, and filing of which statement shall operate, within the meaning of § 2394—5 of this act, to subject such employer to the provisions of this act and all acts amendatory thereof for the term of one year from the date of the filing of such statement, and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file in the office of said board a notice in writing to the effect that he desires to withdraw his election to be subject to the provisions of the act.

"Sec. 2394—7. The term 'employee' as used in § 2394—4 of this act shall be construed to mean:

"1. Every person in the service of the state, or of any county, city, town, village, or school district therein, under any ap-

pointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein, provided that one employed by a contractor, who has contracted with a county, city, town, village, school district, or the state, through its representatives, shall not be considered an employee of the state, county, city, town, village, or school district which made the contract.

"2. Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state (who, for the purposes of the next section of this act, shall be considered the same, and shall have the same power of contracting, as adult employees), but not including any person whose employment is but casual, or is not in the usual course of the trade, business, profession, or occupation of his employer.

"Sec. 2394—8. Any employee as defined in subsection 1 of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employee as defined in subsection 2 of the preceding section shall be deemed to have accepted, and shall, within the meaning of § 2394—4 of this act, be subject to, the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

"1. The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

"2. Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions or, without giving either of such notices, shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

Sections 2394—9 and 2394—10 contain schedules fixing the amounts to be paid by way of compensation in case of disability or death where liability exists under the act, define and classify dependents, and lay down rules for determining the weekly and annual earnings of the injured

or deceased employee. Section 2394—11 requires the giving of a notice in writing within thirty days after the accident, as a condition precedent to the recovery of compensation under the act. Section 2394—12 requires that the injured party shall submit to examination by a physician upon request of the employer, or when required by the industrial accident board, and provides a penalty for refusal so to do. Sections 2394—13 and 2394—14 create an industrial accident board of five members, and define generally the methods of procedure of such board. The next seven sections are as follows:

"Sec. 2394—15. Any dispute or controversy concerning compensation under this act, including any in which the state may be a party, shall be submitted to said industrial accident board in the manner and with the effect provided in this act. Every compromise of any claim for compensation under this act shall be subject to be reviewed by, and set aside, modified, or confirmed by, the board, upon application made within one year from the time of such compromise.

"Sec. 2394—16. Upon the filing with the board by any party in interest, of an application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, which shall fix a time for the hearing thereof, which shall not be more than forty days after the filing of such application. The board shall cause notice of such hearing, embracing a general statement of such claim, to be given to each party interested, by service of such notice on him personally, or by mailing a copy thereof to him at his last known postoffice address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the board, and hearings may be held at such places as the board shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the board; but the board may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and pay roll of the employer to be examined by any member of the board or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the board for its consideration upon final hearing. The board, or any

member thereof, or any examiner appointed thereby, shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers, or records, and to administer oaths. Obedience to such subpoenas shall be enforced by the circuit court of any county.

"Sec. 2394—17. After final hearing by said board, it shall make and file (1) its findings upon all the facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the hearing and determination of any controversy before it, the board shall have power to order the payment of such, or any part, of the compensation, which is or may fall due, as to which the party from whom the same is claimed does not deny. Liability in good faith within ten days after the giving of notice of hearing provided for in the preceding section; and if the same shall not be paid as required by such order, the facts with respect to the liability therefor, and the determination of the board as to the rights of the parties, shall be embraced in, and constitute a part of, its finding and award; and the board shall have the power to include in its award as a penalty for noncompliance with any such order, not exceeding 25 per cent of each amount which shall not have been paid as directed thereby.

"Sec. 2394—18. Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a judgment in accordance therewith, which judgment, until and unless set aside as hereinafter provided, shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.

"Sec. 2394—19. The findings of fact made by the board acting within its powers shall in the absence of fraud, be conclusive; and the award, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the board for the review of such award, in which action the adverse party shall also be made defendant. In such action a complaint which shall state the grounds upon which a review is sought shall be served with the summons. Service upon the secretary of the board or any member of the board shall be deemed completed service. The board shall serve its



answer within twenty days after the service of the complaint, and, within the like time such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the board shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its findings and award. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other, subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such award, and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

"1. That the board acted without or in excess of its powers.

"2. That the award was procured by fraud.

"3. That the findings of fact by the board do not support the award.

"Sec. 2394—20. Upon the setting aside of any award, the court may recommit the controversy and remand the record in the case to the board, for further hearing or proceedings; or it may enter the proper judgment upon the findings, as the nature of the case shall demand. An abstract of the judgment entered by the trial court upon the review of any award shall be made by the clerk thereof upon the docket entry of any judgment which may theretofore have been rendered upon such award, and transcripts of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties.

"Sec. 2394—21. Said board, or any party aggrieved by a judgment entered upon the review of any award, may appeal therefrom within the time and in the manner provided for an appeal from the orders of the circuit court; but all such appeals shall be placed on the calendar of the supreme court, and brought to a hearing in the same manner as state causes on such calendar."

Section 2394—22 regulates officers' fees, costs, and attorneys' fees in the prosecution of claims; § 2394—23 prevents assignment of the claim before payment, and exempts the claim from being taken for debt; § 2394—24 gives the claim preference over unsecured debts of the employer contracted after the passage of the law; § 2394—25 provides that the making of a claim under the act shall operate to assign to the employer any cause of action in tort which the employee might have against a third party for the injury; § 2394—26 provides

that the act shall not affect insurance companies, nor existing contracts of insurance, nor the right of the employer to insure against liability, and contains other clauses respecting the effect of amounts received by the employee, by way of insurance or benefits; § 2394—27 makes all contracts of insurance subject to the provisions of the act; § 2394—28 provides that the employer may be relieved from liability under the act in a given case, either (1) by depositing the present value of the total unpaid compensation, computing interest at 3 per cent per annum, with a trust company to be designated by the board, or (2) by the purchase of an annuity approved by the board; § 2394—29 requires the printing and furnishing of forms for the transaction of the business and the keeping of records by the board, and requires the board to post or publish notices of the employer's election to come under the act; § 2394—30 appropriates a sufficient sum to carry out the provisions of the act; and § 2394—31 repeals all inconsistent acts. Section 2394—32 is as follows:

"Sec. 2394—32. The legislature intends the contingency in subdivision 2 of § 2394—1 of this act, to be a separable part thereof, and the subdivision likewise separable from the rest of the act, and that part of said § 2394—1 that follows subdivision 2, likewise separable from the rest of the act; so that any part of said subdivision, or the whole, or that part which follows said subdivision 2, may fail without affecting any other part of the act."

By a later act passed at the same session of the legislature (chapter 485, Laws of 1911) an industrial commission composed of three members was created, which, among numerous other duties, is required to perform all the duties vested in the industrial accident board aforesaid, and thus the last-named board has passed out of existence. *Re Filer & S. Co.* 146 Wis. 629, 132 N. W. 584. The act is quite long, as the complicated and delicate subject with which it deals manifestly requires, but its general purport and effect so far as this case is concerned may be briefly summarized:

It creates an administrative board to carry its provisions into effect. It divides all private employers of labor into two classes: (1) Those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of assumption of risk, and negligence of a coemployee from the second class (except that where there are less than four coemployees, the latter defense is not disturbed), but leaves both defenses intact to the first class. It prescribes the manner in which an employer may elect to come under its terms,

and how an employee may make his election, and when silence on the part of the employee will be considered an election; but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by wilful misconduct), shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid, by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive, and the award subject to review only by action in the circuit court for Dane county, in which it can be set aside only (1) if the commission acted without or in excess of its powers; (2) if the award was procured by fraud; or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the supreme court.

For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies, and must continue to levy, upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop with few employees, and the stagecoach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with

constantly swelling ranks, marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty.

In approaching the consideration of the present law, we must bear in mind the well-established principle that it must be sustained, unless it be clear beyond reasonable question that it violates some constitutional limitation or prohibition. That governments founded on written constitutions which are made difficult of amendment or change lose much in flexibility and adaptability to changed conditions there can be no doubt. Indeed that may be said to be one purpose of the written constitution. Doubtless they gain enough in stability and freedom from mere whimsical and sudden changes to more than make up for the loss in flexibility; but the loss still remains, whether for good or ill. A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it, and it will generally crystalize with more or less fidelity the political, social, and economic propositions which are considered irrefutable, if not actually inspired, by the philosophers and legislators of the time; but the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third. The race moves forward constantly, and no Canute can stay its progress.

Constitutional commands and prohibitions, either distinctly laid down in express words or necessarily implied from general words, must be obeyed, and imple-

itly obeyed, so long as they remain un-amended or unrepealed. Any other course on the part of either legislator or judge constitutes violation of his oath of office; but when there is no such express command or prohibition, but only general language, or a general policy drawn from the four corners of the instrument, what shall be said about this? By what standards is this general language or general policy to be interpreted and applied to present-day people and conditions? When an eighteenth century constitution forms the charter of liberty of a twentieth century government, must its general provisions be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals? Clearly not. This were to command the race to halt in its progress, to stretch the state upon a veritable bed of procrustes.

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation. These general propositions are here laid down, not because they are considered either new or in serious controversy, but because they are believed to be peculiarly applicable to a case like the present, where a law which is framed to meet new economic conditions, and difficulties resulting therefrom, is attacked principally because it is believed to offend against constitutional guaranties or prohibitions couched in general terms, or supposed general policies drawn from the whole body of the instrument.

Passing to the consideration of the contentions made in the present case, we note *in limine* that this is not a compulsory law. No employer is compelled to pay damages to an employee without having had his day in court. It is true that the argument is made that the law is practically coercive; but that argument is not regarded by us as sound, and will be taken up and treated later in this opinion. We are therefore relieved from all consideration of the question whether a compulsory compensation act offends against those clauses of the state and Federal Constitutions which guarantee all citizens against the deprivation of property without due process of law. This would be a question of greater difficulty than those which are presented in the present case. It was de-

cided in the affirmative by the court of appeals of New York (*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431), and in the negative by the supreme court of Washington (*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, ante, 466, 117 Pac. 1101), and we express no opinion upon it.

The contention which naturally seems to come first in order is the objection that the whole first section, abolishing the defenses of assumption of risk and negligence of a fellow servant, is void, because, as it is said, public policy does not require their abrogation in any but the hazardous trades; it being admitted that in these last-named trades these defenses may properly be abolished.

The term "public policy" is frequently used very vaguely, and evidently is so used here. It is, however, quite a definite thing. Public policy on a given subject is determined either by the Constitution itself or by statutes passed within constitutional limitations. In the absence of such constitutional or statutory determination only may the decisions of the courts determine it. *Hartford L. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L.R.A. 193, 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201; s. c., 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33. This court has said: "We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy." *Julien v. Model Bldg. Loan & Invest. Asso.* 116 Wis. 79, 61 L.R.A. 668, 92 N. W. 561. And the remark is certainly correct. When acting within constitutional limitations, the legislature settles and declares the public policy of a state, and not the court. True, where the legislature has not spoken on a subject, and the courts, in the course of their duty, have declared the principle of common law applicable thereto, public policy may be truly said to be thus created; but any public policy thus created by the courts may be at any time reversed or changed by the legislature, provided it act within constitutional lines. The people, acting directly by means of a referendum, or through their representatives in constitutional conventions or legislative bodies, are the makers of public policy, and it is only when the people have failed to speak in these methods that the courts can be said to have power to make public policy by decision. A constitutional statute cannot be contrary to public policy,—it is public policy.

The contention that a statute is unconstitutional because it is against public policy amounts to nothing more than a

contention that it is unconstitutional; hence we address ourselves directly to that question, and thereby gain something in clearness of thought.

The two defenses which the legislature has thus attempted to take away are not intrenched behind any express constitutional provision, nor were they originally created by legislative action. They were both evolved by the courts. At a time when industries of all kinds were comparatively simple and free from danger, when employees of a common master were few in number and generally acquainted with each other, and when a personal injury action was a rarity, it was thought not to be unreasonable that an employee should assume those simple risks which were plainly before him, and should not be heard to complain if he were injured by the careless act of a fellow workman by whose side he had continued to work when he must have well known the nature and habits of the man. The precedent once made was generally followed, until it became buttressed by a multitude of decisions in practically all of the jurisdictions whose jurisprudence is founded upon the English common law. But, as has been pointed out earlier in this opinion, the conditions surrounding employer and employed have vastly changed during the last half century, and now the legislature, having become convinced that new conditions call for a change in rules of liability, have declared that such a change shall be made. They have changed the rule established by the courts, because they deem another rule better fitted to deal with the problems of the time, or, in other words, because they deem it best to establish a changed public policy.

It is frankly admitted by appellant that it is within the legislative power to make this change with regard to the hazardous trades, but not with regard to what are called the nonhazardous trades. But why not? There are, of course, some occupations which are exceptionally hazardous, and it may well be that it would be within legislative discretion to classify these very hazardous occupations and remove the defenses as to them, while retaining them as to others less hazardous. Indeed, that very thing has been done, and has been approved by the courts in this and many other states, especially in the case of railroads and to some extent with other industries. *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159; *Wis. Stat. § 1816*, as amended by chapter 254, Laws 1907; *Kiley v. Chicago, M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 37 L.R.A. (N.S.)

464; *Wis. Stat.* (1898), §§ 1636j—1636jj (chapter 303, Laws 1905).

But because there is room for classification it does not follow that legislation without classification is unconstitutional. There are hazards in all occupations; indeed, they follow every man from the cradle to the grave. What constitutional requirement, either express or implied, clothes these court-made defenses with exceptional sanctity as to the less hazardous industries, and warns off from them the sacrilegious hand of the legislature? We are referred to none, and we know of none. It is admitted in the *Ives Case*, *supra*, that both the fellow servant defense and the contributory negligence defense, being of judicial origin, may be changed or abolished by the legislature. See also *Opinion of Justices of the Massachusetts Supreme Judicial Court on the Personal Injuries Act of 1911*, 209 Mass. 607, 96 N. E. 308. We see absolutely no ground for the contention that these defenses may be lawfully abrogated as to the more hazardous industries, but must be forever held sacred as to the less hazardous industries. There may be a less persuasive reason for the change in the case of the latter class of industries, but this does not deprive the legislature of the power to make it.

But it is said that there is no proper classification here, and hence that the law is fatally discriminating in its character. The two defenses are preserved intact to employers who elect to come under the law, and taken away from those who do not so elect. The rules governing classification are familiar, and are in brief as follows: It must be based on substantial distinctions which make real differences; it must be germane to the purposes of the law; it must not be limited to existing conditions only, and must apply equally to each member of the class. It seems to us that this classification fully meets these requirements; certainly there will be very real differences between the situation of the employer who elects to come under the law and the employer who does not. If the consenting employer only employs workmen who also elect to come under the law, he can never be mulcted in heavy damages, and will know whenever an employee is injured practically just what must be paid for the injury. Surely this is a different situation from the situation of the man who is liable to be brought into court by an injured employee at any time, and obliged to defend common-law actions upon heavy claims unliquidated in their character, the outcome of which actions none can foretell. On the other hand, if, as seems quite likely, the greater part of the

consenting employer's workmen consent, but some do not, and these latter are still retained in the employment, the same considerations will apply with somewhat less force. On the one hand, there is a class of consenting employers employing wholly or largely consenting workmen, and having definite and fixed obligations to their workmen in case of injury; on the other hand is a class of nonconsenting employers who have no such fixed obligations in case of injury to their workmen, but choose to meet every such workman in court and fight out the question of liability. There seems a very robust difference between these two classes. But after all there is another distinction which seems perhaps more satisfactory. The consenting employer has done his share, and it must be considered a considerable share, in rendering successful the legislative attempt to meet and solve a difficult social and economic problem. Even if it be true (which, as before stated, is not decided) that he may not be compelled under our Constitutions, state and national, to assist in the solution of this problem, still does not his voluntary act in giving that assistance constitute a substantial distinction, making a real difference of situation between him and the employer who refuses his aid,—a difference which justifies a difference in treatment?

It seems to us that this question must be answered in the affirmative, and if it be so answered there can be no doubt as to the legitimacy of the classification, for the reason that it is quite apparent that the other conditions of valid classification are fully satisfied. There can be no doubt that the classification is germane to the purpose of the law, and it is not limited in its application to existing conditions only, and applies equally to each member of the class.

The minor classification, by which the fellow servant defense is preserved to all employers employing less than four employees in a common employment, is also attacked as having no proper legal basis; but it seems to us that the grounds of classification here are more persuasive even than in the case just discussed. The man who is employed with one or two other men in a given employment in all reasonable probability knows their characteristics well, and will probably be with them a great part of the time. He will have ample opportunity to form a just judgment as to the risk of injury from their negligence which he will run if he works with them, and will be enabled to shape his own conduct accordingly; but the man who is one of a large number of men, many of whom he never sees, and some of these latter hav-

ing duties to perform in distant places, upon the due performance of which his own safety depends, has no opportunity to acquire any accurate knowledge of the characteristics of many of his fellow workmen, and cannot intelligently decide what risk he runs at the hands of such distant and unknown employees. The difference in situation is not merely fanciful; it is real. In one case, the employee knows or has the means of knowing what to expect from his collaborators; in the other case, he has neither the knowledge nor the means of knowledge. Of course, there will be cases on the border line, where the difference in situation will be very slight, or perhaps entirely nonexistent. There will probably be no practical difference between the situation of the man who is one of four or five employees in a given employment and the situation of the man who is one of three; but this does not militate against the legitimacy of the classification. This is a necessary defect in all cases of classification based upon numbers. The question is not whether there may be some on one side of the line whose situation is practically the same as that of some on the other side, but whether there "is the distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them." *State v. Evans*, 130 Wis. 381, 110 N. W. 241.

Passing from these questions of classification, we meet the objection that the law, while in its words presenting to employer and employee a free choice as to whether he will accept its terms or not, is in fact coercive, so that neither employer nor employee can be said to act voluntarily in accepting it. As to the employer, the argument is that the abolition of the two defenses is a club which forces him to accept; and as to the employee, the argument is that if his employer accepts the law, the employee will feel compelled to accept also, through fear of discharge if he do not accept.

Both of these arguments are based upon conjecture. Laws cannot be set aside upon mere speculation or conjecture. The court must be able to say with certainty that an unlawful result will follow. We do not see how any such thing can be said here. No one can say with certainty what results will follow in the practical workings of the law. It may well be that many manufacturers, especially those employing small numbers of employees and in the less dangerous trades, will deliberately conclude that it will be better business policy to exercise greater care in guarding their em-

ployees from possible danger, and greater discrimination in the employment of careful men, and reject the law entirely, running the risk of being able to prevent all or nearly all accidents. It seems extremely probable that the great bulk of workmen, especially of the unskilled classes, will be glad to come under the act and thus secure a certain compensation in case of injury, in place of that very uncertain and expensive thing, namely, the final result of a lawsuit; but whether this be so or not, it may be considered as reasonably certain that very many will elect to come under the act voluntarily and freely, and that those who do not will probably come from the ranks of skilled labor, who will deem the rates of compensation under the law as entirely inadequate, or will be careful workmen in the less dangerous trades, who will see no gain in bartering their common-law rights for the restricted remedies furnished by the statute. It cannot be said with any certainty that such men will be discharged for their failure to voluntarily come under the law. The probability would seem rather to be that they would be of a class which the employer would wish to keep in his employ, notwithstanding their attitude toward the law. These matters are, however, purely speculative and conjectural. None can say what the practical operation of the law will be. It is enough for our present purpose that no one can say with certainty that it will operate to coerce either employer or employee.

We thus reach the conclusion that there are no valid constitutional objections to the first section of the law in question, and this conclusion obviates the necessity of any consideration of the provisions of § 2394—32, which aims to preserve the balance of the law intact in case the whole or some part of § 2394—1 should be considered invalid. We may say in passing that we know of no good reason why the legislature may not declare its intention that one part or section of a law is not a compensation for, and that it may be separated from, the balance of the act for the very purpose of saving such balance from being invalidated in case the first-named part or section be held unconstitutional. We think it would take a very extreme case of palpable absurdity or falsity in such a provision, to justify any court in declaring such a declaration of legislative intent ineffective, if indeed a court could make such a declaration at all.

The next important contention is that the law is unconstitutional because it vests judicial power in a body which is not a court, and is not composed of men elected by the people, in violation of those clauses

of the state Constitution which vest the judicial power in certain courts, and provide for the election of judges by the people, as well as in violation of the constitutional guaranties of due process of law. It was suggested at the argument that the industrial commission might perhaps be held to be a court of conciliation, as authorized to be created by § 16 of article 7 of the state Constitution; but we do not find it necessary to consider or decide this contention. We do not consider the industrial commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the Constitution. It is an administrative body or arm of the government, which, in the course of its administration of a law, is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi judicially; but it is not thereby vested with judicial power in the constitutional sense.

There are many such administrative bodies or commissions, and with the increasing complexity of modern government they seem likely to increase rather than diminish. Examples may be easily thought of. Town boards, boards of health, boards of review, boards of equalization, railroad rate commissions, and public utility commissions, all come within this class. They perform very important duties in our scheme of government, but they are not legislatures or courts. The legislative branch of the government by statute determines the rights, duties, and liabilities of persons and corporations under certain conditions of fact, and varying as the facts and conditions change. Manifestly the legislature cannot remain in session and pass a new act upon every change of conditions; but it may and does commit to an administrative board the duty of ascertaining when the facts exist which call into activity certain provisions of the law, and when conditions have changed so as to call into activity other provisions. The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 905. Not only this, but many such boards are created whose decisions of fact honestly made within their jurisdiction are not sub-

ject to review in any proceeding. *State ex rel. Coffey v. Chittenden*, 112 Wis. 569, 88 N. W. 587; *State ex rel. Vilas v. Wharton*, 117 Wis. 558, 94 N. W. 359; *State ex rel. Cook v. Houser*, 122 Wis. 534-561, 100 N. W. 964; *State ex rel. McManus v. Policemen's Pension Fund*, 138 Wis. 133, 20 L.R.A.(N.S.) 1175, 119 N. W. 806. It is important to notice the limitation contained in the last sentence. The decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review. It cannot itself conclusively settle that question, and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within or exceeded its jurisdiction is always open to the examination and decision of the proper court by writ of certiorari. The instances where the question of jurisdiction of such bodies has been examined and decided in certiorari actions are so numerous that it seems unnecessary to cite them. In such cases it is considered that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error, and will justify reversal of the board's action, as well as the failure to take the proper steps to acquire jurisdiction at the beginning of the proceeding. *State ex rel. Augusta v. Losby*, 115 Wis. 57, 90 N. W. 188.

Thus, in the case before us, the jurisdiction of the industrial commission to entertain any claim for compensation under the act rests upon two facts which must exist, *viz.*: (1) That both employer and employee have elected to come under the act; and (2) that the injury was received in service growing out of or incidental to the employment, as the result of accident, and not of wilful misconduct.

The industrial commission must, of course, decide these questions in any case where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise the parties would be denied due process of law. The tribunal only has authority over those who have voluntarily elected to give it authority, and if it can decide finally that a man has given consent, when he has not, it assumes the functions of a court. If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary impli-

cation, the contention that judicial power had been vested in the commission, contrary to the command of the Constitution, would be of greater force; but we think that the act does not do this, or attempt to do it. True, it says that the findings of fact made by the commission shall, in the absence of fraud, be conclusive; but it provides for an action in the circuit court of Dane county, in which the board's award may be set aside upon either of three grounds, *viz.*: (1) That the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award.

We regard the expression "without or in excess of its powers" as substantially the equivalent, or at least as inclusive, of the expression "without or in excess of its jurisdiction," as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law, or is deprived of his right to "due process of law" thereby.

There are some further objections which will be more briefly considered. It is said that, even if it be held that the act is not coercive, still, when employer and employee consent to come under the law, they in effect wholly stipulate away their rights to resort to the courts, and that such agreements are void, citing *Fox v. Mason's Fraternal Acci. Asso.* 96 Wis. 390, 71 N. W. 363. The case cited, however, recognizes the companion principle that agreements to arbitrate special matters, such, for instance, as the amount of the loss under an insurance policy (or, as in the present case, the extent of an injury or disability, and the like), which do not go to the whole ground work of the controversy, are universally sustained. As we have seen, these special matters are the only matters which the board may conclusively decide under this law. If there be a controversy as to fundamental rights, namely, whether the parties have consented, or as to whether the injuries resulted from wilful misconduct, these issues are still open to the court upon the appeal.

In considering the question as to how far consent may go in matters of this kind, a case not cited in the briefs or mentioned in the oral argument should, we think, be

referred to here, viz., the case of *Van Slyke v. Trempealeau County Farmers' Mut. F. Ins. Co.* 39 Wis. 390, 20 Am. Rep. 50. In this case it appeared that the legislature had passed a law providing that, in case of the filing of an affidavit of prejudice against a circuit judge, the parties might, if they chose, stipulate that a member of the bar should act as judge and try the case, with all the powers of the regularly elected judge of the court. Acting on this law, the parties in the case agreed that Mr. John J. Cole should try the case, and he did so, rendered judgment for the plaintiff, and the defendant appealed. The court held (Chief Justice Ryan writing the opinion) that, the Constitution having vested all the judicial power of the state in the courts, and provided for the election of judges for such courts, the legislature could confer no judicial power on other officers or persons, nor authorize the parties to an action to do so; hence there was no trial before a court, and no judgment. The question as to whether the defeated party might not be prevented from raising any objection by his voluntary waiver was not considered or mentioned; but in any event the case has no bearing here, and is only mentioned in order to show that it has not been overlooked. It only decides that neither the legislature nor private parties can make a judge out of a private citizen, and endow him with the power to hold a court, contrary to the direct command of the Constitution. As the commission in the present case is not a court, but simply an administrative board, the doctrine laid down in the case cited has no application.

Again, it is said that the act compels municipalities to levy taxes for other than public purposes, since all workmen injured in the employ of the public are to be compensated, and thus taxpayers will be deprived of their property without due process of law. We have not been quite able to appreciate the force of this point, and we find no argument upon it in the brief. We shall only say that the manner in which the state or the public shall treat its workmen is peculiarly a matter for the legislature to determine. No one is compelled to work for the public, and, if he does, he takes his situation on the terms which the public gives. We know of no reason why the public, acting by its law-making power, may not provide that its employees shall have as part of their compensation certain indemnities in case of accidental injury in the public service. When a law does so provide, the raising of the funds to discharge those indemnities becomes plainly a proper public purpose.

37 L.R.A. (N.S.)

Objection is made to those clauses of § 2394—16 which provides for the giving of notice of claim by mail, and allow testimony to be taken without notice to either party, and the claim is made that this is not "due process of law." Were the commission a court, these objections would probably deserve serious consideration, especially the latter one. But, as we have seen, the commission is an administrative board merely. It is common knowledge that such boards are frequently given power to investigate and determine facts without notice to the parties of each successive step in the proceedings. The proceedings before such boards are not expected to be as formal and cumbrous as the proceedings of courts; indeed, the greater flexibility which such bodies must possess if they are to discharge their duties seems to demand greater freedom of action. If notice, either actual or constructive, of the commencement of the proceedings before such a body, be required to be given to the parties interested, and they be given full and free opportunity to be heard and present evidence, it is generally held sufficient, even though notice of intermediate steps in the proceeding be not required or given. *Schintgen v. La Crosse*, 117 Wis. 158, 94 N. W. 84. In case of a board like the present, which only acts on the rights of parties who have consented that it may so act, the reason of the rule is far stronger.

Some contention is made in the brief that minors cannot be treated in the same manner as adults, and that the provision of the law which declares that a minor who is legally entitled to work shall have the same power of contracting for service as an adult is objectionable, because it allows the employer to decide whether the law shall treat his minor employees as adults. The objection seems to us fanciful and elusive. There is no claim that the legislature may not endow minors with the right to make contracts otherwise lawful, and, if this be so, it seems to us to be the end of the discussion. After the minor is so endowed, he becomes for the purposes of the act an adult, or at least on the same plane. No adult employee of a private employer can elect to come under the act unless his employer has first elected to do so. So the employer has the power to decide whether any of his employees, infant or adult, shall have the privileges of the act if they continue to work for him. This is practically all there is of the matter, and we see no substantial distinction between the effect of the law upon the adult and its effect upon the minor.

The foregoing considerations are believed to fully meet and dispose of all the object-



tions made to the law, which could reasonably be claimed to be fatal to the entire law if sustained. There are many objections made to single sections or clauses of the law, which we do not find it necessary or advisable to treat at this time. Even should some or all of them be sustained, it is our judgment that the sections or clauses so questioned could not be said to be so far compensations for or inducements to the balance of the law that the entire law must fall. In our judgment it is better to reserve these questions for consideration when an actual case arises which calls for the decision of the court upon them. It is well-nigh impossible for the human mind to call up and contemplate in advance all the considerations which ought to be considered in passing upon the validity of the various incidental clauses of a new and complicated law. The concrete case and its actual circumstances and effects are apt to throw much light upon the question, and suggest considerations wholly unthought of when viewing the matter abstractly in advance of any actual experience.

Among these contentions, which we now pass without decision, perhaps the most important is the contention that so much of § 2394—16 as provides that the board or any member thereof, or any examiner appointed thereby, shall have power to issue subpoenas, obedience to which shall be enforced by contempt proceedings in the circuit court. This seems to present a serious question, worthy of careful examination, and we intimate no opinion upon it now.

Other minor contentions, which we do not consider it necessary or advisable to pass upon now, are to the effect that the clauses are void which empower the commission (1) to declare and enforce penalties against the employer for failure to perform certain orders of the board made pending hearing (§ 2394—17); (2) to set aside or modify contracts of settlement previously made by the parties (§ 2394—15); and (3) to regulate the amount of contingent attorneys' fees, and permit one claimant to make a contract which it may refuse to allow another to make (§ 2394—22).

Before closing, we shall briefly refer to another question which was not much discussed on the argument, namely, the question whether the law applies, or was intended to apply, to persons who, like the plaintiffs, are employed under contracts of service made prior to the passage of the law, and which do not expire until some definite date in the future, and, if so, whether the law can apply to them without impairing the obligations of their contracts, and thus violating the Constitution. As

to the first branch of this question, we think that the language of the act leaves no doubt as to the intention of the legislature. The entire act by express terms was to become effective September 1, 1911. Its provisions are broad, and, without express exception, read according to their grammatical meaning, they include all employers and employees who occupy those relations at the time the law becomes effective. If there was an intention to exclude any from its terms, that intention has been carefully concealed. We conclude that it was intended to include all employers and employees, whatever the term of service. The question whether the act as so construed affects an existing contract of service expiring at some distant period in the future is easily answered in the negative, as it seems to us. Certainly the law does not affect the service to be rendered, or the wages to be paid in any way. Neither the obligation of the workman to faithfully do his work, nor the obligation of the employer to faithfully pay the stipulated wage, nor the remedy in case of breach by either party, is in any way affected. What, then, is affected? Plainly no provision of the contract; but, if the employer elects to come under the law, the employee must choose whether he will come under it or not, and if he does not wish to come under it, he may run the risk of being discharged, or, if he wishes to retain his employment, he may feel compelled to elect to come under the law, and thus lose his right to bring an action at law in case of a personal injury sustained in the employment.

But all this does not in any way affect the contract of employment. That remains absolutely unimpaired in all its terms. The right to bring an action in the future in case of a possible tort not yet committed is no part of the contract of employment. That right arises out of the relation of employer and employee, and is subject to change by the lawmaking power at any time. The employer does not contract that it shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong. At most the law cannot be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The legislature may change the remedies for torts yet to be committed at any time, and such changes cannot be said to make any change in mere contracts of service existing between the parties. This seems very patent. The legislature has, at many times within the last two decades, passed laws very materially changing the liabilities of employers to employees for injuries resulting from the negligent acts

of the employer, *e. g.*, the laws requiring the protection of machinery, abolishing assumption of risk in such cases, abolishing the coemployee rule as to railway companies, and changing the rules as to contributory negligence. In no case has the claim ever been made that these laws in any way affected or impaired existing contracts of service for terms expiring in the future, although many cases must doubtless have occurred where those laws were applied to parties who were under such contracts.

We have now discussed all of the contentions made against the law which we deem entitled to detailed treatment, and we find no serious difficulty in sustaining its fundamentals and essential provisions. As said in the beginning of this opinion, this law forms the answer of the legislature to a very widespread demand. It is a legislative attempt to reach within constitutional lines some fair solution of a serious problem which other nations, not restricted by written constitutional inhibitions, have solved or partially solved years ago. Doubtless the law will need and will receive changes and amendments as time shall test its provisions and demonstrate its weak points. It would be unreasonable to expect that a law covering so important a subject, along lines not before attempted, should be perfect, or very near perfect, upon its first enactment. If experience shall demonstrate that it is practicable and workable, and operates either wholly or in great measure to put an end to that great mass of personal injury litigation between employer and employee, with its tremendous waste of money and its unsatisfactory results, which now burdens the courts, the long and painstaking labors of those legislators and citizens who collaborated in framing it will be fittingly rewarded by a result so greatly to be desired. That result will mean a distinct improvement in our social and economic conditions.

The effect of our conclusions upon the result in the present case is yet to be considered. The complaint was sustained, and the injunction granted, on the ground apparently that, the law being valid, the plaintiffs would be greatly injured if their employer elected to become bound by it, because they would be obliged either to break their existing contracts or lose their common-law remedies for their employer's torts. Granting all that plaintiffs claim as to the necessary results of their employer's election, it is very certain that no irreparable injury results to them. If their employer breaks his contract of employment because they decline to accept the new law, they have adequate legal remedies for the recovery of damages.

If, on the other hand, they elect to come under the law themselves, they lose no vested or contract right, and are not damaged in the eyes of the law by the change in their remedies for future torts. In either event there is no cause of action in equity, and no ground for an injunction. The complaint should have been dismissed on the pleadings.

Judgment reversed, and action remanded with direction to dismiss the complaint,

**Barnes, J.**, concurring (filed November 16, 1911):

I concur in the opinion of the Chief Justice, except in so far as it is said in effect that our Constitutions may mean one thing to-day and something different to-morrow, depending on whether conditions and ideals have in the meantime undergone a change. I regard our Constitutions as immutable, except when changed in the manner therein prescribed. Judges, in interpreting our fundamental laws, may at one time reach conclusions different from those which would be reached at another time. This does not argue that the constitutional provision under consideration has undergone any change, but demonstrates that judges, being finite beings, made a mistake at one time or the other. No act of the legislature should be declared unconstitutional unless it is clearly so. This is elementary. By hewing closely to this line, there is little danger of the courts committing any serious blunders in interpreting our organic laws. If a legislative act, measured by this standard, trenches on the Constitution, it should be held void, regardless of whether or not the provision violated is out of harmony with twentieth century conditions and ideals. To hold otherwise is to say that the courts may change our fundamental laws. This would be a clear usurpation of power, never vested nor intended to be vested in the courts, and one which was reserved to the people themselves. I am a firm believer in constitutional government. I do not share the belief that our Constitutions have become archaic, or that they have outlived their usefulness. If the opinion of the court is intended to mean that it is a doubtful question whether our Constitutions should be preserved or thrown in the "scrap heap," I do not agree with it.

**Marshall, J.**, concurring (filed November 22, 1911):

The result itself meets with my unqualified approval. Some language in the court's opinion, however, respecting the Constitution, I fear will be construed in a different way than the writer thereof, or any member of the court, intended or would sanc-

tion, tending to impair the lofty character of the fundamental law as significantly maintained by this court. I am not alone in that. Other language appears which does not express my personal views. True, none of such is matter of decision or even judicial *dicta*, but, if left unchallenged, it is liable to misleadingly indicate a trend of judicial thought here which, I am safe in saying, does not exist. I choose to avoid responsibility therefor. It, seemingly, is my duty to do so. In discharging that duty I wish not to take from the dignity of the court's able opinion on the vital questions presented for solution. I do not understand they involved any new constitutional, or any, question of difficulty, giving rise, under any circumstances, to a desire a broader fundamental spirit than has been long firmly intrenched in the jurisprudence of this country.

The law approved is a very mild piece of legislation. While I would not suggest it is too moderate for now,—for that is not within my province,—yet I would not indicate that the legislature responded as fully as it might to the need for a system as directly as practicable laying the personal injury burdens of production upon the things produced where they belong, as should have been efficiently recognized long ago, and would have been, had the lawmaking power appreciated that it is its province, not that of courts, to cure infirmity in the law. If criticisms, unjustly and freely directed toward the latter and the human instrumentalities thereof, merely because of their fidelity to duty to maintain the laws as given, had been turned upon the former for failure to better conserve human happiness in the industrial field in the light of twentieth century conditions, untold suffering might have been prevented, which only the people's representatives could prevent. Tardy recognition of such duty casts no reflection upon legislative actors of to-day. Who can say but that they would have had the same ideals as now, and effected the same results long ago, if opportunity had been offered them to do so? It has been, in the past, far easier to criticize a power which was helpless to supply a remedy, than to suggest one, or move legislative power to adopt one.

I am constrained to write the foregoing, to give deserved credit to the patient, earnest, efficient labor of the lawmakers who placed the enactment in question upon the statute book of this state. It would give them too little credit to record, merely, that they bowed to public demand, and too little credit to this court to leave room for the thought that it has been influenced by any such demand to give the Constitution

any new shade of meaning to sustain the enactment, or that it would change, or arrogate to itself power or disposition to change, fundamentals in any sense, by judicial interpretation.

As to the subject of the enactment, advanced thinkers in economics, law, and legislation have been, at the front, and the public has been slow to follow. It took the industrious, able, patient, tactful legislative committee over two years of activity, to educate the people up to willingness to accept on trial the mild law before us. Opposition had to be overcome by education on all sides. The legislature responded, not so much to a general demand, as to a constitutional command, to conserve, in the light of the present, the public welfare.

The remarks in the court's opinion which may suggest to some that a different meaning is to be read out of the Constitution now than formerly; that it may have meant one thing when framed and later another, and now be held differently, according to judicial interpretation, to meet social necessities as recognized by human instrumentalities in the particular environment,—probably were not so intended, but I sense danger of a contrary impression going out. Such ability to bend the fundamental law in the name of judicial interpretation—the idea that an eighteenth century construction for an eighteenth century condition may not, and at the hands of the court does not have to, fit a twentieth century condition,—has been advanced by some, but not, significantly at least, by any court. On the contrary, it has met with universal condemnation. That it is wrong, every man of eminence that has ever written upon the subject in the past, as well as the very nature of the case and the very logic and limitations of judicial interpretation, bear witness. The fertile method of dealing with the Constitution has been characterized as one which has “furnished a mode of argument which would on the one hand leave the Constitution crippled and inanimate, or on the other hand give it an extent and elasticity subversive of all rational boundaries.” 1 Story, Const. 398.

Manifestly, there can be but one right interpretation or construction of the Constitution. It is said to have been constructed of general declarations, so that, in letter and spirit, it might abide indefinitely, and would have to so abide, dealing with all conditions and all ages, except as amended in the manner therein specified. Considerately with that, there can be but one view point for interpretation, and that is the one from which the framers of the system build. That is unmistakably indicated in *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60;

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

We speak of the Constitution in a general sense,—the American system, commencing with the Federal model and including the state Constitutions framed in harmony therewith. In all writings thereon, from Chief Justice Marshall to date, the idea that it cannot be properly judicially changed to suit the notions of the times, and that there will appear little need thereof when the real nature thereof is comprehended, is made prominent. It was that idea, largely, which moved one eminent writer to speak of it as the "greatest single achievement of the eighteenth century," and another to characterize it as the "most wonderful work ever struck off at a given time by the brain and purpose of man." Truly, it cannot be said of that which was so unequaled in the eighteenth century, and, we may well add, was unequaled in the nineteenth, and has been since, that it can take the cast, so to speak, from time to time, of its environments as judicial instrumentalities may view it through the vista of conditions in *presenti*. All history says no. The very inconsistency of the contrary says no. The absence of any necessity for, and the destructive danger of, any such quality, say no.

A new remedy for a new condition within the boundaries of reason is within legitimate police authority. Who could wish more? How could more exist, and human liberty—natural, inherent rights—be safe? Would it not be well to recur to the classic rule for testing legitimacy of legislative enactments, given by the most eminent judicial expounder of the Constitution, of which the history of American jurisprudence bears record:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

With that and the significance of the declared purpose and central thought of the Constitution in mind, much of the supposed difficulty which has stimulated suggestions of competency to, and necessity for, bending it by a usurpation method of interpretation, will disappear.

How are we to determine when the purpose of law, in the field of police power, and unaffected by any express prohibition, is legitimate? It seems the answer is easy. Look first to the purpose of the Constitution, found in the declaration, "Grateful to Almighty God for our freedom, in order to

secure its blessings, form a more perfect government, insure domestic tranquillity, and promote the general welfare," we "do establish this Constitution." [Const. Preamble.] Then to the central thought—the very substructure—upon which the whole was builded: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness." [Art. 1, § 1.] There is voiced a broad spirit, covering, as this court has, in effect, many times said, a field as limitless as are human needs. The language was not used for mere rhetorical ornamentation or effect, but to suggest the permissible scope of legislation in the zone of general welfare, its extent and its limitations. *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L.R.A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *State v. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 126 Am. St. Rep. 1003, 114 N. W. 137; 15 A. & E. Ann. Cas. 408; *Bonnett v. Vallier*, 136 Wis. 193, 17 L.R.A. (N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885.

So here, as it seems, the initial question was this: Is the purpose of the law legitimate, within the broad dominating spirit mentioned? The answer must be yes, as the manifest purpose is to promote every element of the central thought of the Constitution. Anything fairly within that has always been, and must necessarily always be, held legitimate. Keeping in mind that in the selection of means the legislature has a very broad comprehensive field in which to freely make a choice, the next question is, are the means contemplated reasonably appropriate to the end to be attained? Not are they the best means, but are they proper means, in that they are not within any express prohibition, and tend to conserve rather than to destroy? All must agree in the affirmative on that in harmony with the best thought of all the more civilized nations of Europe. The difficulty here has been want of appreciation of the great economic truth that personal injury losses incident to industrial pursuits, as certainly as wages, are a part of the cost of production of those things essential to or proper for human consumption, and the more directly they are incorporated therein, the less the enhancement of cost and the better for all.

True, the old remedies for losses mentioned have been inefficient and wasteful. They are, economically speaking, unscientific, and have always been. It is more apparent now than formerly, by reason of greater and more numerous modern activities and methods, that is all. In truth,

the infirmity, from an economic standpoint, and from the standpoint of man's duty to his fellow men, has always existed, though the quantum of regrettable results and useless waste has greatly increased by the multiplication of human activities and physical instrumentalities.

So it will be seen, I think, that while particular means may be reasonably appropriate to a legitimate purpose under some conditions characterizing a particular period, and not have been at a prior time, no change in the Constitution is involved in remedying the misfit. The end being proper, the legitimacy of means may be dependable upon conditions, the question turning more on matter of fact than anything else. The change of mere means does not require a fundamental change, so long as legitimacy of end and reasonable appropriateness of means shall be kept efficiently in view.

Want of appreciation, in my judgment, of the Constitution from the view point suggested, has led some to advocate judicial changes to meet new conditions, while others have insisted that many amendments made in the prescribed way, practically substituting a new system for that of the fathers, are necessary or advisable, and still others have maintained the broad liberal view suggested, which was early intrenched in the jurisprudence of this country by the judicial writings of Chief Justice John Marshall. That idea renders changes of any kind unnecessary to legislative competency to legislate to any extent which reasonably promotes a constitutional object. Anything further would destroy, or tend to destroy, instead of promote, public welfare. Such idea is the safe one, and the right one from the view point, I think, of the fathers. It is the one sturdily maintained by this court. It is the one I feel competent to say all members of this court would now maintain, and that nothing in its opinion should be otherwise taken.

If the Constitution is to efficiently endure, the idea that it is capable of being resquared, from time to time, to fit new legislative or judicial notions of necessities *in presenti*, instead of new legislation being tested by it, must be combatted whenever and wherever advanced, and wrong impressions in regard to the matter carefully guarded against. To even significantly speak of making the Constitution adaptable to new conditions by means of interpretation, when the selection of new and constitutional means adaptable to such conditions is meant, is liable to confuse and weaken that high regard all should have for the fundamental law, as a broad, definite, certain, comprehensive, unvarying,

and unvariable system, other than by the means therein pointed out. Dark will be the day, if that day will ever come, for the people of this country, and dark to the people of all countries whose attention is directed here for lessons in constitutional government, when our system shall not be held up by the courts as speaking the same at one time as at another, except in so far as changes shall be made in the particular way. That is the doctrine of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60. No one can read that great exposition of our system without appreciating how illogical it is to speak of interpretation as an instrumentality for giving, from time to time, a different cast to the fundamental law. The whole spirit of the court's logic condemns such reasoning as heresy. Note the significance of this: "The exercise of this original right" to make a system of government "is a very great exertion, nor can it, nor ought it, to be frequently repeated. The principles therefore so established are deemed fundamental, and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." In that connection the court added, in unanswerable logic, that the Constitution is not only the paramount law, but is absolutely unchangeable by ordinary means; that laws adaptable to it are legitimate, and laws so called not so adaptable are not laws at all. It was designed to govern the legislature and the courts as well. That conception is of something high above either legislatures or courts, to vary it. How can that be done by indirection, mis-called interpretation and construction, —a method of rounding a syllogism with a conclusion based on false premises. Interpretation of that sort would enable courts to evade, and render useless, the most carefully drawn enactments, whether of fundamental or subsidiary law.

So, in short, I think the law in question is a reasonably appropriate means to effect a constitutional purpose; that the Constitution needs no bending whatever in order to sustain it in its essential features, and none would be proper if the contrary were the case.

The foregoing I can but regard out of harmony with this, in its letter: "Changed social, economic, and governmental conditions and ideals of the time, as well as the problems the changes have produced, must logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation,"—so far as it is pregnant with the thought that the fundamental law is judicially changeable. The words "problems" of "construction" and "interpretations" I think

were unfortunately used, if the thought was merely of problems of whether new enactments to cope with new conditions are within or without the legitimate field of legislative activity, having regard to appropriateness of means to effect a constitutional end. The latter might be, as I have suggested at one time, and not a half century theretofore, because changed conditions may render an end legitimate, within the unchangeable scope of the fundamental law, which earlier was not; or the selected means to effect that end might be reasonably appropriate at one time, though not so a century, more or less, theretofore.

Why treat judicial interpretation of law as a process of following changing ideals, social problems, and ideas, since its sole office is to solve uncertainties as to the intent at the time of the enactment? Interpretation commences where begins uncertainty,—obscurity as to the meaning the lawgivers purposed putting into the enactment, and succeeded, discoverably, in expressing, literally or inferentially. In short, the gist of the matter is the intent when the law was made, not what one can make the language say in a different environment from that of its origin to accomplish a desired purpose. No bending is permissible for the latter purpose, but for the former the very letter may have to give way to the spirit. *State ex rel. Heiden v. Ryan*, 99 Wis. 123, 74 N. W. 544; *State ex rel. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846; *State ex rel. McGrauel v. Phelps*, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041. The expounder is to "look to the whole and every part of the law, to the intent apparent from the whole, to the subject-matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present" in the lawgiving body's mind at the time of the enactment, and then, so far as such idea can reasonably be spelled out of the enactment, give effect to it, though it violates the letter. *Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 659, 79 N. W. 422.

True, "the Constitution is a very human document," in the sense that it is a collection of words recognizing, characterizing, and guarantying the natural rights of man,—all that are essential to public welfare in the social state, but it is not so in the sense of creating such rights. The right to life, to liberty, to happiness, to equality one with another, are not of human creation. They are of divine origin, though by human instrumentality some one or more of them might be taken away. It is to prevent that, in the main, the Constitution was

framed. So anything not expressly prohibited, which reasonably conserves those God-given rights, is within its saving grace. Anything which clearly or materially impairs or destroys any one of them is condemned by it. It were better to inculcate the idea that it is not subject to change with the change of times and conditions, though such new conditions, by logical process, may well be the deciding factor as to whether legislative means resorted to for a particular end are within or without the unchangeable constitutional principles. Manifestly it must have been the latter conception of the Constitution which so inspired statesmen of the first century of the Republic with veneration for it. That might well have inspired Webster to love it, "to have a profound passion for it," to "cherish it day and night," to "live on its healthful saving influence," and to "trust never, never to cease to heed it until" he should "go to the grave of his fathers," to "earnestly desire not to outlive it." It is good to draw inspiration from those lofty sentiments. I would not by word or deed, to any extent, give rise to the thought that the ancient dignity of our system, in judicial conception here, has changed.

At no period has appreciation of the great work of the fathers been more important than now. We need to sit anew, in thought, at their feet, revive knowledge that the result was wrought by a body of men, representatives of the great seats of learning of the English speaking races of two hemispheres, and otherwise men of broad experience, many of whom had been students of all Federal governments of all prior ages in preparation for the special task,—as the historian declared, "the goodliest fellowship of lawgivers whereof this world has record,"—a body dominated by specialists inspired "by enobling love for their fellow men," and the thought that they wrought not for their age alone, but for the ages to come, and so sought to avoid the infirmities of previous systems of government by the people, by carefully providing that no change in letter or spirit should occur, except in a particular and most deliberate and conservative way.

Appreciating that the report of this case will be widely read and commented upon within and without the field of judicial administration, I particularly desire to aid in creating and promoting correct impressions respecting the dignity of the abolished defenses and the responsibility of courts for their existence.

True, such defenses are of judicial origin, but not as that term, without explanation, might be understood by laymen. They are so in the same sense that a large part of the

law, upon which rights and remedies depend, is of such creation. Nevertheless, all such is as much the law of this state, to be respected by the court as any part of the Constitution or any act of the legislature. It did not originate with the courts of our age or century. It has not been within the competency of this court at any time to change it. The defenses in question became a part of the law of the mother country through its judicial administration long before the Revolution. The law of such country, so far as adapted to our conditions here, was adopted when our independent government was formed, and became the common law of this country. It was in full force in the territory of Wisconsin when our state was admitted into the Union. All officers were sworn to maintain it,—that part relating to the law of negligence as well as the rest,—and were bound to do so with as much fidelity as if incorporated into the written law. When the Constitution was adopted, the unwritten law was substantially given the cast of written law, and as such firmly intrenched as fundamental, subject to legislative change, by § 13, art. 14, of the Constitution, in these words: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this state, until altered or suspended by the legislature."

Every judge of every court has been sworn to maintain the common law as thus intrenched in our system, till changed by the legislature. So, from the view point of the present, the law of negligence—including the defenses in question—does not lose in dignity when compared with an act of the legislature, because ages ago it had judicial origin. It was, as we have seen, with deliberation adopted by the people when they organized our state government. No court in our time has had competency, we repeat, to change or create or destroy in that field. Power in that regard was expressly reserved to the legislature. It has been free to act in the matter, within such reasonable limits as not to violate guaranteed rights, for over sixty years, while the courts have been powerless to do more than to determine, to the best of their ability, the law as fundamentally adopted or subsequently changed, by the lawmaking power, and apply it.

Under the power reserved to the legislature as aforesaid, it was competent for it to abolish the defenses in question, and to do it in such a way as to create inducement for employers to voluntarily become parties to the new system designed to better conserve human life and human happiness. Call the method "constitutional coercion,"

if thought best. That casts no discredit upon the method, for where coercion is necessary, reasonable coercion is legitimate, no guaranteed rights being infringed upon.

It is needless to add that I heartily indorse all said in the court's opinion regarding the importance of the legislation which has received approval. May it be the beginning of a well rounded out constitutional system, making everyone who consumes any product of labor for hire pay his proportionate amount of the cost of the creation, representing the personal injury misfortunes of those whose hands have enabled him to secure the objects of human desire, thus minimizing the sufferings which are the natural incidents of industry, and should be borne, so far as they represent pecuniary sacrifice, by the mass of mankind whose desires are administered to by such industry.

#### WISCONSIN SUPREME COURT.

SARAH M. CAWKER et al., Exrs., etc., of  
E. Harrison Cawker, Deceased, Respts.,  
v.

B. H. MEYER et al., Railroad Commissioners,  
Appts.

(147 Wis. 320, 133 N. W. 157.)

#### Public utility — furnishing heat — regulation.

A building owner does not come within the meaning of a statute constituting a public utility everyone who shall furnish heat, light, or power, either directly or indirectly, to or for the public, by furnishing heat, light, and power to his own tenant and selling surplus to three neighbors.

(November 14, 1911.)

**A**PP<sup>EAL</sup> by defendants from an order of the Circuit Court for Dane County overruling a demurrer to the complaint in an action brought to restrain defendants from enforcing against plaintiffs the provisions of the public utility act. Affirmed.

#### Statement by Vinje, J.:

Action to restrain the railroad commission of Wisconsin from enforcing the provisions of chapter 499, Laws of 1907 (§§ 1797m-1 to 1797m-108, Stats.) as against the plaintiffs. The complaint alleged:

"First. That these plaintiffs are, and at

*Note. — Heating service as public utility.*

A public use is a use which concerns the whole community as distinguished from a particular undivided or a particular number of individuals; public usefulness, utili-

all the times hereinafter mentioned were, duly qualified and acting as executors of and trustees under the last will and testament of E. Harrison Cawker, deceased, and under and by virtue of letters testamentary duly issued to them out of the county court in and for the county of Milwaukee, in the state of Wisconsin, and that these plaintiffs are, and at all times hereinafter mentioned were, as such executors and trustees, the owners in fee simple and in possession of certain real estate known and described as lot numbered eleven (11), and the south half of lot numbered twelve (12), in block numbered fifty-seven (57), in the fourth ward of the city of Milwaukee, county of Milwaukee, and state of Wisconsin.

"Second. That said defendants are, and for some time last past were, the duly appointed and qualified members of the railroad commission of Wisconsin.

"Third. These plaintiffs further show that, in or about the year 1896, these plaintiffs caused to be erected and constructed upon said premises a certain building known as the Cawker building, designed and intended by these plaintiffs to be rented for stores, offices, and light manufacturing purposes. That at the time of the erection of said building, as aforesaid, these plaintiffs caused to be installed therein a steam plant for the generation of heat, electric light and power, for the purpose of heating and lighting said building, and furnishing electric light and power to such of the tenants and occupants of said building as should desire the same.

"Fourth. That, in order to operate said steam plant with economy, it is necessary to operate the same so as to generate heat, light, and power to the full capacity of said plant, and that after the completion of said building and the installation therein of said steam plant, these plaintiffs

found that they were unable to make use of the full capacity of said power plant in the heating and lighting of said building, and in furnishing to the tenants thereof as much light and power as said tenants desired to purchase, and that, in order to operate said plant with economy, it would be necessary for them to dispose of their surplus heat, light, and power to other persons.

"Fifth. These plaintiffs further show that, for the purpose of enabling them to operate their said plant with economy, they entered into contracts with three persons occupying premises adjacent to said Cawker building, to furnish them with light and power from their said plant, to wit, Otto Pietsch Dye Works, F. H. Feldman, and G. Logemann & Son Company, and that they also entered into a contract with said G. Logemann & Son Company to furnish to said G. Logemann & Son Company steam heat, for the purpose of heating the premises immediately adjoining said Cawker building on the north, and that the furnishing of such heat, light, and power to said three persons or corporations is merely incidental to the furnishing of heat, light, and power for their own use in said Cawker building, and for the use of the tenants occupying said Cawker building, and for the purpose of enabling these plaintiffs to operate their said power plant economically.

"Sixth. These plaintiffs further show that they have not at any time applied for or received any permit from the city of Milwaukee to make use of any street or alley in said city, nor have they ever held themselves out as able to or willing to furnish light, heat, and power to the public, or to any person or persons other than the persons above named, or their predecessors in the occupancy of the premises now occupied by said three persons. That there

ty, advantage, or what is productive of general benefit, a use by or for the government, the general public or some portion of it. 32 Cyc. 1255.

But one case has been found which is similar to CAWKER v. MEYER, and that is Seaton Mountain Electric Light, H. & P. Co. v. Idaho Springs Invest. Co. 49 Colo. 122, 33 L.R.A. (N.S.) 1078, 111 Pac. 834, holding that a rule adopted by a corporation organized to supply electric light and steam heat to the inhabitants of a municipal corporation, and which, under a franchise from the municipality, has placed conduits for that purpose in the public streets, to the effect that steam for heat will be supplied only to persons taking electricity from the company, is unreasonable, and cannot be enforced to deprive persons who do not take electricity, of the 37 L.R.A. (N.S.)

right to steam. The case also holds that an injunction will lie to prevent a public service corporation from wrongfully ceasing to furnish steam to a consumer for heating purposes, after the proper connections have once been made and the service has begun. The assumption essentially involved in this case, that this was a public service corporation, in no way conflicts with the CAWKER CASE, for in the former the heating company was organized to give public service in the broad sense, a condition which does not exist in the latter. As already shown, the former also involves the question as to the right of a public service corporation which performs two distinct kinds of service, to refuse to furnish one without the other, and a note on this point is appended to the case in 33 L.R.A. (N.S.) 1078.

L. A. W.



are two public utilities in said city of Milwaukee engaged in the production, transmission, delivery, and furnishing of heat and light, operating under intermediate permits.

"Seventh. These plaintiffs further show that said defendants have demanded of these plaintiffs that they comply with the provisions of chapter 499, Laws of 1907, and the various acts amendatory thereof, entitled 'An Act to Create §§ 1797m-1 to 1797m-108, inclusive, Statutes of 1898, Giving the Wisconsin Railroad Commission Jurisdiction over Public Utilities, Providing for the Regulation of Such Public Utilities, Appropriating a Sum Sufficient to Carry Out the Provisions of This Act, and Repealing Certain Acts in Conflict with the Provisions Hereof,' and have threatened to cause the attorney general of the state of Wisconsin to prosecute these plaintiffs under the provisions of said act, in case of their failure or neglect to comply therewith; and these plaintiffs further show that they are advised and believe that said chapter 499 of the Laws of 1907, and of the several acts amendatory thereof, are not applicable to these plaintiffs, or to any person or persons operating a light, heat, and power plant under conditions similar to those under which these plaintiffs are operating their said heat, light, and power plant in said Cawker building; that the provisions of said act, if applied to these plaintiffs, would render the operation of their said plant so expensive and burdensome as to compel these plaintiffs to cease the operation thereof, or to operate the same at a considerable loss to these plaintiffs; that if said act should be construed to be applicable to these plaintiffs, these plaintiffs are liable under the provisions thereof to forfeit a sum not less than \$100, nor more than \$1,000, per day, for each and every day during which they have, since the passage and publication of said act, or shall in the future, fail to comply with the provisions of said act; that the penalties so imposed are unreasonable and void, and are so large that the enforcement of said penalties against these plaintiffs might amount to a confiscation of the entire trust estate in their hands, to the irreparable injury of these plaintiffs and of the beneficiaries under the trust, by virtue of which these plaintiffs hold the premises hereinafter described; and that these plaintiffs have no adequate remedy at law.

"Wherefore, these plaintiffs pray the judgment of this court that said defendants, and each of them, their successors in office, and their agents, servants, and employees be forever restrained and en-

joined from enforcing, or seeking to enforce, the provisions of said chapter 499, Laws of 1907, as against these plaintiffs, or from making any order or orders under and by virtue of the authority vested in them by said act, requiring these plaintiffs to do or perform any act required by the provisions of said public utility law, or from in any manner interfering with the operation by these plaintiffs of their said heat, light, and power plant, and for such other and further relief as may be just and equitable, and for their costs in this action."

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and from an order overruling the demurrer they appealed.

Messrs. L. H. Bancroft, Attorney General, and Russell Jackson, for appellants.

Mr. Lewis M. Ogden, with Messrs. Ryan, Ogden, & Bottum, for respondents:

The respondents are not operating a public utility within the meaning of chapter 499, Laws of 1907.

Hennepin County v. Brotherhood of Church, 27 Minn. 462, 38 Am. Rep. 298, 8 N. W. 595; State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1077; South Highland Land & Improv. Co. v. Kansas City, 172 Mo. 534, 72 S. W. 944; Cooley, Const. Lim. 6th ed. 738; Wisconsin River Improv. Co. v. Pier, 137 Wis. 337, 21 L.R.A. (N.S.) 538, 118 N. W. 857.

Vinje, J., delivered the opinion of the court:

From the allegations of the complaint set out in the foregoing statement of facts, it appears that plaintiffs built a plant for the purpose of furnishing the tenants of their own building with heat, light, and power; that the completed plant proved to be large enough, when economically run, to furnish more heat, light, and power than the tenants of their own building required, and that they sold the surplus to three of their adjoining neighbors. Does the operation of such a plant, under such circumstances, constitute a public utility, within the meaning of the statute, §§ 1797m-1 to 1797m-108, Stats. (Laws of 1907, chap. 499)? Section 1797m-1 defines a public utility as follows: "The term 'public utility' as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, and every town, village, or city that now or hereafter may own, operate, manage,

or control any plant or equipment, or any part of a plant or equipment, within the state, for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, light, water, or power, either directly or indirectly, to or for the public." The state claims that by furnishing heat, light, and power to the tenants of their own building, the plaintiffs became a public utility; that the furnishing of such commodities to anyone else than to one's self is furnishing it to the public, within the meaning of the statute. It is obvious that such a construction is too narrow, for it would constitute the owner of every building furnishing heat or light to tenants, as well as every householder who rents a heated or lighted room, a public utility. The legislature never contemplated such a construction to be given the words "public utility." They must receive a construction that will effectuate the evident intent of the legislature, and not one that will lead to a manifest absurdity. It was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the legislature sought to regulate, but the furnishing of those commodities to the public; that is, to whoever might require the same. *Wisconsin River Improv. Co. v. Pier*, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857. The use to which the plan, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility.

But whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public, as where a plant is built and operated for furnishing power to the public generally, but for a time finds one consumer who uses it all. If the product of the plant is intended for, and open to the use of, all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility. On the other hand, a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming either under the letter or the intent of the law. In the instant case, the purpose of the plant was to serve the tenants of the owners, a restricted class, standing in a certain contract relation with them, and not the public. The furnishing of power, light, and heat to a few neighbors was incidental merely, and limited to them. Should plaintiffs, however, enlarge their field of service, it is by no means certain that they would remain exempt

from the operation of the law. And, having come within its provisions, they would be required, to the extent of the capacity of their plant, to serve anyone making a demand upon them, under such regulations as the railroad commission might lawfully prescribe. *Ibid*.

It is very difficult, if not impossible, to frame a definition for the word "public" that is simpler or clearer than the word itself. The Century Dictionary defines it as: "Of or belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; . . . not limited or restricted to any particular class of the community." The New International defines it as: "Of or pertaining to the people; relating to or affecting a nation, state, or community at large." The tenants of a landlord are not the public; neither are a few of his neighbors, or a few isolated individuals with whom he may choose to deal, though they are a part of the public. The word "public" must be construed to mean more than a limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors, or more than a few who, by reason of any peculiar relation to the owner of the plant, can be served by him.

While we find it quite easy to ascertain the true spirit and intent of the law, yet we deem it inexpedient and unsafe to attempt to define in more specific terms than the statute what does and what does not constitute a public utility. Each case will depend upon its own peculiar facts and circumstances, and must be tested by the statute in the light of such facts and circumstances. The law should receive a construction that will effectuate its true purpose, however difficult that may be. No resort should be had to any arbitrary standard, or to any fixed line of demarcation, on the ground that they are easy of application, or for any other reason. The statute was intended to include those, and only those, who furnished the commodities therein named to or for the public. It was not intended to affect the relation of landlord and tenant, or to abridge the right to contract with a few neighbors for a strictly incidental purpose, though relating to a service covered by it.

The conclusions we have arrived at render it unnecessary to determine whether or not the statute unreasonably abridges the right to contract, and whether or not that portion of it prescribing penalties is unconstitutional, on the ground that they are excessive.

Order affirmed.

## COLORADO SUPREME COURT.

NOVELTY THEATER COMPANY, Appt.,  
v.  
LOTTIE WHITCOMB.

(47 Colo. 110, 106 Pac. 1012.)

**Master and servant — actors' frolic — contributory negligence.**

1. An actress who, during the presentation of her part upon the stage, unneces-

sarily mounts a chair, which is not required by her engagement, at a time when the actors are engaged in a frolic, throwing shoes, cans, and other missiles about, and thereby becomes particularly conspicuous, is guilty of contributory negligence as matter of law, which will prevent her holding her employer liable for an injury due to being hit by a missile.

**Same — assumption of risk.**

2. An actress who continues her performance after the other actors have begun a

**Note. — Applicability of master and servant doctrines to case of injured actor.**

There is apparently no reason why the ordinary rules pertaining to the relation of master and servant should not apply to an actor while engaged in his occupation, and acting within the scope of his employment. Indeed, the few reported cases which involve injuries to actors apply such rules, generally without discussing the peculiar nature of the plaintiff's employment.

A woman engaged in the chorus in a pantomime was held, in *Burr v. Theatre Royal*, 76 L. J. K. B. N. S. 459, [1907] 1 K. B. 544, 96 L. T. N. S. 447, 23 Times L. R. 299, to be the servant of the manager of the theater.

And members of the chorus have been held fellow servants of the stage hands engaged in shifting the scenery and in doing other work of that character upon the stage. *Ibid.*; *Hahn v. Conried Metropolitan Opera Co.* 126 App. Div. 815, 111 N. Y. Supp. 161.

In *Davenport v. Oceanic Amusement Co.* 132 App. Div. 368, 116 N. Y. Supp. 609, it was held that a woman who contracted to allow herself, as part of an exhibition, to be carried down a rope from the fourth floor of a burning building, assumed the risk of another employee grasping the end of the swinging rope and throwing her and her rescuer against the burning building. And in *Conyes v. Oceanic Amusement Co.* 202 N. Y. 408, 95 N. E. 801, in which the plaintiff was the employee who performed the rescuing act, it was held that the master had performed his duty when he furnished a sufficient rope; that the plaintiff was in a better position than the master to know when the rope became unsafe for further use; and that consequently, if the injury was caused by a worn-out condition of the rope, the master would not be liable therefor.

A bridge constructed by the stage hands, and used as part of the paraphernalia, was held in *Hahn v. Conried Metropolitan Opera Co.* supra, to be a mere appliance, and not a place furnished for the servant, for the defective condition of which the master would be liable.

And in an early English case it was held that since the plaintiff was not obliged to enter into a contract with the owner of a theater "to act, sing, and perform as a chorus singer," she must accept things as

she found them; and that the owner was under no obligation to light the stage or fence a hole in the floor by any means not employed in the ordinary course of his business. *Seymour v. Maddox*, 5 Eng. L. & Eq. Rep. 265.

One or two other cases not involving personal injuries may be considered for the light which they throw upon the question herein discussed.

Thus, in *Re Winter German Opera Co.* (1907) 23 Times L. R. 662, an opera company having gone into liquidation, the question arose whether or not an artist who had been engaged to sing during the season for a certain sum for each performance was a "servant," and whether his remuneration was "wages or salary in respect of services rendered," within the meaning of the preferential payments in bankruptcy act 1888, so as to entitle him to be paid in priority to other creditors. It was argued for the other creditors that if the artist in question should be considered a servant, then other great singers, such as Patti, Melba, and Caruso, engaged to sing for, say, three nights during the year, would be mere servants, and that their remuneration would constitute wages or salary; but the court held that cases of this character must turn upon the terms of the particular contracts; and according to the terms of the contract in question the artist was to be considered a servant, and entitled to the preference provided in the act.

And in *McKay v. Buffalo Bill's Wild West Co.* 17 Misc. 601, 40 N. Y. Supp. 592, it was held that an employee of the Wild West Company, employed to maintain order and discipline in the car used for lodging various members of the show, was a fellow servant of another employee whose particular duty was that of watchman at the gate, and that therefore, the former could not recover for the value of his personal effects, which were burned when the watchman overturned an oil stove in the car and set fire to it.

As to the liability of the master for injuries inflicted upon an employee maliciously or in sport, by other employees, see the note to *Medlin Mill. Co. v. Boutwell*, 34 L.R.A.(N.S.) 109.

As to the master's liability for injury from the sportive manner in which a servant performs an act done in the discharge of his duty, see the note to *Soderlund v. Chicago, M. & St. P. R. Co.* 13 L.R.A.(N.S.) 1193.

L. A. W.

frolic in which they throw missiles about assumes the risk of being hit and injured by one of them.

**Same — scope of employment.**

3. The owner of a theater is not liable for injury to an actor employed by him, which is caused by a missile thrown by another actor at a time when all the employees, including the stage manager, are engaged in a frolic, since such acts are entirely outside the scope of the employment, and the employer is not answerable for them.

(October 4, 1909.)

**A** PPEAL by defendant from a judgment of the District Court for Pueblo County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. James J. McFeely and E. O. Stimson, for appellant:

There can be no recovery, as the servant was not acting within the scope of his employment at the time of the alleged injury.

*Southern Cotton-Oil Co. v. De Vond*, — Tex. Civ. App. —, 25 S. W. 43; *Sammis v. Chicago, B. & Q. R. Co.* 97 Ill. App. 28; *Pettigrew v. St. Louis Ore. & Steel Co.* 14 Mo. App. 441; *Chicago, R. I. & P. R. Co. v. Smith*, 10 Kan. App. 162, 63 Pac. 294; *Bradley v. Nashville, C. & St. L. R. Co.* 14 Lea, 374; *Williams v. Mineral City Park Asso.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 A. & E. Ann. Cas. 924; *Sagers v. Nuckalls*, 3 Colo. App. 95, 32 Pac. 187.

Where the only knowledge that the defendant could possibly have had of the employee's act which is complained of came through the employee alone, no liability attaches to the employer.

*Western U. Teleg. Co. v. Olson*, 40 Colo. 264, 90 Pac. 841.

Plaintiff was guilty of contributory negligence, and cannot recover.

1 *Bailey, Personal Injuries Relating to Mast. & S.* 1897, p. 300, §§ 800, 800a; *Smith v. Van Sciver*, 58 N. J. L. 190, 33 Atl. 390.

Mr. M. J. Galligan, for appellee:

Wherever a servant's injury is legitimately traceable to the master's negligence in any manner, he cannot escape liability by showing that the harm was due in part to the negligence of a fellow servant.

*Burdick, Torts*, 179; *Buswell, Personal Injuries*, §§ 192, 197; 2 *Bailey, Personal Injuries*, § 3020; 2 *Labatt, Mast. & S.* § 811; 1 *Labatt, Mast. & S.* §§ 28, 118.

A master or proprietor of a place of amusement is bound to use reasonable care

to keep the place free from danger to those in attendance.

*Colorado Midland R. Co. v. Brady*, 45 Colo. 203, 101 Pac. 62; *Williams v. Sleepy Hollow Min. Co.* 37 Colo. 62, 7 L.R.A.(N.S.) 1170, 86 Pac. 337, 11 A. & E. Ann. Cas. 111; *Ferringer v. Crowley Oil & Mineral Co.* 122 La. 441, 47 So. 763; *McDuffie v. Ocean S. S. Co.* 5 Ga. App. 125, 62 S. E. 1008; *Anderson v. Fleming*, 66 L.R.A. 152, note; *Clowdis v. Fresno Flume & Irrig. Co.* 118 Cal. 315, 62 Am. St. Rep. 238, 50 Pac. 373; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 50 L.R.A. 199, 81 Am. St. Rep. 512, 46 Atl. 631.

In order to defeat a recovery on the ground of contributory negligence it must appear that the plaintiff so far contributed to the disaster by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened.

*Colorado C. R. Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331; *Allen v. Florence & C. C. R. Co.* 15 Colo. App. 213, 61 Pac. 491; *Trumbull v. Erickson*, 38 C. C. A. 536, 97 Fed. 891; *St. Louis Nat. Stock Yards v. Godfred*, 198 Ill. 288, 65 N. E. 90; *Baltimore & O. S. W. R. Co. v. Young*, 153 Ind. 163, 54 N. E. 791; *Galveston, H. & S. A. R. Co. v. Bonnett*, — Tex. Civ. App. —, 38 S. W. 813.

It is a question for the jury as to whether or not an employee is within the scope of his employment.

*Hoye v. Chicago & N. W. R. Co.* 62 Wis. 666, 23 N. W. 14; *Texas & P. R. Co. v. Carlin*, 60 L.R.A. 462, 49 C. C. A. 605, 111 Fed. 777; *Mason & O. R. Co. v. Yockey*, 43 C. C. A. 228, 103 Fed. 265; *Nelson v. New Orleans & N. E. R. Co.* 40 C. C. A. 673, 100 Fed. 737; *McGhee v. Campbell*, 42 C. C. A. 94, 101 Fed. 936; *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Linden v. Anchor Min. Co.* 20 Utah, 134, 59 Pac. 355; *Downey v. Gemini Min. Co.* 24 Utah, 431, 91 Am. St. Rep. 798, 68 Pac. 417.

**Bailey, J.**, delivered the opinion of the court:

The action is to recover damages for personal injuries sustained under these circumstances and conditions: The plaintiff below, appellee here, Lottie Whitcomb, with her husband, were employed to perform as actors by the Novelty Theater Company, appellant here, defendant below, in the city of Pueblo, at the Empire Theater, for the week ending April 3, 1904. The act which the plaintiff and her husband

presented consisted in the imitation by them of the action and noises of certain barnyard fowls, as the rooster and hen, interspersed with singing and dancing. A portion of the fifth paragraph of the complaint, which sets forth her first cause of action, and that is the one upon which recovery was had, is as follows:

"Fifth. That unknown to plaintiff the said defendant wrongfully and negligently arranged for what was termed a charivari on the closing night of plaintiff's engagement at said Empire Theater, and on April 3, 1904, at about 10:30 P. M. on the closing night of said plaintiff's engagement at the said Empire Theater, and while said plaintiff was on the stage in the capacity of actress in the employ of defendant, in the regular line of her duty, the said defendant, in furtherance of its plan and scheme in connection with the said charivari, wrongfully, negligently, and carelessly threw cans and other missiles on the stage where said plaintiff was performing at said theater, and wrongfully and negligently turned out the lights on said stage, and in a rough, rude, and reckless manner the said defendant, in pursuance of its said charivari plan, struck or caused said plaintiff to be struck on the ankle by a can thrown in furtherance of said plan for said charivari, which said can struck the said plaintiff with great force and violence about her right ankle, causing the same to be sprained and permanently injured."

For the defense to the cause of action, beside the general issue which the defendant tendered and the plea of contributory negligence, there was a separate further defense as follows:

"That on the night of April 3, 1904, this plaintiff, in connection with her co-actors at said theater, planned a little amusement among themselves, without the knowledge or consent of this defendant, and outside of their employment, said amusement consisting, among other things, of throwing tin cans and other missiles at each other, and that none of the cans or other missiles so thrown at this plaintiff struck her on or near her ankle, or caused her any injury whatever.

"That this plaintiff is a very large and heavy person, and while on the stage, and without the knowledge or consent of this defendant, and outside of her duty, according to her employment, she mounted a chair on said stage, said chair being about 20 inches high, from the floor of the stage on which she was performing, and in getting down from said chair to the stage of said theater, she jumped from the said chair of her own free will, and struck the stage

floor in a manner which caused her ankle to become injured."

The plaintiff replied, joining issue upon all new matter. Trial was had with a verdict for the plaintiff for \$2,000, and after the overruling of a motion for a new trial, judgment was rendered thereon. Defendant brings the case here for review.

It is contended by the defendant:

First. That if the injury complained of occurred through the negligence and improper conduct of other employees of the company, as alleged, such conduct was without their employment, unauthorized by the company, and that it may not be legally held for the damages resulting therefrom.

Second. That the plaintiff had full knowledge of what was going on, but still continued to act her part, and so, by remaining at her post, voluntarily assumed the risk incident thereto; and,

Third. That the plaintiff was guilty of conduct contributing to the injury, and may not therefore recover.

It is admitted that in the presentation of the respective parts of the plaintiff and her husband no chair was necessary, and that up to the night in question none had been used, while on this occasion the plaintiff in her performance mounted one that stood about 20 inches above the stage, and thus placed herself in a position of increased danger. It is also undisputed that, after she had begun her act, and for a considerable time before the injury occurred, the boisterous and unruly conduct of the other actors, which it is alleged finally resulted in damage to the plaintiff, had been in progress. It also appears that while she stood upon the chair she was imitating a hen, with her husband dancing around her imitating a rooster, and that her action in mounting a chair was wholly voluntary and without the scope of her employment and beyond the purview of her part, as theretofore rendered. Such conduct of necessity must have attracted particular attention to herself, and doubtless substantially contributed to the result complained of. It could not fail to make her more conspicuous than ordinarily, and must have increased the zest and zeal with which oyster cans, old shoes, and other missiles were thrown. She simply by her own action in this respect made herself a special target for her companions. The injury was sustained as she stepped to the stage from the chair. Had she remained upon the floor, as in previous performances, it is altogether possible that no damage would have been inflicted. Under the admitted facts, plaintiff was clearly guilty of contributory negligence, as a matter of law, in our view of the situation.

It is contended by defendant, and there is proof to show, that prior to going upon the stage that evening for her own part, plaintiff had actively engaged in similar conduct toward other performers, and seemed to be enjoying herself along with the rest. This, of course, is denied. Be that as it may, in any event, it is clear that, with full knowledge of what was going on, and the character of the amusement in which the other actors were indulging at her expense, for several minutes before any harm befell her, the plaintiff voluntarily continued in her performance, and thereby, as is contended by the defendant, assumed all risk of injury to herself.

At the close of plaintiff's testimony a motion for a nonsuit, on substantially the same grounds now urged in argument, was interposed and denied. We are of opinion that this motion should have been sustained, for each of the reasons suggested. The acts complained of, which occasioned the injury, if they in fact did so, were clearly without the scope of the authority of the fellow actors, including the stage manager. Manifestly the whole affair was a frolic among the performers themselves, for their own amusement, edification, and diversion, and while the plaintiff now denies any knowledge of, or part in, that jollification, such denial is contrary to human experience, reason, and observation, and is probably contrary to the fact, as we view the matter. Anyhow it is settled that for a considerable period while this side play was in progress, after plaintiff's appearance upon the stage, she still remained at her post and continued her act, with as full knowledge of the danger incident thereto as anybody else could possibly have had, when she might easily have withdrawn and avoided it all. By failing to do this, under such circumstances, she assumed the risk attendant upon her remaining. She thus plainly made possible the injury, which could not otherwise have occurred, and thus contributed thereto by her own negligent conduct.

The conduct complained of on the part of her fellow actors amounted to a wilful battery, and it may safely be assumed, from common knowledge, that such acts are not fairly within the scope of the actor's employment. No more has a stage manager the power to authorize such acts of his own volition, and thus bind the company. It would be absurd to so hold. To bind the company for damages resulting from such conduct and actions on the part of its em-

ployees, they must have been expressly or impliedly authorized; and if by implication, then in such manner as to leave the matter free of doubt. No such authorization, either express or implied, has been shown.

There appears to be no doubt, upon a full consideration of all of the testimony, that these stage people were all fellow servants. Any of the acts complained of, which the stage manager is charged with having committed, were not within the scope of his employment; but, on the contrary, were entirely outside of it. It does not appear from the testimony, or from anything in the record, that he was acting in any such capacity as to entitle him to be considered a vice principal.

"All who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, although it may be in different grades or departments, are fellow servants, each taking the risk of the other's negligence." 26 Cyc. 1282, and cases cited.

The rule, as we gather it from the best reasoned cases, is that, for the acts of the vice principal, done within the scope of his employment, and such as properly devolve upon the master in his general duty to his servants, the master is liable, while for all such acts as relate to the common employment and are on the level with the acts of the fellow laborer, the master is not liable. In other words, the test of liability is the character of the act, rather than the relative rank of the servants. *Deep Min. & Drainage Co. v. Fitzgerald*, 21 Colo. 533-543, 43 Pac. 210; *Poorman Silver Mines v. Devling*, 34 Colo. 37, 44, 46, 81 Pac. 252.

There is no liability on the part of the principal as to matters beyond the scope of the authority of the superior servant. In order that the master's liability may be established, it must be shown that the superior servant had authority, either express or implied from the nature of his functions and the regular course of the business, to do the act or give the order alleged to be negligent. Authority to commit acts of personal violence amounting to battery cannot be inferred. Larger powers cannot be imputed to an agent than the principal himself possesses. *Labatt, Mast. & S. § 537*, pp. 1539, 1540, and cases cited.

If a servant whose negligence visits an injury on another servant is acting outside and beyond the line of his duty at the time, and doing that which he was not employed to do, the master will not be liable. *Southern Cotton-Oil Co. v. De Vond*, — Tex.

Civ. App. —, 25 S. W. 43; *Sammis v. Chicago, B. & Q. R. Co.* 97 Ill. App. 28; *Pettigrew v. St. Louis Ore & Steel Co.* 14 Mo. App. 441.

The law seems to be settled that where a servant continues to work with knowledge, actual or constructive, of danger to which an ordinarily prudent person refuses to subject himself, such a one is guilty of contributory negligence. 26 Cyc. 1239, and cases cited.

Or, stated in another way, to render a master liable for injuries to his servant, the latter must have exercised ordinary and reasonable care; and if the injured party might, by the exercise of ordinary and reasonable care under the circumstances, have avoided the consequences of defendant's negligence, he cannot recover. *Last Chance Min. & Mill. Co. v. Ames*, 23 Colo. 167, 47 Pac. 382; 26 Cyc. 1261.

These statements of the law describe accurately and precisely the situation of the plaintiff, having reference to the conditions under which she was injured. Upon the facts shown it is plain that she might readily have withdrawn from her position of danger. Had she done so, all chances of harm to her would have been removed. She appears, however, to have been willing to remain with full knowledge of the situation, and thus subject herself to an apparent danger, and should and must be charged with the consequences of her voluntary act.

We cite as being instructive upon the question here involved, and as upholding the general conclusion reached, the following: *Segers v. Nuckolls*, 3 Colo. App. 95, 32 Pac. 187; *Orphan Belle Min. & Mill. Co. v. Pinto Min. Co.* 35 Colo. 564, 85 Pac. 323; *Iowa Gold Min. Co. v. Diefenthaler*, 32 Colo. 391, 76 Pac. 981; *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 390, 21 Pac. 148; *Western U. Teleg. Co. v. Olsson*, 40 Colo. 264, 90 Pac. 841; *Smith v. Van Sciver*, 58 N. J. L. 190, 33 Atl. 390.

We have given the case full and careful consideration from every view point, and interpreting the testimony most favorably to the plaintiff, we are of the unalterable conviction that the defendant is not legally liable, and the judgment rendered cannot be permitted to stand. It is therefore reversed and the cause remanded, with instructions to the court below to dismiss the complaint.

Steele, Ch. J., and White, J. concur.

Petition for rehearing denied Feb. 7, 1910.  
37 L.R.A. (N.S.)

## GEORGIA SUPREME COURT.

W. N. AULD, Admr., etc., of Eliza Auld,  
Plff. in Err.,  
v.

SOUTHERN RAILWAY COMPANY.

(136 Ga. 266, 71 S. E. 426.)

### Carrier — crossing platform of moving train — negligence.

1. The act of crossing from one car platform to another on a moving train is not *per se* negligence, in the absence of a rule or notice warning the passengers from such act. A passenger who undertakes to go from one car to another while the train is in motion assumes only the risks incident to such undertaking in the ordinary operation of the train; and if such passenger is injured by being thrown from the platform by a sudden jerk, questions of negligence of the defendant in causing the injury and of the passenger's contributory negligence are for the jury.

### Evidence — custom — crossing platform of moving train.

2. In a suit against a carrier for an injury to a passenger from being precipitated from a moving train while crossing from one coach to another, testimony of a known usage or custom of passengers to cross is competent evidence, not to justify or ex-

Headnotes by EVANS, P. J.

### Note. — Passing from one car to another of a moving train as contributory negligence.

The earlier cases upon this question will be found in a note to *McAfee v. Huidekoper*, 34 L.R.A. 720.

For cases involving injuries received while on vestibuled platforms, see *Clanton v. Southern R. Co.* 27 L.R.A. (N.S.) 253, and *Johnson v. Yazoo & M. Valley R. Co.* 22 L.R.A. (N.S.) 313, and the notes appended to these cases.

For questions as to the liability of a carrier for injuries to passengers upon the platforms of cars under various circumstances, see note to *Norvell v. Kanawha & M. R. Co.* 29 L.R.A. (N.S.) 325, and the other notes referred to therein.

As shown in the earlier note, the general rule is that it is not negligence *per se* to pass from one car to another of a moving train. *Galveston, H. & S. A. R. Co. v. Patillo*, 45 Tex. Civ. App. 572, 101 S. W. 492; *St. Louis Southwestern R. Co. v. Keitt*, — Tex. Civ. App. —, 76 S. W. 311.

Thus, in *Galveston, H. & S. A. R. Co. v. Morris*, — Tex. Civ. App. —, 60 S. W. 813, it is held that a passenger who is unable to find a seat in one car is rightfully upon the platform in passing to another car to find one, and in an action for being thrown therefrom, it devolves upon the carrier to show contributory negligence.

In *Andrist v. Union P. R. Co.* 30 Fed. 345, where an emigrant train which had been stopped for a considerable time was

cuse the passenger from attempting to cross when it would be an obviously hazardous act, but as illustrating the character and nature of the act as bearing on the passenger's alleged contributory negligence in crossing.

**Same — opinion — inference to be drawn by jury.**

3. If data supplied by a witness can be placed before the jury in such a way that they may draw the inference, as well as the witness, it is superfluous to add by way of testimony the inference which the jury may well draw for themselves.

(May 10, 1911.)

**E**RROR to the Superior Court for De Kalb County to review a judgment in defendant's favor in a suit to recover dam-

started without warning, and plaintiff, who, with others, was off the train, hurriedly boarded the first coach, and was crossing the platform to get to his seat when the cars were parted without warning, for the purpose of switching, it was held that he was not guilty of negligence *per se*.

And in *St. Louis, I. M. & S. R. Co. v. Leftwich*, 54 C. C. A. 1, 117 Fed. 127, the court held that a passenger who boarded the front of the train showed no want of reasonable or ordinary care in passing through the train, and even left it to the jury to say whether he was negligent in grasping the hand-holds and going upon the step for the purpose of spitting.

In *Northern P. R. Co. v. Adams*, 54 C. C. A. 196, 116 Fed. 324, it is held that deceased was not chargeable with negligence *per se* in passing into the dining car over a platform which he knew to be unvestibuled, but recovery was denied on other grounds, on appeal reported in 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408.

In *Boston & M. R. Co. v. Stockwell*, 77 C. C. A. 19, 146 Fed. 505, it was held that plaintiff was not negligent as matter of law, where, after entering the train at a station where there was no agent, he deposited his baggage in the baggage car according to custom, and started to go into the passenger car, when his hat was blown off, and he was thrown from the platform as he released his hold on the door knob.

And in *Gaunce v. Gulf, C. & S. F. R. Co.* 20 Tex. Civ. App. 33, 48 S. W. 524, evidence on the part of plaintiff that while passing from one coach to another to get a drink of water he was thrown from the platform by an unusual jerk and the giving away of a hand-hold, though contradicted, was held to be sufficient to require that the case be submitted to the jury.

But while it is not negligence as matter of law for a passenger to pass from one car to another of a moving train, in the absence of a rule of the carrier prohibiting it, he nevertheless assumes the risk of injury caused by the movements of a train of good construction and repair passing over a track in good condition. *St. Louis, I. M. & S. R. Co. v. Pollock*, 93 Ark. 240, 123 S. W. 790.

ages for the alleged wrongful death of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Mr. Burton Smith, for plaintiff in error:

The evidence was enough to justify the jury in believing that deceased was thrown from the train.

*Southern R. Co. v. Webb*, 116 Ga. 152, 59 L.R.A. 109, 42 S. E. 395.

Her conduct in passing from one coach to another was not so negligent as to bar recovery.

*Columbus R. Co. v. Asbell*, 133 Ga. 573, 66 S. E. 902; *Augusta R. Co. v. Glover*, 92 Ga. 146, 18 S. E. 406; *Cotchett v. Savannah & T. R. Co.* 84 Ga. 687, 11 S. E. 553; *Hutchinson, Carr.* § 650; *Marquette v.*

*& S. R. Co. v. Pollock*, 93 Ark. 240, 123 S. W. 790.

However, he assumes only ordinary risks. *San Antonio & A. P. R. Co. v. Choate*, 22 Tex. Civ. App. 618, 56 S. W. 214. For former appeals, see 90 Tex. 82, 36 S. W. 247, 37 S. W. 319, and 91 Tex. 406, 43 S. W. 537, 44 S. W. 69.

And if the danger is not obvious, it is not negligence for a passenger to attempt to pass from one coach to another upon being requested by the conductor to do so. *Central R. Co. v. Carleton*, 163 Ala. 52, 51 So. 27.

However, the circumstances may be such that it will be considered contributory negligence for a passenger to pass from one car to another of a moving train.

Thus, in *Dougherty v. Yazoo & M. Valley R. Co.* 84 Miss. 502, 36 So. 699, it was held to be negligence barring recovery for a passenger voluntarily to attempt to pass from one car to another of a train while it was moving rapidly on a curve.

In *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, Fed. Cas. No. 12,392, which was an action on an insurance policy which provided against liability for injury incurred through negligence of the insured, it was held that passing from car to car of a rapidly moving train, without some necessity for doing so, was such negligence as to preclude recovery.

In *McDonnell v. New York C. & H. R. R. Co.* 35 App. Div. 147, 54 N. Y. Supp. 747, appeal dismissed in 159 N. Y. 524, 53 N. E. 1127, where plaintiff had passed through the train and was returning, although there were seats he could have occupied, when he was thrown from the platform by the train parting, it was held that the jury was justified in finding him guilty of contributory negligence.

And in *Hunter v. Atlantic Coast Line R. Co.* 72 S. C. 336, 110 Am. St. Rep. 605, 51 S. E. 860, a passenger who went through the train looking for water, and stepped off the unguarded platform of the rear car, thinking there was another car, was held to be guilty of negligence barring recovery.

R. L. S.



Chicago & N. W. R. Co. 33 Iowa, 562; Bronson v. Oakes, 22 C. C. A. 520, 40 U. S. App. 413, 76 Fed. 734; Robinson v. Chicago & A. R. Co. 135 Mich. 254, 97 N. W. 689; San Antonio & A. P. R. Co. v. Choate, 22 Tex. Civ. App. 618, 56 S. W. 214; Galveston, H. & S. A. R. Co. v. Morris, — Tex. Civ. App. —, 60 S. W. 813, affirmed in 94 Tex. 505, 61 S. W. 709; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 117 Fed. 127; Northern P. R. Co. v. Adams, 54 C. C. A. 196, 116 Fed. 324; Crandall v. Minneapolis, St. P. & S. Ste. M. R. Co. 96 Minn. 434, 2 L.R.A. (N.S.) 645, 113 Am. St. Rep. 653, 105 N. W. 185.

Messrs. McDaniel, Alston, & Black for defendant in error.

Evans, P. J., delivered the opinion of the court:

W. N. Auld, administrator of Mrs. Eliza Auld, brought suit in the superior court of De Kalb county, against the Southern Railway Company, to recover damages for the alleged wrongful death of the plaintiff's intestate. The injury resulting in Mrs. Auld's death occurred in the state of South Carolina, and the action was in virtue of a South Carolina statute authorizing suit by an administrator. The plaintiff was non-suited.

The substance of the evidence was that Mrs. Auld, a married woman, forty-four years of age, the mother of seven children, on the day previous to her death had been discharged from a sanatorium, and was returning to her home in company with her husband and brother. She had been in failing health for two or three years before being sent to the sanatorium. She was despondent, morose, and gloomy. At the time of her injury her mental and physical health was a great deal better than it had been. Her party boarded the cars of the defendant at Toccoa, Georgia. The particular coach in which she entered was vestibuled. The coach in the rear was not vestibuled. The train was about two hours behind time. The country traversed by the defendant's road was mountainous. The train was running fast, trying to catch up the lost time. A passenger testified that the husband and brother of Mrs. Auld were in the rear coach; that he observed her leave her seat, and go to the rear of the car, and pass through the door. "As she left the door there was a sudden plunge or jerk of the train, and we all had to hold our seats, just at the point she was

thrown from the train." She was found lying near the track in an unconscious condition, and died from her injuries. One of the plaintiff's witnesses testified that "the train was about two hours late that night," and in the absence of any other testimony on the subject we infer that the injury occurred at night.

1. It is not negligence as matter of law for a passenger to pass from one coach to another while the train is in motion. Whether or not a passenger is negligent in so doing depends upon the facts and circumstances of the particular case. *Cottchett v. Savannah & T. R. Co.* 84 Ga. 687, 11 S. E. 553; *Augusta Southern R. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005. Some early cases may be found in other jurisdictions in which it is said that a passenger's attempt to cross the platforms between the coaches while the train was running was a negligent act. The later cases are harmonious that it is not *per se* negligence for a passenger to go from one coach to another while the train is in motion. The modern view results from the great improvement in constructing cars; the tacit or implied invitation by railroad companies in the make-up of the trains, including a smoking car, a dining car, and other coaches, that the passenger may pass from one to the other for his comfort or convenience. A passenger who undertakes to pass from one coach to another while the train is running assumes the risk of injury caused by the ordinary movements of the train. If he is injured in his effort to go from one car to another, and the railway company is not guilty of negligence proximately causing the injury, the passenger cannot recover. *Hicks v. Georgia Southern & F. R. Co.* 108 Ga. 304, 32 S. E. 880. Or, if the railway company is negligent, and the plaintiff could have avoided the consequences thereof by the use of ordinary care and diligence, he cannot recover. *Blitch v. Central R. Co.* 76 Ga. 333; *Southern R. Co. v. Strickland*, 130 Ga. 779, 61 S. E. 826. The circumstances attending the injury to the plaintiff's intestate, as developed on the trial, were sufficient to make a *prima facie* case against the carrier, and the burden was upon it to overcome the imputation of negligence or to show the passenger's contributory negligence. It appeared from the testimony that the train was behind time and running fast to catch up the lost time, and that it gave a sudden plunge and jerk as Mrs. Auld passed to the platform. These facts are not conclusive

that Mrs. Auld was thrown or fell from the train by a jerk usual and incident to the ordinary operation of the train. Under the rule just stated, it was a question for the jury to determine whether the defendant was negligent in the operation of the train, and whether, under all the circumstances, the plaintiff's intestate was guilty of such negligence in undertaking to pass from one coach to another as would defeat a recovery. *Branan v. Southern R. Co.* 135 Ga. 24, 68 S. E. 793.

2. A witness was examined by interrogatories. He was asked: "If you say anything about her moving from one place to another, state how and where she moved. State whether or not there was any custom with reference to moving. If so, what was the custom? Answer fully." To which he replied: "I saw her get up and start back through the car, and as she passed the door I did not see her any more. It is the custom of passengers to go from one car to another whenever they want to, and go to the toilet whenever they want to go." The court excluded the following part of the answer: "It is the custom of passengers to go from one car to another whenever they want to, and to go to the toilet whenever they want to go." We do not think that the question was too indefinite to apprise the defendant of an effort to prove a custom or usage among the passengers to go from one car to another of a moving train. It is competent to show a known usage or custom of passengers to pass from one car to another while in motion, not so much as an act of license by the defendant, but as explanatory of the custom and usage of passengers on moving trains. If passengers commonly go from one car to another, the very commonness of the custom tends to show that it is known to the defendant. Of course, no custom to do an obviously dangerous act will excuse contributory negligence; but, as we have seen, this court cannot say as matter of law that it is negligence to go from one car to another.

3. The court refused to allow a witness to testify that, from certain facts which he enumerated, it was his opinion that the jerk of the car threw Mrs. Auld from the train. There was no error in this. The jury were as competent to draw the deduction from the facts as the witness. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237.

Judgment reversed.

All the Justices concur.

37 L.R.A. (N.S.)

## MINNESOTA SUPREME COURT.

RE RUSSELL M. BENNETT et al.

RUSSELL M. BENNETT et al., Appts.,  
v.  
WILLIAM HARRISON et al., Respts.

(115 Minn. 342, 182 N. W. 309.)

**Statute of frauds — oral agreement to convey land — part performance.**

1. A "part performance," to take an oral agreement to convey real estate out of the statute of frauds, must be substantial, and of such a nature that the refusal to enforce the agreement would result not merely in the denial of the right which the agreement was intended to confer, but in an "unjust and unconscionable" injury.

**Same — effect as mortgage.**

2. One having no interest in land, legal or equitable, at the time a deed was executed by the owner to a third party, cannot assert the rights of a mortgagee therein against the grantee, solely by virtue of an oral agreement made by the grantee to convey the land to him upon payment of a certain sum.

**Fraud — agreement to convey — part performance — equitable mortgage.**

3. In this case, land was conveyed by the owner to the applicants; they having orally agreed to thereafter convey an interest to the defendant upon payment by him to them, at any time within three years, of a specified sum. The defendant had no interest, legal or equitable, in the land at any time prior to the conveyance thereof to applicants. Held:

(a) That the fact that the defendant had a possible broker's opportunity to find other purchasers for this land, and that he acted for applicants in negotiating a purchase, was not such a change of defendant's situation in "part performance" of the oral agreement as to render the same enforceable.

(b) That through such transaction the defendant did not acquire in the land included in the agreement the equitable interest or title of a mortgagor.

(Lewis, J., dissents.)

(August 4, 1911.)

Headnotes by SIMPSON, J.

**Note. — Necessity and character of one's previous interest in land essential to his claim as an equitable mortgagor.**

The cases discussed in this note have been limited to those in which it is sought to have decreed as a mortgage a deed absolute of lands to which the person claiming the rights of a mortgagor had no title. The cases in which land is deeded directly from a debtor to his creditor are thus excluded, as well as those in which an execution debtor at a judicial sale has entered into an

**A** PPEAL by applicants from an order of the District Court for St. Louis County denying a motion for new trial in proceedings to register title to certain land, in which the title claimed by them had not been recognized to the extent claimed. Reversed.

The facts are stated in the opinion.

Messrs. Van Derlip & Lum for appellants.

Messrs. John G. Williams, C. O. Baldwin, and W. G. Bonham, for respondents:

The agreement constituted a mortgage.

Stitt v. Rat Portage Lumber Co. 96 Minn. 27, 104 N. W. 561; Jones v. Gillett, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5; Beebe v. Wisconsin Mortg. Loan Co. 117 Wis. 328, 93 N. W. 1103; Phelan v. Fitz-

patrick, 84 Wis. 240, 54 N. W. 614; King v. McCarthy, 50 Minn. 227, 52 N. W. 648; Heaton v. Darling, 66 Minn. 262, 68 N. W. 1087; Grout v. Stewart, 96 Minn. 230, 104 N. W. 966; Jones, Mort. 6th ed. § 258; Conway v. Alexander, 7 Cranch, 218, 3 L. ed. 321; Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570, 889; Jourdain v. Fox, 90 Wis. 99, 62 N. W. 936; Schneider v. Reed, 123 Wis. 488, 101 N. W. 682.

The mortgage was an enforceable obligation.

Grout v. Stewart, 96 Minn. 230, 104 N. W. 966; Jones v. Gillett, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5; Krebs v. Lauser, 133 Iowa, 241, 110 N. W. 443; Terry v. Wilson, 50 Minn. 570, 52 N. W. 973.

agreement with another who purchased the property, either at the sale or afterwards, to hold it as security for the sum thus advanced, unless it appears that the period for redemption has expired, in which case, the former owner would not longer have any interest in the property.

It is a general rule that the intent of the parties will determine the nature of the transaction, irrespective of the form which may have been used. 27 Cyc. 991.

It is necessary that the distinction between a mortgage and a land contract be kept clearly in mind. The mortgagor is something more than a vendee, i. e., he has certain rights that the vendee does not have, such as the right to redeem after default, and in equity at least, and in some jurisdictions at law, he is regarded as the holder of the legal title with the rights consequent thereto. A person therefore occupying the relation of a mortgagor has thus acquired a higher and better right than a mere vendee.

It will be noted that the dissenting opinion in *RE BENNETT* does not dissent from the proposition that there must exist an interest to entitle one to the right of an equitable mortgagor. The dissent is from the proposition taken in the majority opinion as to when this interest must exist. In holding that the interest is necessary, the opinion is in accord with the majority of the cases that have passed on this point.

Thus, in *Conkey v. Rex*, 212 Ill. 444, 72 N. E. 370, a person who had entered into a written agreement with the purchaser of land to go into possession and pay interest on the purchase money, and upon payment of a stated sum to receive a conveyance of the premises from such purchaser, was held not to be entitled to the rights of a mortgagor, for the reason that he had no interest in the premises. It was urged in this case that the person claiming to be mortgagor had negotiated with the original grantor for a conveyance, but it is stated in the opinion that it was to be a conveyance to the purchaser, and not to the claimant. See *Watts v. Kellar*, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1, infra. 57 L.R.A. (N.S.)

So, in *Heaton v. Gaines*, 198 Ill. 479, 64 N. E. 1081, one who was in possession of lands under a person who purchased them of a third person was held not to have shown the existence of an intention to mortgage; and in the course of the opinion the court says that a conveyance of lands by a third person to a person under whom one held possession could not be a mortgage, unless it appeared in some way that the person thus holding possession had an interest as owner.

In *Caprez v. Trover*, 96 Ill. 456, one in possession of real estate as a lessee, who orally agrees with another that the latter shall purchase the real estate and take title thereto, and that the former be given a deed upon paying the purchaser the entire cost and interest, was held not to be entitled to the rights of a mortgagor, and in the course of the opinion the court states that such lessee had no interest in the property susceptible of being mortgaged.

In *Greene v. Cook*, 29 Ill. 186, where it was agreed that one person should enter government land and give another a bond for title upon the execution of an agreement to pay a certain sum, which was done, and thereafter, upon the failure of the other party to pay the note, a new bond and note had been executed, and this forfeited, the obligee in the bond was held not entitled to the rights of a mortgagor as against one purchasing the land in good faith. In the course of the opinion the court states that this appears to have been an ordinary sale, and further, that the debtor never had any interest in the land to mortgage. This case, however, seems to be based more on the theory that it was not the intention of the parties to create a mortgage.

In *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206, where a person purchased a certificate at an execution sale, and agreed with the execution debtor after the period for redemption had expired, that he would take title to the property, and that the debtor could buy it back at a stated sum, the transaction was held not to be a mortgage, so as to give the execution creditors of such debtor the right to redeem. In the

There was an oral agreement to convey on certain terms, and appellants ought in equity to be required to convey, because of the partial performance by Chesebrough, and his offer of full performance by the tender which the court finds he made. This partial performance is enough to take the case out of the statute of frauds, if the statute otherwise applied.

Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; Hughes v. Mullaney, 92 Minn. 485, 100 N. W. 217; Phoenix Ins. Co. v. Ryland, 69 Md. 437, 1 L.R.A. 548, 16 Atl. 109; Alexander v. Ghiselin, 5 Gill, 138; Washington F. Ins. Co. v. Davison, 30 Md. 99; Brown v. Hoag, 35 Minn. 373, 29 N. W. 135; Slingerland v. Slingerland, 39 Minn. 197, 39 N. W. 146; Svanburg v.

Fosseen, 75 Minn. 363, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; White v. Poole, 74 N. H. 71, 65 Atl. 255; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Wheeler v. Reynolds, 66 N. Y. 227; Williams v. Stewart, 25 Minn. 517; Gilmore v. Johnston, 14 Ga. 683; Moore v. Allen, 26 Colo. 197, 77 Am. St. Rep. 255, 57 Pac. 698, 30 Colo. 307, 70 Pac. 682; Morris v. Gaines, 82 Tex. 255, 17 S. W. 538.

Simpson, J., delivered the opinion of the court:

This is an application to register title to lot 5, township 58 north, range 15 west. After issue joined and trial, the court, by amended findings and decree, determined that Russell M. Bennett was the owner of

course of the opinion the court says that the debtor had no interest in the property, no debt was due, and the transaction could not be regarded as a mortgage.

So, in Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530, where mortgaged property belonging to an estate was sold at foreclosure, and after the period of redemption had expired an heir entered into an agreement in writing with another that he should purchase the property and hold the same for his own benefit, unless such heir should repay him within a stated time, the transaction was held not to be a mortgage. In the course of opinion the court says: "Inasmuch, therefore, as appellants had no interest in the property by reason of the expiration of the twelve months (the period for redemption), there was no title in them which they could mortgage." This seems not to have been necessary, however, as a subsequent agreement was conceded to have made the transaction a mortgage.

In Loomis v. Loomis, 60 Barb. 22, one whose property was sold under foreclosure, who agreed with the purchaser to buy it back, and who procured his brother to furnish the money and take the title as security, was held not to have the rights of a mortgagor, the court stating that he had no interest in the property, and no consideration passed and therefore no mortgage existed. Apparently the period of redemption had expired in this case.

In Payne v. Patterson, 77 Pa. 136, where, by parol agreement between the former owner and a third person, the latter was to buy the property from the purchaser at a previous sheriff's sale, and the former was to remain on the property and have it back on payment of the purchase price and interest, it was held that he was not entitled to the rights of a mortgagor; and in the course of the opinion the court says: "We have already shown that he had no interest whatever in the land. He had no estate therein which could be bound by a mortgage or to which a mortgage could attach." It does not clearly appear from the report whether the period of redemption had expired in this case, but apparently it had.

57 L.R.A. (N.S.)

In Stephenson v. Thompson, 13 Ill. 186, an execution debtor whose land had been sold, and who after the time for redemption had expired had secured another to purchase the property, and had entered into a parol understanding that it should be conveyed to him upon reimbursement to such purchaser for his advances, was held not to have such an interest in the property as can be asserted in a court of equity, and an execution creditor of the debtor can claim no greater right. The court discussed the theory of mortgages, and held that it was not applicable to the facts of this case.

In Sterck v. Germantown Homestead Co. 27 Pa. Super. Ct. 336, a person desirous of purchasing property, who applied to a building and loan association, which thereupon purchased the property taking title thereto in its own name, and afterwards executed a contract with such person that, upon the payment of certain sums, she was to have a deed to the property, was held not to be entitled to the rights of a mortgagor, as at the time she had no interest in the property. In this case a statute abolishing oral defeasances was considered, and held to prevent recovery, even if the transaction should have been a mortgage.

In Schriber v. Le Clair, 66 Wis. 579, 29 N. W. 570, however, a surveyor engaged in the business of a woodsman, locating lands and ascertaining the amount and value of timber upon them, who, having made an estimate of the timber on certain government lands, entered into an agreement with another to advance the purchase price necessary to enter such lands, and to take title in his own name as security, was held entitled to the rights of a mortgagor. On the question of interest the court says: "True, as claimed, the defendant had no interest in the lands before the parties met. Neither had the plaintiff, but, as conceded, the defendant had hunted up the lands, made minutes of their descriptions, and estimated the amount and value of the timber upon them. This certainly was of value in securing the lands."

In Schneider v. Reed, 123 Wis. 488, 101 N. W. 682, the owners of property, part of

an undivided seven eighteenths of lot 5, Edmund J. Longyear of an undivided seven eighteenths, and William H. Daniels of an undivided four eighteenths subject to certain mining leases and agreements for the payment of royalties; and, further, "that the interest of said Russell M. Bennett and Edmund J. Longyear in the two thirds ( $\frac{2}{3}$ ) of the fee of said lands, acquired by the deed from William J. Atwell to Rollin N. Dow, and the deed from Rollin N. Dow to said Bennett and Longyear, is subjected to the right of said defendant George L. Chesebrough and said defendant William Harrison to have from them a deed or conveyance of an undivided two ninths ( $\frac{2}{9}$ ) of an undivided two thirds ( $\frac{2}{3}$ ) of the fee of said land, the same being an undivided

four twenty-sevenths ( $\frac{4}{27}$ ) thereof, upon the payment to them by said Chesebrough and said Harrison of the sum of \$8,777.77, with interest thereon from October 3, 1906, at the rate of 5 per cent per annum; and the right of said Chesebrough and said Harrison to have such conveyance and deed upon such payment is hereby adjudged."

After unsuccessfully moving for certain amendments, the applicants, Bennett and Longyear, moved that the decision be vacated, and that a new trial be had. This motion being denied, they bring the case to this court by their appeal from the order denying such motion.

The applicants claim that, under the facts as shown by the evidence and found by the trial court, the defendants, Chesebrough

which had been sold at a foreclosure sale, and part of which was held by another under a tax deed, intending to redeem the same, entered into an agreement with another to assist them in raising the money and to take a third interest in the property. Afterwards, they made an arrangement with another to furnish the money and take title in his name, and the action was brought to foreclose the deeds thus taken as mortgages. It does not clearly appear whether or not the period for redemption had expired, but apparently it had. Upon the argument, it was urged that the former owners and such third person, who were claimed to be mortgagors, had no interest in the premises such as they could mortgage, and in answer to this the court says: "This contention is satisfactorily answered by the holding in the case of *Schriber v. Le Clair*, supra, where the defendant had absolutely no interest in the lands deeded, and was not even in possession thereof, yet, it appearing that the lands were conveyed to the plaintiff as mere security for a loan to the defendant, the transaction was held to be a mortgage. Further citation of authority on this point is unnecessary."

In *Stitt v. Rat Portage Lumber Co.* 96 Minn. 27, 104 N. W. 561, a logger who had options on timber land and was engaged in extensive logging operations, and who agreed with a lumber company that such company would advance the money and take title to the lands in the name of its president as security for the moneys thus advanced, was held entitled to the rights of a mortgagor. The court did not especially consider the question of interest in this case.

In the following cases the question of interest is not discussed by the court, and apparently was not raised. They are cited here as illustrations of the character of interest of those who have been adjudged to have the rights of mortgagors.

A person who had made improvements on public lands which, at the sale thereof, were purchased by another who took title in his own name as security for the purchase

price, was held entitled to the rights of a mortgagor, in *Davis v. Hopkins*, 15 Ill. 519, and *Smith v. Sackett*, 15 Ill. 528.

And in *Wright v. Shumway*, 1 Biss. 23, Fed. Cas. No. 18,093, a person who had a pre-emption right in public lands, and who secured another to advance the purchase price, and take a certificate of location, and enter the lands in his own name, and give a bond of conveyance back, was held entitled to the rights of a mortgagor.

In *Watts v. Kellar*, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1, where a transaction was understood to be a loan, with the reservation to retain the property if the lender should so decide, a person who purchased the property and gave a contract to another to sell it to him at a certain price, if he should decide to sell, was held to be a mortgagee, with the right to foreclose and enforce his lien. This case was heard on demurrer to a petition which alleged the transaction to have been understood as a mortgage, and the allegations of the complaint were treated as true. See *Conkey v. Rex*, 212 Ill. 444, 72 N. E. 370, supra.

In *Hemans v. Lucy*, 1 Thomp. & C. 523, one who, being desirous of aiding another in obtaining a home, proposed to advance the money to her for that purpose, and, in pursuance thereof, made a contract for the purchase of the premises in question in her name, advanced the money, and took title in his own name, and went into possession and made improvements, was held to take title as mortgagee or trustee.

And in *Jones v. Gillett*, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5, one desiring to purchase land and intending to pay a part of the purchase price, who applied to another for a loan for the balance, it being verbally agreed that such person would advance the necessary amount and take title as security, and such person having thereafter agreed to advance the entire purchase price, was held entitled to the rights of a mortgagor.

In *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265, where one had lost all his interest in lands through foreclosure of a land contract and execution thereon, but thereafter

and Harrison, have no right or interest in the fee of the land involved, and that the portion of the decision above quoted is not sustained by the evidence or findings of fact. The facts found by the trial court bearing on this contested point are:

"That in the month of September, 1906, said defendant Chesebrough called the attention of said applicants, Bennett and Longyear, to the matter of purchasing the fee of said William J. Atwell in a two thirds ( $\frac{2}{3}$ ) of said lands; that said defendant Chesebrough had no interest in the fee of said Atwell, had no contract or agreement of any kind, either verbal or written, for the purchase or sale thereof, and had no property right therein or claim thereto; that said Chesebrough was engaged

as a broker in the buying and selling of mining lands; that he had no acquaintance or connection with said Atwell; that he then knew that said A. P. Cook was the one through whom Atwell could likely be reached and a purchase made, and said defendant Chesebrough was then in a favorable position for obtaining title to the said Atwell interest; that said Bennett and Longyear were not in a position where they could likely obtain title without the aid of someone; that he then represented to them that he thought the fee of said Atwell could be purchased for the sum of \$25,000, and that he would be able, as in fact he was, to secure the same through said Cook; that in case said Atwell interest should be purchased, he, said Chesebrough, would be

arranged with another to loan the money and take a conveyance from those who held the fee, together with a quitclaim deed from herself, the transaction was held to constitute a mortgage, the court regarding the disputes and litigation which arose subsequent to the execution of the sheriff's deed, the debtor's activity in the matter, and the fact that a quitclaim deed was taken from him, as rendering the transaction equivalent to a conveyance by one who owned the land.

In *Lucia v. Adams*, 36 Tex. Civ. App. 454, 82 S. W. 335, an owner of lands which had been sold at a tax sale, and which is stated by the court to have divested the owner's title, who afterwards secured another to advance the money and purchase the property of the purchaser at the tax sale, was held entitled to the rights of a mortgagor. Nothing is said in the opinion as to the effect of interest.

In *Houser v. Lamont*, 55 Pa. 311, 93 Am. Dec. 755, where one purchased at an orphans' court sale, and thereafter made a verbal agreement with another to let her have the property, whereupon she paid a part of the purchase price, and thereafter the land was conveyed by the purchaser to a third person upon the condition on which he held it, such third person was held to stand in the relation of mortgagee.

So, one who purchases land and procures the title to be taken by another as security for the purchase price advanced by him is entitled to the rights of a mortgagor. *Lindsay v. Matthews*, 17 Fla. 575; *Weekly v. Ellis*, 30 Kan. 507, 2 Pac. 96; *Stratton v. Rotrock*, 84 Kan. 198, 114 Pac. 224; *Sandlin v. Kearney*, 154 N. C. 596, 70 S. E. 942; *Hall v. O'Connell*, 52 Or. 164, 95 Pac. 717, judgment modified as to other questions, 52 Or. 171, 96 Pac. 1070; *Fessler's Appeal*, 75 Pa. 483; *Jourdain v. Fox*, 90 Wis. 99, 62 N. W. 936.

In the following cases, in which the same rule was applied, it appeared that the person claiming to be the mortgagor had himself paid part of the purchase price: *Mason v. Hearne*, 45 N. C. (Busbee, Eq.) 88; *Fultz v. Peterson*, 78 Miss. 128, 28 So. 829; *Randall v. Constans*, 33 Minn. 329, 23 N. W. 37 L.R.A. (N.S.)

530; *Pennington v. Hanby*, 4 Munt. 140; *Hewitt v. Huling*, 11 Pa. 27.

So, one who has purchased land and gone into possession, and thereafter secured another to loan him the money and take title from the original vendor, is entitled to the rights of a mortgagor. *Stoddard v. Whiting*, 46 N. Y. 627; *Stewart v. Fellows*, 128 Ill. 480, 20 N. E. 657; *Hill v. Grant*, 46 N. Y. 496.

And so, when one who purchases property, and pays a part of the purchase price, thereafter agrees with another that he shall advance the balance of the purchase price and take title as security, and thereafter the purchaser goes into possession, he is held entitled to the rights of a mortgagor. *Carr v. Carr*, 52 N. Y. 251; *Stinchfield v. Miller*, 71 Me. 567; *Sims v. Gaines*, 64 Ala. 392.

So, one who has purchased land and paid part of the purchase price, and gone into possession, after which another pays the balance of the purchase price and takes title from the vendor as security, is entitled to the rights of a mortgagor. *Hughes v. McKenzie*, 101 Ala. 415, 13 So. 609; *Banks v. Walters*, 95 Ark. 501, 130 S. W. 519; *Smith v. Cremer*, 71 Ill. 185; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; *Balduff v. Griswold*, 9 Okla. 438, 60 Pac. 223; *McClintock v. McClintock*, 3 Brewst. (Pa.) 76; *Moseley v. Moseley*, 86 Ala. 289, 5 So. 732; *McBurney v. Wellman*, 42 Barb. 390, affirmed in 43 How. Pr. 427; *Leahigh v. White*, 8 Nev. 147.

In *Fleming v. Georgia Railroad Bank*, 120 Ga. 1023, 48 S. E. 420, one who purchased land and had title taken in the name of another who advanced a part of the purchase price, which was afterwards paid and a new loan made, and agreement entered into by which the deed was to be held as security for the new loan, was held entitled to the rights of a mortgagor, and his assignee entitled to redeem.

Where a purchaser under a land contract secures title to be taken in another as security for the balance of the purchase price paid by him, and also as security for another debt, such purchaser is entitled to

unable to obtain any commission, and that he desired to acquire for himself an interest therein; that said applicants, Bennett and Longyear, were desirous of obtaining title to said Atwell interest; that it was thereupon agreed orally between said applicants, Bennett and Longyear, and said defendant Chesebrough, that said defendant should and would do what he was able

to do in securing a transfer and conveyance of the Atwell interest; that said property should be purchased of said Atwell in the name of said applicants, Bennett and Longyear, or in the name of the clerk of one of them; that said Bennett and Longyear should pay the purchase price thereof; that said defendant Chesebrough should have a two-ninths ( $\frac{2}{9}$ ) interest in the two-

the rights of a mortgagor. *Beebe v. Wisconsin Mortg. Loan Co.* 117 Wis. 328, 93 N. W. 1103; *Walling v. Aiken*, McMull. Eq. 1.

So, where the purchaser of land secured the title to be taken in the name of a third person as security to such third person for a debt owing him by the purchaser, and took an agreement back to convey the land upon the payment of such debt, such purchaser is entitled to the rights of a mortgagor. *Parmer v. Parmer*, 88 Ala. 545, 7 So. 657; *Weed v. Stevenson*, Clarke, Ch. 166.

But in *Fowler v. Rice*, 17 Pick. 100, one who purchased premises and had the title to the same taken in the name of another, to secure him against loss on a note of the purchaser on which he was surety, taking back a bond for reconveyance, was held not to be entitled to the rights of a mortgagor, and the person to whom he had mortgaged the premises not entitled to the right to redeem them. This case, however, is based on the limited equity powers of the court.

In *Malloy v. Malloy*, 35 Neb. 224, 52 N. W. 1097, one who had leased lands from the state and assigned the lease to another, under an agreement that the assignee should purchase the lands and pay the purchase price, and give the assignor the privilege of repurchasing them by paying the amount of such purchase price, was held entitled to the rights of a mortgagor.

In *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164, a purchaser from the state on a conditional deed on which he had made some payments, who executed a mortgage to another who completed the payments and took a deed from the state, is held entitled to the rights of a mortgagor, and those who succeeded him upon his death are held entitled to the right to redeem as against a purchaser with notice from the assignee in bankruptcy, the mortgagee.

In *Dwen v. Blake*, 44 Ill. 135, an assignee of land warrants, in the name of whose assignor title is taken to secure the payment of the purchase price, such assignor giving bonds for the reconveyance of such lands is held entitled to the rights of a mortgagor.

In *Green v. Maddox*, 97 Ark. 397, 134 S. W. 931, where one purchased at a judicial sale a piece of land, but had not made all the payments at the time of his death, and thereafter another paid the balance and received a deed for such land, subject to the right to redeem of the heirs of such purchaser, such person is held a trustee for the heirs, and the transaction in effect an equitable mortgage.

In *Brownlee v. Martin*, 28 S. C. 364, 6 S. 27 L.R.A. (N.S.)

*E. 148*, a beneficiary under a will, who purchases land of the estate at an executor's sale thereof, and who thereafter agrees with another that title is to be taken in his name as security for the payment of the purchase price, occupies the position of a mortgagor.

In *Krebs v. Lauser*, 133 Iowa, 241, 110 N. W. 443, a lessee of land who gave the purchaser thereof notes aggregating the exact amount of the purchase price, and at the expiration of his lease took a written lease from the purchaser with a clause therein that he was to have the privilege of buying the land at a stated price, and providing that the rent shall be interest on such purchase money, was held not to have the rights of a mortgagor, as the facts proved were not sufficient for the court to declare the transaction a mortgage.

In *Benge v. Benge*, 15 Ky. L. Rep. 514, 23 S. W. 668, one who made a verbal agreement with another to purchase property and take title thereto in her own name as security for the purchase price was held not entitled to the rights of a mortgagor for the reason that he did not make the deed, and was not bound by it.

In *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966, a person who had a contract for purchase, and had a deed executed to the person loaning the money as security, and such person agreed to reconvey on the payment of the purchase price, was held entitled specifically to enforce the agreement.

In *Weed v. Stevenson*, supra, one who obtains property to be deeded to another to secure a debt, and who takes a defeasance or contract by which the creditor agrees to convey upon the payment of such debt, is held a mortgagor.

It is held in *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113, that a person who advances the purchase price of certain real estate, and takes title in his own name, and thereafter loans other sums to the purchaser, holds the land in trust for the purchaser, subject to a lien for the amount thus advanced by him, and may enforce the same by foreclosure.

In *Starks v. Redfield*, 52 Wis. 349, 9 N. W. 169, a person who had a void tax deed to premises, and who conducted negotiations for the purchase of such lands in the name of a third person, by whom the deed was taken upon an agreement to reconvey the same upon payment of the debt, was held to be a mortgagor in an action to restrain him from cutting timber on the lands.

W. A. E.

thirds ( $\frac{2}{3}$ ) interest of said Atwell, being a four twenty-sevenths ( $\frac{4}{27}$ ) of the whole fee of said lands, and should pay two-ninths of the purchase price thereof to said Bennett and Longyear at any time within three years from said date, with interest thereon at the rate of 5 per cent per annum; that upon such payment said Chesebrough should have a deed of such interest from said Bennett and Longyear, or from the person in whose name title should be taken."

Facts further found in detail, briefly stated, are: Upon completion of the purchase, a contract was to be given Chesebrough containing the foregoing agreement, and Chesebrough was to give Bennett and Longyear, as security for the payment to be made by him, certain royalty agreements. Chesebrough, in attempting to secure a transfer of the Atwell interest, learned it could not be secured for less than \$35,000. Bennett and Longyear thereupon agreed with him that it should be purchased at that price under the same arrangement. Chesebrough then had Cook procure a deed of the Atwell interest made to Bennett and Longyear's clerk, who later conveyed to Bennett and Longyear, and Bennett and Longyear paid the \$35,000 purchase price.

After receiving such deed, Bennett and Longyear refused to execute a contract to Chesebrough pursuant to the agreement, and refused to convey an interest in the land to Chesebrough, although Chesebrough demanded such contract, "after doing all the things required of him by said agreement." And, further, "that when said Bennett and Longyear entered into said oral agreement with said Chesebrough, they intended in good faith to abide by it and to carry out its terms."

It is further found that the defendant Chesebrough thereafter transferred to the defendant Harrison one half of his interest under such agreement.

By his memorandum the trial judge indicated that the theory on which the right of Chesebrough and Harrison to a deed of an undivided four twenty-sevenths of the land was adjudged is that the facts found created an equitable mortgage.

The defendants take the position that the transaction constitutes an equitable mortgage, but, if not, that the facts establish an oral agreement to convey land, which is taken out of the statute of frauds by the part performance on the part of Chesebrough.

The applicants take the position, first, that no equitable mortgage was created because, at the time of the transaction claimed to constitute a mortgage, Chese-

brough had no estate or right in the land, has never had any mortgageable interest therein, and the arrangement made was within the statute of frauds; second, that specific performance of the oral agreement to convey cannot be decreed because there was no such partial performance of the agreement as to take it out of the statute of frauds.

The findings of fact are relied upon by the defendants as sufficient to sustain the conclusion upon either position taken by them; that is, as showing an equitable mortgage or an oral promise to convey. There is no specific finding that the claimed interest of Chesebrough was agreed to be held as security, or that it was so held. Chesebrough's version of the conversation which constituted the agreement contains some phrases tending to characterize it as a mortgage, and others equally apt to characterize it as a privilege to buy in the future at a specified price. The applicants claim that from the evidence nothing could be found beyond an oral promise to sell an undivided interest to Chesebrough, if they acquired the land, made on the representation of Chesebrough that he would be unable to obtain a commission from the seller. The applicants further claim from the evidence that Chesebrough, contrary to such representation, did receive \$1,000 as a commission from Cook, and that they thereupon refused to carry out their oral agreement, but offered to pay to Chesebrough an additional sum to make a full broker's commission. The trial court made no finding as to whether or not Chesebrough did receive \$1,000 as a commission, and, if so, the circumstances of such payment; but in the decision Chesebrough and Harrison are required to pay, in consideration of a conveyance of the specified interest, \$1,000 in excess of two ninths of the amount paid for the Atwell interest. The controversy arising out of the claimed receipt by Chesebrough of \$1,000, and the subsequent refusal on the part of Bennett and Longyear to carry out the oral agreement, and the charges and countercharges of bad faith, are not material to the decision of the legal status of the parties, and presumably, for that reason, the facts with reference thereto are not fully found, and the question need not here be discussed. While a number of the errors assigned by the applicants go to the refusal of the trial court to change or add to the findings, yet their main claim is, as stated above, that the facts found do not sustain the decision on any theory, and counsel for the defendants and applicants have discussed fully their conflicting claims as to the decision being sustained by the



facts found upon either theory,—that of an equitable mortgage, or a right to specific performance of a promise to convey. We will dispose of the case as thus submitted. It will not be necessary, therefore, to consider whether, under the evidence, the findings should be limited to a finding of the existence of one or the other agreement.

Considering, first, the claim chiefly urged by counsel for defendant Chesebrough, that the decision made may be sustained as a decree for the specific performance of an agreement to convey land: This claim assumes that the oral promise made by Bennett and Longyear to convey to Chesebrough an undivided two ninths of the Atwell interest was so in part performed by Chesebrough as to take the agreement out of the statute of frauds. The equitable doctrine thus invoked rests on the ground of fraud. "The underlying principle is that, where one of the contracting parties has been induced or allowed to alter his situation on the faith of an oral agreement within the statute, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute." *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135. The courts have not attempted to define what extent or character of change in the situation induced by the oral agreement will be sufficient to estop the party inducing such change from questioning the validity of the oral promise. It must be a change of such character and to such an extent that the interposing of the defense of the statute would be a fraud. The mere denial of the right promised by the oral agreement, the loss of that which existed only by virtue of the oral promise, being deprived of the bargain, does not create an exceptional situation as to the statute, but the very situation the statute covers. To take a case out of the statute because of such resulting loss or injury annuls the statute. The injury or loss which would result from the enforcement of the statute must arise from the acts done in performance or in pursuance of the oral agreement, and such acts must so far alter the situation of the parties seeking to avoid the statute that it would be unjust and against conscience to allow the other party, who has permitted such change to take place in pursuance of his oral agreement, to thereafter refuse to perform on his part. *Ibid*: *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146; *Thomas v. Rogers*, 108 Minn. 132, 133 Am. St. Rep. 421, 121 N. W. 630.

In the instant case, Chesebrough had 57 L.R.A. (N.S.)

no interest in the Atwell land. He had a broker's chance to attempt to buy it if he found someone ready to buy, for whom he could act. His knowledge of or information as to the situation was that one Cook was in position to negotiate with the owner, and that the land probably could be bought. Under these circumstances, Chesebrough stating that he would be unable to get a commission from the owner, Bennett and Longyear made the oral agreement with him that, if he succeeded in buying the Atwell title for them, they would give him a contract for the purchase of an undivided two ninths. Thereafter he did successfully negotiate, through Cook, the purchase by Bennett and Longyear of the Atwell title. Clearly neither the services performed by Chesebrough in negotiating the purchase, nor the loss of the opportunity to buy the undivided two ninths from Bennett and Longyear, by their refusal to carry out the oral agreement, takes the agreement out of the statute under the rule invoked. *Thomas v. Rogers*, 108 Minn. 132, 133 Am. St. Rep. 421, 121 N. W. 630; *Townsend v. Fenton*, 32 Minn. 482, 21 N. W. 726; *Levy v. Brush*, 45 N. Y. 589; *Russell v. Briggs*, 165 N. Y. 500, 53 L.R.A. 556, 59 N. E. 303.

It is urged, however, that Chesebrough, in reliance on the oral promise of Bennett and Longyear, lost an opportunity to buy the land himself, or to find other purchasers who would give him an interest in the land. While this opportunity affords a wide range of conjecture and speculation as to possible results, its surrender does not bring Chesebrough within the principle here invoked. He lost a broker's chance to find a buyer and get in touch with Cook and make a sale,—a chance open to others. Every broker who succeeds in closing a deal evidences a somewhat favorable position with reference to that deal. This opportunity was clearly something indefinite, general, and unsubstantial. There must be a definite and substantial change in situation, in performance, or in furtherance of the oral agreement, before it can be said that it would be a fraud to invoke the statute against such agreement. *Browne*, Stat. Fr. §§ 445, 460; *Lanz v. McLaughlin*, 14 Minn. 72, Gil. 55; *Thomas v. Rogers*, 108 Minn. 132, 133 Am. St. Rep. 421, 121 N. W. 630; *Dunphy v. Ryan*, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486.

In the cases (*Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146, and *White v. Poole*, 74 N. H. 71, 65 Atl. 255) greatly relied on by respondents' counsel as sustaining his claim herein, acts clearly re-

sulting in a substantial definite change in situation were performed in pursuance of the oral agreement. In this fundamental particular, these cases differ from the instant case.

The other ground on which it is claimed the decision may be sustained is that the transaction between Chesebrough, on the one hand, and Bennett and Longyear, on the other, constituted an equitable mortgaging of two ninths of the Atwell title by Chesebrough to Bennett and Longyear. By the decision, the right of Chesebrough and Harrison to a conveyance and deed of an undivided two ninths of the Atwell two thirds of lot 5 is adjudged. Prior to the making of the oral agreement, Chesebrough had no title to or interest in the Atwell land. Through the Atwell deed to Bennett and Longyear's clerk, Chesebrough lost, conveyed, or allowed to lapse no equitable or legal title or interest in the property included in the Atwell deed. Atwell, when he deeded, neither intended to nor did convey any right or interest belonging to Chesebrough, nor intended to nor did convey any right or interest to Chesebrough. If any right or interest in the land ever did vest in Chesebrough, it is solely through the oral promise of Bennett and Longyear, that is, through the oral promise of the persons against whom the promise is sought to be enforced. Upon this point there can be no difference in statement under the facts of this case. But it is claimed that, because Bennett and Longyear's promise to Chesebrough was to hold the land as security, thereby such oral promise to convey on payment by Chesebrough becomes enforceable against the persons making the promise, as conferring an equity of redemption. The very apparent departure from recognized rules governing the transfer of interests in realty involved in this claim, coupled with the fact that the court below makes it the basis for a decree transferring a considerable interest in lands, invites a careful consideration of the principles governing the creation of equitable mortgages.

It is elementary that any interest in real estate which may be sold or assigned may be mortgaged; and, conversely, that some estate or interest capable of being mortgaged, held by the mortgagor, is essential to the existence of a mortgage. When a transaction constitutes a mortgage, therefore, there must be, either independently of the transaction, some interest in the mortgagor capable of being mortgaged, or through the transaction itself such interest must be acquired by the mortgagor. Courts of equity have long been concerned with preserving from for-

feiture this interest in the mortgagor. The designation given that interest—equity of redemption—suggests the history of its preservation rather more clearly than its nature. In accord with other principles of equity affording protection to the interest of the mortgagor, it is the established law that where an interest in land is parted with as security, equity will, regardless of the form of the transfer, treat it as a mortgage. The generally accepted and announced rule is: A deed or conveyance of land, absolute and unconditional on its face, but intended by the parties to be security, will be regarded and treated in equity as a mortgage. The form of the transaction will not preclude an inquiry into its true nature. "Nor need the deed even be made by the debtor. It is sufficient if the debtor, who claims to occupy the position of a mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title acquired it by the act and assent of the debtor, and as security for his debt." 27 Cyc. 993.

As stated in *Fisk v. Stewart*, 24 Minn. 97: "Nor is it at all important as affecting the rights and obligations of the party taking the conveyance, that he received it from another who happens to hold the legal title, instead of the borrower, in whom is vested the equity of redemption, so that it is obtained through the instance and request of the latter and for his benefit."

And in *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369: "Plaintiff, being vested with the equitable title to the land, had an interest capable of being mortgaged. . . . It is entirely immaterial, under such circumstances, whether the trustee of the legal title should convey to the mortgagee directly by the arrangement of the parties, or that it should pass to him through the mortgagor." *Randall v. Constans*, 33 Minn. 329, 23 N. W. 530; *St. Paul Division No. 1 v. Brown*, 9 Minn. 151, Gil. 141; 20 Am. & Eng. Enc. Law, 915, 943; *Jones, Mortg.* §§ 136, 331.

The nature or extent of the interest in the premises, or the manner in which it is evidenced, is unimportant; but under the rule as stated, there must be some interest in the claimed mortgagor which, but for the protection of a court of equity, would be surrendered and lost through the transaction. In the instant case, at the time of making the oral agreement with Bennett and Longyear, Chesebrough had no right or interest, legal or equitable, in the land. He was a stranger alike to Atwell and to Atwell's title at that time.

Therefore there was nothing belonging to Chesebrough, either actually or potentially, which he could mortgage, and therefore nothing a court of equity could protect from the operation of an instrument or a transaction intended as a mortgage, but in form something else. Through the transaction here involved, Chesebrough transferred, surrendered, or lost no interest or right connected with the land involved. If it is determined that he now has no right in the land, his complaint could only be that by the transaction he did not acquire an interest,—the interest orally promised by Bennett and Longyear. The requirement of some interest in the land mortgaged is, of course, satisfied, if, as part of the carrying out of the transaction constituting the mortgage, such interest is transferred by any lawful means to the mortgagor. Such would have been the instant case if, to carry out or as part of the transaction, Atwell had deeded to Chesebrough, and he, in turn, had deeded to Bennett and Longyear, or if Bennett and Longyear had given to Chesebrough a written contract evidencing an interest in the land, or if there had been "part performance" by Chesebrough of the oral agreement.

It is claimed on the part of the defendants that certain recent cases, including one in this state, show a departure from or denial of the rule that an interest in the mortgagor, created or evidenced by something outside of the oral mortgage agreement, is essential to the finding of an equitable mortgage. The decisions of other courts so relied upon are: *Starks v. Redfield*, 52 Wis. 349, 9 N. W. 168; *Schriber v. Le Clair*, 66 Wis. 579, 29 N. W. 570, 889; *Jourdain v. Fox*, 90 Wis. 99, 62 N. W. 936; *Schneider v. Reed*, 123 Wis. 488, 101 N. W. 682; *Jones v. Gillett*, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5; *Krebs v. Lauser*, 133 Iowa, 241, 110 N. W. 443; *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113; *Watts v. Kellar*, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1; *Hall v. O'Connell*, 51 Or. 225, 94 Pac. 564.

The decision in one of these cases goes to the extent necessary to sustain the position of the defendants in the instant case. In each one the claimed equitable mortgagor was related to the title by some means other than the oral promise of the mortgagee,—the person against whom the promise was sought to be enforced. The opinions in these cases do not, as we understand them, announce the rule that without such relation, solely on the oral promise of the mortgagee, an interest in the land may be transferred to the mortgagor. A failure to distinguish the cases in which the equitable mortgage may be found, because, as 37 L.R.A. (N.S.)

part of the transaction, by written instrument or other effectual means, an interest in the mortgaged land is transferred to the mortgagor, from the cases in which the creation of the equitable mortgage must depend upon a prior interest of the mortgagor, has caused some confusion of statement in the cases.

In the cases of *Stitt v. Rat Portage Lumber Co.* 96 Minn. 27, 104 N. W. 561, and *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966, this court had under consideration transactions constituting equitable mortgages, but the decision in neither case goes to the extent necessary to sustain the title of the defendants in the instant case. In the *Stitt Case* the parties claiming as equitable mortgagors contracted with the owners for the purchase of the lands involved; the money for such purchase being advanced by the other party, in whose name title was taken as security for the repayment of the purchase price so advanced. Further, under the arrangement, the claimed mortgagors, "pursuant to the agreement, procured deeds to the lands involved, went into possession thereof, built camps, cleared out logging and tote roads, constructed dams, cleaned out streams, opened up part of the lands as a farm, and raised crops." They paid on the mortgage indebtedness a large sum. From these facts the conclusion that there was a part performance of the oral agreement was properly reached. Upon this argument it is urged that an examination of the record in the *Stitt Case* discloses that in three tracts of the land the claimed mortgagors did not acquire an interest through contracts with the owners. If such be the fact, the decision of this court rendered in that case as to these three tracts is fully sustained within the general rule first stated, because of the part performance of the contract. In the *Grout Case* the person who claimed as mortgagor had an interest in the land mortgaged prior to the transaction constituting the equitable mortgage.

A state of facts very similar to the facts in the instant case was before the supreme court of Illinois in the recent case of *Heaton v. Gaines*, 198 Ill. 479, 64 N. E. 1081. The court in that case thus announces the rule which we deem applicable to the facts in the present case: "Without an ownership in lands, there can be no mortgage of them. *Payne v. Patterson*, 77 Pa. 136; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206. *Edward Smith Heaton* cannot be said to have owned any equity of redemption which was kept alive by any agreement between *Ford* and the appellee. *Heaton* had no interest in the property which could sus-

tain a parol agreement by appellee to buy the property for his benefit, and to convey it to him when required. Inasmuch as such an agreement, even if it existed, created an interest in land by parol, it could not be sustained under the statute of frauds. A naked promise by appellee to buy lands in his own name, pay for them with his own money, and hold them for the benefit of Edward Smith Heaton, could not be enforced in equity. *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Stephenson v. Thompson*, 13 Ill. 186; *Perry v. McHenry*, 13 Ill. 227; *Magnusson v. Johnson*, 73 Ill. 156; *Caprez v. Trover*, 96 Ill. 456; *Wilson v. McDowell*, 78 Ill. 514." *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530.

And in *Conkey v. Rex*, 212 Ill. 444, 72 N. E. 370: "Defendant in error calls our attention to the fact that a court of equity disregards form, and seeks the substance of the transaction, and argues that it is therefore immaterial that the title to the land in controversy was never in *Rex*. We are referred to a number of authorities in support of this proposition, and find that in each of those cases, where the court has given the matter any consideration, the party in whom the right of redemption was held to exist had some interest in the real estate, legal or equitable, prior to the execution of the deed from the third party to the person held to be a mortgagee. . . . In the case at bar, at the time of the execution of the deed, from *Carr* to *Conkey*, *Rex* had no interest, legal or equitable, which he could assert, in the real estate; and as he had nothing which could be mortgaged, the deed in question cannot be regarded as a mortgage from him to *Conkey*."

No matter how much obscurity may arise from the application of the doctrine to complicated facts, the doctrine of equitable mortgages cannot be made effectual to convey or transfer a title to the mortgagor, but finds its full scope in protecting the interest of the mortgagor—any legal or equitable right or interest in the land—by preserving a right of redemption.

This principle, that some right or interest of the mortgagor in the land mortgaged is a prerequisite to the creation of an equitable mortgage, finds its importance not merely as a definition of a mortgage, nor because it adds to the equities of the mortgagor. Many situations disconnected from any interest in the land may present equally serious and quite similar hardships, if the form of the writings control the nature of the transaction in a given case. But if the rule were relaxed or abrogated to the extent necessary to sustain a finding of an equitable mortgage in the instant case,—that is, a right to the fee in *Chesebrough* 37 L.R.A. (N.S.),

and a mortgage lien right in *Bennett* and *Longyear*,—a fundamental change would thereby be made in the law governing the transfer of interests in land, and a change directly in conflict with the statute of frauds. It is frequently and correctly stated that the statute of frauds has no application to parol proof of an equitable mortgage, but this is for the obvious reason that such proof, by establishing an equitable mortgage, does not transfer to the mortgagor an interest in land. The oral proof simply limits the effect of a conveyance absolute in form to the agreed effect,—a transfer as security. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671.

Such is the stated rule in *Stitt v. Rat Portage Lumber Co.* supra: "That a deed, absolute on its face, can be shown by parol evidence to be in fact a mortgage, is elementary. . . . Parol evidence is admissible for this purpose, notwithstanding the statute of frauds."

But if a parol agreement, though containing the terms of a mortgage, is relied on to transfer the fee to the mortgagor, to such agreement the statute of frauds is exactly applicable. Such agreement, in so far as it transfers an interest to the mortgagor, is not properly described as an agreement for an equitable mortgage. Equity never transferred a title to the mortgagor by the doctrine of equitable mortgages. That doctrine fulfils its purpose by protecting the title vested by other means in the mortgagor. In effect, the defendants' claim is that solely by parol agreement,—an agreement supported by a consideration, but not in writing,—they are vested with the estate or interest of the mortgagor in a tract of land. That such interest is an equitable estate matters not, for it is thereby potentially a legal estate. The form of the decree in this case is that the right of the defendants to have a conveyance and deed of the property in question upon the payment of a specified sum is adjudged. The complete legal title is transferred without a writing signed by the party required to make the transfer, or without any right acquired from any other party having an interest in the land. It is apparent that the fact that the title in the present case comes from a third party is not a distinguishing feature; the claimed mortgagors confessedly having no relationship to such third party, or through him, with the land. *Chesebrough* derives all his rights from *Bennett* and *Longyear's* title, and their oral agreement. His services as broker furnish sufficient consideration for the promise to convey, but it in no way establishes any relationship with the source of their title.

If a title can be decreed in Chesebrough under these circumstances, then equally, if Bennett and Longyear, for a good consideration, made the same oral promise as to a tract of land which they had long owned, the relationship of mortgagor and mortgagee would equally be created, and a mortgagor's title vested in Chesebrough. In legal principle there is no distinction between the instant case and any case where the owner of land orally agreed to convey the same to another for a specified price, promising to hold the land as security until the payment of the price.

It is unnecessary to discuss the wisdom of the legislation requiring contracts for a transfer of real property to be in writing. The statute of frauds expresses the fixed legislative policy of the state, and the court should not, by the extension of any equitable doctrine beyond established limits, interfere with such legislative policy. The instant case illustrates one of the very situations that the statute was passed to avoid. A valuable interest in land is made dependent upon the conflicting oral evidence of the interested parties. The trial court, while determining the nature of the transaction as claimed by the defendants, resolved the dispute as to the extent of interest promised in accordance with the claim of the applicants. The statement made by one of the counsel for the defendants, in his brief, that the titles to many valuable tracts of ore-bearing lands were continually being transferred in the northern part of the state in fulfillment of oral promises, suggests the inadequacy of any system of law to protect those who may suffer loss through intentional voluntary disregard of well-understood legal requirements.

The facts found do not sustain the decision adjudging the defendants, on payment of a specified sum, entitled to a conveyance of an undivided four twenty-sevenths of the land involved in the application for registration, on either theory advanced by the defendants. The trial court was clearly correct in the opinion expressed that the facts found do not show a joint venture or partnership between Bennett and Longyear and Chesebrough in the Atwell land; nor could Bennett and Longyear be adjudged thereunder to hold an interest for Chesebrough as trustees. We conclude the decision of the court below is not sustained by the findings of fact.

The order appealed from is reversed, and the cause remanded, with directions that the conclusion of law and decision be amended in accordance with this opinion, and judgment entered therein.

37 L.R.A. (N.S.)

Lewis, J., dissenting:

I dissent. The decision reached by the majority is based upon the premise that it is essential to the existence of an equitable mortgage that some estate or interest in the debtor shall exist at the time of the creation of the mortgage relation. If this premise is sound, then the facts of this case are not within the rule, and the decision of the majority is correct. But, if the doctrine of equitable mortgage is not based upon the fact of a pre-existing interest in the mortgagor, then the argument of the opinion and the conclusions reached are not justified by the facts. In most of the cases where the doctrine has been discussed, it was conceded that the mortgagor or debtor had an interest, or owned the land, and the title was conveyed under an agreement to hold it as security for a loan, and the discussion of the general principles involved in those decisions did not necessarily reach back to the roots of the doctrine. For instance, in *Niggler v. Maurin*, 34 Minn. 118, 24 N. W. 369, there was no question but what Mr. Niggler was the owner in fee of the property when he deeded it to Mr. Maurin, and the expression of the court that the plaintiff was vested with the equitable title and had an interest capable of being mortgaged was sufficient for the occasion.

It is admitted that Bennett and Longyear agreed to carry Chesebrough for the amount represented by two ninths of the two thirds purchased. They advanced the money for him, and agreed to hold the title in their own names as part security for the loan. There was talk of Chesebrough furnishing additional security, and the moneys coming in on the royalties were to be applied in part payment. The transaction clearly amounted to a joint purchase of the two-thirds interest in the proportion of two ninths by Chesebrough, and seven ninths by Bennett and Longyear, they to hold his interest as security for the advancement by them. The transaction was not a purchase of the entire interest by Bennett and Longyear, and then a resale of the two ninths to Chesebrough. Let us suppose that Atwell had conveyed the two-ninths interest to Chesebrough and the seven-ninths interest to Bennett and Longyear, and that Chesebrough had executed a mortgage upon his two-ninths interest to Bennett and Longyear to secure them for the advancement to pay for his interest, would the transaction have been any more a mortgage than was accomplished by what actually did take place? Under the arrangement Chesebrough acquired an interest in the purchase the instant Bennett and Longyear became the grantees, and the agreement that Ben-

nett and Longyear hold that interest as security became at once effective. The transaction resulted in creating an equitable mortgage in favor of Chesebrough, although his interest and the mortgage relation were created at the same time by the same transaction.

In the majority opinion, reference is made to *Schriber v. LeClair*, 86 Wis. 579, 29 N. W. 570, 889, and to other cases from Wisconsin, Iowa, California, and Oregon, and it is stated that no one of the cases goes to the extent necessary to sustain the position of the decision in this case. It all depends upon the point of view. As I read most of those cases, they stand for the doctrine that the interest of the mortgagor may be created simultaneously with the agreement to hold that interest as security for a loan; that such an agreement is just as effective to create an equitable mortgage as where the title has been conveyed by the debtor under an agreement that it be held as security. In *Schriber v. LeClair*, the court ignored the writing and went back to the original agreement, which was proved by parol.

The principle is stated in *Krebs v. Lauser*, 133 Iowa, 241, 110 N. W. 443, but it was held that the evidence was insufficient to meet the rule that an absolute deed cannot be established as a mortgage, except upon clear and satisfactory evidence. The doctrine was applied later in *Jones v. Gillett*, 142 Iowa, 506, 118 N. W. 314, 121 N. W. 5. In that case Jones, desiring to purchase the land from one Davidson for \$1,760, applied to Gillett for a loan of a part of the purchase money; it being verbally agreed between them that the defendant would advance the necessary amount at 7 per cent and take a deed for the land from Davidson as security. Subsequently the defendant agreed to advance the entire purchase price, and took a deed from the owner with that understanding, and secured himself for the payment of the interest by a nominal lease of the land at a rental which amounted to 7 per cent of the purchase price, and finally defendant repudiated the contract and attempted to hold the land. The court said that parol evidence was admissible to show that the deed was subject to an agreement that the defendant should hold the title as security only. To the same effect is *Hall v. O'Connell*, 52 Or. 164, 95 Pac. 717, 96 Pac. 1070. The facts were essentially the same as here, with the exception that in this case Chesebrough bought only a part, instead of the entire, interest.

As I understand the case of *Stitt v. Rat Portage Lumber Co.* 96 Minn. 27, 104 N. W. 561, this principle was applied to the three 37 L.R.A. (N.S.)

tracts of land known as the "Loper & Rumery," the "Murray," and the "Houlton," with respect to which Mr. Stitt had no interest, legal or equitable, and it was held that it might be shown by parol evidence that the company had taken title to those lands under an agreement to hold them as security. That part of the opinion dealing with the doctrine of equitable estoppel was written advisedly, and the case was not disposed of on the ground that the contract had been partly performed.

### MISSOURI SUPREME COURT.

JACOB LAMPERT, Respt.,

v.

JUDGE & DOLPH DRUG COMPANY et al.,  
Appts.

(238 Mo. 409, 141 S. W. 1095).

**Damages — punitive — infringement of trademark — nominal.**

1. Punitive damages may be allowed for the infringement of a trademark, although the actual damages are only nominal.

**Same — legal malice — substituting cigars.**

2. The placing by a retailer of inferior cigars in trademarked boxes, and making sales therefrom, is legal malice, which will justify punitive damages in favor of the owner of the trademark.

(November 14, 1911.)

**CERTIFICATION** by the St. Louis Court of Appeals to the Supreme Court of question arising upon appeal by defendant from a judgment of the Circuit Court of the City of St. Louis in plaintiff's favor in an action brought to recover damages for the infringement of a trademark. Affirmed.

**Note.** — *Punitive damages for infringing trademark, tradename, or copy-right, where amount of actual damages not established.*

As to damages recoverable for infringement as affected by loss of profits, see note in 51 L.R.A. 801.

As to the right to recover damages for infringement, as distinguished from profits, where proceeding is in equity to enjoin the infringement, see note in 21 L.R.A. (N.S.) 526.

It is stated generally in 13 Cyc. 109, that although the courts have not been uniform in awarding exemplary damages where the injury is purely nominal, yet where the law implies sufficient damages to sustain the action, it has been held sufficient ground to warrant the imposition of vindictive damages, but as a rule it must be shown by the evidence that actual damages are due.

Although questioned in *Taylor v. Carpen-*

**Statement by Roy, C.:**

This is a suit instituted February 23, 1904, in the circuit court of the city of St. Louis, for damages for the infringement of a trademark. On a jury trial, October 19, 1904, plaintiff had a verdict for 1 cent compensatory damages, and \$500 punitive damages, and judgment accordingly. On appeal to the St. Louis court of appeals, the judgment was reversed in an opinion reported in 119 Mo. App. 693, 100 S. W. 659. One of the judges of that court being of the opinion that the decision is in conflict with *Kennedy v. North Missouri R. Co.* 36 Mo. 351, the cause was certified to this court.

The Judge & Dolph Drug Company, one of the defendants, is a corporation engaged in selling drugs and cigars at retail in St. Louis for a good many years. Defendant Taylor was the cigar clerk of the company from October, 1900, to the time of the trial.

Plaintiff claimed in his petition that he had been making and selling cigars in St. Louis for fifteen years under a trademark which was composed of the words "Flor de Lampert" and the picture of the plaintiff, which trademark was by the plaintiff, on February 26, 1892, filed and recorded in the United States Commissioner of Patents Office; that, by reason of the quality of the tobacco used, and the efforts of plaintiff in advertising the same, the plaintiff's cigars sold under said trademark had gained great

reputation on account of their excellent quality; and that during all that time plaintiff had received large profits from the sale of the cigars; that plaintiff, during the time from March 11, 1902, to February 15, 1904, sold to defendants cigars so manufactured by plaintiff, on the boxes of which was said trademark, and said cigars were so sold to defendants to be sold at retail to their customers; that during all that time defendants, well knowing the reputation of plaintiff's cigars for excellent quality, did wrongfully, wilfully, and wickedly substitute and place other cigars of cheap and inferior quality in the boxes bearing said trademark, and sold them to their customers as and for cigars manufactured by the plaintiff, thereby intending to injure the plaintiff and to injure the reputation of plaintiff's cigars, and to cheat and defraud the public and their customers. The actual damages were alleged at \$5,000, and the punitive damages at the same amount. The answer admitted the corporate existence of the drug company, but was, in effect, otherwise a general denial. The evidence tended to establish all the allegations of the petition, and tended to show several sales by Taylor, as such clerk, of substituted, inferior cigars from boxes having said trademark.

Defendant Taylor was arrested and fined in the Federal court for violation of the

ter, 2 Woodb. & M. 21, Fed. Cas. No. 13,785, the doctrine is clear that under some circumstances, as where the infringement involves an actual fraud, in an action at law for damages for an infringement of a trademark, tradename, or copyright, in addition to actual damages, punitive or exemplary damages are recoverable. *Warner v. Roehr*, Fed. Cas. No. 17,189a; *Hennessy v. Wilmerding-Loewe Co.* 103 Fed. 90, and see also *Cusimano v. Olive Oil Importing Co.* 114 La. 312, 38 So. 200, holding that, although the evidence is not sufficient to enable the court to render a judgment for any specific amount of damages for loss of sales caused by an infringement, yet the court, being empowered in infringement cases to fix the amount of damages as it may deem just and reasonable, may take into consideration all the circumstances, and use discretion in fixing the damages.

And at least where the damages are actual, even though the evidence thereof is not sufficient to entitle the plaintiff to recover more than nominal damages, if the infringement complained of is fraudulent and wilful, it seems clear that, in addition to nominal damages, punitive or exemplary damages are recoverable. In addition to *LAMPERT v. JUDGE & D. DRUG CO.*, which sustains this doctrine, it finds support in *Press Pub. Co. v. Monroe*, a circuit court of appeals case, 51 L.R.A. 353, 19 C. C. A. 420, 38 U. S. App. 410, 73 Fed. 196. In 37 L.R.A. (N.S.)

this case a poem by the plaintiff was accepted by the World's Fair Association of Chicago, to be delivered on the opening day of the World's Fair, the defendant in some manner not explained, prior to this occasion, obtained a copy of the poem, and with knowledge of the rights of the author and of her objection to its being published prior to the date mentioned, published the same. Under these circumstances, although the wrong done the plaintiff was incapable of being measured by a money standard, and hence only nominal damages were otherwise recoverable, the right in addition to such damages, to recover exemplary damages, was sustained. This case is referred to and quoted from in *LAMPERT v. JUDGE & D. DRUG CO.* It is also referred to with approval in *Hennessy v. Wilmerding-Loewe Co.* supra, and distinguished, the distinction being made between an action at law for damages and a bill in equity to restrain an infringement, the court holding that while exemplary damages are recoverable in an action at law, they are not recoverable in equity.

While this particular question was not discussed in *Addington v. Cullinane*, 28 Mo. App. 238, it was there held that the evidence, while showing actual damages, did not furnish a sufficient basis for determining the same, and that hence only nominal damages were recoverable for an infringement of a trademark.

A. G. S.

revenue laws in such sales. The revenue officers testified to finding the substituted cigars in boxes having plaintiff's trademark, in the defendants' store, and at the same time finding plaintiff's genuine cigars in another such box. The president of defendant drug company loaned Taylor \$25 to pay his fine in the Federal court, and retained him in its employ.

Mr. Bierman, deputy collector of internal revenue, testified that he bought three of the substituted cigars, and that two were left in the box; he went out and gave the cigar to Mr. Lampert, and when he went back there were sixteen cigars in the box. On cross-examination by defendants' counsel, Mr. Atwood, deputy collector of internal revenue, testified that complaints had been made to him by various other cigar makers that defendants were substituting their cigars. Mr. Farrar, a real estate man, testified that the substituted cigars were like "these machine cigars, so they call them; smooth, round, straight, light cigars that haven't any taste,—no flavor."

There was no direct evidence to show that anyone connected with the drug company, except Taylor, had any knowledge of the infringement. Mr. Judge, president of the drug company, disclaimed any knowledge of any substitution of cigars, and testified that the company carried a \$90,000 stock of goods, with \$80,000 insurance, and was worth net \$10,000, with \$15,000 capital stock.

The fourth and fifth instructions were as follows:

"(4) The court instructs the jury that if they believe from the evidence that the defendants wilfully and maliciously, between the dates of November 1, 1903, and February 15, 1904, sold cigars which were not manufactured by plaintiff, from boxes having thereon the trademark and picture of plaintiff, as cigars manufactured by plaintiff, and if the jury further finds from the evidence that the plaintiff is entitled to compensatory or actual damages in any sum whatever, as defined in other instructions given to them, then they are at liberty to find in addition to said actual damages such further sum in the way of exemplary or punitive damages, by way of punishment to defendants, and as an example to others, as, in their sound judgment, under all the evidence in the case, they believe the defendants ought to pay, not exceeding \$5,000.

"(5) The jury are instructed that malice is the wilful or intentional doing of a wrongful act without legal justification or excuse."

57 L.R.A. (N.S.)

Mr. Frank K. Ryan, for appellants:

In cases of mere refilling or substitution like this one, the courts do not permit damages of any sort.

Barnett v. Leuchas, 13 L. T. N. S. 495, 14 Week. Rep. 166; Saxlehner v. Eisner & M. Co. 88 Fed. 61; Hostetter Co. v. Brueggeman-Reinert Distilling Co. 46 Fed. 188; Hostetter v. Fries, 21 Blatchf. 339, 17 Fed. 620; Evans v. Von Laer, 32 Fed. 153; Sawyer Crystal Blue Co. v. Hubbard, 32 Fed. 388; Hostetter v. Anderson, 1 Vict. Rep. (Webb, A'B. & W.) 7; Rose v. Henley, cited in Rose v. Loftus, 47 L. J. Ch. N. S. 576, 38 L. T. N. S. 409; Welch v. Knott, 4 Kay & J. 747, 4 Jur. N. S. 330; Hostetter Co. v. Sommers, 84 Fed. 333; Myers v. Theller, 38 Fed. 609; Hostetter Co. v. Comerford, 97 Fed. 585; Hostetter Co. v. Bower, 74 Fed. 235; Hennessy v. White, 6 Wyatt, W. & A'B. 221; Hennessy v. Hogan, 6 Wyatt, W. & A'B. 225; Krauss v. Jos. R. Peebles' Sons Co. 58 Fed. 585; Gillott v. Kettle, 3 Duer, 624; Enoch Morgan's Sons Co. v. Wendover, 10 L.R.A. 283, 43 Fed. 420; Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294; Taendsticksfabriks Aktiebolaget Vulcan v. Myers, 58 Hun, 161, 11 N. Y. Supp. 665; Avery v. Meikle, 81 Ky. 75.

Exemplary damages should not be allowed, for nominal damages will not support exemplary damages.

Hoagland v. Forest Park Highlands Amusement Co. 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878; Sutherland, Damages, § 406; Kuhn v. Chicago, M. & St. P. R. Co. 74 Iowa, 141, 37 N. W. 116; Schwartz v. Davis, 90 Iowa, 324, 57 N. W. 849; Stacy v. Portland Pub. Co. 68 Me. 279; Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Ganssly v. Perkins, 30 Mich. 492; Maxwell v. Kennedy, 50 Wis. 645, 7 N. W. 657.

Compensatory damages should be allowed only in cases for the infringement of trademarks.

Addington v. Cullinane, 28 Mo. App. 238; Ransom v. New York, 1 Fisher, Pat. Cas. 252, Fed. Cas. No. 11,573; Parker v. Hulme, 1 Fisher, Pat. Cas. 44, Fed. Cas. No. 10,740; Taylor v. Carpenter, 2 Woodb. & M. 1, Fed. Cas. No. 13,785; Hennessy v. Wilmerding-Loewe Co. 103 Fed. 90; Wilbur v. Beecher, 2 Blatchf. 132, Fed. Cas. No. 17,634; Hall v. Wiles, 2 Blatchf. 200, Fed. Cas. No. 5,954; Haselden v. Ogden, 3 Fisher, Pat. Cas. 378, Fed. Cas. No. 6,190; Russell v. Place, 5 Fisher, Pat. Cas. 134, Fed. Cas. No. 12,161; Seymour v. McCormick, 16 How. 489, 14 L. ed. 1028.

Messrs. Jamison & Thomas for respondent.



Roy, C., delivered the opinion of the court:

The trial court properly refused defendants' demurrer to the plaintiff's evidence. The evidence fully covered the plaintiff's case as made by the pleadings, except that there was no evidence as to the quantum of damages. It is the clearly established law that for every infraction of his legal right the party injured is entitled to at least nominal damages, and we adhere to the opinion of the court of appeals on that point.

2. Whether exemplary damages are recoverable where there are allowed only nominal actual damages is a question as to which the authorities are divided; the courts of this state and the Federal courts, as well as legal reason, and the greater weight of authority, being in favor of such recovery. Some of the decisions of the courts speak of nominal damages as being something else than actual damages, whereas the nominal damages assessed for the violation of a legal right, where there is no showing as to the quantum of damages, are actual or compensatory damages. This court has spoken very clearly on that subject in *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. loc. cit. 345, 94 Am. St. Rep. 740, 70 S. W. 880, where it is said: "The jury in finding for plaintiff in effect found that defendants arrested the plaintiff, and cursed and abused him without any lawful excuse or reason therefor, and upon that finding he was entitled to have actual damages in some amount assessed in his favor. Under such circumstances, at the common law he is entitled to pecuniary reparation by way of damages, at least nominal, and as much more, if anything, as the jury may think him entitled to under the evidence." The consensus of authority is to the effect that punitive damages are not recoverable where no actual damages are allowed. But that is a very different thing from holding that they are not recoverable in connection with nominal actual damages. There are comparatively few cases holding that nominal actual damages will not support exemplary damages.

The leading case in opposition to the allowance of punitive damages where only nominal actual damages are allowed is *Stacy v. Portland Pub. Co.* for libel, 68 Me. 279. The court in that case cited no authorities, and its reasons for so holding were based almost entirely on the peculiar facts of that case, and in the conclusion the following language is used: "There may be cases, no doubt, where the actual damages would be but small, and the punitive damages large. But this case is not of such a kind." That case was followed and 37 L.R.A. (N.S.)

approved in *Maxwell v. Kennedy*, 50 Wis. 645, 7 N. W. 657.

The cases cited by appellants from Illinois and Michigan turned on the construction of statutes against the sale of intoxicants to inebriates, and have no application here. The Iowa cases (*Kuhn v. Chicago*, M. & St. P. R. Co. 74 Iowa, 137, 37 N. W. 116, and *Schwartz v. Davis*, 90 Iowa, 324, 57 N. W. 849) were based on the Illinois cases, the Iowa court seemingly overlooking the fact that the Illinois cases only applied to suits brought under the statute.

On the other hand, the supreme court of New York, in *Prince v. Brooklyn Daily Eagle*, 16 Misc. 186, 37 N. Y. Supp. 250, after citing the *Stacy Case*, said: "But I do not think it is the law of this state; a person may be of such high character that the grossest libel would damage him none; but that would be no reason for withdrawing his case from the wholesome, if not necessary, rule in respect of punitive damages. It is in such cases that the rule illustrates its chief value and necessity."

In *Press Pub. Co. v. Monroe*, in the United States circuit court of appeals, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196, it is said: "There is room for argument against the allowance of exemplary damages at all as anomalous and illogical. Some courts have held that it is unfair to allow the plaintiff to recover not only all the loss he has sustained, but also the fine which society imposes on the offender to protect its peculiar interests. But, if it be once conceded that such additional damages may be assessed against the wrongdoer, and, when assessed, may be taken by the plaintiff,—and such is the settled law of the Federal courts,—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant." And in *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 30 Am. St. Rep. 17, 9 So. 375, the court, after quoting from the *Stacy Case*, said: "The position of the supreme court of Maine can be sustained in principle, it seems to us, only by assuming that which is manifestly untrue, namely, that no act is criminal which does not inflict individual injury capable of being measured and compensated for in money."

The supreme court of Kansas, in *Hesley v. Baker*, 19 Kan. 9, which was a suit in trespass to the realty, held that plaintiff "was only entitled to nominal damages and

to such exemplary damages as the jury might think proper to give him."

In *Flanagan v. Womack*, 54 Tex. 45, 51, the court said: "It is a general rule that for every unlawful trespass the injured party is entitled to at least nominal damages. Certainly this should be so if the trespass was of such character as to authorize exemplary damages. This nominal damage would be the measure of the actual damage, if no other is shown, and must necessarily arise in every case in which exemplary damages could be given."

The United States circuit court for the district of Kansas held, in *Wilson v. Vaughn* (C. C.) 23 Fed. 229, in favor of the rule allowing punitive damages in connection with nominal damages.

We come now to a consideration of the decisions in this state on the question. The first in order of time is *Favorite v. Cottrill*, 62 Mo. App. 119, in which Judge Biggs said, after quoting from the *Stacy Case*: "But there is a line of decisions equally respectable which hold to the contrary."

In *Ferguson v. Evening Chronicle Pub. Co.* 72 Mo. App. 462, a libel case, Judge Bond clearly and satisfactorily upholds the right to punitive damages in such cases, and his opinion is quoted and commended in 2 *Sutherland on Damages*, § 406. To the same effect is *Mills v. Taylor*, 85 Mo. App. loc. cit. 115. And it was said in *Brennan v. Maule*, 108 Mo. App. loc. cit. 338, 83 S. W. 284: "It is now settled in this state that actual damage in at least a nominal sum must be found as a condition for the recovery of exemplary or punitive damages." It may be interesting in this connection to call attention to *Courtney v. Blackwell*, 150 Mo. loc. cit. 277, 51 S. W. 668, in which the damages for slander were assessed at a lump sum as punitive damages; there being no finding as to actual damages on account of oversight in the form of the verdict given to the jury. This court refused to reverse the case on account of the failure to find actual damages.

Our attention has been called to many infringement cases in equity, in which the courts refused to order an accounting where plaintiff's damages were nominal or very small. The remedies in equity and at law are radically different. Equity gives as damages the profits of the defendant; while the law limits them to the loss suffered by plaintiff. Equity restrains future wrongs by injunction. Law seeks to prevent such future violations by inflicting exemplary damages for past offenses.

We hold that a verdict for nominal ac-

tual damages will support a verdict for punitive damages.

3. It is insisted by appellants that exemplary damages are not recoverable in this case, for the alleged reason that there is no showing of malice or oppression. On that proposition we are forced to a different conclusion from that reached by the court of appeals. We concede that the cases there cited require that there shall be 'malice in the case. There are two kinds of malice; malice in fact, and malice in law. Legal malice, as distinguished from actual malice, will justify exemplary damages in this state.

In *Goetz v. Amba*, 27 Mo. 28, 33, the court says: "If the injury is not intentional, but results simply from a want of proper care, nothing more should be recovered than will compensate for the actual damage; but if the act is wilful or intentional, then 'the idea of compensation is abandoned, and that of punishment is introduced.' It is said generally that malice must exist to entitle the plaintiff to anything more than reparation for the injury; but it will be found that the word 'malice' is always used in such connections, not in its common acceptance of ill-will against a person, but in its legal sense,—'wilfulness; a wrongful act, done intentionally, without just cause.'" "To entitle the plaintiff to recover punitive damages, he must show that the act complained of was unlawful; and, further, that it was a wanton or malicious act. In other words, he must show an unlawful act coupled with an intentional wrong." State use of *McClenden v. Jungling*, 116 Mo. 162, 165, 22 S. W. 688, 689. "The average layman would believe that 'malicious' means ill-will; spite; hostility towards the other party. This is not the legal meaning. Those feelings may or may not be present in the legal meaning of the term. The legal meaning of the term is 'the intentional doing of a wrongful act, without just cause or excuse.'" *McNamara v. St. Louis Transit Co.* 182 Mo. loc. cit. 681, 66 L.R.A. 486, 81 S. W. 881. The Supreme Court of the United States held, in *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374, that punitive damages could be allowed in actions for torts where the injury is wilful, or is the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. We therefore hold that the question of malice and punitive damages was properly submitted in the fifth instruction.

4. We come now to the consideration of the question as to whether cases for the infringement of trademarks are outside the rule allowing exemplary damages. Appel-

lants claim they are. They call our attention to a long line of patent cases which were held by the courts not to be within the rule as to exemplary damages; and appellants claim that trademark cases are governed by the same rule as in patent cases. An examination of those cases, however, will reveal the fact that in 1836 it was provided by act of Congress that the jury should not, in patent cases, allow vindictive damages, but that the court should have the power to inflict punitive damages within the limits of trebling the actual damages found by the jury. *Seymour v. McCormick*, 16 How. 480, 14 L. ed. 1024. It will thus be seen that those cases rest solely on the act of Congress, and are not authority for appellants' contention.

The Am. & Eng. Enc. Law (vol. 2, p. 438) holds that exemplary damages cannot be recovered, citing *Taylor v. Carpenter*, 2 Woodb. & M. 1, loc. cit. 22, Fed. Cas. No. 13,785, decided by the United States circuit court at Boston, Massachusetts, in 1846. In that case the court said: "So in very corrupt or flagitious wrongs, if a criminal prosecution lies for the public offense, I do not see much justification for what are called vindictive damages there, or smart money in a civil suit, as the criminal one covers them." That reasoning is opposed to the well-established law in this state, as this court has uniformly held that the right to exemplary damages is not removed by the fact that the same wrongful act is punishable criminally. *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398; *Buckley v. Knapp*, 48 Mo. 152.

The only other case found which lends color to appellants' contention on this point is *Addington v. Cullinane*, 28 Mo. App. 238. That was an action at law for damages for the infringement of a trademark. There was an instruction telling the jury that the measure of damages was the net profits made by defendants, unless there was malice on the part of defendants, in which case they might find exemplary damages. The learned judge who wrote the opinion in that case held the instruction erroneous, because it made the defendants' gain, instead of plaintiffs' loss, the measure of actual damages. He did not discuss the subject of exemplary damages, and we do not construe that case as expressing any opinion on that subject.

*Hopkins on Trademarks* (page 356) says that the better rule is in favor of such allowance, and that it is difficult to see how the result stated in *Taylor v. Carpenter* 37 L.R.A. (N.S.)

and *Addington v. Cullinane*, supra, was reached, adding: "They are wholly without precedent and opposed to the rule of damages which obtained at common law."

Judge Blodgett, in *Warner v. Roeher*, Fed. Cas. No. 17,189a, a case for the infringement of a trademark, in the northern district of Illinois, instructed the jury that exemplary damages might be allowed "in cases of this character, where you are satisfied from the proof and from the admissions in the case, that the fraud—the intention to defraud—is at the bottom of the matter." *Paul, Trademarks* (§ 324) and *Browne, Trademarks* (§§ 519 and 520) hold in favor of such allowance.

If the jury found all that the evidence tended to prove, they found that the clerk, Taylor, was making a practice of substituting cheap cigars in boxes with plaintiff's trademark thereon, and also in place of the cigars of other makers, to such an extent that various makers of cigars complained to the revenue officers; that Taylor was fined in the Federal court for such substitution, and the president of the company loaned him the money to pay the fine and retained him as such clerk, showing that if the higher officers of the company knew nothing of his wrongdoing while it was going on, they did not repudiate him after learning all about it; that the well-earned reputation of various brands of cigars was being besmirched, and customers were being disappointed and disgusted with cheap substitutes for their favorite smoke. In other words, Taylor, as such clerk, was running amuck in the cigar world, destroying reputations, and offending tastes, all done wilfully, intentionally, and without any sort of justification or excuse, for dishonest gain. Yet, from the very nature of the trade, it was practically impossible to prove more than nominal actual damages.

It must be remembered that this case has been briefed on both sides on the undisputed theory that the acts and intent of the clerk in making said sales bind the drug company as effectually as if done by the president of the company himself.

The judgment is affirmed.

Bond, C., not sitting.

Per Curiam:

The foregoing opinion of Roy, C., is hereby adopted as the opinion of the court.

Petition for rehearing denied, December 19, 1911.

# NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN B. BALL and Wife, Respts.,  
v.

NELLIE W. BALL et al., Appts.

(— N. J. —, 81 Atl. 724.)

## Deed — to avoid prosecution — validity.

A deed by parents to avoid prosecution of their child upon a charge which is in fact unfounded, but which the accuser honestly believes that the child has subjected itself to, will be set aside.

(November 20, 1911.)

**A**PPEAL by defendants from a decree of the Court of Chancery in plaintiffs' favor in a suit to set aside two deeds made by complainants to avoid prosecution of their child. Affirmed.

The facts are stated in the opinion.

Messrs. Pitney, Hardin, & Skinner, for appellants:

If there were threats, they were not such as constitute duress, and the conveyances in question should not be set aside because of them.

## Note. — Contracts procured by threats of prosecution of relative.

The earlier cases upon this question are collected in notes to Williamson-Halsell Frazier Co. v. Ackerman, 20 L.R.A. (N.S.) 484, and City Nat. Bank v. Kusworm, 26 L.R.A. 48.

A conveyance of land made by a wife under the influence of threats of a criminal prosecution of her husband may be avoided by her where the grantee received the deed with actual knowledge of such threats although taking no actual part therein. 13 Cyc. 585.

In *Ellyson v. Schooler*, 149 Iowa, 332, 128 N. W. 551, foreclosure of a mortgage was denied because it appeared that it and the note accompanying it were obtained from defendant through fear of prosecution of her husband for forgery.

In *Martin v. Evans*, 163 Ala. 657, 50 So. 997, a deed obtained from a mother under threat of prosecution of her son for embezzlement was set aside on the ground of duress, though the threats were conveyed to the mother by the son and his adviser, and not by the grantee personally.

In *Nebraska Central Bldg. & L. Assn. v. McCandless*, 83 Neb. 536, 120 N. W. 134, where a lawyer had converted money belonging to a client to his own use, and a representative of the client went to his home in his absence, and by threats of commencing proceedings so worked upon the fears of his wife that she met her husband at the train and prevailed upon him to go at once with her to his office, where she executed a mortgage to secure the amount, it was held that the mortgage was not en- 37 L.R.A. (N.S.)

1 Jones, Mortg. § 266, p. 604; Chitty, Contr. 269; 1 Parsons, Contr. 392, 393; Clark, Contr. 358, 359; Addison, Contr. 455, note; Story, Contr. § 400; Pollock, Contr. 587, \*554; Clark v. Turnbull, 47 N. J. L. 267, 54 Am. Rep. 157; Sooy v. State, 38 N. J. L. 329; Bordentown v. Wallace, 50 N. J. L. 13, 11 Atl. 267; Sickles v. Carson, 26 N. J. Eq. 440; Dixon v. Dixon, 22 N. J. Eq. 91; Tooker v. Sloan, 30 N. J. Eq. 394; Smillie v. Titus, 32 N. J. Eq. 51; Bodine v. Morgan, 37 N. J. Eq. 426; Dixon v. Olmstead, 9 Vt. 310, 31 Am. Dec. 629; Compton v. Bunker Hill Bank, 96 Ill. 301, 36 Am. Rep. 147.

Messrs. Riker & Riker, for respondents.

The threats were of such a nature as to render the conveyance involuntary.

*Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Bayley v. Williams*, 4 Giff. 638, 11 Jur. N. S. 236, 11 L. T. N. S. 110, 13 Week. Rep. 533; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

forceable in equity, because obtained by duress, though the mortgagor did have the benefit of the presence of her husband at the time it was executed.

In *International Harvester Co. v. Voboril*, 110 C. C. A. 311, 187 Fed. 973, it is held that notes signed by a married woman because of threats to arrest her husband were signed under duress, though the husband had in fact committed no offense, and no officer was present or warrant issued or proceeding commenced against him.

But in *Bianchi v. Leon*, 138 App. Div. 216, 122 N. Y. Supp. 1004, reversing 63 Misc. 73, 118 N. Y. Supp. 386, where a woman whose husband had been arrested on a civil warrant for a claim of \$600 obtained by fraud executed deeds in trust to secure the payment of that and other debts to the extent of \$7,100, it was held that they were not obtained by duress, inasmuch as she was told that he could be released on \$500 bail, and was given opportunity to secure independent counsel.

And in *Mallory v. Royston Bank*, 135 Ga. 702, 70 S. E. 586, it was held that a representation by bank officers to the father of a former officer of the bank, that the borrowing of money from the bank by the son while an officer, to be used for speculative purposes, although such loan was with consent of the directors and was entered on the minutes, was a criminal offense, for which he was liable to prosecution, although such was not the fact, was not such duress as would entitle them to avoid a note given under the erroneous belief that such representation was true, as the threats were made without color of authority to make them effective.

R. L. S.

Gummere, Ch. J., delivered the opinion of the court:

The bill in this case was filed to set aside two deeds of conveyance made by the complainants to Sidney S. Ward, the defendants' decedent, upon the ground that they were executed under duress exercised upon the grantors by Mr. Ward; the duress complained of consisting of threats of the immediate arrest and imprisonment of their son, Arthur D. Ball, for obtaining money from Mr. Ward under false representations.

We concur in the conclusion reached by the learned vice chancellor that the complainants established by a fair preponderance of proof the validity of their claim that these conveyances were made as a result of the threat to have their son arrested, and for the purpose of preventing that threat from being carried into effect. The analysis of the testimony made by the vice chancellor, and set out in his opinion, is complete and accurate, and leaves nothing to be added by us. The vice chancellor further concluded from the proofs submitted that the money advanced by Ward to the son of the complainants was not, in fact, obtained under false pretenses, although Mr. Ward probably believed that this was the case when he made the accusation to the complainants. We concur in this conclusion of the vice chancellor, and for the reasons which he states in his opinion.

Having reached these conclusions upon the facts, the vice chancellor in his opinion then takes up the consideration of the question whether a conveyance made by parents to a creditor of their son, under the pressure of a threat to have the son criminally prosecuted, is valid, when it appears that the creditor honestly believed that the son had subjected himself to such a prosecution, although the contrary was the fact. He reaches the conclusion that the grantors of a conveyance made under such conditions are entitled to have it set aside. We concur with him in this view. In discussing this latter question, however, the learned vice chancellor goes outside of the lines of the question, and the conclusion declared by him is broader than the decision of the case required. He thus states it: "In my judgment, the equitable rule to be applied in this case is that it is against equity and good conscience for the creditor to extort from the parent payment or security for the debt of the son, for which the parent is not responsible, by threats of criminal prosecution of the son, even if imprisonment be lawful." The question whether a conveyance made by a parent to prevent the imprisonment of a child who has, in fact, been guilty of a criminal offense, may afterward be set 37 L.R.A. (N.S.)

aside at the option of the parent, is one upon which judicial views are not in harmony. It is not presented under the facts found by the vice chancellor, and concurred in by us, and any expression of view upon the question by this court would, consequently, be *obiter*. For this reason we neither assent to, nor dissent from, what was said by the learned vice chancellor upon this point.

The decree under review will be affirmed.

#### KANSAS SUPREME COURT.

UNITED STATES BANKING COMPANY

v.

ANNA WILSON VEALE, Appt.

(84 Kan. 385, 114 Pac. 229.)

#### Pleading — foreign laws.

1. Foreign laws differing from our own, and relied on to support a cause of action or a defense, must be pleaded and proved.

#### Husband and wife — Mexican law — guaranty of debt.

2. Under the proof, it is held that in Mexico a wife may become a surety for her husband, and guarantee the payment of his debts.

#### Duress — securing execution of note.

3. An obligation signed by a wife in renewal of one given by her husband, by reason of a statement of one who was a surety on her husband's obligation, to the effect that if she did not then sign the obligation, it would be a great detriment to her husband, and result in loss and damage to him, is held, under the attending circumstances, not to have been constrained by duress.

#### Same — threatening suit.

4. Ordinarily, it is not duress to bring or threaten to bring an action to enforce a valid obligation, nor to do that which a party has a legal right to do.

(March 11, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Shawnee County in plaintiff's favor in an action on a promissory note. Affirmed.

The facts are stated in the opinion.

Headnotes by JOHNSTON, Ch. J.

**Note.** — No cases have been found in addition to UNITED STATES BKG. CO. v. VEALE, which pass upon the effect of statements that failure to secure a relative's obligation will involve him in business or financial difficulty, as duress which will affect the enforceability of security given under the influence of such statements.

As to the validity of contracts procured by threats of prosecution of a relative, see note to Ball v. Ball, ante, 539.

Messrs. R. W. Blair, H. A. Scandrett, and B. W. Scandrett, with Messrs. Joseph G. Waters, Richard E. Chism, and John C. Waters, for appellant:

The appellant received no consideration for the notes or the indebtedness for which the notes were given.

6 Am. & Eng. Enc. Law, 673-678, 789; Silvernail v. Cole, 12 Barb. 685; Weatherley v. Choate, 21 Tex. 272; Shuder v. Newby, 85 Tenn. 348, 3 S. W. 438; Fleming v. Greene, 48 Kan. 649, 20 Pac. 11.

Defendant's note is void by the common law.

Kenton Ins. Co. v. McClellan, 43 Mich. 564, 6 N. W. 88; Howe v. Wildes, 34 Me. 566; Mahon v. Gormley, 24 Pa. 80; Bryant v. Merrill, 55 Me. 515; Wooden v. Wampler, 69 Ind. 88; Daxis v. Foy, 7 Smedes & M. 64; March v. Clark, 9 Fed. 753; Mount v. Zisken, 7 N. J. L. 71; 1 Randolph, Com. Paper, 404; Phillips v. Burr, 4 Duer, 113; Oulda v. Sansom, 3 Taunt. 261; Wambole v. Foote, 2 Dak. 1, 2 N. W. 239; 1 Am. & Eng. Enc. Law, 2d ed. 942; Patton v. Stewart, 19 Ind. 233; Read v. Jewson, 4 T. R. 362; Caldwell v. Walters, 18 Pa. 79, 55 Am. Dec. 592.

At common law a married woman cannot render herself liable as a surety or guarantor, for any other, and is not liable upon her bond given for the debt of her husband, nor is her separate estate liable in equity for the payment of such a bond.

1 Randolph, Com. Paper, 419, § 89; Williams v. Hayward, 117 Mass. 532; Ross v. Walker, 31 Mich. 120; Alger v. Scott, 54 N. Y. 14; Emery v. Lord, 26 Mich. 431; Hetherington v. Hixon, 46 Ala. 297; McClure v. Harris, 7 Heisk. 379; Hansee v. DeWitt, 63 Barb. 537; National Bank v. Smith, 43 Conn. 323; Athol Mach. Co. v. Fuller, 107 Mass. 437; King v. Thompson, 59 Ga. 380; Saulsbury v. Weaver, 59 Ga. 254; Claverie v. Gerodias, 30 La. Ann. 291; Koechlin v. Thontke, 26 La. Ann. 737; Willard v. Eastham, 15 Gray, 328, 77 Am. Dec. 368; Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216, 68 N. Y. 329; 1 Randolph, Com. Paper, 430; Schouler, Dom. Rel. § 58; Wood v. Terry, 30 Ark. 385; Oglesby Coal Co. v. Pasco, 79 Ill. 164.

Messrs. T. F. Garver and R. D. Garver, for appellee:

There is nothing in this case tending to show that what is a valid consideration in Kansas would not be a valid consideration in Mexico. In the absence of such evidence, the court will presume that the law of Mexico on the subject of consideration is the same as that of Kansas.

Alexandria, A. & Ft. S. R. Co. v. Johnston, 61 Kan. 417, 59 Pac. 1063; Mutual 37 L.R.A. (N.S.)

Home & Save Asso. v. Worz, 67 Kan. 506, 73 Pac. 116; Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 412, 97 Am. St. Rep. 404, 66 N. E. 425; Fuller v. Scott, 8 Kan. 25; Winans v. Gibbs & S. Mfg. Co. 48 Kan. 777, 30 Pac. 163.

The laws of another state or country must be pleaded and proved the same as any other material fact in the case, or they cannot be considered.

Alexandria, A. & Ft. S. R. Co. v. Johnston, 61 Kan. 417, 59 Pac. 1063; Loyal Mystic Legion v. Brewer, 75 Kan. 729, 90 Pac. 247; Hefferlin v. Sinsinderfer, 2 Kan. 401, 85 Am. Dec. 593.

The claim of duress or intimidation is unfounded.

Kiler v. Wohletz, 79 Kan. 716, — L.R.A. (N.S.) —, 101 Pac. 474; Electric Plaster Co. v. Blue Rapids City Twp. 77 Kan. 580, 96 Pac. 68; Shelby v. Bowman, 64 Kan. 879, 68 Pac. 1131; Gabbey v. Forgeus, 38 Kan. 62, 15 Pac. 866.

Johnston, Ch. J., delivered the opinion of the court:

The United States Banking Company, a corporation organized under the laws of the Republic of Mexico and doing business in the city of Mexico, brought this action against Anna Wilson Veale to recover on a promissory note for 9,243.57 pesos and another for 282.29 pesos, and also for interest and attorneys' fees on each, stipulated for in case the notes were not paid at maturity. It was alleged that the pesos mentioned were of the value of 50 cents in legal tender of the United States. The defendant answered that the notes had been paid; that they were barred by the lapse of time; that there was no consideration for her signature; that she had no authority from her husband to sign her own name to the notes, nor that of her husband; and that he had not since the signing of the notes consented to her action. She also alleged that John J. Judd, whose name is also signed to the notes, informed her that her husband's notes had fallen due at the bank, "and that she must sign his name to the renewal note, and also sign the same herself, and, if she failed to do so, that it would be to the great injury, loss, and damage of her husband; that, believing such statement to be true, she signed her husband's name to said notes and also her own." The reply was a denial of the averments of the answer, and it contained a verified denial of the averment that Judd acted as the agent of the bank in procuring the signing of the notes. When the cause came on for trial, the parties submitted the following stipulation: "A trial by jury of the general issues and a general

verdict from the jury is waived, and all of the issues in this case submitted to the court, except the court, if he thinks the evidence warrants, shall submit to the jury the question of the execution of the note by the defendant under duress, and the finding of the jury upon that question shall be received and considered the same as the finding of the jury upon any question of fact in a law case." A jury was called by the court as to the charge of duress, but, after the testimony had been received, the trial judge determined that he was not warranted in submitting the question to the jury, and all the questions in the case were taken and decided by the court.

The evidence disclosed that appellant and her husband, Walter J. Veale, were citizens of Kansas, but had been residing in the Republic of Mexico since the year 1896, and that while there he had become indebted to the appellee, and had given his note for the debt, and that John J. Judd had signed it as surety. When the note became due, Veale and Judd were both absent from the city of Mexico. Veale telegraphed Judd that he was unable to pay the note, and requested him to intercede for and procure a renewal. Judd returned to the city before Veale did, which was several days after the note was due. He called on Mrs. Veale, and, according to her testimony, he told her of the situation; that the renewal notes had to be signed that day, and, when she inquired if he could not wait for the return of her husband, he told her that it could not be postponed till her husband came home; that it would be a great detriment to her husband if it was not fixed that day, and so she went to the bank with Judd and signed her husband's name to the notes, and also signed her own name as surety. Mr. Veale returned to the city shortly after the execution of the notes, and learned of the action taken, but it does not appear that he made any objection to the bank or to Judd in regard to the execution of the renewal notes, but, on the other hand, he repeatedly promised to pay them. About three years later he made a payment of \$450 to the bank, for which a credit was given on the notes. Although appellant did not plead the laws of Mexico relating to the capacity of a married woman to sign notes for her husband or herself, or to enter into contracts, testimony on the subject was received, and, based on that, the court found as follows: "The law of Mexico at the time the notes in suit were executed was that the husband is the legal representative of his wife, and that, except in the cases provided by law, the wife cannot obligate herself without the express authorization of her husband. The law of Mexico

at the time the notes in suit were executed further provided, as an exception to the law stated above, that a wife could obligate herself as a guarantor or surety for her husband. At the time the notes in suit were executed, and continuously to the date of trial, the law of Mexico was that, if the husband expressly or tacitly ratified the acts of his wife, no one could bring a suit for a nullity; a suit for a nullity being the remedy afforded by the Mexican law for the redress from a voidable contract. At the time the notes in suit were given, and ever since, the failure of the husband, with the knowledge of the unauthorized action of his wife in personally assuming an obligation, to object thereto, was a tacit ratification within the meaning of the Mexican law, and a voluntary payment on such obligation by him, with such knowledge, was an express ratification, and either such tacit or express ratification would validate such unauthorized act. Walter J. Veale returned to his home in the city of Mexico in two or three weeks after the execution of the notes by his wife, as narrated in finding No. 3, and was immediately notified of his wife's said action. No objection was ever made by said Walter J. Veale, or by anyone for him, to said bank, or to said Judd, or to any other person, on account of said action of his wife in executing said notes, until after this suit was commenced, and said Walter J. Veale repeatedly promised and agreed to pay the same, giving his financial inability as his only reason for not doing so, and on January 21, 1907, did pay to said bank on said notes the sum of \$450, Mexican, which sum was by the bank credited on said indebtedness and indorsed on said principal note."

On the findings of fact the court concluded that the appellant had legal capacity under the laws of Mexico to execute the notes, and that appellee was entitled to judgment for the amount demanded. As to the capacity to execute the notes, there is little ground for contention. It is true that the laws of Mexico, as proven, merge the individuality of the wife into that of her husband, and give a married woman but few rights and privileges. The husband is the representative of the wife, and he may ratify her acts, either expressly or tacitly. As the trial court correctly held, there is an exception to the disqualification of women, in that they may be sureties "if they obligate themselves in respect of a thing which belongs to themselves, or in favor of their ancestors, descendants, or husbands." Here Mrs. Veale became a guarantor or surety for her husband, and, so far as the matter of the consideration for her obligation is concerned, the agreement

to extend the time of the payment of her husband's indebtedness is a sufficient consideration for her guaranty of its payment. *Fuller v. Scott*, 8 Kan. 25; *Winans v. Gibbs & S. Mfg. Co.* 48 Kan. 777, 30 Pac. 163; *Harrison Nat. Bank v. Leslie*, 72 Kan. 401, 83 Pac. 984. The provision quoted is part of the Civil Code which provides for the marital relations of husband and wife, and which defines the powers and privileges of women. Attention is called to a provision of what is termed the "Commercial Code," to the effect that a married woman cannot carry on commerce without express authority from her husband, but manifestly this provision relates to the running of a business on her own account; that is, she cannot be a merchant or storekeeper, or engage in a particular branch of commerce, unless she has the express authority of her husband. It does not apply to single transactions like that in question. If his consent and authority were necessary to her right to execute the paper under the laws of that country, their absence has been supplied and the defect cured. Among the provisions relating to husband and wife are the following:

"Art. 203. The nullity of the acts of the wife, founded on the want of a marital or judicial license, cannot be set up except by herself, by her husband, or by the heirs of both. If the husband has expressly or tacitly ratified the acts of his wife, no one can bring a suit for a nullity."

"Art. 1677. When the contract is null through incapacity, intimidation, or error, it may be ratified on the defect or cause of the nullity ceasing, there being no other cause which invalidates the ratification.

"Art. 1678. The ratification and voluntary fulfilment of an obligation by means of payment, novation, or otherwise, executed with the same formalities, is held to be a ratification, and cannot be impugned."

If the appellant could not bind herself without the consent of her husband, and if ratification was needed to give her act validity, he effectively ratified it when he made a voluntary payment of a substantial amount upon the notes. Under provisions quoted, it is competent for him to ratify her contracts either for incapacity or for intimidation. The common-law authorities cited by appellant on ratification are not applicable here, as this contract, having been made in Mexico, is to be interpreted, and its validity determined, by the laws of that country, and it is well known that the common law of that country is based on the civil and Spanish laws, and is something quite different from the common law of this country and of this state. As was said in *Banco De Sonora v. Bankers' Mut. Casualty Co.* 124 Iowa, 576, 104 Am. St. Rep. 367, 37 L.R.A. (N.S.)

100 N. W. 532: "We know that Mexico was a Spanish province for about 300 years, and then became, and still is, a Republic. At no period of its history has it been under British sovereignty. Its institutions are Latin, and not Anglo-Saxon, and the common law is not presumed to be in force in any state or country where English institutions have not been established." P. 537. One of the witnesses, who testified in regard to the law of ratification in Mexico, stated that payment on a note was an active ratification of its execution, while a tacit ratification was a failure to object or contest it in the courts of the country. There was testimony, too, that under the laws of that country the husband is the legitimate representative of his wife, and that he may ratify her acts expressly or tacitly, directly or indirectly, provided no third party is thereby damaged.

Complaint is made of the action of the court in refusing to submit to the jury the testimony relating to duress. It is doubtful whether, under the stipulation, there would have been error in such a refusal, even if substantial testimony of duress had been offered. It is a peculiar stipulation, wherein a general verdict is waived, and wherein the court is vested with discretion to call a jury for the decision of a single issue. It does not provide that the court shall absolutely leave that question to the jury, but rather that it may do so if, after receiving and considering the testimony, it feels warranted in submitting it to the jury. The situation is somewhat similar to an equity case where the court at its option may call in a jury for advice and to answer special questions of fact, and is then at liberty to approve or reject the answers as its judgment may direct. But, if it be treated as an absolute reservation of the right of a jury trial on that issue, no substantial error was committed by the court in taking the question from the jury. Under the circumstances of this case, it cannot be held that either the averments of the answer or the testimony of appellant shows that there was duress in the execution of the notes. Her husband's notes had matured in his absence, and Judd, a surety on the paper, had been telegraphed by him to intercede with the bank for an extension of the paper. He could obtain an extension by procuring her to sign the notes, and visited her for that purpose. The only averment of the answer which had the semblance of pressure or constraint was the statement that, unless she signed the notes, it would result in injury and loss to her husband. This result would necessarily follow if the holder of the note would begin proceedings to enforce the collection of the



debt. In her testimony she stated that Judd told her that "it had to be fixed up to-day that it would be a great detriment to my husband, and I didn't know what might happen, to fix up the notes to-day, so I had to go with him." When she went to the bank to execute the notes, no objection was made by her to the signing of the paper, and it does not appear that anyone connected with the bank talked with her about the matter, or even knew of the conversation between her and Judd prior to the execution of the paper. In view of the relations between the Veales and Judd, it can hardly be conceived that what was said by him operated to deprive her of the exercise of free will, or to render her incompetent to contract. Friendly relations existed between the parties before and after the signing of the notes, and up to the time the action was brought. They visited together, but no complaint was made either by her or her husband that undue influence had been exerted upon her. She was an intelligent woman who had a bank account of her own, and drew checks upon the bank, and was able to transact business for herself. To suggest that a failure to arrange for her husband's default would bring trouble and loss hardly amounts to a threat, and is little more than to say, if the matter is not adjusted, the bank will institute judicial proceedings, something which it had a right to do, and something which she would know and expect. Duress "is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness." *McCormick v. Dalton*, 53 Kan. 146, 35 Pac. 1113. It is not easy to say that Judd's conduct was wrongful or fraudulent, and still more difficult to say that it overcame her will or measured up to duress as defined by law. That neglect of the overdue debt would bring litigation and loss was doubtless anticipated without suggestion from anyone, and ordinarily it is not duress to threaten to do that which a party has a right to do; and even if the bank itself had told her that it would resort to legal proceedings to collect the debt if renewal, or provision for payment, was not made, it would not have constituted duress. *Gabbey v. Forgeus*, 38 Kan. 62, 15 Pac. 866; *Shelby v. Bowman*, 64 Kan. 879, 68 Pac. 1131; *Electric Plaster Co. v. Blue Rapids City Twp.* 77 Kan. 580, 96 Pac. 68; *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474. No material error was committed on the exclusion of testimony on this subject, nor in relation to the Mexican statute of limitation. The answer did not plead a 37 L.R.A. (N.S.)

statute of limitation of that country, and hence proof of such statutes was not admissible. The laws of another country, as well as another state, are unknown to the courts of the state in which the action is brought, and, where such statutes are material to the controversy and relied on as a defense, they must be pleaded as well as proven before they can be given consideration. *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *Loyal Mystic Legion v. Brewer*, 75 Kan. 729, 90 Pac. 247; 36 Cyc. 1240. In the absence of pleading and proof of the limitation laws of Mexico, the laws of Kansas will govern, and under our laws the notes were not barred.

The judgment of the District Court is affirmed.

All the Justices concur.

#### ARKANSAS SUPREME COURT.

O. J. LEWIS MERCANTILE COMPANY,  
Appt.,  
v.  
N. HARRIS.

(— Ark. —, 140 S. W. 981.)

**Bills and notes — draft — forged indorsement — effect of payment.**

The payment by the drawee of a draft with bill of lading attached, drawn payable to the order of a bank, upon a forged indorsement, does not satisfy the account.

(November 13, 1911.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in defendant's favor in an action brought to recover an amount alleged to be due for goods sold and delivered by plaintiff to defendant. Reversed.

The facts are stated in the opinion.

**Note.** — That the rule under which *LEWIS MERCANTILE Co. v. HARRIS* was decided is so certainly established may account for the fact that no other case in point has been found.

Nor has any case been found passing upon the question whether the bank to which a draft has been sent for collection is chargeable with the act of an unauthorized person who obtains possession of the draft and collects it from the drawee.

As to the right of a drawee of forged check or draft to recover money paid thereon, see the notes to *First Nat. Bank v. Bank of Wyndmere*, 10 L.R.A. (N.S.) 49; *Title Guarantee & T. Co. v. Haven*, 25 L.R.A. (N.S.) 1308; and *State Bank v. First Nat. Bank*, 29 L.R.A. (N.S.) 100. E. M. S.

Messrs. Moore, Smith. & Moore and H. M. Trieber, for appellant:

An indorsement of the payee is necessary to pass title to the paper as a voucher, and the maker of a note or drawee of a draft pays at his peril upon the forged indorsement of the payee.

Graves v. American Exch. Bank, 17 N. Y. 205; Story, Bills of Exchange, 587; Tolman v. American Nat. Bank, 22 R. I. 462; 52 L.R.A. 877, 84 Am. St. Rep. 850, 48 Atl. 480.

Messrs. Manning & Emerson for appellee.

McCulloch, Ch. J., delivered the opinion of the court:

Defendant, N. Harris, is engaged in the secondhand clothing business in the city of Little Rock, and in August, 1910, he purchased a bill of goods from plaintiff, O. J. Lewis Mercantile Company, a corporation engaged in the wholesale business in St. Louis. The bill amounted to \$403.04, and defendant paid \$50 in cash, reducing it to \$353.04, and it was agreed that the plaintiff should ship the goods to Little Rock, and forward its draft on defendant, with bill of lading attached, through the German National Bank of Little Rock, for the amount of the bill. This was done on August 31, 1910, the draft being in ordinary form, payable to the order of the German National Bank, and the same was duly deposited in the mails, addressed to that bank. Subsequently plaintiff instituted this action against defendant in the circuit court of Pulaski county to recover the amount of said account, claiming that the draft had never been paid. Defendant answered, pleading payment of the draft, and upon this issue the case was tried before a jury.

The defendant produced the draft in question with the following indorsement stamped thereon with a rubber stamp: "German National Bank. Paid September 2d, 1910.—Little Rock, Ark." Defendant testified that between 4 and 5 o'clock on the afternoon of September 2, 1910, a young man appeared at his place of business, representing himself as a collector for the German National Bank, and presented this draft for payment, and that, after borrowing part of the amount from two of his neighbors, he paid the amount to the young man, and the draft was surrendered to him. He stated that he was not acquainted with the young man, and had never seen him before nor since. He introduced another witness who corroborated his statement as to the payment of the draft. It was agreed that the German National Bank had never accounted to the plaintiff for said amount or any part thereof, and that the plaintiff had never received

anything in satisfaction of the draft or the account. Four of the employees of the bank were introduced, who testified that they had exclusive charge and control of the bank's collection department, that they had no recollection of any such draft having passed through the bank, and that there was no trace thereof upon the records of the bank. Other evidence tended to show that the daily mail coming to the bank was placed in charge of the head of the collection department, who was one of the witnesses and who opened it. Other testimony also tended to show that it was possible for other employees of the bank to come in contact with the mail before it actually passed into the hands of this witness who opened it. The testimony of one of the witnesses tended to show that there was no such stamp used by the bank similar to the one which made the impression on the draft in defendant's hands. In this state of the proof the trial judge instructed the jury to return a verdict in favor of the defendant.

We are of the opinion that the court erred in giving this instruction, and that the question as to payment of the draft should have been submitted to the jury under proper instructions. The evidence tended to establish the fact that the bank never received the draft, and that it was paid by the defendant, if at all, on an unauthorized or forged indorsement. The testimony was sufficient to warrant a finding to that effect, and this would have called for a judgment in favor of the plaintiff.

It is now too well settled to need citation of authority that the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, and that the drawee of a draft payable to order, who pays upon a forged or unauthorized indorsement, does so at his peril. *Sims v. American Nat. Bank*, 98 Ark. 1, 135 S. W. 356; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Bank of British N. A. v. Merchants' Nat. Bank*, 91 N. Y. 106; *Chism v. First Nat. Bank*, 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; *Henderson Trust Co. v. Ragan*, 21 Ky. L. Rep. 601, 52 S. W. 848; *Barnett v. Ringgold*, 80 Ky. 289; *Janin v. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100; *Garthwaite v. Bank of Tulare*, 123 Cal. 132, 55 Pac. 773; *Id.*, 134 Cal. 237, 66 Pac. 326; *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793, 86 N. W. 483; *Com. v. Foster*, 114 Mass. 311, 19 Mass. Rep. 353; *Winslow v. Everett Nat. Bank*, 171 Mass. 534, 51 N.

E. 16. If the draft, which was sent through the mail, never reached the bank, it remained the property of the plaintiff, and title thereto could not be divested through a forged indorsement. *Garthwaite v. Bank of Tulare*, supra.

If it actually reached the bank and was fraudulently or wrongfully abstracted, indorsed, and collected by some unauthorized person, neither the bank nor the plaintiff was bound thereby. *Kellogg v. Norris*, 10 Ark. 18; *Walker v. Scott*, 13 Ark. 644; *Chicago, B. & Q. R. Co. v. Burns*, 61 Neb. 793, 86 N. W. 483; *Doubleday v. Kress*, 50 N. Y. 410, 10 Am. Rep. 502; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. The case of *Barnett v. Ringgold*, 80 Ky. 289, was very similar to the present case, and the court, in disposing of it, said: "[The indorsement on the note] . . . was a special authority to the bank authorizing it to make the collection of the note, and . . . the bank, or its agents authorized to act for it, were the proper parties to whom the payment should have been made, and by whom the note could have been legally presented for payment. . . . The payment by the appellant to an unknown holder or stranger who had no right to collect it, either as agent in fact or bona fide owner, in the face of the special indorsement to the bank for collection by the appellees, was made at his own risk, as the possession with such an indorsement was notice to him that none but the bank or its agents . . . were authorized to present the note or receive the money thereon. The appellees adopted the natural and proper method of informing the appellant of the fact that they had constituted the bank their agent for collection, and had he taken the precaution which ordinary prudence dictates, and read the indorsement plainly written upon the back of the note, he could have ascertained whether the person presenting it was the proper person to whom payment should have been made; and having paid the note to a fraudulent holder, if, indeed, he paid it to anyone, the appellant must suffer the loss, because he took the risk."

Learned counsel for defendant rely on *Fidelity Mut. L. Ins. Co. v. Click*, 93 Ark. 162, 124 S. W. 764, as sustaining the ruling of the court in giving a peremptory instruction. That case is not, however, in point. There the plaintiff relied, as evidence of payment, on a receipt which was admitted to be genuine, and defendant insurance company contended that the receipt was mailed to the insured by mistake, and that payment had not been made. Several witnesses, employees of defendant, testified

to that effect, and it was insisted by defendant that, notwithstanding the receipt in the hands of the plaintiff, the proof was undisputed that no payment had in fact been made, and that the court should have given a peremptory instruction in its favor. We said that possession of the receipt raised a presumption of payment, and that it devolved on defendant, in order to overcome it, so as to make the proof undisputed, to "close up by affirmative proof every avenue through which payment could have been made." We did not hold that possession of the receipt was conclusive evidence of payment, or that defendant had to close up "every avenue through which payment could have been made," in order to be entitled to go to the jury on the question of payment.

The court having erroneously taken the case from the jury by a peremptory instruction, the judgment is reversed, and the cause remanded for a new trial.

#### ARKANSAS SUPREME COURT.

ST. LOUIS SOUTHWESTERN RAILWAY  
COMPANY, Appt.,

v.

W. J. MITCHELL.

(— Ark. —, 142 S. W. 168.)

**Carrier — accepting stock beyond facilities.**

1. A carrier which accepts stock for transportation knowing that its facilities are so overloaded that loss will result to the shipper is liable for the loss.

**Same — consent of owner — effect.**

2. A carrier of live stock is not absolved from liability for loss due to its refusal to unload when necessary, by the fact that the owner, when informed of that fact, consented that the stock might be immediately forwarded from the point where unloading became necessary.

**Same — custom — reliance on.**

3. Where a carrier has established the custom to unload stock at a particular place for their proper care and necessary preservation, a shipper, in delivering stock to the carrier without notice of change of custom, may rely on its being observed, and the carrier will be liable for loss resulting from its breach.

(December 4, 1911.)

**Note.** — As to liability of railroad for delay in transportation of freight, due to inadequate facilities, see notes to *Yazoo & M. Valley R. Co. v. Blum*, 10 L.R.A. (N.S.) 432, and *Daoust v. Chicago, R. I. & P. R. Co.* 34 L.R.A. (N.S.) 637.

**A**PPPEAL by defendant from a judgment of the Circuit Court for Craighead County in plaintiff's favor in an action brought to recover damages for loss of plaintiff's livestock while in defendant's possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. S. H. West and J. C. Hawthorne, for appellant:

Carriers are under no legal obligation to unload stock for rest, feed, and water, upon the request of the owner, without regard to the necessity for the demand or request.

St. Louis, I. M. & S. R. Co. v. Washum, 96 Ark. 384, 131 S. W. 959; St. Louis, I. M. & S. R. Co. v. Davenport, 97 Ark. 82, 133 S. W. 186; Missouri, K. & T. R. Co. v. Clark, 35 Tex. Civ. App. 189, 79 S. W. 827; Johnson v. Alabama & V. R. Co. 69 Miss. 191, 13 So. 515; Ft. Worth & D. C. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525; Nashville, C. & St. L. R. Co. v. Heggie, 86 Ga. 210, 22 Am. St. Rep. 453, 12 S. E. 363; Illinois C. R. Co. v. Peterson, 68 Miss. 454, 14 L.R.A. 550, 10 So. 43; McAlister v. Chicago, R. I. & P. R. Co. 74 Mo. 351; Regan v. Adams Exp. Co. 49 La. Ann. 1579, 22 So. 835.

Messrs. Lamb & Caraway, for appellee:

If a railway company receives live stock or perishable freight, it cannot exempt itself from liability for delays in shipment, or failing to care for, or affording the shipper reasonable opportunity to care for, the property after receiving it.

2 Hutchinson, Carr. §§ 634, 638.

Wood, J., delivered the opinion of the court:

On the 4th day of December, 1909, the appellee loaded two carloads of hogs in a 36-foot car at Pekin, on the line of the Jonesboro, Lake City, & Eastern Railway, about 10 miles east of Jonesboro. There were 158 hogs, weighing from 120 to 130 pounds, put in one car, and 144 hogs, averaging about 165 pounds, were put in the other car. The temperature at the time of this shipment ranged from 56 to 42 degrees. The hogs arrived on the connection between the Jonesboro, Lake City, & Eastern Railway and the appellant's line about 9:30 P. M., and were received by the appellant about 11 P. M., and shipped out of Jonesboro to destination at 12:15 A. M. next day. The shipment was made by appellant under a contract wherein the appellee agreed that the defendant should be exempt from liability for loss arising from heat, suffocation, overloading, carrying, and other accidents not arising from its negligence. And the appellee in the same contract assumed all risk, the expense of unloading, feeding, and watering and otherwise caring for the stock

while in the yards or pens. The stock arrived at Illmo, Missouri, on December 5, 1909. The appellee brought this suit against the appellant to recover damages for the loss of his hogs, alleging that, when the two cars arrived at Jonesboro, he demanded that they be unloaded before being forwarded to their destination, and that the appellant refused to unload the hogs, or permit them to be unloaded, and that, by reason of the refusal of the appellant to unload the hogs, they died *en route* between Jonesboro and Illmo, and that appellee was damaged thereby in the sum of \$471.75. The appellant's answer admitted that it received the hogs for shipment at time mentioned, but denied that appellee requested them to be unloaded, and denied that it refused to permit the hogs to be unloaded, and alleged that they died either from disease or from overloading them. The appellant also set up the contract above mentioned.

The testimony on behalf of appellee tended to prove that between 5 and 6 o'clock on December 4, 1909, appellee told the shipping clerk and agent of appellant at Jonesboro that the hogs had been shipped from Pekin and would arrive that evening, and that he wanted appellant to unload them when they arrived at Jonesboro, and that the custom of appellant had been with hogs delivered to it from the Lake City road to unload them at night, at Jonesboro, and let them rest until the next morning, and then ship them out on the fast stock train, and that appellee requested that his hogs be unloaded in accordance with this custom. It appeared that it would require from thirty minutes to an hour to load a car of hogs at Jonesboro. The appellant refused to unload the hogs, giving as a reason for its action in so doing, that the pens were full and that they had no room for them, and that the hogs would either have to remain on the side track during the night or be moved on the first outgoing train. The appellee consented for the hogs to be shipped on the first train out of Jonesboro, rather than have them remain in the standing cars until the next morning.

There was testimony on behalf of appellee tending to show that the hogs were not overloaded, and also that they were not diseased, and the verdict of the jury on these questions must be taken as conclusive against appellant. The testimony on behalf of appellant tended to show that the appellee did not make any request of its agents and servants at Jonesboro to have the hogs unloaded, and that, on account of the crowded condition of its stock pens on that night, it could not and did not receive or accept the hogs, except upon the condition that they should be shipped out that night on

the first train; that the accumulation of stock in its stock yards on that evening was not and could not have been anticipated by appellant, as it was an unusual condition; that the hogs were overloaded before it received them for shipment, and that appellant had no notice of that fact.

We have held that a carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and that he will therefore be excused for delay in shipping or in receiving goods for shipment until such emergency can, in the regular and usual course of business, be removed,—citing *St. Louis Southwestern R. Co. v. Clay County Gin Co.* 77 Ark. 357, 92 S. W. 531,—but that is not this case. Where a common carrier accepts live stock for transportation, knowing at the time that the condition of its facilities is such that a loss will result to the shipper by the reason of the shipment, then such carrier will be responsible for the loss, because carrier will be negligent in undertaking the shipment under such conditions. The jury might have found from the evidence in this record that such was the case here.

The appellee testified that it had always been the custom to unload at Jonesboro, because they got a better run; if they unloaded them, they got on a stock train in the morning that got out about 7:30. Appellant had established the custom presumably for the reason that it was necessary in the proper transportation of hogs. It was shown that the hogs of appellee when they were received by appellant for shipment were in good condition, that they were free from disease, and that they were not overcrowded in the cars; in other words, that the cars were not overloaded.

The testimony of appellee tended to show that his hogs that died were the largest and fattest ones, and that it was necessary to unload such hogs at Jonesboro in order to prepare them for shipment through to St. Louis.

One witness stated that, when hogs were loaded in cars when standing still, they soon get hot if the air is not stirring, and, of course, they soon suffocate if the weather is not awful cold, and that, when cars are moving, hot air passes out, and they get the breeze. The usual and ordinary effect on hogs in a car nineteen or twenty hours is that they are apt to get too hot and die. There were several stops of thirty or forty minutes between Jonesboro and Illmo. There was ample evidence to sustain the finding of the jury to the effect that, if the hogs had been unloaded at Jonesboro, as it was the custom of appellant to do, they would not have died. There was evidence to support the verdict that the loss of the

hogs was caused through negligence of appellant.

The appellant's liability as a common carrier of live stock began the moment it received the hogs of appellee for transportation. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *Fordyce v. McFlynn*, 56 Ark. 424, 19 S. W. 961.

And as this was an interstate shipment, it could not by any contract with appellee limit its liability for loss caused by it.

Appellant, having received the hogs for transportation, could not relieve itself of liability for loss caused by its failure to unload same at Jonesboro, on the ground that appellee had consented for the hogs to be shipped out of Jonesboro on the train that night. No consent of appellee, and no contract with appellee, either before or after the hogs were delivered to appellant for transportation, would exempt appellant from liability for a failure to unload the hogs at Jonesboro, if such failure on its part was the cause of the loss. *Chicago, R. I. & P. R. Co. v. Miles*, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; *Kansas City Southern R. Co. v. Carl*, 91 Ark. 97, 134 Am. St. Rep. 56, 121 S. W. 932. Therefore the court did not err in instructing the jury as follows: "If you find from the evidence that the defendant railway company received two carloads of hogs from the Jonesboro, Lake City, & Eastern Railway Company for transportation to East St. Louis, knowing that its stock pens at Jonesboro were so overcrowded that said stock could not be unloaded, then the fact, if it be a fact, that said stock pens were so overcrowded, will not excuse the railway company if it is otherwise liable." On the question of negligence the following principles apply to the facts of this case:

It is the duty of a common carrier of live stock to furnish all necessary facilities for the proper rest, exercise, and refreshment of the animals received by it for transportation. The times when, and places where, rest and refreshment may be necessary, must be left to the judgment of the carrier, and not the shipper.

The shipper cannot arbitrarily demand of the carrier that it unload the live stock at any particular time or place, but where the carrier has established a usage of unloading at a particular place for the proper care and necessary preservation of certain live stock, the shipper, in delivering his stock to the carrier for transportation without any notice of a change of usage, has the right to expect that such usage on the part of the carrier will be observed, and if it is not observed, resulting in loss to the shipper, he may hold carrier responsible for such loss. *Illinois C. R. Co. v. Peterson*,

68 Miss. 454, 14 L.R.A. 550, 10 So. 43; Missouri, K. & T. R. Co. v. Clark, 35 Tex. Civ. App. 189, 79 S. W. 827; Nashville, C. & St. L. R. Co. v. Heggie, 86 Ga. 210, 22 Am. St. Rep. 453, 12 S. E. 363; McAlister v. Chicago, R. I. P. R. Co. 74 Mo. 351; Hutchinson, Carr. § 638, and cases cited in note. Under the pleadings and evidence adduced in support of the respective contentions, it was a question for the jury as to whether the loss sued for was caused by the negligence of the appellant in failing to unload hogs at Jonesboro, or by the negligence of the appellee in overloading the cars.

The issues were submitted to the jury under instructions that were really more favorable to appellant than the law warrants, and of which it has no cause to complain.

The judgment therefore was correct, and it will be affirmed.

—  
**CALIFORNIA SUPREME COURT.**  
(In Banc.)

**RE ESTATE OF GIUSEPPE GHIO, Deceased.**

**SALVATORE L. ROCCA, Consul General of Italy, Appt.,**  
v.

**GEORGE F. THOMPSON, Public Administrator, Resp't.**

(157 Cal. 552, 108 Pac. 516.)

**Executor — alien — foreign consul.**

The foreign consul is not entitled to administer upon the estate of a citizen of his country dying within one of the United States, in preference to the public administrator of such state, under a treaty provision that if any citizen of either country

shall die in the territory of the other, the consul of the nation to which he belonged shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.

(April 5, 1910.)

**A** PPEAL by the consul general of Italy from an order of the Superior Court for San Joaquin County granting letters of administration to respondent as public administrator upon the estate of Giuseppe Ghio, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Ambrose Gherini, Clary & Loutitt, and R. K. Barrows, for appellant:

The Italian consul general is entitled under the treaty provisions to letters of administration upon the estate of an Italian citizen dying intestate in this country.

Re Fattosini, 33 Misc. 18, 67 N. Y. Supp. 1119; Re Lobrasciano, 38 Misc. 415, 77 N. Y. Supp. 1040; Re Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; Devlin, Treaty Making Power, § 202; Geofroy v. Riggs, 133 U. S. 258, 271, 33 L. ed. 642, 646, 10 Sup. Ct. Rep. 295; Westlake, International Law, pt. 1, 282; The Bello Corrunes, 6 Wheat. 152, 5 L. ed. 229; Rabasse's Succession, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 So. 867.

Messrs. John E. Budd, Cullinan & Hickey, and John J. O'Toole, for respondent:

The language of the Argentine treaty does not give to the consul general the right to letters of administration.

Lanfear v. Ritchie, 9 La. Ann. 96; Re Logiorato, 34 Misc. 31, 69 N. Y. Supp. 507.

**Note. — Jurisdiction and power of consuls to administer on estates.**

A consular officer is, by the law of nations and by statute, the provisional conservator of the property within his district belonging to his countrymen deceased therein. 2 Cyc. 271.

The early cases upon the question here considered are gathered in the note to Telefsen v. Fee, 45 L.R.A. 496, and the present note includes only the decisions which have passed upon the point since the writing of that note.

The right of consuls to administer under the treaty provisions involved in RE GHIO was finally settled by the affirmance of this case by the United States Supreme Court in Rocca v. Thompson, 223 U. S. 317, 56 L. ed. —, 32 Sup. Ct. Rep. 207, where it was held that the most favored nation clause in the Italian treaty did not give the Italian consul general the right to administer

the estate of an Italian citizen dying intestate in one of the United States, to the exclusion of the one authorized by the local law to administer, because of the privilege conferred by the Argentine treaty upon consular officers of the respective countries as to citizens dying intestate, "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs," since this provision, if applicable, could not be construed as intended to supersede the local law as to the administration of such estates. The court said: "In this country the right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law. It seems to be so regulated in the state of California, by giving the administration of such property to the public administrator. There is, of course, no Federal law of probate or of the adminis-

Shaw, J., delivered the opinion of the court:

Salvatore L. Rocca appeals from an order of the superior court granting to George F. Thompson, as public administrator of San Joaquin county, letters of administration upon the estate of Giuseppe Ghio, deceased, and refusing the application of said appellant for such letters. The appeal was submitted to the district court of appeal of the third district, and decided in favor of the respondent. A rehearing in the supreme court was ordered, because, as treaty rights were involved, it was deemed advisable that the highest state court should consider the matter. Giuseppe Ghio, at the time of his death, was a resident of San Joaquin county, California, and a

citizen of the Kingdom of Italy. He left a small estate situated in San Joaquin county. His heirs at law are his wife, Maria, and three minor children. All of them reside in Italy. The appellant is the consul general of the Kingdom of Italy for California, Nevada, Washington, and Alaska territory. The deceased died intestate on April 27, 1908, in San Joaquin county.

The sole question for consideration is whether or not, where a citizen of Italy, being a resident of California, dies intestate, leaving property in this state, and his lawful heirs all reside in Italy and are citizens of that country, the consul general of Italy is entitled to letters of administration upon his estate, in preference to the public

tration of estates, and, assuming for this purpose that it is within the power of the national government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the states, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question, with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of art. 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right 'to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs.' It will be observed that, whether in the possession, the administration, or the judicial liquidation of the estate, the sole right conferred is that of intervention, and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent, and to supersede the local laws as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property. . . . Emphasis is laid upon the right, under the Argentine treaty, to intervene in possession, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of a citizen of his nation, for the purpose of protecting and conserving the rights of those interested, before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene. So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of

an estate to the consul general, to the exclusion of one authorized by local law to administer the estate. . . . Our conclusion, then, is that, if it should be conceded for this purpose that the most favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease."

Prior to this decision the cases had generally supported the right of consuls under these treaty provisions to administer upon the estates of their deceased countrymen.

Thus, under these provisions it was held that the Italian consul was entitled to administer upon the estate of a deceased Italian whose entire estate was distributable to citizens resident of Italy, in preference to one who claimed to administer as the general guardian, brother, and creditor of the deceased. *Re Silvetti*, 66 Misc. 394, 122 N. Y. Supp. 400.

And by virtue of this treaty it was held in *Re Arduino*, 9 Ohio N. P. N. S. 369, 20 Ohio S. & C. P. Dec. 461, that the Italian consul had the preference in determining to whom administration should be granted on the estate of a deceased Italian subject who left no kin in the United States, notwithstanding the fact that the only property left was a right of action for wrongfully causing his death.

And in *Carpigiani v. Hall*, — Ala. —, 55 So. 248, it was held that the Italian consul was entitled to administer upon the estate of an Italian subject who died intestate in his consular territory.

And in *Re Scutella*, 129 N. Y. Supp. 20, the words "the right to intervene" in this treaty were held to entitle the Italian con-

administrator of the county of his residence.

The appellant bases his claim to such letters upon the provisions of the treaty of May 8, 1878, between Italy and the United States. The clauses relating to this subject are articles 16 and 17, which are as follows:

"Art. 16. In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consul or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested.

"Art. 17. The respective consuls general, consuls, vice consuls, and consular agents, as likewise the consular chancellors, secretaries, clerks, or *attachés*, shall enjoy in both countries all the rights, prerogatives, immunities, and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation." 20 Stat. at L. 732.

Under article 17, the appellant, as consul general of Italy, claims the rights which are given to consuls general of the Argentine Republic by the treaty between that country and the United States, concluded July 27, 1853 (10 Stat. at L. 1005). The last clause of article 9 of that treaty is as follows: "If any citizen of either of the two contracting parties shall die without

sul to letters of administration upon the estate of an Italian killed in this country, in preference to a creditor of such person.

And the right of consuls to administer under these treaty provisions was also upheld in *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119; *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040; *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507; *McEvoy v. Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; and *Lanfear v. Ritchie*, 9 La. Ann. 96, which are set out by the court in *RE GHIO*.

In *The Gen. McPherson*, 100 Fed. 860, it was held that article 8 of the consular convention between the United States and Germany, of December 11, 1871, authorizing German consuls to act as legal representatives of German subjects, did not constitute the consul administrator of the estate of a deceased person, or authorize him to recover the wages of a deceased seaman who was a German subject without showing that he represented German subjects who were entitled to the money. The court said: "But that article does not constitute a German consul administrator of the estate of a deceased person. On the contrary, it only authorizes German consuls to act as legal representatives of the German Emperor's subjects. Now, Mr. Schultz ceased to be a subject of the Emperor when he departed from this mundane sphere, and he has no rights for which the German consul need have a care, for his rights were terminated with his death. If he has any heirs, they may be Germans or citizens of the United States. The court will not presume anything as to their identity or nationality."

In *Re Davenport*, 43 Misc. 573, 89 N. Y. Supp. 537, it was held that the word "intervene" in the treaty with the Argentine Republic included the right of the Italian consul to receive from the public administrator the balance of the estate of an Italian for the benefit to the sole heir, who was an Italian subject.

And in *Re Bristow*, 63 Misc. 637, 118 N. Y. Supp. 686, it was held that the Italian consul had the right to represent by a delegated attorney an alien minor, next of kin 57 L.R.A. (N.S.)

of a deceased Italian subject, upon an accounting by the administrator of the deceased, and that the appointment of a special guardian for such minor was therefore improvident.

So, in *Rabasse's Succession*, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 So. 867, it was held that the treaty with France providing that in case of death of a citizen of that country in the United States without any testamentary executor by him appointed, the consul should have the right to appear personally or by delegate in all proceedings on behalf of the absent or minor heirs, required the recognition of a delegate of the French consul as the representative of absent heirs, the court holding that the treaty was the supreme law of the land.

In *Carpigiani v. Hall*, *supra*, it was held that the Italian consul had the right independent of treaty provisions, to intervene for the purpose of having letters of administration, granted on the estate of an Italian subject, revoked on the ground of fraud. The court said: "The duty, and by comity the authority, of a consul to receive and care for the personal estate of citizens of his own country who may die within his consulate, and to protect the estate from spoliation, is prescribed and recognized by all civilized nations. 7 Moore's Digest International Law, § 722, p. 117; *The Bello Corrunes*, 6 Wheat. 152, 5 L. ed. 229; *Wheaton, International Law*, 2d ed. 151; *Woolsey, International Law*, § 96. Of the general propriety of such a practice, there can be no possible doubt, and we are of the opinion that the appellant's intervention on the grounds set forth in his petition was no more than his official duty prescribed, and was authorized by the law and comity of nations. We mean to say only that he had a right to be heard on his petition, independently of treaty provisions, for the purpose of procuring the removal of these administrators if shown to be dishonestly conspiring to despoil the estate, or if they were improvidently appointed; and that this prerogative attaches by law to his consular office, without any special authority



will or testament in any of the territories of the other, the consul general, or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, in his absence, shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." Page 1009.

Article 6 of the Constitution of the United States declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." And § 10 of article 1 further provides that "no state shall enter into any treaty, alliance, or confederation." We will assume that the treaty-making power of the Federal government is so far superior to the lawmaking power of Congress that it would authorize the Federal government to control by treaty the power of the states to confer and limit the right of administrations of estates, and the power of the state courts to appoint administrators, so far as

the estates of resident citizens of foreign countries are concerned. See, on this subject, note to *Yeaker v. Yeaker*, 81 Am. Dec. 536. If this is the case, the treaty with the Argentine Republic, if construed in accordance with appellant's contention, supercedes, in part, the provisions of our Code of Civil Procedure of California, giving the right of administration of the estates of persons dying intestate to the public administrator, in the absence of resident legal heirs, and gives to the consular agents of that country a paramount right to letters upon the estates of citizens of that country residing here, who die intestate, leaving real or personal property in this state and no resident heirs. The favored nation clause of the Italian treaty would give the like right to the appellant, as consul general of Italy, in the present case.

Similar favored nation clauses are found in the treaties with Austria-Hungary (treaty of 1870, art. 15, 17 Stat. at L. 831); Denmark (treaty of 1826, art. 8, 8 Stat. at L. 342); Japan (treaty of 1894, art. 15, 29 Stat. at L. 852); Kongo (treaty of 1891, art. 5, 27 Stat. at L. 929); Korea (treaty of 1882, art. 2, 7 Fed. Stat. Anno. 680); Russia (treaty of 1832, art. 8, 8 Stat. at L. 448); Spain (treaty of 1902, art. 28, 33 Stat. at L. 2120); Switzerland (treaty of 1850, art. 7, 7 Fed. Stat. Anno.

from those who are entitled to the estate."

In *Re Peterson*, 51 Misc. 367, 101 N. Y. Supp. 285, under the "most favored nation clause" in the treaty with Denmark, it was held that the Danish consul had no right to waive the issuance and service of citation on behalf of an infant party to proceedings for the probate of a will and testament of a subject of Denmark, so as to give the court jurisdiction over such minor, notwithstanding the section in the treaty with Italy providing: "The citizens of each of the contracting parties shall have the power to dispose of their personal goods within the jurisdiction of the other by a sale, donation, testament, or otherwise, and the representatives, being citizens of the other party, shall succeed to their personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases;" or the section of the Argentine Republic treaty involved in *RE GHIO*. The court said: "I have found no case reported in which the right of a consul to waive the rights of an infant in a proceeding in a surrogate's or other court of this state is passed upon, and, as it is not expressly covered by the treaty between the United States and the Kingdom of Den-

mark, or any other country, the laws of the state of New York must govern. These laws do not admit of an infant waiving any of its rights, and, of course, no one else has any authority to do what the infant itself could not do. Under these circumstances the infant party in this proceeding must be brought under the jurisdiction of the court, through the medium of a citation properly issued and served."

And in *Re Nyahay*, 66 Misc. 418, 121 N. Y. Supp. 207, it was held that the Austria-Hungarian consul was not, under the "most favored nation" clause, entitled to appear for minors residing in Austria-Hungary in proceedings for the settlement of the account of an executor, and receive their share of the estate, without the issuance of a citation directed to be served upon them. The court said: "I cannot conceive it possible that greater privileges could be granted to alien infants than are granted to our own residing in this state, and it has been settled beyond all question that even a general guardian appointed for minor infants cannot waive the issuance and service of a citation. I therefore can see no possible course open to the executor here but to take and serve in the usual way a citation, duly returnable in this court after proper service of the same has been made."

For a note on effect of treaties upon an alien's right to inherit, see *Rixner's Succession*, 32 L.R.A. 177. J. T. W.

842); Tonga (treaty of 1886, art. 11, 25 Stat. at L. 1442); and Zanzibar (treaty of 1886, art. 2, 25 Stat. at L. 1439). Foreign consuls and consular agents are given the same "privileges" as those of the most favored nation, by the treaties with Belgium (treaty of 1880, art. 2, 21 Stat. at L. 777); Costa Rica (treaty of 1851, art. 10, 10 Stat. at L. 922); France (treaty of 1853, art. 12, 10 Stat. at L. 999); Germany (treaty of 1871, art. 3, 17 Stat. at L. 922); Greece (treaty of 1902, art. 2, 33 Stat. at L. 2123); Honduras (treaty of 1864, art. 10, 13 Stat. at L. 705); Netherlands (treaty of 1878, art. 3, 21 Stat. at L. 663); Paraguay (treaty of 1859, art. 12, 12 Stat. at L. 1097); Persia (treaty of 1856, art. 7, 11 Stat. at L. 710); Roumania (treaty of 1881, art. 2, 7 Fed. Stat. Anno. 773); and Servia (treaty of 1881, art. 2, 22 Stat. at L. 968). The treaty of 1903 with China gives Chinese consuls here the same "attributes, privileges, and immunities" as those of the most favored nation. Art. 2, 7 Fed. Stat. Anno. 487. The consuls from the countries thus given the same "rights," "prerogatives," or "powers," being those embraced in the list first given, could doubtless claim the same rights as those of Italy, with respect to estates of citizens of their respective countries dying here. Perhaps those included in the second list would claim the same right as a "privilege," within the intent of the respective treaties. The treaty of 1887, with Peru (25 Stat. at L. 1461, art. 33), which terminated in 1899 by notification from Peru, provided that the consuls of each country, in the absence of heirs or representatives, should, *ex officio*, be the executors or administrators of the citizens of their country who died within their consular jurisdiction.

The question presented would directly affect the right of administration upon the estates of all citizens of all the above-named countries residing in this state, of whom there is doubtless a large number. It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the Federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states, and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the Federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

So far as we are aware, the exact point has not been considered in any of the states 37 L.R.A. (N.S.)

except Massachusetts and New York. In New York it has arisen only in the surrogate courts of two of the counties, New York county and Westchester county. The surrogate court of the latter county held that the consul general of Italy was entitled to letters of administration upon the estate of a citizen of Italy who died leaving property in that county, in preference to the county treasurer, who, by the state law, was entitled as public administrator, in the absence of heirs and creditors. *Re Fattosini*, 33 Misc. 18, 67 N. Y. Supp. 1119. The same court, in a similar case, apparently, decided that the Italian consul was entitled, by virtue of his office, to maintain a proceeding in the surrogate court, before any grant of letters of administration, to obtain possession of the effects of the deceased, in order that the consul might administer the same under the direction and control of the court. It does not appear that letters had been granted to the consul. *Re Lobrasciano*, 38 Misc. 415, 77 N. Y. Supp. 1040. The surrogate court of New York county held, in a similar case, that, where the public administrator refused to act, and the Italian consul was legally competent under the state law, he would be entitled to letters, under the statutory provision that when, in such case, the public administrator refused to act, any person legally competent might be appointed. But his right in preference to the public administrator was denied. *Re Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507. The Massachusetts supreme court decided that, under the most favored nation clause of the treaty with Russia, and by referring to the treaty with the Argentine Republic, the Russian vice consul had a right to administer, paramount to that of the public administrator, in the case of a citizen of Russia who died in Massachusetts leaving personal property there, his legal heirs being in Russia. *McEvoy v. Wyman*, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379. In a Louisiana case (*Lanfear v. Ritchie*, 9 La. Ann. 96) the Swedish consul applied for an order that he supersede the duly appointed public administrator in the possession of the estate of a deceased citizen of Sweden, whose heirs were Swedish subjects residing in Sweden. The contention was that this was guaranteed by the treaty with Sweden. The treaty then in force did not contain any favored nation clause, nor purport to give to consuls in either country the right to administer the estates of its deceased citizens. The court denied his application on that ground, and also on the ground that a treaty could not control the state courts. In *Aspinwall v. Queen's Proctor*, 2 Curt. Eccl. Rep. 241, the

English court held that the United States consul, as such, had no right, under the act of Congress of 1792, to administer upon the estate of an American traveler who died while in England leaving property there. The court said that "the Crown is the party to see that the property of any person dying in its dominions goes into proper hands," and that the law of the United States could not be allowed to control, even if it purported to do so.

We do not agree with the supreme court of Massachusetts and the surrogate of Westchester county, New York, in regard to the meaning and effect of the Argentine treaty. They held that the right given thereby "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country," included the right to be appointed administrator of the estate in place of the person who might be designated by the laws of the particular state to be such administrator, and who had either been previously duly appointed by the local state court, or was applying for such appointment. It appears clear to us from this language that, whatever right was given, it was intended to be a right which should conform to the laws of the country, and that, in view of the well-known complex form of our government, the phrase "laws of the country," so far as the United States is concerned, means the local laws of administration and procedure of the respective states. If the right asserted is necessarily contrary to those laws, it cannot be said to conform to them. Our law declares that, in the absence of next of kin entitled to inherit, the public administrator shall take charge of and administer the estate for the benefit of the creditors and heirs. The right claimed under the treaty is that, in such a case, the consul of the country of which the deceased was a citizen shall take charge and administer; a right directly in conflict with our law. The contention of the appellant is that the only effect of the phrase "conformably with the laws of the country" is that the consul, when appointed, must administer the estate in compliance with the local law of administration. The more obvious interpretation is that the phrase qualifies the right and the method of intervention, as well as the procedure after intervention takes place; that is, that, if the consul intervenes, he must do so in the manner, to the extent, and for the purposes prescribed and allowed by the laws of the local jurisdiction in which the property is situated. This is the grammatical effect of the qualifying clause.

Whether the matter in hand is the possession, the administration, or the judicial

liquidation of the estate, the treaty secures to the consul only the right to "intervene" therein. The word "intervene" is here used with reference to a proceeding in a judicial tribunal. In that connection the word has a settled meaning. The dictionaries declare that when applied to matters of law it means: "To interpose in a lawsuit so as to become a party to it." Century Dict.; Standard Dict. Bouvier defines "intervention" at common law thus: "The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be effected by such proceedings." And in the civil law as "the act by which a third party becomes a party in a suit pending between other persons," citing Pothier, *Procès Civils*, lère part, chap. 2, S. 6, 3 (1 Bouvier's Dict. Rawle's ed. 1114). A similar definition is given in our Code of Civil Procedure (§ 387).

Appellant says that the word should be construed according to its literal meaning, "to come between," and that "to come between," in the possession and administration of an estate, means to have a preferred right to act as administrator, if it refers to a time before the appointment is made, or to supersede any other appointee, if used in reference to any subsequent time. This claim is based on the assertion that an intervention was unknown in the civil law, from which it is supposed the Argentine Republic takes its system of legal procedure, and also upon the principle that in construing treaties words are to be given their popular, rather than their legal, signification.

The Constitution of the Argentine Republic was adopted on May 25, 1853. It was avowedly modeled upon the Constitution of the United States, which it closely follows, both in general plan and in specific provisions. Its government is federal in form, with "provinces" which correspond to our states; each having power to make its own local laws, subject, however, to the civil, criminal, commercial, and mineral codes when such should be enacted by the national Congress. Argentine Const. arts. 105, 108, and 87 [10], vol. 9, Senate Exec. Doc. The treaty with this country was made in July, 1853. At that time the public men of that country must have been very familiar with the form of government of the United States, and with the fact that it committed local affairs to the several states. It is not probable, therefore, that the words of the treaty under consideration were chosen with the intent to have the international agreement become a part of,

and in part supplant, the laws of the states and of the United States, or of the provinces of Argentina, in matters committed solely to the states or provinces. The assertion that an intervention, as our law defines it, was not known in civil-law countries, is shown to be without foundation by the foregoing citation of Bouvier to Pothier, and also by the fact that our own Code definition of an "intervention" and that of many of the other states, is taken from the Code of Louisiana. *Horn v. Volcano Water Co.* 13 Cal. 69, 73 Am. Dec. 569. The procedure and jurisprudence of that state, as is well known, was derived from the Code Napoléon and from the system in use in the early Spanish-American colonies, both of which are adaptations of the civil law. Justice Field said, in *Geoffroy v. Riggs*, 133 U. S. 271, 33 L. ed. 646, 10 Sup. Ct. Rep. 298, with regard to the construction of treaties: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred." Appellant quotes this canon of construction as decisive of the sense in which the word "intervene" is to be understood. The court in that case held that the phrase "in all the states of the Union," in the clause of the treaty with France giving citizens of France the right to inherit the property of citizens of the United States, included the District of Columbia. The subject in hand and the context indicated that the phrase was used in the most comprehensive sense, to include the entire country, and the court could not reasonably have held otherwise. But treaties are subject to the same rules of interpretation as other documents. The clause of the Argentine treaty relates to legal proceedings for the settlement of estates, and the words used are to be given the meaning they usually have in their respective countries when used in that connection. The right to intervene in a legal proceeding, partaking of the nature of a proceeding *in rem*, is not usually understood in either country to include the right to take the property from the custody of the court, or from the officer upon whom the laws of the country impose the duty of administering and distributing it. The object and purpose of the treaty would be fully met by allowing the foreign consul to represent

the citizens of his country who are interested as heirs or creditors, in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safekeeping and proper disposition of the effects of citizens of his country who may die while traveling or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this, and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country, when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty, and is in accord with the obvious meaning of the language used.

The order appealed from is affirmed.

We concur: Angellotti, J.; Lorigan, J.; Henshaw, J.; Melvin, J.

Affirmed by the Supreme Court of the United States February 19, 1912. 223 U. S. 317, 56 L. ed. —, 32 Sup. Ct. Rep. 207.

#### ILLINOIS SUPREME COURT.

ELLA ANSON

v.

NEW YORK LIFE INSURANCE COMPANY, Appt.

(252 Ill. 369, 96 N. E. 846.)

**Insurance — deduction of indebtedness — extraneous claims.**

A provision in a life insurance policy which provides for cash loans on it, au-

thorizing the insurer to deduct indebtedness from the face of the policy in making settlement of the amount due thereunder, does not cover debts growing out of transactions extraneous to the contract, such as indebtedness incurred by the insured while acting as agent for the insurer.

(Vickers, J., dissents.)

(December 21, 1911.)

**A**PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago in plaintiff's favor in an action brought to recover a balance alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Edward O'Bryan and William N. Marshall, for appellant:

If any contract stated in the clauses in the policy has a certain well-known and understood meaning, then it is unambiguous, and the liability of the insurer is limited thereby.

Sheridan v. Prudential Ins. Co. 128 Ill. App. 522; 1 Cooley, Briefs on Insurance, 628; Western Assur. Co. v. Altheimer Bros. 58 Ark. 565, 25 S. W. 1067; Yoch v. Home Mut. Ins. Co. 111 Cal. 503, 34 L.R.A. 857, 44 Pac. 189; Grand Pacific Hotel Co. v. Michigan Commercial Ins. Co. 243 Ill. 110, 90 N. E. 244; Crook v. New York L. Ins.

Co. 112 Md. 268, 75 Atl. 388; Rye v. New York L. Ins. Co. 88 Neb. 707, 130 N. W. 434; Sweeney v. Life Asso. of America, 152 Ill. App. 173; Berner v. Brotherhood of American Yeomen, 164 Ill. App. 27; Jacobson v. Liverpool, L. & G. Ins. Co. 135 Ill. App. 20; Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478, s. c. 106 Ill. App. 458; Simons v. First Nat. Bank, 93 N. Y. 269; People ex rel. Stevens v. Fidelity & C. Co. 153 Ill. 25, 26 L.R.A. 295, 38 N. E. 752; Commercial Bank v. Weinberg, 53 N. Y. S. R. 653, 25 N. Y. Supp. 235.

Where a policy is taken out by a person on his own life for the benefit of another, the beneficiary so named in the policy is bound by the terms of the contract between the insurer and the insured.

Caffery v. John Hancock Mut. L. Ins. Co. 28 Fed. 25; Kohen v. Mutual Reserve Fund Life Asso. 28 Fed. 705; Frank v. Mutual L. Ins. Co. 102 N. Y. 266, 55 Am. Rep. 807, 6 N. E. 667; Behling v. Northwestern Nat. L. Ins. Co. 117 Wis. 24, 93 N. W. 800; Forbes v. Union Cent. L. Ins. Co. 151 Ind. 89, 51 N. E. 84; Mutual L. Ins. Co. v. Allen, 212 Ill. 138, 72 N. E. 200.

Messrs. Anderson, Anderson, & Anderson, for appellee:

If there is an ambiguity in the language of the contract, then, as the contract is in the words of the company, the language is to be construed most strongly against the insurer, and in favor of the insured.

**Note.**—*Insurance: right to deduct indebtedness of insured extrinsic to insurance contract.*

In this note loans made to insured, under specific provisions in the policy for such loans, and their deduction from the amount of the policy, are considered as being part of the insurance contract, and are therefore excluded.

In Re Cleveland Ins. Co. 22 Fed. 200, where a fire insurance company which re-insured the risks of another company, and, on the latter making an assignment, purchased claims against it for losses, for the purpose of setting them off against its own liability, it was held that it was entitled to set off claims embraced in the contract of reinsurance, but not others.

In McKown v. Manhattan L. Ins. Co. 91 Fed. 352, under a policy providing only for the deduction of "any indebtedness on account of this policy," it was held that an independent indebtedness of the insured could not be deducted, nor could it be set off against the policy, as the two were not due in the same right, the debt on the policy not coming into existence till after the death of the insured.

In Ladd v. Union Mut. L. Ins. Co. 116 Fed. 878, where a twenty-year endowment policy was made payable to the executors, administrators, and assigns of insured, and 37 L.R.A. (N.S.)

at the time of his death eleven payments had been made, entitling him to extended insurance for five years, it was held that he then had a present valuable interest in the policy, and therefore the company could set off indebtedness arising independently of the insurance contract, which matured before his death, but not that which matured afterward.

In Union Cent. L. Ins. Co. v. Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205, under a policy of life insurance which provided for payment in case of death, "the balance of the year's premiums, if any, and all other indebtedness, being first deducted," but did not in terms provide for a loan of money to the insured, and its repayment out of the insurance money, it was held, in an action on the policy by the beneficiary, that the company was not entitled to set off claims for money loaned to the insured, for the reason that the provision for the deduction of "all other indebtedness" could not be construed to contemplate any indebtedness not connected with the subject of insurance with reference to which the parties were contracting, but only such as arose from the premiums upon which the insurance was based, as for instance premiums unpaid, or for which notes might be given.

In Kansas Ins. Co. v. Craft, 18 Kan. 283, which was an action on a fire insurance

Union Cent. L. Ins. Co. v. Woods, 11 Ind. App. 345, 37 N. E. 180, 39 N. E. 205; Healey v. Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52; Baily v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139.

Cooke, J., delivered the opinion of the court:

The appellee, Ella Anson, recovered a judgment in the municipal court of Chicago against the appellant, the New York Life Insurance Company, for \$225.01, being a balance claimed to be due on a policy of life insurance issued by appellant on the life of Charles W. Anson, husband of the appellee. The judgment was affirmed in the appellate court for the first district, and the case is brought to this court upon a certificate of importance by appeal from that judgment.

On August 11, 1904, appellant issued a policy of life insurance in the sum of \$1,000 to Charles W. Anson, appellee being named as beneficiary. Anson died in 1907, having paid all the premiums as they became due. At the time the policy was issued and at the time of his death he was indebted to the appellant in the sum of \$225.01. The appellant claimed the right to withhold that sum under the terms and conditions of

the policy, and paid the appellee \$774.99. This suit was brought to secure the amount thus withheld. The sole question for our determination is whether the appellant had the right to deduct the amount claimed to be due from Charles W. Anson in its settlement with appellee.

The policy of insurance contained a number of provisions, among them being one numbered six, which was as follows: "Any indebtedness to the company will be deducted in any settlement of this policy or of any benefit thereunder," and it is by virtue of this provision that appellant claims the right to deduct this amount in its settlement with appellee.

The facts were stipulated, and they show that, prior to making this insurance contract with the appellant, Charles W. Anson had been in its employ as an agent. He quit the service of appellant at the time this policy was issued, and at that time was indebted to it in the sum of \$225.01. The indebtedness grew out of his transactions with appellant as its agent, extending over a period of about one year, and consisted of numerous items. It was in no wise connected with this policy of insurance, but had to do entirely with his employment as an agent.

Appellee contends that the language of this provision is uncertain and ambiguous, and, being so, that it must be construed most favorably for the insured; while ap-

policy against a company which was authorized "to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on real estate, . . . and to lend the same or any part thereof on the security of such stocks or bonds, . . . and to change and reinvest the same as occasion may from time to time require," it was held that it was not authorized to go into the market and buy up a mortgage given by the insured, not as an investment, but for the purpose of setting it off against his claim.

And to the same effect is Straus v. Eagle Ins. Co. 5 Ohio St. 59.

In Mutual L. Ins. Co. v. Twyman, 122 Ky. 513, 121 Am. St. Rep. 471, 92 S. W. 335, 97 S. W. 391, it was held that a policy which provided that the insured might at any time, with the consent of the company, assign the policy or change the beneficiary, authorized an assignment of it to the company as security for a loan, which would bind the beneficiary, although the charter of the company provided that any policy issued for the benefit of the wife or children of insured should not be held liable for any of his debts, and that all of such policy should be paid to the beneficiaries, to be held by them free from the debts of such insured person.

In Boyden v. Massachusetts Mut. L. Ins. 37 L.R.A. (N.S.)

Co. 153 Mass. 544, 27 N. E. 669, it is held that independent debts due from the insured to the insurer may be set off against a policy which had been assigned by the beneficiaries to the insured before his death.

In Webb v. Missouri State L. Ins. Co. 134 Mo. App. 576, 115 S. W. 481, a provision in a life insurance policy payable to the wife of insured, that "any indebtedness to the association, under any provision thereunder or otherwise," should be deducted upon settlement, was held to authorize the association to deduct from the policy indebtedness of the insured not arising out of the contract of insurance.

In Murray v. Great Western Ins. Co. 72 Hun, 282, 25 N. Y. Supp. 414, affirmed in 147 N. Y. 711, 42 N. E. 724, which was an action on a policy of marine insurance, it was held that notes given for the premium for insurance on other vessels might be set up as counterclaims.

In Entwistle v. Travelers' Ins. Co. 17 Pa. Super. Ct. 180, under a paid-up life insurance policy which provided that after a certain time the holder might convert it into cash, it was held that one to whom the policy had been assigned by the insured and beneficiary was the holder, and entitled to the cash value without any set-off of the general indebtedness of the insured to the insurer.

R. L. S.

pellant, on the other hand, contends that there is no ambiguity or uncertainty in the language of the provision, but that under the plain meaning of its terms it gives to appellant the right to deduct from the amount due on the policy the amount of any indebtedness of the insured to appellant at the time of his death. The meaning of the language used in this provision is not free from doubt. It is not clear that the indebtedness referred to is meant to be the indebtedness of the insured or that of the beneficiary. Neither is it certain whether it refers only to indebtedness growing out of or connected with the policy of insurance, or to indebtedness in general. In construing the meaning of any of the provisions of a policy of insurance, regard must be had to the object and purpose which were intended by the contracting parties, and the policy being signed by the insurer alone, and the language employed being that of the insurer, the provisions are usually construed most favorably for the insured in case of doubt or uncertainty in its terms. *Healey v. Mutual Acci. Assn.* 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52.

Among the provisions in the policy preceding provision six is one which provides for cash loans to the insured on the pledge and security of the policy. The obligation to pay the annual premium and the possibility of borrowing money by pledging the policy were the only ways in which the insured could become indebted to appellant by reason of his connection with it as a policy holder. If we consider the object and purpose which were intended by the parties, in construing provision six, what indebtedness can it be said was contemplated by them? Bearing that purpose in mind, it cannot be said that they contemplated any other indebtedness than that connected with the subject of the insurance. Appellant would hardly contend that by this provision it was contemplated that it might be enabled to purchase outstanding notes and claims against the insured equal to the amount of the policy, and thus defeat entirely his object in purchasing the insurance. yet the contention of appellant that this was meant to refer to any possible indebtedness would be broad enough, if sustained, to allow it to do so. The indebtedness that must be understood to have been referred to by appellant and the insured was that which might arise by virtue of the terms of the policy itself,—that is, either by lending money to the insured as the policy provided, or by extending the time for paying any premium, as it also provided might be done. The provision is uncertain and ambiguous, 37 L.R.A. (N.S.)

and being so, the trial court properly construed it most favorably for the insured.

The judgment of the Appellate Court is affirmed.

Vickers, J., dissents.

## IOWA SUPREME COURT.

J. A. FITCHPATRICK, Appt.,

v.

WILLIAM E. BOTHERAS et al.

(150 Iowa, 376, 130 N. W. 163.)

### Mortgage — assessment on property — absence of notice — validity.

Failure to provide for notice to the mortgagee of the amount of a special assessment on the mortgaged property, and the time for hearing objections thereto, does not render the statute invalid as to him, as depriving him of property without due process of law, although enforcement of the assessment may impair his lien.

(March 10, 1911.)

**A**PPEAL by plaintiff from a judgment of the District Court for Story County sustaining a demurrer to a petition filed to foreclose a mortgage. Affirmed.

Statement by McClain, J.:

Action in equity to foreclose a second mortgage on certain described real property. The defendant Fowler, as county treasurer, was made a party, with the allegation that a special assessment on the property for a drainage ditch was invalid, and a part of the relief asked was that said county treasurer be perpetually enjoined from enforcing the collection of said special assessment. The county treasurer interposed a demurrer to the petition, which demurrer was sustained. Whereupon judgment was entered against plaintiff for costs, and plaintiff appeals.

*Note.*—*Public improvement: necessity of giving mortgagee or other lienor notice.*

Although it has often been held that notice to property owners of a public improvement for which they will be specially assessed is generally essential to the validity of the assessment (28 Cyc. 979), the question stated in the title to the note has seldom arisen. There are a few decisions, however, which directly bear thereon.

The decision in *FITCHPATRICK v. BOTHERAS* is directly supported by *Baldwin v. Moroney*, 173 Ind. 574, 30 L.R.A. (N.S.) 761, 91 N. E. 3, holding that the statute making drainage assessments have priority over existing mortgages does not deprive

Messrs. Fitchpatrick & McCall for appellant.

Messrs. E. H. Addison and Burnham & Egermeyer, for appellees:

It was not necessary to provide in the statute a notice of the assessment to the mortgagee, for the question of priority of liens could not be raised in the proceedings by him.

People v. Weber, 164 Ill. 412, 45 N. E. 724.

Where a statute provides for notice to property owners at some stage of the proceedings before the assessment is made, it is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step.

Ross v. Wright County, 128 Iowa, 427, 1 L.R.A.(N.S.) 431, 104 N. W. 506; Yeomans v. Riddle, 84 Iowa, 147, 60 N. W. 886; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Johnson v. Story County, 148 Iowa, 539, 126 N. W. 153.

McClain, J., delivered the opinion of the court:

The validity of the special drainage assessment of the mortgaged property is questioned by appellant on the ground that the statute does not provide for notice to mort-

gagees out of possession of their property without due process of law, because not providing for notice to them; but no other case seems to have passed upon the constitutional right of the mortgagee or other lienor to notice. Norwich v. Hubbard, 22 Conn. 587, however, treats\* the question on general grounds, it being held that a mortgagee out of possession was not entitled to notice of proceedings for public improvements, part of the cost of which would be assessed on the mortgaged premises, the court saying that however reasonable it might be that the mortgagee should, by timely notice, have the opportunity of protecting his rights which the mortgagor has neglected, it cannot be required, in the absence of legislative provision therefor.

The question of the necessity of giving a mortgagee notice has also arisen under statutes relating to the making of public improvements and the levying and payment of assessments therefor. Thus, in *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. 345, it was held that under a statute requiring notice of the hearing for the appointment of special drain commissioners to be served upon every person whose lands are traversed by the proposed drain, or who will be liable to assessment therefor, mortgagees are not entitled to notice. And in *Ruyter v. Reid*, 121 N. Y. 498, 24 N. E. 791, affirming 52 Hun, 610, 22 N. Y. S. R. 200, 4 N. Y. Supp. 743, under a statute providing that no sale of real estate for the nonpayment of assessments shall destroy the lien of any recorded mortgage, except in case the pur-

gages of the amount of such assessment apportioned to each tract, and of the day set for hearing objections to such assessment. Code Supp. 1907, § 1989-a12. A prior section (1989-a3) requires notice to be served upon owners of land within the proposed drainage district, and upon persons in actual occupancy of any such land, and upon each lien holder or encumbrancer of any land through which or abutting upon which the proposed improvement extends, as shown by the county records of the proceedings for establishing the district; and it is conceded that plaintiff as mortgagee was given the notice thus provided for, the mortgaged property abutting in fact upon the proposed improvement. But plaintiff had no notice of the assessment, and no opportunity therefore, as he contends, to file objections to the specific assessment upon the mortgaged property. For the appellee it is contended that failure of the statute to provide for any notice to mortgagees or other lien holders would not render it unconstitutional, and that the notice which was in fact provided for and given to appellant of the proceedings to establish the district was sufficient to charge him with notice of all subsequent proceedings.

Notwithstanding the averments of plaintiff's petition that the mortgagor is insol-

vent, the mortgagee is entitled to notice. The mortgagee gives the mortgagee written notice thereof requiring him to redeem, it was held that a sale for assessments which became liens, after the recording of a mortgage, did not affect the rights of the mortgagee, where no notice was given him as provided by the statute.

The element of notice to a mortgagee was also involved in *Deisner v. Simpson*, 72 Ind. 435, wherein it was held that a mortgage whose mortgage was recorded before certain ditch proceedings were commenced could question, in a proceeding to foreclose the mortgage, and in which by cross complaint it was sought to have the lien for the ditch assessment declared superior to the mortgage, the legality of the ditch proceeding and a prior judgment declaring the assessment a lien on the mortgaged land, where he had no notice of the ditch proceeding, and had not been made a party to the action for recovery of the assessment,—but in rendering the decision more weight was evidently attached to the fact that the mortgagee was not made a party to the suit in which the assessment was declared a lien, than to the fact that no notice was given.

The general question of "procedure for the establishment of drains and sewers" is treated in the note to *State ex rel. Utick v. Polk County*, 60 L.R.A. 161.

As to superiority of lien of local assessment over prior lien, see notes to *Scattle v. Hill*, 35 L.R.A. 372, and *Baldwin v. Moroney*, 30 L.R.A.(N.S.) 761. G. J. C.



vent, so that the debt secured by plaintiff's second mortgage cannot be satisfied as a personal obligation, and that the value of the property is such that, if the special assessment be enforced against it, appellant's second mortgage lien will be practically valueless, we think that appellant cannot complain that, under the drainage proceedings, he is deprived of property without due process of law. It must be conceded, of course, that as to a property owner a statute is unconstitutional which provides for a levy of a special assessment upon his property without some form of notice which will enable him to appear in the proceedings and question at the proper stage the propriety and fairness of the assessment. *Beebe v. Magoun*, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 986; *Ross v. Wright County*, 128 Iowa, 427, 1 L.R.A. (N.S.) 431, 104 N. W. 506. But we have never held that mortgagees and other lien holders, or persons simply having such interest in the property that they may possibly be affected by the enforcement of a special assessment against it, are entitled to notice and an opportunity to be heard in such proceedings. The power to levy a special assessment for public improvements on the property directly benefited is a part of the general power of taxation. *Seattle v. Hill*, 35 L.R.A. 372, and note (14 Wash. 487, 45 Pac. 17); *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781.

A mortgagee takes his lien subject to the rights of the state, or of any municipal authority to which the power is properly delegated, to impose on the property in accordance with law not only general taxes, but special assessments. He is not the owner of the property, but a lien holder merely, and the fact that incidentally the value of the lien may be impaired by the enforcement against the property of general or special taxes does not give him a constitutional right to be notified of the proceedings under which such taxes are imposed. The possible impairment of his lien does not amount in such cases to a taking of property without due process of law. *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612; *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33.

The legislature might properly provide therefore, as it has done (in Code Supp. 1907, § 1989-a45), that the special assessment for drainage purposes when levied shall be a lien on the premises upon which it is assessed to the same extent and in the same manner as taxes levied for county and state purposes. See Code, § 1400. 37 L.R.A. (N.S.)

And although the mortgagee of the premises has not had notice of the proceedings, such an assessment takes priority over the lien of his mortgage. The statute so expressly provides, and it is conceded that a general tax lien has priority over the lien of a prior mortgage.

This question has often arisen in other states, and it seems to have been uniformly held that, if the statute provides for a superior lien, as the result of special assessments, the mortgagee has no ground of complaint, although he is not, by notice or otherwise, made party to the proceedings in which the assessment is levied. *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767; *Norwich v. Hubbard*, 22 Conn. 587; *People v. Weber*, 164 Ill. 412, 45 N. E. 723; *Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119; 1 *Abbott, Mun. Corp.* § 639.

As the statute would have been valid therefore without any provision for notice to plaintiff as mortgagee, we have no occasion to determine whether the notice which was in fact given to him of the proceedings to establish the drainage district, so that he might join in the special proceedings for the assessment of damages to the land from the taking of a portion thereof for the construction of the ditch across or over such land, was sufficient to charge him with notice of the subsequent proceedings for the levying of the special assessment.

The judgment of the trial court is affirmed.

#### KENTUCKY COURT OF APPEALS.

OLDS MOTOR WORKS, Appt.,

v.

LUCY SHAFFER.

(145 Ky. 616, 140 S. W. 1047.)

**Evidence — notice — faulty construction of machine.**

1. A manufacturer of an automobile will be charged with notice of the unsafe condition of a rumble seat attached to the car, if the faulty construction was so patent that no person engaged in its construction could have failed to observe it.

**Note. — Liability of manufacturer or dealer for personal injuries caused by defects in automobile.**

The case of *OLDS MOTOR WORKS v. SHAFFER* seems to be the first in which the specific question as to the liability of manufacturers of automobiles for injuries resulting from defects in their cars has been passed upon.

It had previously been held, however, that such manufacturers impliedly warrant that

**Negligence — automobile — dangerous construction — liability for injury.**

2. The manufacturer of an automobile who attaches to it a rumble seat so insecurely that it is likely to break off when occupied by a passenger is liable to a stranger for injuries caused by its so doing, if he knew or was charged with notice that the seat was imminently dangerous, and concealed that fact from the purchaser.

**Same — unsafe condition of machine — concealment.**

3. Representing a machine to be well built is a sufficient concealment from the purchaser of a defect in it, with notice of which the maker is charged, to bring him within the rule that a manufacturer who sells an article for general use knowing it

they are reasonably fit for the use for which they were intended.

Thus, in *Berg v. Rapid Motor Vehicle Co.* 78 N. J. L. 724, 75 Atl. 933, where an action for breach of contract was brought against a manufacturer of automobiles by one to whom he had contracted to sell a sight-seeing automobile suitable for his purposes, it was held that a direction that the plaintiff must support, by a preponderance of testimony, the burden of showing that the machine supplied could not generate the power contracted for, was decidedly favorable to the defendant, since the plaintiff was entitled to go to the jury on the question of whether the defendant had supplied a machine capable of performing the work for which the defendant knew it was purchased. The court said: "The rule is an equitable modification of the hardship resulting from the uniform enforcement of the doctrine of *caveat emptor*, and was first applied in *Jones v. Bright*, 5 Bing. 533, 3 Moore & P. 155, 7 L. J. C. P. 213, 30 Revised Rep. 728, where it was held that a manufacturer or maker who undertakes to supply an article for a particular purpose warrants it to be reasonably fit for that purpose; and the reason for the existence of the warranty thus implied is that the purchaser must rely upon the judgment and skill of the vendor. This doctrine has been held to apply whether the subject of the contract is already manufactured and in stock, or is to be made on the purchaser's order."

And in *Buick Motor Co. v. Reid Mfg. Co.* 150 Mich. 118, 113 N. W. 591, where an action was brought by a manufacturer of engines for automobiles against a manufacturer of automobiles to recover the price of engines furnished, it was held that there was an implied warranty that the engines and transmissions should be merchantable in quality and reasonably fit for the use for which they were intended.

It would therefore seem clear that any negligence in the manufacture of these machines or in the selection of materials used would render the manufacturer liable to the purchaser of the machine for any injury resulting to him by reason of this negligence, 37 L.R.A. (N.S.)

to be imminently dangerous and unsafe, and conceals that fact from the purchaser, may be liable for injury caused by use of the machine.

**Same — unsafe automobile — dangerous character.**

4. A rumble seat placed upon an automobile so insecurely as to be liable to break off if a passenger attempts to ride in it is imminently dangerous, within the rule that a manufacturer who sells an imminently dangerous article, concealing the defect from the purchaser, may be liable to strangers attempting to use it, for injuries caused by its defective condition.

**Same — notice to purchaser — duty to examine.**

5. Although a rumble seat is so insecure-

providing the latter was himself in the exercise of due care.

The liability of the manufacturer to third parties, which arises independently of contract, presents a question somewhat more difficult. Upon the principle of closely analogous cases cited by the court in *OLDS MOTOR WORKS v. SHAFFER*, and which will be found dealt with at length in the notes subsequently cited, the decision in *OLDS MOTOR WORKS v. SHAFFER* seems sound.

It may be well here to emphasize the wide distinction between the call made upon ordinary vehicles, such as carriages, wagons, etc., and that made upon motor vehicles, as regards the strain and racking to which the latter are subjected. These increased demands for strength, created by the great speed at which automobiles are driven, place them in a distinct class as regards the question whether they are dangerous or unsafe in their construction, and whether they are reasonably fit for the use for which they are intended.

As to implied warranty of fitness of goods bought for a special purpose, see notes to *McQuaid v. Ross*, 22 L.R.A. 189; *Leavitt v. Fiberloid Co.* 15 L.R.A. (N.S.) 855; *Oil Well Supply Co. v. Watson*, 15 L.R.A. (N.S.) 868; *Farrell v. Manhattan Market Co.* 15 L.R.A. (N.S.) 884; *Miller v. Raymond*, 31 L.R.A. (N.S.) 783; *Nettograph Mach. Co. v. Brown*, 34 L.R.A. (N.S.) 737.

As to implied warranty by manufacturer or vendor of machinery or apparatus not in itself defective, of fitness for use under existing conditions, see note to *Lombard Water-Wheel Governor Co. v. Great Northern Paper Co.* 6 L.R.A. (N.S.) 180.

As to liability of dealer for personal injuries from article not obviously dangerous, see note to *Clement v. Rommeck*, 13 L.R.A. (N.S.) 382.

As to liability of manufacturer, packer, or vendor to persons not in privity of contract, for injury from defects in article sold, see note to *Tomlinson v. Armour & Co.* 19 L.R.A. (N.S.) 923.

As to liability of druggist for injury to stranger from drug or poison sold him, see note to *McKibbin v. Bax*, 13 L.R.A. (N.S.) 646.

J. T. W.

ly fastened to an automobile that slight examination would disclose its danger, the purchaser will not be charged with notice of it, so as to relieve the manufacturer from liability for injury to a third person through its attempted use, if the purchaser was assured by the manufacturer that it was safe, and thereby induced not to make an examination.

**New trial — newly discovered evidence — lack of diligence.**

6. A new trial will not be granted in an action to hold an automobile manufacturer liable for injuries caused to a passenger by the breaking off of the rumble seat, because of newly discovered evidence consisting of the box on which the seat was fastened, if the court is convinced that by the exercise of diligence the box could have been secured before the trial.

(December 1, 1911.)

**A**PPEAL by defendant from a judgment of the Common Pleas Branch, First Division, of the Circuit Court for Jefferson County, in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence in selling a defective automobile. Affirmed.

The facts are stated in the opinion.

Messrs. **Robert L. Page** and **W. W. Davies** for appellant.

Messrs. **Percy N. Booth** and **Alexander G. Barret**, for appellee:

Where an article is dangerous through defects known to the seller, he is liable if he fails to give notice of the defect, and if he falsely represents that the article is safe.

*Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A. (N.S.) 1103, 92 S. W. 608; 29 Cyc. 478, 479; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; *Torgesen v. Schultz*, 192 N. Y. 156, 18 L.R.A. (N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A. (N.S.) 238, 103 S. W. 245; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233.

The automobile with the known defect was "imminently dangerous."

*Ward v. Pullman Co.* 138 Ky. 554, 128 S. W. 606; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Bright v. Barnett & R. Co.* 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418.

**Carroll, J.**, delivered the opinion of the court:

On June 15, 1909, Gardner and Colston bought an automobile from the appellant, 37 L.R.A. (N.S.)

*Olds Motor Works.* The machine, which had no top, had a rear seat for two, called a rumble seat, that rested on and was fastened to a box that was also a tool box. On July 30, 1909, Colston took riding with him in his machine Mrs. Tyler, who occupied with him the front seat, and the appellee, Miss Shaffer, and her sister, who occupied the rear seat. While going up what is known as the Broadway hill, in Louisville, Kentucky, at a reasonable rate of speed, the box on which the rear seat was fastened split or cracked, and fell off from the body of the automobile to which it was attached, carrying with it the seat, thus throwing appellee and her sister to the ground. The appellee was severely and permanently injured by the fall, and brought this action against the appellant company to recover damages for the injuries sustained. On the trial, the jury awarded her \$4,088, and the appellant asks on this appeal a reversal of the judgment entered on the verdict.

The suit was brought against the appellant as the manufacturer of the automobile, upon the ground that when it sold the car to Gardner and Colston it knew it was defectively constructed, and that the rear seat was unsafe and dangerous for any person to ride in. The petition, as amended, averred that "the said automobile, when it was sold by defendant to said Colston and Gardner, and when the plaintiff's fall took place, was defective, unsafe, and imminently dangerous to human life and limb; and it was at both said times unsafe and dangerous for any person to ride in either of said two rear seats. The defendant when it made said sale knew the said automobile was defective, unsafe, and dangerous; knew that it was unsafe and dangerous for anyone to ride in either of said two rear seats; and knew that said automobile in the condition aforesaid was imminently dangerous to human life and limb. Notwithstanding such knowledge, the defendant negligently sold said automobile to Colston and Gardner, without notifying or warning either of them it was defective, or in an unsafe or dangerous condition. On the contrary, at the time of said sale, defendant falsely represented to said buyers that said automobile was safe, and negligently failed to inform, and concealed from both of them the defects therein, and the unsafe and dangerous condition thereof. . . . That at no time did the plaintiff or Gardner or Colston know of the defective or unsafe or dangerous condition of said automobile, which caused the said plaintiff's fall and injuries, or know that it was unsafe or dangerous for any person to ride in either of the two rear seats of said automobile, or

know that said automobile in the condition set forth in the petition was imminently dangerous to human life or limb." The answer was a traverse of the averments of the petition.

As it is not seriously insisted—and, indeed, could not well be—that the damages are excessive, it is not necessary to notice further this feature of the case.

But it is strongly contended by counsel for appellant that (1) if the automobile was unsafe and dangerous, this fact was known to Gardner and Colston at the time and before appellee was injured, and this knowledge on their part exempted the company from liability to appellee; (2) if the automobile when sold was so constructed as that it was unsafe and dangerous, it was incumbent upon appellee to prove that the condition of the automobile was concealed from the purchasers at the time of the sale; and it is insisted that, as the evidence showed that the defects in the machine were known to the purchasers, and that there was no concealment of them by the appellant, the jury should have been directed to return a verdict in favor of the appellant. It is also said that the court erred in instructing the jury, and in refusing to grant a new trial upon the ground of newly discovered evidence.

There is much conflict in the evidence upon the question as to whether or not Gardner and Colston knew of the unsafe condition of the machine before the accident, and also upon the question of the concealment of the defects by appellant from the purchasers when it sold the machine. But there is convincing evidence that the box upon which the rear seat rested was not only insufficient in itself, but was insecurely fastened to the body or bed of the automobile. It is clearly shown that the body of this box was made out of wood entirely too thin and light for the purpose, and that it was held in place on the body of the machine by four iron pieces fastened to the body of the machine, that run up on the inside of the box, and to which the box was fastened by very small and short wood screws. The evidence is conclusive that the box should have been fastened to the iron uprights by bolts, and that the manner in which it was fastened was unsafe and dangerous in the extreme to persons riding on the rear seat. Indeed, it might be said that the box was not attached at all to the iron uprights, and so was liable at any moment when the machine was running, especially up a hill, to tilt over and fall off, as it did when appellee was injured. We may therefore assume at the very outset that the appellant company sold to Gardner and Colston an automobile so defectively construct-

ed as that it was unsafe and dangerous for persons to ride on the rear seat.

This fact, however, is not sufficient to authorize a recovery against the company by the appellee, who was not a party to the contract it entered into with Gardner and Colston, the purchasers. There was no privity between the appellee and the appellant company. She was a stranger to the contract between it and the purchasers. In cases like this, the liability of the manufacturer to third parties, where any liability exists, is put upon the ground that the manufacturer of certain articles intended for general use owes what may be called a public duty to every person using the articles to so construct them as that they will not be unsafe and dangerous, and for a breach of this duty the manufacturer, within the limitations we will point out, is liable in an action for tort—not contract—to third persons who are injured by his breach of duty. The class of cases, however, in which the maker is liable to third parties is quite limited; the general rule being that no liability attaches for injury to persons who cannot be brought within the scope of the contract. There are, however, well-defined exceptions to the rule of nonliability, and the courts are singularly agreed as to the law applicable to cases of this character. The rules found in textbooks and cases, defining the liability of the maker of the article to third persons who are injured by its use, are stated substantially as follows by all the authorities: (1) When he is negligent in the manufacture and sale of an article intrinsically or inherently dangerous to health, limb, or life; (2) when the maker sells an article for general use, which he knows to be imminently dangerous and unsafe, and conceals from the purchaser defects in its construction, from which injury might reasonably be expected to happen to those using it. Under the first class fall articles such as poisons or dangerous drugs, that are labeled as containing innocent or harmless ingredients; and in this class of cases it is not essential to a recovery by the injured party against the maker that knowledge of his mistake or negligence should be brought home to him. His liability rests upon the broader ground that persons dealing in articles intrinsically and inherently dangerous must use a high degree of care in putting them on the market, for the protection of the health and lives of those who may naturally and reasonably be expected to use them. And for his negligence or carelessness alone, without any fraud, deceit, or concealment, he may be held accountable in damages to any person injured by their use. *Thomas v. Winchester*,

6 N. Y. 397, 57 Am. Dec. 455. But in the other class of cases, where the article itself is not inherently or intrinsically dangerous to health or life, a third party, seeking to hold the maker liable for injuries suffered by him in the use of the article, must show that the maker knew it was unsafe and dangerous, and either concealed the defects or represented that it was sound and safe. But even when this is shown, the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it. *Heindirk v. Louisville Elevator Co.* 122 Ky. 675, 5 L.R.A. (N.S.) 1103, 92 S. W. 608; *Berger v. Standard Oil Co.* 126 Ky. 155, 11 L.R.A. (N.S.) 238, 103 S. W. 245; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233; *Ward v. Pullman Co.* 138 Ky. 554, 128 S. W. 606; *Logan v. Cincinnati, N. O. & T. P. R. Co.* 139 Ky. 202, 129 S. W. 575; *Huet v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630; *Ines v. Welden*, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408; *Tomlinson v. Armour Co.* 75 N. J. L. 748, 19 L.R.A. (N.S.) 923, 70 Atl. 314; 2 Cooley, Torts, 3d ed. p. 1486.

It is obvious that in the case we are considering the liability of the maker falls under the second exception above stated, and, putting it upon this ground, the contention is made that there is no evidence that the maker knew of the defect in this machine, or concealed it from the purchasers, and for this reason it is said a peremptory instruction should have been given to the jury to find for the appellant. It is true there is no direct evidence that the appellant knew of the defect in the construction of the rear seat, but the faulty construction was so patent that no person engaged in its construction could have failed to observe it. We think it may safely be assumed that these machines are made by competent mechanics and according to well-arranged plans, and the construction of the box upon which the rear seat rested was so palpably defective that the makers may be charged with actual notice of it. If direct notice had to be brought home to the manufacturer in cases like this, it would defeat in almost every instance the meritorious rule of law charging the maker with liability, as it is seldom that evidence could be obtained tending to show that the maker had actual notice of the de-

fect complained of. But the maker will not be permitted to shield himself from responsibility upon the theory that he did not have notice of the defect in the article, when the evidence shows that it was so plain that notice of it could not have escaped his attention. This principle is well stated in *Ward v. Pullman Co.* 138 Ky. 554, 128 S. W. 606. In that case, suit was brought by a third party to recover damages from the Pullman Company for injuries sustained in the use of a defective brake staff on a railroad car made by it. In considering the question as to whether notice of the defect had been brought home to the company, the court said: "It was shown by the testimony of three blacksmiths that appellee's blacksmiths were bound to have had hold of the brake staff in welding it, and to have known that the brake staff was defectively welded, that the slightest strain upon it would cause it to break, and that any attempt of a brakeman to turn it would break the staff, and cause him to fall from the car. We think it legitimate to conclude that this defect in the brake was known to appellee's servants by whom the welding was done; that it must also have been discovered while the car was being painted by appellee's servants charged with that work, who inserted in the rift or crack paint to hide its presence, and prevent its discovery by others. . . . We think it further proper to say that the jury, from the facts proved, would, if properly instructed, have had the right to conclude that appellee, when it sold and delivered the gondola to the railway company for use in its business, and by its employees, was bound to have known and did know that its brake staff was imminently dangerous to life and limb." We think the evidence that the construction of the rear seat was unsafe and dangerous was sufficient to bring notice of the defect home to the maker; and therefore the motion for a peremptory instruction based upon the ground that there was a failure of proof upon this point was properly denied.

The argument is further made by counsel for appellant that, as it is necessary that there should be evidence that the maker concealed the defect, this concealment means a physical concealment, such as covering up or hiding with paint or other material, or in some other way, the defects that, except for this character of concealment, would be open and apparent. But it is not necessary that the defect should be concealed from the purchaser by the application of paint or some other method. When the maker is chargeable with liability for a defect in a machine, he is guilty of concealing it if he represents to the pur-

chaser that the machine is safe and sound. It was charged in the petition, and there was sufficient evidence to support it, that the agents of appellant who sold this machine represented to the purchasers at the time of the sale that it was a well-built and well-constructed machine. This representation of the condition of the automobile the purchasers had the right to rely on; and if the machine was not as represented, the representation may be treated as a concealment from the purchasers of the defects in its construction. There is no substantial difference between concealing a defect in an article by hiding it in some way from the view of the purchaser, and in representing to him that the article is sound and well constructed, when in fact it is not. In either event, the effect is to mislead and deceive the purchaser. If the defect is hidden from his view by artificial means, an inspection of it would give him no information of the defect. The appearance of the thing would deceive him into believing that it was as it seemed to be. On the other hand, if it is represented to be sound and all right, and he relies on this assurance, as he has the right to do, he is equally deceived by the appearance of things. It is true the word "concealment" is used in nearly all the cases as being an essential element in fixing liability upon the maker; but we do not think that this word should be given the limited and narrow meaning contended for by counsel for appellant. It is used in the cases to express the idea that the seller has deceived the purchaser by hiding or keeping from him a defect in the article that he desires to purchase. It is the fact that the defect is concealed from the purchaser, and not the means or method by which the deception is practised, that is the material thing to be considered. Therefore we feel justified in saying that the representations made by the seller as to the kind and quality of an article, upon which it is intended the purchaser shall rely, if they are false, should be treated as if he had concealed from him, by paint or other means, the defects that, except for the representation, he might by examination have discovered. *Berger v. Standard Oil Co.* 126 Ky. 155, 1 L.R.A. (N.S.) 238, 103 S. W. 245; *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124; *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847. Whether the mere failure of the maker to disclose dangerous defects that he had knowledge of would be sufficient to hold him liable in cases of this character it is not necessary to consider, as this question is not presented

37 L.R.A. (N.S.)

by the record; but there is authority to the effect that if the maker fails to give notice of known defects, he will be liable to third persons. *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L.R.A. 821, 33 Am. St. Rep. 482, 19 S. W. 630. This being our understanding of the law applicable to the point under consideration, the court did not commit error in instructing the jury that appellant was liable if it represented "to Colston and Gardner, or either of them, at the time of the sale, that the tool box mentioned was not defective, or that it was fastened with reasonable security to the body of the automobile and was not dangerous, and they relied upon the representations, if they were made, and in reliance upon them purchased or used the automobile."

It is further insisted that under the authorities cited there can be no recovery unless the article is what is termed an "imminently dangerous" one; and it is said that, as an automobile cannot be classed as an imminently dangerous machine, the rule of law holding manufacturers liable cannot be invoked by appellee. It is true that, generally speaking, the liability of the maker of an article in cases like this to third parties is confined to articles that are regarded as imminently dangerous to life or limb. But this does not mean that the article must be at all times and under all conditions imminently dangerous. This would be entirely too narrow a construction to place upon the meaning of these words as used in the opinions; and while the words "imminently dangerous" will be often found, the disposition of the cases in which they are used shows that they were used in a broad and liberal sense. Many articles are very simple and safe in their use and construction, and under no conditions could they be regarded as dangerous in their use. On the other hand, there are a great many things in common use that are dangerous, unless they are safely and properly constructed. This is especially true of machinery that is operated by power of any kind. It is a matter of common knowledge that automobiles are equipped with engines operated by electricity, steam, or gasoline, and are intended to travel over highways at a high rate of speed; and it is indispensable to the safety of persons using these vehicles that they should be safely and properly constructed with reference to the use for which they are intended. They are in general use throughout the country, and are employed as means of transportation by great numbers of people, and the liability of their occupants to injury from the defects in material or construction is so great as to put upon manufacturers the

duty of exercising a high degree of care in their construction, and equipping them in such a manner as will make them, when used with proper care, reasonably safe. If an automobile is defectively or insufficiently constructed, there can be no doubt that it is an imminently dangerous thing to life and limb, as much so as a railroad engine or any other powerful machine, because, no matter how careful the driver or occupants may be in its use, or how competent they may be to operate it, they are helpless to protect themselves from undiscovered and unknown defects that place in peril their lives. It is also worthy of notice that the courts are not disposed to confine the liability of the maker to machines or articles that are generally understood to be dangerous. There is an inclination along right lines, and based on sound principles, to hold manufacturers of articles intended for public use, and that are liable, if defectively constructed, to inflict harm, responsible to third parties. As illustrations of this, in the leading cases of *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865, and *Heizer v. Kingsland & D. Mfg. Co.* supra, threshing machines were held to fall within the meaning of an imminently dangerous article; in *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398, a folding bed was treated as a dangerous article. The doctrine was further extended in *Woodward v. Miller*, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847, to embrace a buggy; in *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103, to include a stepladder; and in *Kuelling v. Roderick Lean Mfg. Co.* 183 N. Y. 78, 2 L.R.A. (N.S.) 303, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124, to apply to a farm wagon. And so there is no room for two opinions about the proposition that an automobile comes well within the class of articles for which the manufacturer may be held liable to third persons for injuries sustained on account of defective construction.

It is further contended for appellant that the evidence shows that Gardner and Colston, at the time and before the appellee was injured, had full knowledge of the defective construction of the box upon which the rear seat rested, and this notice upon their part relieved the company from liability for its breach of duty. The rule seems to be that, where the purchaser of an article knows that it is unsafe or dangerous, and with knowledge of this fact invites or permits a third party to use it, and the third party is injured, he cannot maintain an action for tort against the 37 L.R.A. (N.S.)

maker. The reason for this is that the action against the maker proceeds on the theory, and is founded on the fact, that in selling the article he practised fraud and deceit in concealing the defects that made its use unsafe and dangerous; and, of course, when it is admitted or proven that he has not practised any concealment, and that the purchaser was well informed as to the defects, the bottom drops out of the case against the maker, and the liability is shifted to other shoulders. Another reason is that the maker's wrongful act in such a case is not the proximate cause of the injury, when it is shown that there was the intervention of a new agent, to wit, the purchaser, who, with knowledge of the danger, used and permitted others to use the article. *Logan v. Cincinnati, N. O. & T. P. R. Co.* 139 Ky. 202, 129 S. W. 575. The evidence upon the question of the knowledge of the purchasers is conflicting, but they state positively they had no notice of the defective construction of the machine until after the accident; and, while it seems apparent that a careful examination by them would have disclosed the defects in the construction of the rear seat that caused the accident, it is evident that they were influenced not to make a careful examination by the representations made to them by the agent who sold them the machine, and these representations absolved them from the duty of seeking to discover the defects. They had the right to, and say they did, rely upon what the agent told them. When he represented the machine to be safe and sound, after his attention was directed especially to the rear seat, the purchasers were naturally lulled into security, as he knew more about the machine and its construction than they did. Although it must appear that a purchaser through whom another in a case like this is seeking redress exercised ordinary care to discover the defects upon which the action is grounded, it will take very slight evidence of care on his part to satisfy the requirements of the law, when it is shown, as in this case, that the seller deceived and misled the purchaser by representations as to the sufficiency of the article. The jury were instructed that they could not find for the appellee unless they believed that the defect was not known to either Colston or Gardner, and could not have been known to them, or either of them, by the exercise of ordinary care. This instruction fairly presented to the jury the law applicable to the point under consideration, and it was with the jury to weigh the evidence introduced upon this issue; and we are not disposed to disturb their finding upon this question of fact.

It is also urged that a new trial should

have been granted upon the ground of newly discovered evidence. It appears that the box in which existed the defects that caused the accident was not present during the trial, but its whereabouts was discovered, and it was secured before the motion for a new trial was acted upon. It is now insisted that the presence of this box at the trial would have been material evidence for the appellant, and that it is entitled to a new trial on account of its failure, after due diligence, to obtain this box before the trial. From the evidence introduced on the trial, and an inspection of the box that was brought to this court and exhibited during the argument, we are inclined to the opinion that its presence on the trial would have been hurtful in place of beneficial to the appellant. But, aside from this, we are convinced that the appellant, by the exercise of reasonable diligence, could have secured this box before the trial.

Upon the whole case we find no substantial error to the prejudice of the appellant, and the judgment is affirmed.

Petition for rehearing denied.

# MASSACHUSETTS SUPREME JUDICIAL COURT.

## COMMONWEALTH OF MASSACHUSETTS

v.

SILAS N. PHELPS.

(210 Mass. 78, 96 N. E. 349.)

**Criminal law — *ex post facto* law — reducing number of judges.**

A statute passed after the commission of a crime, reducing the number of judges who shall preside at the trial, is not invalid as an *ex post facto* law.

(October 17, 1911.)

**A**PPEAL by defendant from an order of the Supreme Judicial Court for Franklin County, denying his motion in arrest

of judgment upon a verdict convicting him of murder. Affirmed.

The facts are stated in the opinion.

Messrs. William A. Davenport and Harry E. Ward for appellant.

Mr. Richard W. Irwin for the Commonwealth.

Loring, J., delivered the opinion of the court:

The question in this case is whether a statute enacted after the commission of an offense is void as an *ex post facto* law because its effect is to provide that one in place of two or more judges shall preside when the defendant is tried by a jury.

The question thus raised is a question upon which the Supreme Court of the United States is the final authority. The general rule was laid down by that court in *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570, 572, in these words: "It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443. But the prescribing of different modes of procedure, and the abolition of courts, and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition. *Coolsey*, Const. Lim. 5th ed. 329." And in the subsequent cases of *Thompson v. Missouri*, 171 U. S. 380, 386, 43 L. ed. 204, 207, 18 Sup. Ct. Rep. 922, and *Mallett v. North Carolina*, 181 U. S. 589, 596, 597, 45 L. ed. 1015, 1019, 1020, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241, the more particular statement of the general rule origi-

**Note. — *Ex post facto* law: statute reducing number of presiding judges at criminal trial.**

A law which deprives an accused person of some substantial right or immunity possessed by him before its passage is *ex post facto* as to prior offenses. 8 Cyc. 1031.

A careful search has failed to disclose any authority upon the question whether a statute reducing the number of presiding judges at a criminal trial is void as an *ex post facto* law. The cases of *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. 37 L.R.A. (N.S.)

Rep. 570, and *State v. Jackson*, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829, cited in *Com. v. Phelps*, held that a constitutional amendment which divided the number of judges of the supreme court into two divisions, and conferred exclusive jurisdiction of criminal cases on one division, is not an *ex post facto* provision as to pending cases; and to the same effect are *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179, and *State v. Bulling*, 105 Mo. 204, 15 S. W. 367, 16 S. W. 830, which were cases construing the same constitutional amendment.

J. H. B.



nally put forward in Cooley's Constitutional Limitations was approved: "But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rule of practice, and heard only by the courts in existence, when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." See Cooley, Const. Lim. 7th ed. 381.

It was accordingly decided by the United States Supreme Court, in *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904, that a subsequent statute requiring members of the grand jury to be persons of good intelligence, sound judgment, and fair character, as well as qualified voters and able to read and write, was not void as an *ex post facto* law; in *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922, that a subsequent statute providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine should be permitted to be made by the witnesses and submitted to the jury was a valid act; and in *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241, that a subsequent act giving the state an appeal in a criminal case was not void as an *ex post facto* law. It was held, on the other hand, in *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, that the provision of the Constitution of the state of Utah, providing that cases should be tried by a jury of eight, was void as an *ex post facto* law in its application to felonies committed while Utah was a territory.

To come to decisions nearer to the question in the case at bar, it was decided by this court in *Com. v. Phillips*, 11 Pick. 28, that a subsequent statute transferring jurisdiction from the supreme judicial court to the municipal court was not void as an *ex post facto* law. In that case Chief Justice Shaw said, at page 31: "A new tri-

bunal may be erected, or new jurisdiction given to an existing court, to try past offenses, and this is not *ex post facto*." In *State v. Jackson*, 105 Mo. 196, 15 S. W. 333, 16 S. W. 829, at the time of the killing, the court of appeal consisted of five judges, a majority of whom made a quorum. By a subsequent constitutional amendment the number of judges of that court was raised to seven, and it was divided into two divisions, one of which only had jurisdiction in criminal cases. That division consisted of three judges. It was held that "it was entirely competent for the people to adopt such a change in their organic law as to take away from this court as a whole all cognizance of criminal causes, and to confer such jurisdiction on a portion or division of this court, though less in numbers and different in personnel from this court, as organized when the crime in question was committed." The case of *Com. v. Phillips*, *supra*, was relied upon by the supreme court of Missouri in coming to that conclusion. For a similar decision, see *State v. Thompson*, 141 Mo. 408, 42 S. W. 949.

Finally, it has been a common practice in this commonwealth to do the very thing here complained of, namely, to enact statutes reducing the number of judges who are to preside at the trial of capital cases without excepting from their operation and making special provision for cases where the killing took place before the statute was enacted. This is not decisive of the constitutionality of such acts, but this practice, extending over a number of years, is an indication of what by common consent has long been regarded as within the limits of the Constitution. By force of Stat. 1782, chap. 9, and Stat. 1804, chap. 105, capital cases were to be heard, tried, and determined by this court sitting in banc. It was held in *Com. v. Hardy*, 2 Mass. 303, that this provision covered the arraignment of the defendant in a capital case. Stat. 1832, chap. 130, § 6, provided that a prisoner in such a case could be arraigned at a term of court holden by a single justice, leaving the trial to be conducted by the full court. This continued to be the law (see Rev. Stat. chap. 81, §§ 15 and 13) until 1859 when from July 1 of that year until May 31, 1860, the superior court had jurisdiction of capital cases and trial was to be had before three justices of that court (Stat. 1859, chap. 1906, §§ 1, 21). We are not aware that any trial was held under these provisions. They were repealed and the former law re-established

by Gen. Stat. chap. 112, §§ 5 and 8, chapter 181, § 2, and chapter 182, at p. 905; and it continued in force until the enactment of Stat. 1872, chap. 232. That act provided that two or more justices of this court present at a jury term should have the powers of the full court in the trial of indictments for the crime of murder. This continued to be the law (see Pub. Stat. chap. 150, §§ 18, 19) until the enactment of Stat. 1891, chap. 379. By that act jurisdiction over capital cases was transferred to the superior court, and by § 2 it was provided that the trial should be before three justices. By Stat. 1894, chap. 204, that was changed so that the trial could be before two or more justices. That continued to be the law (see Rev. Laws chap. 157, § 8) until the enactment of the statute here in question (Stat. 1910, chap. 555, § 3), which repealed Rev. Laws chap. 157, § 8, and left trials in capital cases to be conducted by one or more justices under Rev. Laws, chap. 157, § 2.

In the case at bar there was no change in the indictment that had to be found nor in the conduct of the trial by which the fact of the defendant's guilt had to be established, nor in his right to have any and all questions of law reviewed by the same appellate court that was in existence when the alleged crime was committed. The only change was in the fact that one in place of two or more judges was to and did preside at the trial. The learned counsel for the defendant has frankly admitted that the only connection in which this change operated to the injury or prejudice of the defendant was in matters lying in the discretion of the presiding judge. His contention is that the fact that while before Stat. 1910, chap. 555, § 3, matters lying in the discretion of the presiding judge were decided by two or more judges, at the trial they were decided by one judge only. But the reason why matters which are left to be finally decided in the discretion of the presiding judge are left to be so decided is because they are matters of such a character that whichever way they are decided, it cannot be said that they are decided wrongly. We are of opinion that a change by which such matters are to be decided by one in place of by two or more judges is not a change which affects the substantial protection with which, at the time the offense was committed, the existing law surrounded the defendant as a person accused of crime. It follows that Stat. 1910, chap. 555, § 3, repealing Rev. Laws, chap. 157, § 8, is not void as an *ex post facto* law.

The entry must be that the order denying the motion in arrest of judgment should be affirmed.

37 L.R.A. (N.S.)

## MINNESOTA SUPREME COURT.

MARTHA B. FORTMEYER, Resp.,  
v.  
NATIONAL BISCUIT COMPANY,  
Impleaded, etc., Appt.

(116 Minn. 158, 133 N. W. 461.)

### Action — joinder — independent wrongdoers.

Held, overruling *Trowbridge v. Forepaugh*, 14 Minn. 133, Gil. 100, that where several persons, without any concert of action, but whose several acts of negligence concur in causing the plaintiff's injury, he may join them in an action for the recovery of damages therefor.

(December 1, 1911.)

Headnote by START, Ch. J.

*Note. — Joinder of municipality and person responsible for dangerous condition, in action for injuries on street or highway.*

This note does not deal with the question of joinder of two municipalities which are under a joint or common duty to maintain a certain portion of a street or highway. Nor does it deal with the right to sue jointly the city and an employee or contractor who causes a dangerous condition in a street, under a contract of employment with the city.

As to the right of a municipality which has been held liable for injuries from an unsafe condition of a street, to recover over against the owner or occupant of abutting property, see the note to *Seattle v. Puget Sound Improv. Co.* 12 L.R.A. (N.S.) 949.

As to the effect of the question of proximate cause upon the rule denying contribution or indemnity between joint tortfeasors, see the note to *Tacoma v. Bonnell*, 36 L.R.A. (N.S.) 582.

As to the character of the liability of several persons whose independent wrongs of the same kind contribute to enhance the degree or extent of the injury sustained by plaintiff, see the note to *Day v. Louisville Coal & Coke Co.* 10 L.R.A. (N.S.) 167.

As to the joint liability of master and servant for tort of servant, see the notes to *French v. Central Constr. Co.* 12 L.R.A. (N.S.) 670, and *Hagerty v. Wilson*, 25 L.R.A. (N.S.) 356.

As to joinder of statutory action against a master, with common-law action against a servant for the latter's negligence, see the note to *Mayberry v. Northern P. R. Co.* 12 L.R.A. (N.S.) 675.

As to the effect of a verdict for the servant in an action against the master and servant, for the latter's negligence or misfeasance, see the notes to *McGinnis v. Chicago, R. I. & P. R. Co.* 9 L.R.A. (N.S.) 880, and to *Southern R. Co. v. Harbin*, 30 L.R.A. (N.S.) 404.

It should be observed that the Texas

**A** PPEAL by defendant National Biscuit Company from an order of the District Court for Ramsey County, overruling its demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. Price Wickersham, for appellant:

The complaint does not charge a joint tort, and cannot be construed to allege that the defendant National Biscuit Company in any manner committed a tortious act jointly with the other two defendants, or either of them.

Trowbridge v. Forepaugh, 14 Minn. 133, Gil. 100; Landru v. Lund, 38 Minn. 538,

38 N. W. 699; Berg v. Stanhope, 43 Minn. 176, 45 N. W. 15; Langevin v. St. Paul, 49 Minn. 189, 15 L.R.A. 766, 51 N. W. 817; L'Herault v. Minneapolis, 69 Minn. 261, 72 N. W. 73; Dutton v. Lansdowne, 198 Pa. 563, 53 L.R.A. 469, 82 Am. St. Rep. 814, 48 Atl. 494; Lohr v. Philipsburg, 156 Pa. 246, 27 Atl. 133; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754.

Messrs. Barton & Kay, for respondent:  
The several causes of action are properly united in the complaint.

Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Pleins v. Wachenheimer, 108 Minn. 342, 133 Am. St. Rep. 451, 122 N. W. 166.

practice permits the municipality to implead the abutter or to overplead against him in case he is otherwise made a party. San Antonio v. Talerico, 98 Tex. 151, 81 S. W. 518. This permits the adjudication in a single action of the responsibility for the injury, not only as between the person injured and the city, but also as between the city and the abutter.

The test usually applied in the determination of this question is whether the defendants were charged with a common duty, the breach of which caused the injury. But the cases applying the test do not agree in results obtained.

Commonness of duty—cases permitting or requiring joinder.

It is held in Illinois that for separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties cannot be jointly held liable to the party injured; or, in other words, if there is no concert of action, no common intent, there is no joint liability; but that a different principle applies where the injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them. In such cases, it is held that the party injured may have his election to sue all parties owing the common duty, or each separately, treating the liability as joint or separate. Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683.

So, by the application of this doctrine, where it is ascertained that it is the duty of both the owner and the city to keep the sidewalk in repair, the failure to do so is a common neglect, and the parties may be held either jointly or severally. Ibid; Elliott v. Field, 21 Colo. 378, 41 Pac. 504.

While the Kansas court holds that where the abutting owner puts down a dangerous sidewalk, and the city negligently suffers it to remain in a dangerous condition, the city is liable for an injury thereby caused, irrespective of the negligence of the abutter, and the latter is not a necessary party 37 L.R.A.(N.S.)

to an action against the former. (Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933), it decides that where an electric light wire breaks and remains hanging in the street for a period of three weeks, when a user of the street is injured, both the city and electric light company are charged with knowledge of its condition, and both may be joined in an action for injuries thereby inflicted. Kansas City v. File, 60 Kan. 157, 55 Pac. 877. It was contended in this case that the obligation of the two parties to prevent the electric wires from becoming obstructions or dangerous agencies proceeded from different sources; that no relation of contract or of public or municipal policy existed between the parties, which made the care of the wires a joint duty; and that no obligation rested upon the city to inspect the wires of the light company or to superintend the business of lighting the streets, so as to charge it jointly with the company for damages resulting from the latter's delinquency. But after pointing out that the Code, which, in legal as well as in equitable actions, seeks the adjustment of interrelated controversies in a single suit, and lends strong countenance to the joinder of defendants in such cases, the court said: "But aside from the rules of the Code, and going to the metaphysical question of relationship between the two defendants, there was a community of action, or rather of negligent omission, upon their part. Each was under obligation to see that the electric wire in question did not fall down and remain upon the ground,—the city because of the general oversight of its streets which the law requires it to take; the light company because of its obligation to prevent its property from becoming a dangerous menace to the public safety. If it be admitted that these obligations are different, or spring from different sources, they nevertheless concur to one end,—to the end of avoiding, among other and similar consequences, just such injuries as the plaintiff sustained. The concurring neglect of these respective obligations produced a single consequence, and must therefore be viewed as joint and mutual. The petition alleged that the wire

Start, Ch. J., delivered the opinion of the court:

Appeal by the defendant National Biscuit Company from an order of the district court of the county of Ramsey, overruling its demurrer to the complaint upon the ground that several causes of action are improperly united therein. The allegations of the complaint, here material, are to the effect following:

The defendant McMillan Company is the owner of the premises described in the complaint, which front upon Eighth street, in the city of St. Paul. The defendant Biscuit Company is the lessee of the premises. The defendant city, more than five years ago, opened, graded, and paved the street in front of the property, and con-

structed a stone sidewalk along the south side of the street in front of the property, and opened it for public use and travel. More than five years ago the city authorized the owner of the property to construct an areaway in and under such sidewalk and make an opening therein, and the same was thereafter and more than five years ago so constructed, and has ever since been maintained and used by the defendant the Biscuit Company as the occupant and lessee of the premises. The opening so made in the sidewalk was covered by two iron shutters working upon hinges which extend about an inch above the level of the sidewalk and the shutters, and were, during all the times mentioned, dangerous obstructions in the sidewalk. The Biscuit Company has so

in question broke and remained down for three weeks before the accident occurred. This was time enough to charge the city, as well as the company, with knowledge of its condition, and from which its concurrent disregard of its duty is plainly to be inferred. Inasmuch as the duty in question rested upon both city and company, and inasmuch as each possessed knowledge of the other's failure to discharge the obligation, it can be fairly said that each so concurred in the other's negligence as mutually and jointly with it to conduce to the plaintiff's injury."

A Louisiana case holds that a petition in an action to recover for injuries resulting from a defect in a street alongside a street railway shows a sufficient solidarity of obligation to warrant an action against the city and the railway company, jointly, although it may be they may sever at the trial, where it alleges that it is the legal duty of the city to keep its streets in good order and repair and safe for the use of its inhabitants; that the railroad company, by virtue of city ordinances and contracts by which it acquired the franchise, is bound to keep the streets through which its tracks are laid in good order and repair, and safe for the use of the people; and further, that it is so bound as a part of its duty to the public, independently of its contract; and that the defect in the street remained with knowledge of the officers of both corporations, and was due to their gross negligence. *Cline v. Crescent City R. Co.* 41 La. Ann. 1031, 6 So. 851. This result was reached as against an objection that although the defendants might be bound to repair and keep in repair the public streets, the obligation to do so arose from two entirely different sources, in that the city's duty arose from the act of the legislature, and was an obligation imposed entirely by law, whereas the railway company's duty grew out of its contract with the city, and was purely contractual in its nature.

It is held in Connecticut that an action cannot be maintained against the town alone under a statute authorizing an action against the railroad company and

the city for injuries occurring by reason of any defect in that part of the highway which any street railway company is bound to keep in repair, such action being but a substitute for an action under another statutory provision under which it was held that the town could not be sued alone. *Lavigne v. New Haven*, 75 Conn. 693, 55 Atl. 569.

In *Kosters v. National Bank*, 62 Misc. 419, 116 N. Y. Supp. 647, the court intimates that a distinction should be made between activity and passivity in relation to the creation of the dangerous condition; holding that where the cause of the injury was not the result of any affirmative act upon the part of the abutter, but was rather the result of passively suffering snow and ice to accumulate upon the walk, an action could not, at least, where no notice was given to the abutter of the condition; be maintained against him without joining the city, as the latter was primarily responsible. The court alluded to a provision of the charter making it the duty of the abutter to keep the sidewalks clear of snow and ice, and making him liable for any injury resulting from his failure to do so, but pointed out that this provision did not specify that he should be liable to the party injured, and that it therefore did not affect the primary responsibility of the city, which made it a necessary party.

So, one who makes an excavation in the street under permission from the city, and executes to it an instrument whereby he promises to pay all cost or damage resulting to the city, and to save the city harmless, is a necessary party to an action against the city for injuries received because of the excavation, where the city charter provides that whenever an action is brought against the city on a claim for which the city would have a right of action against another person upon a bond, the surety or sureties on said bond must be made codefendants; and the necessity for such joinder is not affected by the fact that the amount named in the instrument is less than the amount of damages demanded in the action; nor can it be avoided upon

been the lessee and occupant of the premises for more than five years, during which time it has so maintained and used the opening in the sidewalk and the shutters, including the hinges. All of the defendants knew of the dangerous condition of the hinges for a long time prior to the time when plaintiff received the injuries herein complained of. Each of the defendants at all times stated carelessly and

negligently caused and permitted the hinges to be in the condition stated, and they negligently failed to make the same safe. The plaintiff, while walking along the sidewalk, tripped and stumbled over the hinges, and was thereby personally injured.

The contention of the appellant is that the complaint does not allege a joint tort, and that this case is ruled by the case of *Trowbridge v. Forepaugh*, 14 Minn. 133,

the theory either that the instrument is not a bond, or that the obligation assumed by signing the instrument was that of a principal, and not of a surety. *Donovan v. Oswego*, 42 App. Div. 539, 59 N. Y. Supp. 759.

—cases forbidding joinder.

The Massachusetts court holds that a right of action at common law against electric lighting and electric railway companies for negligence in permitting the street to become charged with electricity cannot be joined with a right of action against the city upon its limited liability under the highway law, upon the theory that such defendants are joint tortfeasors. *Mooney v. Edison Electric Illuminating Co.* 185 Mass. 547, 70 N. E. 933. The court points out that, as against the electric company, the liability rests solely upon the common law, while, as against the city, it rests solely upon the statutes; that the electric companies had nothing to do with the negligence charged against the city, and that the city had nothing to do with the negligence charged against the companies; that the liability of the city depends upon statutory conditions, and is limited in amount, while the liability of the other defendant depends upon conditions entirely different, and is measured only by the amount of damages suffered by the plaintiff; and that, as between the defendants, the liability of the electric companies was primary and that of the city secondary; and that the city, in case of a recovery against it, could maintain an action against the other defendants to recover what was paid.

So, it is held in *Trowbridge v. Forepaugh*, 14 Minn. 133, Gil. 100, in respect of the right to join an abutting owner and the city in an action for injuries received by reason of an excavation in the street, the city's liability being predicated of the duty imposed by its charter to keep the street safe, that the liability of the city depended on a state of facts not affecting its codefendants, and the converse; that neither defendant was in fact or in law chargeable with, or liable on account of, matter set up as a cause of action against the other; and that they did not jointly conduce to the injury by any act, either of omission or commission. It was said that the statute, which was merely declaratory of the common law, forbade the joinder of causes of action which did not affect all parties there- 37 L.R.A. (N.S.)

to, and that for the joinder in that case either defendant might demur.

It was held in *Baines v. Woodstock*, 10 Ont. L. Rep. 694, that since the tort of the abutter was in placing the lumber on the highway, for which the city was not liable, and the tort of the city consisted in not removing the lumber, for which the abutter was not liable, it was clear that there was not a joint tort, but two separate and distinct torts, and that therefore a joint action was not maintainable.

So, in *Dutton v. Lansdowne*, 198 Pa. 563, 53 L.R.A. 469, 82 Am. St. Rep. 814, 48 Atl. 494, holding that a municipality and the abutting owner cannot be sued jointly to recover damages for injuries caused by a defective sidewalk, the court declares that it does not follow that because both the property owner and the municipality may be liable for the neglect of a particular duty, that they may be joined in an action of tort. "If two defendants be sued jointly for a tort," said the court, "and the evidence is not sufficient to hold one, there may be a discontinuance as to that one and the trial may proceed as to the other. In such case the joint action does not fail because the tort is not joint, if committed, but for the reason that the evidence fails to show any concert of action. But where the declaration is for a joint tort, and the case goes to the jury as against both defendants, if under such circumstances, the evidence fails to show that the defendants were joint tortfeasors, it is error to permit a recovery against one or both."

So, too, upon the ground of want of concert of action between defendants and of the distinctiveness of their respective duties, the court in *Wiest v. Electric Traction Co.* (Weist v. Philadelphia), 200 Pa. 148, 58 L.R.A. 666, 49 Atl. 891, holds that a joint action cannot be maintained against a municipal corporation, a street railway company, and a contractor working for the latter, for injuries caused by the negligent obstruction of the street, on the theory that it was the duty of the municipality to keep its streets free from obstructions, and that the company and contractor were negligent in placing and continuing the obstruction in the street.

And it was held in *Mineral City v. Gilbow*, 81 Ohio St. 263, 25 L.R.A. (N.S.) 627, 90 N. E. 800, that a municipal corporation and the owner of a lot abutting upon a street were improperly joined in an action to recover for injuries resulting to a traveler on the street from falling over a retaining

Gil. 100. If the question presented by the demurrer be considered and determined on principle, disregarding mere verbal logic, and without reference to the case relied upon, we are of the opinion that there was in this case no misjoinder of causes of action. The plaintiff has only one cause of action, which is for the recovery of damages by reason of the defect in the sidewalk. Each defendant owed a duty to the

traveling public, including the plaintiff, to remove the nuisance in the sidewalk which caused her injury. Now, if the allegations of the complaint are true, then she may maintain her action against all of the defendants,—against the city, because it authorized the creation of the unsafe condition of the sidewalk and negligently permitted such condition to continue; against the owner of the premises,

wall on the lot, where the allegation against the lot owner was that he negligently maintained upon his premises a dangerous pit which encroached upon a sidewalk without any barrier or other protection to warn persons using the sidewalk, or to prevent them from falling into the pit; and the allegation against the municipality was that it wrongfully permitted the sidewalk to be in a dangerous condition without any such barrier, and that at the time of the plaintiff's injury it negligently allowed an electric light near the place of the accident to be unlighted, since an entirely different cause of action was alleged against each defendant. The court invoked the rule of *Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683, supra, that for separate acts of trespass separately done, or for positive acts negligently done, although a single injury is inflicted, the parties cannot be jointly held liable to the party injured, and that if there is no concert of action and no common intent, there is no joint liability.

In *Zeigler v. Ashley*, 7 Ohio N. P. 388, 5 Ohio, S. & C. P. Dec. 163, a demurrer to the joinder of the city with the abutter, who made the excavation in the street without maintaining sufficient guards, was sustained, the demurrer having been interposed by the city upon the ground that since the city did not create the danger, it could not be liable without actual notice of the dangerous condition, or unless it had existed for such length of time as to charge it with constructive notice; and that therefore this constituted a separate cause of action against the city, because the negligence of the abutter was in not sufficiently protecting the public against a danger he had created; and upon the further ground that the action being joint, the judgment, if rendered against the defendant, must be joint; and that if the city was required to pay the judgment, there could not be that contribution or indemnity which the law gives a municipality in cases where it has been required to pay damages resulting from the negligence of third persons.

It was held in *Stephani v. Manitowoc*, 89 Wis. 467, 62 N. W. 176, that in an action against a city for injuries resulting from a defect in a drawbridge, the bridge tender was not a necessary party, where the complaint failed to show that he was responsible for the condition so as to render him liable over to the city.

*Donoho v. Vulcan Iron Works*, 75 Mo. 401, holds merely that § 9 of article 16 of the charter of St. Louis of 1876, whose 37 L.R.A.(N.S.)

provision it does not disclose, means that when the city is liable in an action on account of the negligence or wrongful act of another, who is also liable to an action for the same injury, the city and such other person must be joined as defendants, and that there can be no judgment against the city unless judgment be also rendered against such other person, who is also liable; but that if a person be joined as defendant with a city, who is found upon trial not to be liable to an action by the plaintiff, this will not prevent a recovery against the city, if the case be one in which an action could have been maintained against the city alone before the adoption of the section referred to. The action was for injuries received by the falling of a bank of earth in a street, created with knowledge of the city, by the other defendant. It appears from *Norton v. St. Louis*, 97 Mo. 537, 11 S. W. 242, that this section of the charter provided that whenever the city shall be made liable to an action for damages by reason of the unauthorized or wrongful act, or of the negligence of any person who shall also be liable to an action on the same account, the injured party, if he sue the city for damages, shall also join such other person and no judgment shall be rendered against the city unless judgment is rendered against such other person; and if any action be brought against the city alone, and it is made to appear that any person ought to be joined according to the provisions of this section, the plaintiff shall be nonsuited; but no person shall be liable to be sued jointly with the city who would not be liable to be sued separately, irrespective of its provisions. It was contended in the *Norton Case*, that, under the section of the charter, the city could not be held liable for injuries upon a sidewalk allowed to become covered with ice, where the abutter himself was not held liable for his nonobservance of an ordinance providing that, after any fall of snow, the abutter should cause the same to be immediately removed from the sidewalk. The court, however, held that this was not a case where the city was held liable by reason of the negligence of another, for which negligence the other person was also liable, and did not come within the terms of the charter provisions referred to, and that therefore it was not necessary that the abutter should have been made a party to the suit, or that the judgment should have been recovered against it in order that the city be held liable; and pointed out that

because it created the unsafe condition, or nuisance, in the public street to be utilized in connection with the premises, and passed them on to its lessee in that condition; against the lessee, because it continued to maintain and use the opening in the sidewalk, with its defective shutters and unsafe condition; or, in other words, it

is a continuer of the nuisance. *Landru v. Lund*, 38 Minn. 538, 38 N. W. 699; *Ferman v. Lombard Invest. Co.* 56 Minn. 166, 57 N. W. 309; *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224. Why should the plaintiff, having but one cause of action, and entitled to only one satisfaction of it, be compelled to proceed against the de-

the city was sought to be charged because of its neglect to discharge a duty owed to the plaintiff as a traveler on one of its streets over which it alone had exclusive power and control, and that it was liable, if at all, because of its own negligence, and not by reason of the negligence of any other person. "Conceding," continued the court, "that the city has the power to cause obstructions upon the sidewalk to be removed at the expense of the owners of the ground fronting thereon (charter, art. 3, paragraph 9), and that the ordinance requiring such owners, immediately after any fall of snow, to cause the same to be removed from the sidewalk in front of their premises, is a legitimate mode of exercising that power, yet, the city could not, by passing such an ordinance, relieve itself of its duty to the plaintiff and to the public traveling on its streets, of keeping its sidewalk in a reasonably safe condition for travelers thereon, or transfer or impose that duty upon another. Nor can its liability for a failure to discharge that duty be made contingent upon the liability of the citizen to the city for a failure to discharge his duty to the city in the matter of removing the snow, as required by ordinance. For a neglect of this duty of the citizen, the city might impose such a penalty as would be calculated to secure its performance, if it has the power to impose such a burden; but it could not create a liability to damages for a civil action by a private individual against one who failed to discharge the city's duty in that behalf."

The provision of the St. Louis charter involved in the last two cases was held inoperative and void in *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817, upon the ground that it was not enacted by the general assembly of the state, but was framed by a board of freeholders, under a statute giving it express authority to prepare a charter for the city, and was ratified at a special election; and that therefore it constituted an invalid attempt by the city to regulate the practice and proceedings of state courts, in that it was invalid, especially because a state statute provided that every person who should have a cause of action against several persons, and who should be entitled by law to one satisfaction therefor, might bring suit thereon jointly against all or as many of the persons liable as he might think proper.

*Badgley v. St. Louis* was followed in *Noble v. Kansas City*, 95 Mo. App. 167, 68 S. W. 969, holding the provisions of the Kansas City charter void for the same reason assigned in the *Badgley Case*, and holding 37 L.R.A. (N.S.)

therefore, that a city against which an action was brought for personal injuries jointly with the abutting owner who created the dangerous condition on the sidewalk could not be heard to object that the plaintiff subsequently dismissed her suit as against the abutter. In this case the court also invoked the provision of the statute that every person having a cause of action against several persons, and entitled to one satisfaction therefor, may bring a suit thereon jointly against all or as many of the persons liable as he may think proper, and held that the election in the first place to sue both the city and the abutter did not have the effect of precluding the plaintiff from subsequently dismissing the action as against one of them.

In *Waltemeyer v. Kansas City*, 71 Mo. App. 354, involving an action against a city and a water company for injuries received by falling upon ice which accumulated when the water company opened its hydrants to prevent freezing, it was held that the lower court erred in giving a judgment in favor of the water company, and that since such a judgment would be a bar to any future contest between the city and the company, it should be reversed in so far as it affected the right of the city, but the judgment against the city was affirmed. The charter provision as to joinder of action involved in this case was much like that contained in the St. Louis charter already referred to.

Under the provision of the St. Louis charter before it was declared void, it was held that where an action was brought jointly against the city and a person whose negligence caused the dangerous condition in the street, but was afterwards dismissed as to the latter, a subsequent judgment against the city should be reversed. *Schweickhardt v. St. Louis*, 2 Mo. App. 571.

So, too, it was held that under the Kansas City charter, where a plaintiff was, due to his own fault, compelled to dismiss the action as to the wrongdoer in order to avoid a judgment in the latter's favor which would be a bar to an action over by the city against him, he stood in no better position than he would have occupied if he had voluntarily dismissed the action as to the wrongdoer; but that the city, by filing its answer and going to trial notwithstanding its objection to the dismissal of the wrongdoer, waived its right to invoke the provision of the charter, and to have the wrongdoer made a party, or to make this a ground of invalidating the judgment rendered against it. *Mancuso v. Kansas City*, 74 Mo. App. 140, L. A. W.

fendants separately, and bring three separate actions, instead of one, for the same cause of action?

It is urged that by joining them in the same action they might be embarrassed in making their defense, but by answering separately, as they have the right to do, the court can and will protect the rights of each. It has been urged by some courts that, if all the parties liable in a case like the one at bar are joined in the same action, their right of contribution will be lost. This claim is purely technical, for courts look at the substance of the transaction, not its form, and if in this case the defendants were sued separately, they would be entitled to contribution among themselves, the right would not be lost by their joinder in the same action. *Mayberry v. Northern P. R. Co.* 100 Minn. 79, 12 L.R.A. (N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754. The joinder of all the parties in one action in such a case as this avoids a multiplicity of suits and conserves the orderly administration of justice. We can conceive of no sound reason why they should not be so joined. The fact that they did not, by their joint act, conduce to the plaintiff's injury, which seems to have been the only basis for the decision in the case of *Trowbridge v. Forepaugh*, affords no substantial reason why they should not be joined in the same action upon a cause of action for which each is liable, for the several acts of negligence of the defendants concurred in causing the injury. We accordingly hold, overruling *Trowbridge v. Forepaugh*, that several causes of action are not improperly united in the complaint. Order affirmed.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

UNITED STATES FIDELITY & GUARANTY COMPANY, Appt.,

v.

MAYOR AND COMMON COUNCIL OF CITY OF NEWARK et al., Resp'ts.

(— N. J. —, 81 Atl. 758.)

Contract — public work — retention of fund — assignment.

A provision in a contract for public work entitling the municipality to retain a cer-

tain percentage of the contract price until claims of laborers and materialmen, of which it is given notice, have been paid, does not prevent assignment by the contractor after completion of the work, of the right to such balance prior to the filing of notice of laborers' and materialmen's claims, which shall take precedence of the latter in the distribution of the fund.

(November 21, 1911.)

**A** PPEAL by complainant from a decree of the Court of Chancery dismissing its bill filed to enforce a lien on funds in the hands of the defendant city for the construction of a reservoir. Affirmed.

The facts are stated in the opinion.

Messrs. McCarter & English, for appellant:

The lien of the complainant is ahead of the assignment of Stewart and Abbot to James C. and Alexander M. Stewart, and should be enforced as against them.

*Shannon v. Hoboken*, 37 N. J. Eq. 315; *Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; *Burnett v. Jersey City*, 31 N. J. Eq. 341; *Miller v. Stockton*, 64 N. J. L. 614, 46 Atl. 619; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Jersey City v. Bayonne*, 80 N. J. L. 131, 76 Atl. 1010.

Messrs. Sherrerd Depue and George Gordon Battle, for respondents:

An assignment of moneys earned or to be earned, under a contract within the purview of the municipal lien law, defeats a lien claim filed after the assignment.

*Garretson v. Clark*, — N. J. Eq. —, 57 Atl. 414; *Somers Brick Co. v. Souder*, 70 N. J. Eq. 388, 61 Atl. 840.

The assignment in question, either with or without notice to the city, was a complete equitable assignment of the fund.

*Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922; *Cogan v. Conover Mfg. Co.* 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973; *Miller v. Stockton*, 64 N. J. L. 614, 46 Atl. 619; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; *Burnett v. Jersey City*, 31 N. J. Eq. 341; *Craig v. Smith*, 37 N. J. L. 549; *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269.

The execution and delivery of the assignment, followed by notice to the city,

*Note.* — *Right of laborers or materialmen in fund retained pursuant to contract for public work, to insure payment of their claims.*

Cases have been excluded from this note where the provision in the contract for the retention of a fund was required by stat- 37 L.R.A. (N.S.)

ute or ordinance; cases of that class have generally held, that the provision was for the benefit of materialmen and laborers. *Merchants' & T. Nat. Bank v. New York*, 97 N. Y. 355; *Murphy v. Bowery Nat. Bank*, 30 Hun, 45.

As to right of subcontractor, materialmen, or laborers to maintain action on contract-



made the assignment effectual at law as well as in equity.

*Sullivan v. Visconti*, 68 N. J. L. 543, 53 Atl. 598; *Craig v. Smith*, 37 N. J. L. 550; *Miller v. Stockton*, 64 N. J. L. 614, 46 Atl. 619.

The appellant is not entitled to the benefit of the provision in the contract between Stewart and Abbot and the city, with respect to the assignment of moneys due and to grow due under the contract.

*Burnett v. Jersey City*, 31 N. J. Eq. 341; *Somers Brick Co. v. Souder*, 70 N. J. Eq. 388, 61 Atl. 840; *Shannon v. Hoboken*, 37 N. J. Eq. 123; *Essex County v. Lindale*, 41 N. J. Eq. 189, 3 Atl. 391; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478; *Bates v. Salt Springs Nat. Bank*, 157 N. Y. 322, 51 N. E. 1033.

*Gummere*, Ch. J., delivered the opinion of the court:

The complainant, the United States Fidelity & Guaranty Company, filed its bill under the provisions of the municipal lien law to enforce a lien on moneys in the

hands of the city of Newark under a contract between the city and John L. Stewart and Frederick W. Abbot, partners, for the construction of the Cedar Grove reservoir. Stewart and Abbot subcontracted the embankment and borrow pit work to one James Seme, who entered into a bond with the complainant, the United States Fidelity & Guaranty Company, as the surety thereon, to indemnify and save harmless Stewart and Abbot from any pecuniary loss resulting to them from a breach of any of the terms of the contract between them and Seme. This bond also provided that in case of default by Seme in the work, the complainant could at its option assume and complete his contract. Seme did default in his work, and the complainant exercised its option to complete his contract, and did in fact perform the work and furnish the materials called for therein to an amount exceeding \$35,000. Not being paid by the principal contractor the money due them for such work and materials, they, on December 12, 1904, filed their lien with the city in compliance with the statute.

or's bond to owner, see note in 27 L.R.A. (N.S.) 573.

The general rule is that a provision in a contract with a municipality that the latter may retain a certain percentage until claims of materialmen and laborers are paid is for the benefit of the city, and such provision may be waived by the city; but where such fund is retained, the rights of materialmen and laborers in the funds are superior to those of general creditors of the contractor.

#### Right of city to waive provision.

A provision in a contract that the city may retain money due the contractor until claims of materialmen and laborers have been paid does not create a right of action in their favor against the city in case the contractor is paid in full. 28 Cyc. 1063.

A provision in a contract that if the contractor did not furnish evidence that all persons who had done work or furnished material had been paid, then such sums as might be necessary for such payment should be retained by the city until such claims should be fully satisfied, is a contract only between the contractor and the city, which might be waived by the latter; or it could retain the money until the contractor paid the workmen, at the city's option; and the materialmen acquire no rights by virtue of the provision to compel the city to pay them out of the money due the contractor. *Old Dominion Granite Co. v. District of Columbia*, 20 Ct. Cl. 127.

In *Quinlan v. Russell*, 15 Jones & S. 212, there was a provision that, upon failure of the contractor to furnish satisfactory evidence that claims of laborers and materialmen who had filed notice thereof had been paid, such amount as might be necessary to 37 L.R.A. (N.S.)

satisfy the same should be retained from moneys due the contractor until liability should be fully discharged or such notice withdrawn, and it was held that such provision did not amount to such an equitable assignment of such fund that materialmen who had given the notice specified had a lien on the sum retained.

And in *Grasman v. Bonn*, 30 N. J. Eq. 490, in construing such provision, the court said: "It does not create a lien in favor of such persons. It gives merely the right to retain money until the claims shall have been settled, and proof to that effect shall have been given to the commissioners. It was intended as a means of coercion, of compelling the contractors to pay their debts contracted in connection with and for the work. The commissioners are charged with no duty towards those to whom such debts are due, by reason of it. Whether they would retain or not was entirely at their option. The provision does not render them liable at law or in equity for the payment of those debts. Nor is the provision an equitable assignment on the part of the contractors of so much of the fund as may be necessary to pay such debts."

In *Weisemair v. Buffalo*, 57 Hun, 48, 32 N. Y. S. R. 755, 10 N. Y. Supp. 569, it was held that a provision for the retention of a percentage of the contract until three months after its completion was not for the benefit of the contractor, still less for that of his employees, but for the benefit of the city as security on the part of the contractor that the work done should remain or be kept in repair for the period named after its completion. It was a condition which the city might waive at its pleasure, and under which no other party could claim any rights.

On the 18th of November, 1904, Stewart and Abbot made a written assignment to Alexander M. Stewart and James C. Stewart of all moneys due and to become due to them from the city of Newark under their contract with the municipality. The question at issue between the parties was whether this assignment took precedence over the lien subsequently filed by the complainant. The learned vice chancellor held that it did, and for this reason advised a dismissal of the complainant's bill.

We concur in the conclusion reached by the vice chancellor, and have nothing to add to his discussion of the matters treated by him in his opinion. There is, however, one ground upon which the complainant rested its right to relief, and which was relied upon in the argument before us, which is not referred to by the vice chancellor in his opinion, *viz.*, an alleged right conferred upon laborers and materialmen by the 8th section of the contract between the city and Stewart and Abbot. That section, after providing for the payment of 90 per cent of the final estimate, upon

the completion of the work in accordance with the provisions of the contract, and its acceptance by the city, provides as follows: "The remaining 10 per centum of said final estimate shall be retained by said city for one year from date of said acceptance of the work, as a guarantee that the contractor has faithfully executed his contract, and shall be used by said city in making good any defects or making any repairs to the work executed under this contract which may be necessary. At the end of said one year the said 10 per centum, or such portion of it as may remain after making said repairs or remedying any defects, shall be paid to the contractor, after the party of the second part shall furnish the said board of street and water commissioners with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and who may have theretofore given written notice to said board of any balance unpaid for work or materials furnished or done on said work, have been fully paid or satisfactorily secured, and in case such evi-

But in *Lawrence v. Dawson*, 34 App. Div. 211, 54 N. Y. Supp. 647, distinguishing *Weisemair v. Buffalo*, where there was a provision for the retention of a percentage in an agreement between the contractor and subcontractor, as well as in the original contract with the city, it was held that such former provision inured to the benefit of the materialman who had a claim against the subcontractor for materials furnished, when he had been induced by both parties to the subcontract to postpone enforcement of that claim, by representations that such percentage would be retained.

In *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351, where there was a provision in a contract between a municipal corporation and a contractor, whereby the former reserved to itself the right to retain money in its hands until all materialmen were fully paid, it was held that the provision created no obligation in favor of materialmen not parties to the contract, which they could enforce as against the municipality.

In *Jones v. Savage*, 24 Misc. 158, 53 N. Y. Supp. 308, it was held that the retention of a certain percentage, by virtue of a provision in the contract, was for the benefit of the city, and so where the city completed the work upon abandonment by the contractor, at a cost in excess of the contract price, there was nothing to which liens of materialmen could attach.

And in *Epeneter v. Montgomery County*, 98 Iowa, 159, 87 N. W. 93, where a contract for the erection of a county building provided for payments at stated times of 90 per cent, and for payment of the remaining 10 per cent on the completion and acceptance of the work, and as soon thereafter as the county was assured against the exist-

ence of any mechanics' liens on said building, and further provided that if the contractors failed to complete the building within the contract time, the county should complete it at their expense, and deduct from any sum due on the contract the value of work or material furnished thereafter, it was held that no duty was enjoined upon the county to hold that 10 per cent for the benefit of subcontractors, but that the county had a right to consume the percentage reserved, in the completion of said building, if necessary. It was contended by counsel in *Iowa Brick Co. v. Des Moines*, 111 Iowa, 272, 82 N. W. 922, that *Epeneter v. Montgomery County* was authority for the contention that a city could waive such a provision in the contract, as it was for its sole benefit, but the court doubted that that case went to the extent claimed for it.

In *McDonald v. New York*, 29 Misc. 504, 62 N. Y. Supp. 72, it was held that, notwithstanding provisions in a contract for the retention by the city of money, where the claims of laborers or materialmen are filed with the city, the consolidation act is the only basis of such a lien.

Right as between materialmen or their assignees, where fund is still retained.

Where there was a provision in a contract with a city that the latter should reserve 15 per cent of amounts due until the completion of the work, it was held that a materialman whose claim was on file should have been paid in full as against other materialmen whose claims were not shown to have been prior in right. *Iowa Brick Co. v. Des Moines*, 111 Iowa, 272, 82 N. W. 922.

dence is not furnished as aforesaid, such amounts as may be necessary to meet the claims of the persons aforesaid may be retained from the money due the party of the second part under this agreement, and until the liabilities aforesaid shall be fully discharged or such notice withdrawn." The contention of the complainant is that, by virtue of this clause in the contract, the 10 per cent was retained for the protection of laborers and materialmen, including the complainant, and so, consequently, subject to lien by them, notwithstanding the assignment made by Stewart and Abbot.

Although the contention is plausible, no authority is cited in support of it, and it is opposed to earlier decisions both of the court of chancery and of this court. In the case of *Grassmann v. Bonn*, 30 N. J. Eq. 490, the litigation arose out of the work of improving a public road in Hudson county under a contract by which it was provided that so much of the money due to the contractors under the contract as might be considered necessary by the

public authorities should be retained by them until any suits or claims against them for damages, or for errors in payment to workmen, or for material furnished, should have been settled, and evidence to that effect furnished to them. The contention was that this provision of the contract operated as an equitable assignment in favor of unpaid laborers and materialmen. It was held that the provision was probably intended for the indemnity of the public authorities against suits or claims for wages or the price of materials, which, though unobtainable, might nevertheless be brought against them; that it did not create a lien in favor of laborers and materialmen, but was intended as a means of coercion to compel the contractors to pay their debts contracted in connection with and for the work; that the public authorities were charged with no duty toward these classes of persons, and whether they would retain the fund or not was entirely at their option; and, finally, that the provision was not an equitable as-

And in *Ross v. Beaumont Brick Co.* 53 Tex. Civ. App. 469, 116 S. W. 643, where a fund was withheld by the city to pay claims of certain materialmen, under provisions of contracts authorizing the city, on final settlement, to retain such sum as might appear necessary to satisfy unpaid claims for labor and materials furnished for the work, it was held that the rights of the materialmen therein were superior to the right of an assignee of another materialman, under garnishment proceedings against the city.

#### Right as against assignee of fund.

A provision in a contract with a municipality that if the contractor fails to pay for labor done or materials furnished, the municipality may withhold moneys under the contract, and apply them to the payment or such debts, does not operate as an equitable assignment of the fund, nor does it deprive the contractor of his right of alienation; and his assignees, notwithstanding such provision, will be entitled to the moneys as against materialmen and laborers. *Shannon v. Hoboken*, 37 N. J. Eq. 123; *Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391; *Ross v. Beaumont Brick Co.* supra.

But in *Friedman v. Hampden County*, 204 Mass. 494, 90 N. E. 851, it was held that under an interpretation of a provision in a contract that a certain percentage should be retained, read in the light of a statute requiring public contracting officers to obtain sufficient security for payment of the contractor and subcontractors for labor performed or furnished and for materials used in the construction or repair of public buildings, etc., third persons having claims for labor and materials furnished the contractor or subcontractor had rights in such fund prior to an assignee of the original contract, 37 L.R.A. (N.S.)

And in *Thorn & H. Lime & Cement Co. v. Citizens Bank*, 158 Mo. 272, 59 S. W. 109, it was held that while a materialman has no legal right to a fund retained by the city under provisions of the contract, yet he has a right derived from the contract between the city and the contractor, on the faith of which credit was extended, to maintain a suit in equity to have such fund appropriated to the uses to which it was designated by the contract, and for which it was received by the city, and as this right is superior to the right of the contractor, it will be superior to the right of an assignee of the fund or judgment creditor of the contractor.

#### Right as against general creditors of contractor.

A percentage of a fund under a contract having been reserved for the payment of materialmen, they have, as to such percentage, paramount equity, and are entitled to have their claims paid out of it in preference to all other creditors on an equitable garnishment proceeding. *St. Louis v. Keane*, 27 Mo. App. 642.

A general creditor of a contractor cannot complain that a municipality exercises the power to withhold certain sums to pay materialmen and laborers as provided in the contract, because of the fact that its exercise was optional; and where, in accordance with the intention of the contractor and subcontractor, a fund was retained for the payment of subcontractors, the transaction will be treated as an equitable assignment of the fund, and will be applied to the payment of those subcontractors, to the exclusion of any other creditors of the original contractor. *Luthy v. Woods*, 6 Mo. App. 67. J. H. B.

signment on the part of the contractors of so much of the fund as might be necessary to pay such debts.

In the case of *Shannon v. Hoboken*, 37 N. J. Eq. 123, the litigation was over a contract for the repaving of a part of one of the streets of the city of Hoboken. It contained this provision: "And the said party of the second part [the contractor] . . . covenants and agrees to promptly pay for all labor done and material furnished on said work, and in case he fails so to do, . . . any money due or to grow due to said party of the second part may be used to pay for such labor and material, and the mayor and common council may order warrants drawn to the order of parties doing work or furnishing material, or may issue certificates to them, for the amounts due them. And the receipts of said parties shall be full discharge for the mayor and common council of the city of Hoboken in settlement with the party of the second part or his sureties." The contractor assigned moneys due him under the contract, and, after the assignment, claims for labor done and material furnished in the performance of the contract were presented to the municipality and payment therefor demanded. These laborers and materialmen claimed that they were entitled to be paid out of the funds in the hands of the city, notwithstanding the assignment, upon the ground that the covenant recited deprived the contractor of the power of transferring his claim. Vice Chancellor Van Fleet, before whom the case was heard, held the claim to be without substance, saying: "The covenant on which it rests merely authorizes the municipality . . . to withhold and appropriate the moneys earned under the contract. No beneficial interest is transferred, nor is the municipality made subject to any duty or liability. Such a covenant . . . does not render the municipality liable either at law or in equity, to the creditors of the contractor, nor does it operate as an equitable assignment of the fund to the creditors." This case subsequently came to this court on appeal, and the decree of the court of chancery was affirmed upon the opinion delivered by the vice chancellor. 37 N. J. Eq. 318.

In *Essex County v. Lindsley*, 41 N. J. Eq. 189, 3 Atl. 391, the litigation arose over a contract for the doing of the mason work of the new lunatic asylum which was being built by the county. The contract provided that "should any person or persons that have furnished materials for, or done any labor or work on, the building herein contracted for, present to the parties of the first part (the board of free-

holders) any claim or claims for such materials, work, or labor, then the said parties of the first part shall have the right to withhold any and every one of the above mentioned payments, until such claim or claims so presented are settled and a receipt for the same delivered to the parties of the first part." The contractor assigned the money due to him under the contract to Lindsley. Subsequently claims were presented to the board of freeholders by laborers and materialmen for work done upon and materials furnished to the building. It was claimed that this provision of the contract operated as an assignment of all moneys earned by the contractor under the contract, for the benefit of such persons as should become the contractor's creditors in consequence of having furnished him with any of the means which he used in performing the contract, and that thereby the board became obligated to hold such funds for the benefit of such creditors until their debts were paid. Vice Chancellor Van Fleet, who also heard this cause, thus disposed of the claim: "I can find, in the language used by the parties, no glimpse of a purpose like that attributed to them by this construction. It is certain that no assignment is made by express words, nor am I able to find, in the language of this provision, the slightest indication that either of the parties supposed that it was possible for anything to occur which, without a further act on the part of . . . [the contractor], would operate to transfer his rights under the contract. His dominion over the money earned under the contract is left just as complete and as absolute as it would have been if this stipulation had formed no part of the contract, except in one event, namely, on the presentation of a claim for material or labor, the board of chosen freeholders shall have the right to withhold any moneys due until such claim shall be paid. They are not authorized to pay, but merely to withhold. . . . [The contractor], however, exercised his right to do with his own as he pleased while his dominion was complete, and before any attempt had been made to impound the moneys in the hands of the board of chosen freeholders. His act in that regard is not in violation of his contract. He has not even promised that he would not collect or assign the moneys earned under the contract. All that he has stipulated is that, on the presentation of a claim for material or labor, the board should, as against him, have a right to withhold, but, until a claim is presented, his power and dominion over the fund remain free and unfettered." Upon this reasoning he concluded that it must be held that the assignment was effectual

to pass to Lindsley whatever rights the contractor had under the contract.

These decisions, we have already stated, are opposed to the contention made by the complainant, and that in the case of *Shannon v. Hoboken* is controlling. The reasoning of these decisions leads to the conclusion that the 10 per centum of the final estimate which is retained under the 8th section of the contract now under consideration passed under the assignment free from any liability to be subjected to a lien which might thereafter be filed with the municipality by a laborer or materialman.

The question whether the municipality may, notwithstanding the assignment to Stewart and Stewart, retain the 10 per centum until satisfactory evidence has been furnished to the board of street and water commissioners that all claims of laborers or materialmen of which notice was given to the municipality have been fully discharged, or until such notices have been withdrawn, is not involved in the present litigation, and we therefore express no opinion upon it.

The decree under review will be affirmed.

#### NORTH CAROLINA SUPREME COURT.

PETER HAYNIE, Admr. of William G. Haynie, Deceased, Appt.,  
v.

NORTH CAROLINA ELECTRIC POWER COMPANY et al.

(157 N. C. 503, 73 S. E. 198.)

**Master — minor employee — violation of agreement as to place of work.**

1. A master who violates his agreement with the parent of a child entering his employ, not to let him leave his working place and go about machinery situated in another part of the plant, is liable to the parent for injury caused to the child by such machinery.

**Same — contributory negligence — effect.**

2. That a boy was negligent and disobeyed orders in going about his master's machinery will not absolve the master from liability to the parent for the boy's death caused by the machinery, if the master failed to use due care and diligence to keep his agreement with the father when the boy was hired out to him, not to let him go about the machinery.

**Evidence — burden of proof — waiver of agreement.**

3. The burden is on a master who is

**Note.** — As to right of parent to recover for injury to minor servant employed without his consent, see note to *Hendrickson v. Louisville & N. R. Co.* 30 L.R.A. (N.S.) 311. 37 L.R.A. (N.S.)

sought to be held liable for the death of a minor employee, because of his violation of an agreement with the parent not to permit the child to go about machinery, to show a waiver by the parent of such agreement, if he relies upon it as a defense.

(December 20, 1911.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Swain County granting a nonsuit in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. Locke Craig, Moore & Rollins, and Jones & Williams for appellant.

Messrs. Martin & Wright, for appellees:

Defendants were not negligent in any particular. The burden is on the plaintiff, first, to show that the defendant was guilty of negligence.

*Hendrix v. Cooleemee Cotton Mills*, 138 N. C. 171, 50 S. E. 561; *Labatt, Mast. & S. § 21*; *Anderson v. Morrison*, 22 Minn. 274.

The death of intestate was caused by his own negligence and disobedience of orders.

*Labatt, Mast. & S. § 363*; *Card v. Wilkins*, 61 N. J. L. 296, 39 Atl. 676; 14 Am. & Eng. Enc. Law, p. 908; *McMellen v. Union News Co.* 144 Pa. 332, 22 Atl. 706; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Texas & N. O. R. Co. v. Crowder*, 61 Tex. 262; *Texas & P. R. Co. v. Carlton*, 60 Tex. 397; *White, Personal Injuries*, § 440; *Nugent v. Kauffman Mill Co.* 131 Mo. 241, 33 S. W. 428; *Chicago, B. & A. R. Co. v. Laughlin*, 74 Kan. 567, 87 Pac. 749; *Mann v. Missouri, K. & T. R. Co.* 123 Mo. App. 486, 100 S. W. 566.

**Brown, J.**, delivered the opinion of the court:

The evidence offered by plaintiff tends to prove that his son, the intestate, aged thirteen years, was killed in the engine room of defendants, situated on the west side of the French Broad river, about July 12, 1910, by falling on the belt connected with the engine. The evidence tends to prove that the boy was employed by defendants Willard & Son as a water carrier for the men engaged on the east side of the river in building a railroad track, and that on the west side of the river were situated all the engines and machinery for blasting and moving rock, etc. The evidence shows that at the time the boy was killed the engineer in charge of the engine was Raymond Turner, aged twenty. The boy was killed by falling on the belt. The belt threw him off between the belt and

the wall. His skull was cracked, his leg broken, and he was mashed to pieces and died in four hours. The boy had often been seen playing around the belt by Turner, the engineer, and Correll, the foreman, and he was notified of the danger, but kept on playing around the belt. The evidence tends to show further that C. R. Willard knew of the boy's conduct, and that the engineer and foreman had repeatedly warned the boy. The foundation of plaintiff's action is the allegation that his son was *non sui juris*, inexperienced, and incapable of appreciating great danger, and, by reason of his youth and inexperience, careless in incurring danger; that he hired his son to defendants to work upon the east side of the river as a water carrier away from the dangerous machinery, and he should be protected from such dangers by the defendants. Plaintiff avers that this agreement was violated by defendants, and his son permitted to go in the engine house on the west side of the river, and to be around and about the machinery, in consequence of which he was killed.

The plaintiff does not base his claim upon any defective machinery, but upon a distinct violation by defendants of the contract of hiring. Upon the allegations of the complaint, the burden rests upon plaintiff to show a breach of the contract, and that it was the proximate cause of his son's death.

The plaintiff testifies that he consented to the employment of his son by defendants for the purpose of carrying water on the east side of the river; that he forbade them to let his son go on the other side, where the machinery was; that the foreman promised that his son would be kept at work on the east side; and that he would see to it.

It is well settled that the father may stipulate as to the kind of work his child may be employed in (unless forbidden by statute), and the consent of the parent that the child may be employed at one kind of labor is not consent that he be placed in another and a more dangerous kind of work. *Braswell v. Garfield Cotton Oil Mill Co.* 7 Ga. App. 167, 66 S. E. 539. Thus, it was held that the fact that a parent hired his son as a "doffer boy" did not authorize the employer to change his work and place him in more dangerous environments. *Hillsboro Cotton Mills v. King*, 51 Tex. Civ. App. 518, 112 S. W. 132; *Hendrickson v. Louisville & N. R. Co.* 30 L.R.A. (N.S.) 311, 137 Ky. 562, 126 S. W. 117. The notes to this case are very instructive and contain many cases illustrating and supporting this view.

37 L.R.A. (N.S.)

The sum and substance of the many cases cited in those notes are that it is a general rule that an employer putting a minor servant, against his parent's consent, to do work by which the child is injured, commits an actionable wrong for which the employer is liable, although there is no other evidence of negligence upon his part. *Union P. R. Co. v. Fort*, 17 Wall. 553, 21 L. ed. 739, and cases cited in Rose's notes annotating this case. And under such circumstances it is also held that the minor servant's contributory negligence is no defense to such action. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 So. 914, and cases cited. As illustrating this doctrine, we may refer to cases in *ante bellum* days, where slaves were hired out to perform certain kinds of work and within certain limits, and the owner was permitted to recover damages for a breach of the contract because of injury to the slave. *Slocumb v. Washington*, 51 N. C. (6 Jones, L.) 357; *Spivy v. Farmer*, 3 N. C. (2 Hayw.) 339.

In the brief of the learned counsel for the defendant it is contended:

1. That plaintiff failed to show that defendants violated any duty to plaintiff's intestate. The evidence, if believed, shows that defendants violated the contract of hiring.

2. That there is no evidence that any act or omission of defendant was the proximate cause of the boy's death. From the evidence it is a just inference which a jury may draw that if the defendants had carried out the agreement and kept the boy away from the machinery, or returned him to his father, the injury would not have occurred.

3. That all the evidence shows that the boy was guilty of negligence and disobedience of orders in going into the engine room, where he was killed. To guard against that was the very reason why the plaintiff restricted his child's employment and required the defendants to confine him to the east side of the river. Under such circumstances, the defendants cannot avail themselves of such defense. *Marbury Lumber Co. v. Westbrook*, *supra*.

We do not mean to hold that the defendants became insurers of the intestate's life; but if the agreement be as testified to by plaintiff, it was the duty of defendants to use due diligence and care to keep him away from the machinery, and at the work he was hired to perform, or else to return him to his father.

It may be that the father waived the terms of the agreement and acquiesced in his son working on the west side of the

river; but the burden would be on defendants to show that, unless the facts appear from the plaintiff's own evidence.

The judgment of nonsuit is set aside.  
New trial.

### TENNESSEE SUPREME COURT.

W. H. HUGHEY

v.

LOUISA WORNER et al., Appts.,

(124 Tenn. 725, 140 S. W. 1058.)

**Husband and wife — separate estate —  
life insurance.**

Insurance money collected by a widow

*Note. — Life insurance policy in favor of married woman or its proceeds as her separate estate.*

Cases like *Houston v. Maddux*, 179 Ill. 377, 53 N. E. 599, involving the question whether the policy or its proceeds are within an exemption statute, are not within the scope of the note. Nor does the note cover the question whether the payment by the husband of the premiums on a policy for the benefit of the wife constitutes a fraud on his creditors, which will enable them to reach the proceeds of the policy or a part thereof. So, the question of a married woman's capacity to assign her interest in a policy of insurance or its proceeds is not covered in this note.

The decision in *HUGHEY v. WORNER*, holding that money received by a married woman from a policy of life insurance upon the life of her first husband was her separate property, is in accord with the general rule, which, under the provisions in favor of married women seems to be that a policy of insurance taken out for the benefit of a married woman, or its proceeds, is her separate estate. This result is reached regardless of whether the policy is issued at the instance of the husband or of the wife.

Thus, in *Williams v. Williams*, 68 Ala. 405, it was held that the title to a policy of life insurance taken out by a husband for his wife's benefit, without her knowledge, and kept in force by him, vested in the wife at the time the policy was issued, and was her separate estate, so that where the benefit exceeded the value of her dower right, it constituted a bar to the assignment of further dower.

And where a statute provides that life insurance policies, when made payable to any married woman, shall be her sole and separate property, and shall inure to her separate use and benefit, a policy upon the life of the husband payable to the wife is her sole and separate property, regardless of the source from which the funds are derived for the payment of the premiums, and the husband has no claim upon the proceeds of the policy, except such as he derives from the 37 L.R.A. (N.S.)

upon the life of her deceased husband becomes her separate estate upon her remarriage, and she may will it free from the claims of her husband.

(November 17, 1911.)

**A**PPEAL by defendants from a decree of the Chancery Court for Shelby County in plaintiff's favor in an action brought to recover from defendants property bequeathed to them by plaintiff's deceased wife. Affirmed in part.

The facts are stated in the opinion.

Messrs. P. H. Phelan, Jr., and Trezevant, Bartels, & Trezevant, for appellants:

The insurance money became the separate estate of Mrs. Hughey, and she was en-

terms of her will. *Perkinson v. Clarke*, 135 Wis. 584, 116 N. W. 229.

And where a statute provides "that any policy of insurance . . . on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by herself or her husband, or any other person on her behalf, shall inure to her separate use and benefit, and that of her children if any, independently of her husband and of his creditors and representatives," the husband cannot make a valid assignment of a policy taken out by him for his wife's benefit, although it is made payable to "his executors, administrators, or assigns," the latter being merely designated as trustees for the wife's benefit. *Stokell v. Kimball*, 59 N. H. 13.

So, where a statute provides that a policy of life insurance may be taken out by a married woman or her husband for her benefit, and that the benefit shall inure to her separate use and benefit, and the whole statute shows that it was intended to provide for the wife after her husband's death, the creditors of the husband and wife cannot subject a policy taken by the husband for his wife's benefit to the payment of their claims. *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094.

And in *Southern L. Ins. Co. v. Booker*, 9 Heisk. 607, 24 Am. Rep. 344, where, by the express provisions of the insurance company's charter, the benefits of a policy of life insurance procured by a husband for his wife's benefit were made her separate property, the court said: "There is much force in the argument that the husband, in procuring a policy upon his own life for the benefit of his wife, is the real party,—that the wife is in reality not known. Yet, it is in the form of a contract with the wife in her own name, for her own benefit, and the husband, in procuring the contract, is treated as her agent; in this respect she is allowed to act as a *feme sole*, and the benefit of the contract becomes her separate right, in this case, by the express provisions of the defendant's charter."

And in *Doull v. Doelle*, 10 Ont. L. Rep. 411, where a widow claimed that the pro-

titled to exercise the same power of disposition over it as a *feme sole*.

Southern L. Ins. Co. v. Booker, 9 Heisk. 607, 24 Am. Rep. 344; Scobey v. Waters, 10 Lea, 562; 21 Cyc. 1370-1371; Gosling v. Caldwell, 1 Lea, 454, 27 Am. Rep. 774.

The wife can, without assent of husband, make valid testamentary disposition of personalty owned as separate estate.

Fettiplace v. Gorges, 3 Bro. Ch. 8, 1 Ves. Jr. 46, 1 Revised Rep. 79; Taylor v. Meads, 4 De G. J. & S. 605, 5 New Reports, 348, 34 L. J. Ch. N. S. 203, 11 Jur. N. S. 166, 12 L. T. N. S. 6, 13 Week. Rep. 394; 2 Kent, Com. 164; Schouler, Wills, §§ 51, 52, pp. 50, 52; 1 Underhill, Wills, § 121, p. 172; Perry v. Gill, 2 Humph. 223; Willi-

ford v. Phelan, 120 Tenn. 597, 113 S. W. 365; Pritchard, Wills, § 86, p. 92.

Mr. James H. Malone, for appellee:

In a settlement of property upon a *feme covert*, if it be the intention to interfere with the marital rights of the husband, that intention must be expressed in the clearest and most unequivocal terms; and if a doubt exists as to such an intention, it must be resolved in favor of the marital right.

Wood v. Polk, 12 Heisk. 222; Eaves v. Gillespie, 1 Swan, 131; Houston v. Embry, 1 Sneed, 489; Meredith v. Owen, 4 Sneed, 228; Handwerker v. Diermeyer, 96 Tenn. 628, 36 S. W. 869; Shugart v. Shugart, 111 Tenn. 183, 102 Am. St. Rep. 777, 76 S. W.

ceeds of a life insurance policy taken out by the husband for her benefit were never owned by her during the lifetime of her husband, and that they could not therefore be considered her separate estate, it was held that such proceeds were her separate property by virtue of a statute enacting that the naming of the wife as beneficiary creates a trust in her favor, and of § 4, chap. 163, Rev. Stat. Ont. 1897, of the married women's property act, the provisions of which do not appear. The wife's attempt to prove that the property was not her separate estate was brought about by a desire to save the property from being taken under a judgment under which only her separate property could be taken.

So, in Hogaboom v. Hill, 8 Ont. W. Rep. 352, it was held that money received as a loan by a married woman on a policy of insurance issued to the husband before marriage, in which the wife was named as beneficiary, after marriage was, as between the wife and the creditors of a firm formed by her husband subsequent to the loan, her separate property.

In Scobey v. Waters, 10 Lea, 562, it was held that where a husband takes out a policy of insurance for the benefit of his wife, it is a provision made for her by the terms of which he excludes himself from the right of control over it, and that it is in the nature of a separate estate in the wife, over which she has the power of disposal.

In Hall v. Levy, 3 Tex. Civ. App. 360, 72 S. W. 263, where a husband had paid money to his wife which he had received from an endowment policy taken out by him for his wife's benefit, and she had loaned a part of the sum to a firm of which her husband was a member, it was held that, as against the creditors of such firm, the money was the wife's separate estate, the decision being placed upon the ground of gift by the husband, and also upon the ground that the proceeds were her separate property independently of the gift.

And there are *dicta* in Pence v. Makepeace, 65 Ind. 345, that a policy of insurance taken out by the husband on his life 37 L.R.A. (N.S.)

for the benefit of his wife is her separate property.

As has already been stated, property of the character under consideration is generally held to be the wife's separate estate, although the wife herself takes out the policy.

Thus, it was held in Weber Loper & Co. v. Paxton, 48 Ohio St. 266, 26 N. E. 1061, that where the wife insured her interest in her husband's life, the contract was her separate property, although the husband paid the premium; and it was held that his creditors had no claim against the policy unless it appeared that the payment of the premiums had the effect of withdrawing funds to which they were entitled.

So, in McQuitty v. Continental L. Ins. Co. 15 R. I. 573, 10 Atl. 635, it was held that a policy of insurance taken out by a married woman upon her life, which had an endowment feature, was within the purview of a statute providing that any policy of insurance which should not exceed \$10,000 made by an insurance company on the life of any person, and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, should inure to her separate use and benefit, independently of her husband and of his creditors and representatives.

But it was held that, independently of this section, under other general provisions regulating the rights of married women, which do not specifically appear, a married woman could invest money which was a part of her separate estate in life insurance, and might therefore effect a valid policy. *Ibid*.

And in Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio St. 292, it was held that where the general law in relation to life insurance gave a married woman the right in her own name, "from her separate property, to cause to be insured for her sole use the life of her husband," and the act incorporating a company gave it power to issue a policy on the husband's life to a married woman in her name, and for her sole benefit, free from the claims of the husband's creditors, a policy issued to a married



821; Williford v. Phelan, 120 Tenn. 600, 113 S. W. 365.

A policy of insurance on the life of the husband for the benefit of the wife forms no exception to the marital rights of the husband.

Southern L. Ins. Co. v. Booker, 9 Heisk. 618, 24 Am. Rep. 344; Scobey v. Waters, 10 Lea, 551; Handwerker v. Diermeyer, 96 Tenn. 628, 36 S. W. 869.

Nell, J., delivered the opinion of the court:

In this case there was a controversy between the surviving husband and the sister of his deceased wife over certain items of personal property, consisting mainly of jewels and an insurance fund belonging to the wife, which she had deposited in bank. This fund had arisen under a policy which had been effected on the life of her first husband. The wife left a will by which she attempted to bequeath all of her property to her sister, to the exclusion of the husband, and he brought his bill in the Shelby county chancery court to have his rights declared and to recover the property. The chancellor decreed in favor of

woman in pursuance of these provisions was her separate property, and was beyond the reach of the husband or his creditors.

The English decisions upon the question under consideration are not in entire harmony.

In *Ex parte Dever*, L. R. 18 Q. B. Div. 660, 56 L. J. Q. B. N. S. 552, where, upon application of the husband acting for his wife, a policy was issued payable to the wife for her sole use, the master of the rolls expressed his opinion that the amount withdrawn by the wife was her separate property; but Bowen, L. J., and Fry, L. J., expressed a contrary opinion, but all agreed that it was not necessary to decide the point in the case before them.

In *Re Adam's Policy Trusts*, L. R. 23 Ch. Div. 525, 52 L. J. Ch. N. S. 642, 48 L. T. N. S. 727, 31 Week. Rep. 810, where the policy was made for the benefit of insured's wife and children, the court expressed an opinion that, by virtue of the words "separate use" in the married women's property act, the wife took a life interest only, with remainder to the children, but as the wife predeceased the husband, it was not necessary to decide the point.

In *Re Seyton*, L. R. 34 Ch. Div. 511, where a policy upon the husband's life was taken out for the benefit of his wife and children, it was held that the widow and children took the benefit as joint tenants, notwithstanding that the benefit to the wife was expressed in the married women's act to be for her separate use. The court said: "But even if the act and policy are to be read together as one declaration of trust, I am unable to assent to the view that the wife

the husband as to all of the property, and from this decree the defendant appealed.

The rights of the parties should be settled upon the following principles:

1. Leaving out of view all other grounds, we are of the opinion that the insurance money or fund in question, deposited in bank, belonged to the wife as her separate estate, in the very nature of the property, arising, as it did, from an insurance effected on her first husband's life in favor of the wife. *Prima facie* such insurance was procured by the husband, or with his consent, as a settlement on the wife. We cannot suppose that she would raise such a fund on the life of her husband without his knowledge and consent. That such a fund is separate estate, see the following authorities: *Scobey v. Waters*, 10 Lea, 562, 563; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 607, 24 Am. Rep. 344; 21 Cyc. pp. 1370, 1371. And see *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; 21 Cyc. p. 1370.

2. Being separate estate, the *jus disponendi* would exist, and the wife could dispose of it by will, so as to defeat the right which the husband would have to

takes the whole fund for life, with remainder to her children. It cannot be doubted, I think, that if the trust expressed on the face of the policy was 'for the benefit of my wife and our children as joint tenants,' or if it was 'for the benefit of my wife for life, with remainder to our children,' each would be equally within the act, and would be a good declaration of trust; and if each of those constructions of the words, 'for the benefit of my wife and our children,' is equally within the act, I do not see how the act can supply reasons for preferring one construction rather than the other. One of the reasons which led Mr. Justice Chitty to the view he took in *Re Adam's Policy Trusts*, supra, was that the benefit to the wife was expressed in the act to be for her separate use. I do not see how that throws any light upon the point under consideration; if those words were added to each of the phrases I have just mentioned, this would be wholly ineffectual to alter their construction."

And this case was followed in *Re Davies, Policy Trusts* [1892], 1 Ch. 90, 61 L. J. Ch. N. S. 650, 66 L. T. N. S. 104, where the proceeds of a policy taken out by the husband under the provisions of the married women's property act, for the benefit of his wife and children, were held to be the property of the widow and children as joint tenants.

For a note on widow's right to proceeds of insurance on deceased husband's life, payable to himself or his executors or administrators, see *Burdett v. Burdett*, 35 L.R.A. (N.S.) 965.

J. T. W.

succeed to it as husband, if it were not so disposed of. *Fettilplace v. Gorges* (1789) 3 Bro. Ch. 8; a. c. 1 Ves. Jr. 46, 1 Revised Rep. 79; *Taylor v. Meads*, 4 De G. J. & S. 507, 605, 5 New Reports, 348, 34 L. J. Ch. N. S. 203, 11 Jur. N. S. 166, 12 L. T. N. S. 6, 13 Week. Rep. 394; *Schouler, Wills*, 1st ed. § 51; *Underhill, Wills*, § 121, p. 172. And see our own cases as follows: *Perry v. Gill*, 2 Humph. 218, 223; *Williford v. Phelan*, 120 Tenn. 589, 597, 113 S. W. 365; also *Pritchard, Wills*, § 86, p. 92.

3. The case of *Hays v. Bright*, 11 Heisk. 325, interposes no objection. The settlement under consideration in that case confined the power of disposition to sale. This necessarily excluded the power of disposition by will.

4. The cases of *Hamrico v. Laird*, 10 Yerg. 222; *Brown v. Brown*, 6 Humph. 127; *Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 869; and *Weakley v. Woodard*, 2 Tenn. Ch. App. 589-590, likewise interpose no objection. These were cases wherein it appeared the wife died intestate. The law is clear that the husband will in such cases take her separate property, unless the instrument creating it cuts off his right beyond her death.

5. Although the insurance was collected on a policy issued on the life of a former husband, and the quality of separate estate usually ceases, or is suspended during widowhood, yet, upon the occurrence of a subsequent marriage, it revives. *Pooley v. Webb*, 3 Coldw. 603; *Beaufort v. Collier*, 6 Humph. 492, 44 Am. Dec. 321; *Shouler, Husb. & W.* § 197.

6. The chancellor's decree was erroneous as to the insurance money deposited in bank, and will be reversed to that extent. As to the other personal property, the decree will be affirmed.

7. Divide the costs equally.

#### WASHINGTON SUPREME COURT. (Department No. 1.)

MABEL J. MORIN, Resp.,

v.

SAUL J. MORIN, Appt.

(66 Wash. 312, 119 Pac. 745).

#### Divorce — custody of child — presumption of unfitness — overcoming.

1. The presumption of unfitness on the

Note. — MORIN v. MORIN seems to be a case of first impression on effect of insanity of parent to whom custody of child has been awarded upon right of other parent, as an extended search has failed to 37 L.R.A.(N.S.)

part of a father for custody of his child, raised by refusal of the court to award it to him upon granting a decree of divorce against him, is overcome by evidence of exemplary life for nine months after the passing of the decree, where there is nothing to show the nature of the unfitness upon which the court acted.

#### Same — insanity of mother — rights of grandparents.

2. Parents of the mother of a child, who are given temporary custody of it as agents of the court upon its granting her a divorce against its father, have no right to its continued custody as against the claims of the father, after the mother becomes insane.

(December 20, 1911.)

**A**PPEAL by defendant from an order of the Superior Court for Kitsap County denying his petition for the modification of the part of a decree divorcing plaintiff from him which deprived defendant of the custody of their child. Reversed.

The facts are stated in the opinion.

Messrs. **Kerr & McCord** and **W. L. Read**, for appellant:

Defendant has the natural and legal right to the custody and control of the child, unless so completely unfit for such duties that its welfare imperatively demands another disposition of its custody.

*Re Neff*, 20 Wash. 655, 56 Pac. 383; *Terry v. Johnson*, 73 Neb. 653, 103 N. W. 319; *Norval v. Zinsmaster*, 57 Neb. 159, 73 Am. St. Rep. 500, 77 N. W. 373; *Clarke v. Lyon*, 82 Neb. 625, 20 L.R.A.(N.S.) 171, 118 N. W. 472; *Baker v. Durham*, 95 Ark. 355, 129 S. W. 789; *Re Robinson*, 17 Abb. Pr. 399; *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729; *Re Blackburn*, 41 Mo. App. 622; *Farrar v. Farrar*, 75 Iowa, 125, 39 N. W. 226; *Hopkins v. Hopkins*, 39 Wis. 167; *Welch v. Welch*, 33 Wis. 534; *Eckhard v. Eckhard*, 29 Neb. 457, 45 N. W. 466.

Mr. **James W. Carr** for respondent.

**Parker, J.**, delivered the opinion of the court:

This is a controversy over the custody of a child now about eight years old. The defendant, the father of the child, has appealed to this court from an order of the superior court for Kitsap county, denying his petition for the modification of the decree rendered by that court, May 20, 1910, in this case, divorcing the plaintiff from him, in so far as that decree deprived him of the custody of this child. The only por-

disclose any other authorities. As to effect of death of parent to whom custody of a child has been awarded upon right of surviving parent, see note to *Clarke v. Lyon*, 20 L.R.A.(N.S.) 171.

tions of the divorce decree brought here by this record relate to the monthly allowance for support of the plaintiff and the child and to the custody of the child. It is apparent, however, from other parts of the record before us, that the divorce was granted upon the ground of the cruelty of the defendant to the plaintiff. By the terms of the decree, the child was to remain the ward of the court until further order, and the court then placed it in the temporary custody of its grandparents, the father and mother of the plaintiff. This was done evidently upon the theory that the father was not a proper person to care for the child because of his acts of cruelty to the mother, and that the mother was not a proper person to have the custody of the child because of her then weakened mental condition. The placing of the child in the custody of the grandparents did not deprive the mother of its society, since she was then, and expected to continue, living with the grandparents, to whom the support money, both for her and the child, was by the decree directed to be paid. The decree gave the defendant the right to visit the child and to have the child visit him at reasonable times. Thereafter, in July, 1910, the plaintiff was adjudged insane by the superior court for Kitsap county, and committed to the Western Washington Hospital for the Insane, at Steilacoom. Thereafter defendant filed his petition for the custody of the child, and to be relieved from paying to its grandparents the allowance for its and the mother's support. The court then appointed James W. Carr as guardian *ad litem*, to represent the plaintiff upon the hearing of the petition, and thereupon an answer to the petition was filed by him. On March 9, 1911, over nine months after the rendering of the original decree denying the defendant the custody of the child, the issues thus made came on for trial. We note the length of this period between the granting of the original decree and this hearing, because it is upon the conditions existing during this period that the rights of the defendant to the child largely depend. That is, he must show such changed conditions and meritorious qualifications on his part, after the date of the decree, to properly care for the child, as will overcome the presumption against him to the contrary from the decree at the time of its rendition.

The evidence produced upon the hearing has all been brought here by statement of facts, and from it the following appears: The defendant has a good home in a good residence district in the city of Seattle. This home consists of a well-equipped residence which, with the grounds and his shop on the back part thereof, is worth from \$12,37 L.R.A. (N.S.)

000 to \$15,000, and is within a short distance of a public school. He has lived in this home for many years. It represents the accumulation of his frugality and industry as a mechanic and a manufacturer, in a small way, of a saw filing and setting device, which is his own invention. His wife lived at this home with him until the separation, when she went to the home of her parents in Kitsap county, and soon thereafter commenced this action for divorce. After the separation, he had a middle-aged woman at his home as housekeeper, who, as such, took care of his home for about six months. This woman testified to his good behavior and kindly disposition, especially to his kindly treatment of his child, it being there to visit the father for several days at one time during that period. She also testified that he was a liberal and good provider for the home. This housekeeper ceased to work for the defendant upon his niece coming to live with him, which was about the last of August, 1910. Thereupon his niece became his housekeeper, and has remained such ever since. She is a young woman about twenty years old. She is the oldest of a family of several children, and has had considerable experience in assisting in the care and raising of her younger brothers and sisters. It is very evident from the testimony of her neighbors, who are well acquainted with her, that she is a very competent housekeeper, and would be a suitable person to assist in the care of the child. The arrangement between her and the defendant seems to contemplate that she stay with him indefinitely. A nephew of the defendant also lives with him. These three live together as a family. This niece testifies that the defendant is of kindly disposition, and that he provides well for his home. Also that he spends his time at his home when not at his work. Two other women who live near the defendant, and who are evidently quite well acquainted with him and his niece, testify to his kindly disposition towards the members of his family, and also to the competency of his niece as a housekeeper and one suited to assist in the care of his child. Three men who are well acquainted with the defendant and of his habits generally, though not knowing much of his home life, testify that he is industrious and temperate, and of good reputation. All of this testimony, touching the habits, disposition, and mode of life of the defendant, relates to his conduct since the granting of the decree of divorce, when he was deprived of the custody of his child. It is plain from the whole testimony that he loves his child very much, and that the child has an equal affection for him. At the time of the hearing, the mother was

still in the hospital for the insane, and the child in the custody of its grandparents. During the taking of the testimony upon this hearing, counsel for the defendant attempted to show the suitability of the defendant to have the custody of his child, by showing his disposition and mode of life as it existed prior to the granting of the divorce; but upon objection of the guardian *ad litem* for the plaintiff, the court declined to receive evidence so showing. There was no competent evidence offered in contradiction of these witnesses.

In order, then, to determine the defendant's right to the child at this time, we have the changed condition of the plaintiff, who is no longer in a condition that she can possibly have the comfort and society of her child, and the undisputed evidence of these witnesses, which, standing alone, clearly shows the fitness of the defendant to have the care and custody of his child. Were it not for the presumption arising against him from the decree of the divorce, in effect adjudging that he was not at that time a suitable person to have the custody of the child, there would now seem to be no question whatever as to his rights in that regard. It is not an easy matter to measure the weight of the presumption against the defendant as to his fitness to have the care of his child, arising from the decree adjudging him to be unfit at the time of its rendition. Of course, that is not a presumption which he could overcome by good conduct on his part for a short period of time following the entry of the decree; but it seems to us that his good conduct of the nature undisputably shown by this evidence, covering a continuous period of nine months following the entry of that decree, is sufficient to overcome the presumption arising against him from the decree at this time, giving to that decree every presumption it is entitled to as establishing his unfitness at the time of its rendition. We are not advised of the nature of the defendant's shortcomings at and prior to that time. At the instance of the guardian *ad litem*, the court closed the door to inquiry by defendant's counsel upon that question. Under such circumstances, we are not justified in presuming that plaintiff's faults were so serious that they have not become cured by this nine months of good conduct, at least sufficiently to call for a modification of the decree in that particular.

The guardian *ad litem* seems to wage this contest, in some degree at least, upon the theory that these grandparents have some right to the custody of this child. This is wholly untenable. They were only given the custody of the child as the agent of the court, and even then only temporarily, with

the full knowledge that the child might be taken from them at any time. The legal right of the father to the custody of this child, since the mother is insane, and therefore cannot enjoy its society, is beyond question, unless the father is clearly unfit to have its custody. As was said in *Re Neff*, 20 Wash. 652, 655, 56 Pac. 383, 384: "He has the natural and legal right to the custody and control of the children, unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody." In this case the grandparents have the custody of the child by authority of the order of the court, not because of any inherent right they possess to have such custody. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 43 Am. St. Rep. 839, 37 Pac. 660; *Carey v. Hertel*, 37 Wash. 27, 79 Pac. 482. Of course, it cannot be seriously contended that this is not an open question. It would be so, even though the decree of divorce had not disposed of the child temporarily. The possibility of changed conditions after such a decree necessarily leaves the custody of children an open question.

No one can read the testimony in this record, relating to the habits and disposition of this defendant during the nine months following the rendition of the divorce decree depriving him of the custody of this child, without concluding that he is suitable in every way to have its custody and rearing, unless it can be said such showing is overcome by the presumptions against him arising from the decree, holding that then he was not suitable to have the child's custody. We think that this showing so clearly overcomes that presumption that the learned trial court was in error in declining to modify the decree as prayed for. We do not mean a modification now made in conformity with these views shall close the question of his suitability to have the custody of the child any more than the decree of divorce closed the question as against him. Should the wife become cured of her present affliction, so that it becomes practical for her to enjoy the society of the child, it may be that her rights will then call for another change. Or, should the defendant become unsuitable, that may also call for another change. But, as conditions existed at the time of this hearing, with no one having an inherent legal right to the child other than defendant, and his suitability therefor being shown as we have indicated, we are of the opinion that he should be awarded the custody of the child, subject to such changes as subsequent events may dictate.

The order of the learned trial court is reversed, with directions to proceed in con-

formity with this opinion. The defendant will be relieved of the burden of paying allowance to the grandparents, except for the period the child remains in their custody. In view of the circumstances of this case, the defendant will recover no costs upon this appeal, and will pay to the guardian *ad litem* the costs incurred by him upon this appeal, including an attorney's fee of \$50.

Dunbar, Ch. J., and Mount, Fullerton, and Gose, JJ., concur.

#### ALABAMA SUPREME COURT.

CENTRAL OF GEORGIA RAILWAY COMPANY, Appt.,  
v.

MRS. R. A. JONES.

(170 Ala. 611, 54 So. 500.)

**Evidence — amount of damages — opinion.**

A passenger deprived of the use of his

*Note. — Right of owner of baggage to testify as to its value in an action for its loss.*

An observer, after detailing such facts as fairly exhaust his power of statement, may, if sufficiently familiar with property to make his inference relevant, state his estimate of its value. 17 Cyc. 108.

Few cases like that of CENTRAL R. Co. v. JONES, involving the objection to opinion evidence, have been found which pass upon the question of the right of the plaintiff or owner to testify as to the value of the articles lost. The cases which do determine this question hold with the JONES CASE, that the evidence is admissible as against the objection mentioned.

A witness need not be an expert in order to testify to the value of articles of jewelry taken from baggage, and he may testify if he has any knowledge of such value. Central R. Co. v. Wolff, 74 Ga. 664.

So, parties who have examined clothing which has been injured through the negligence of a carrier of baggage, and who are familiar with the value of such articles, may state their opinions as to the proportion of damage done by the injury. Withey v. Pere Marquette R. Co. 141 Mich. 412, 1 L.R.A. (N.S.) 352, 113 Am. St. Rep. 533, 104 N. W. 773, 7 A. & E. Ann. Cas. 948.

In Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303, involving an action for a loss of baggage containing wearing apparel, the court declared that there was no market value for such property, and that in such case the opinions of witnesses familiar with the facts, together with the facts and conditions, are admissible, to be judged by the jury, and that therefore the plaintiff could testify what

baggage by the carrier's negligence may, in an action to hold the carrier liable for the damages thereby caused him, state to the jury what the possession of the baggage would have been worth to him during the time of delay.

(February 2, 1911.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover damages for delay in the delivery of baggage alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. London & Fitts, for appellant: Plaintiff's opinion as to the amount of damages sustained was inadmissible.

Young v. Cureton, 87 Ala. 727, 6 So. 352; Chandler v. Bush, 84 Ala. 102, 4 So. 207; Montgomery & W. P. R. Co. v. Varner, 19 Ala. 185; Hames v. Brownlee, 63 Ala. 277; Alabama & F. R. Co. v. Burkett, 42 Ala. 83; Louisville & N. R. Co. v. Landers, 135 Ala. 504, 33 So. 482; Brandon v. Progress Distilling Co. 167 Ala. 365, 52

the value of the use of the articles would have been to her during the delay in delivery, for the purpose of assisting the jury, although the testimony would not be binding upon them.

So, in Ft. Worth & R. G. R. Co. v. McCarty, 42 Tex. Civ. App. 514, 94 S. W. 178, it not appearing that the strict rule of market value could be made to apply to the articles lost, the court held that the plaintiff's wife, who accompanied the baggage, might testify as to the value of the articles; and this as against the objection that her testimony failed to show that she was qualified to speak as to the market value, and failed to show that the articles lost were secondhand goods, so as to warrant the application of any other rule than that of market value.

In some of the cases which arose before the passing of the rule forbidding a party to be a witness in his own cause, it was objected that this rule would be violated by the admission of testimony of the kind involved in this note; and there was a conflict of opinion as to whether the objection should prevail.

The Massachusetts court has held that although the plaintiff has no other evidence on the question, he cannot testify as to the contents and value of baggage lost through negligence, since such a case comes within the rule forbidding a party to be a witness in his own case. Snow v. Eastern R. Co. 12 Met. 44. The court declared that the exception to the rule, which permits the owner to testify in case of robbery, upon the ground of necessity in that he alone has knowledge of the facts, does not apply in the case of the loss of baggage through negligence.

And in Garvey v. Camden & A. R. Co.

So. 640; *Staples v. Steed*, 167 Ala. 241, 52 So. 646.

Messrs. Gaston & Pettus for appellee.

Mayfield, J., delivered the opinion of the court:

This was an action by a lady passenger against a common carrier, to recover damages sustained by her on account of the carrier's delay in delivering her baggage, in violation of its duty to promptly deliver the same in accordance with its contract of carriage. The only damages sought were those in consequence of the delay in delivery. The period of delay was about ten days in length.

Plaintiff, by her contract, was a passenger from Birmingham, Alabama, to the city of New York. Her route as per her contract with appellant was from Birmingham, Alabama, to Savannah, Georgia, over the appellant's line of railroad, and from Savannah to New York by a steamer. The appellant's agent sold her a through ticket, which included, as incident thereto, the carriage of her baggage, which con-

sisted of her wearing apparel for her trip and her visit to New York. In consequence of the delay in delivering her baggage, she was without change of necessary dress for ten days, except such as she of necessity had to purchase or obtain elsewhere. The evidence tended to show that she suffered some damages, such as physical pain, inconvenience, and mental worry, on account of the failure to deliver her baggage promptly.

During the examination of plaintiff as a witness in her own behalf, her counsel propounded to her the following question: "What would these goods in your baggage have been worth to you the time you were out of the use of your baggage?" To this question the defendant objected, on the ground that it was a question for the jury, and not for the witness's opinion. The court overruled the objection and allowed the witness to answer. The correctness of this ruling is the only assignment of error insisted on in argument. The witness answered that in her judgment it was about \$500.

4 Abb. Pr. 171, 1 Hilt. 280, following the last case, it was held that necessity alone does not justify making an exception to the rule and that, to make the testimony as to value admissible, there must be fraud, mere negligence not being sufficient.

In *Johnson v. Stone*, 11 Humph. 419, it was held that the rule should not be extended beyond actual necessity, and that it should be confined to such articles as are embraced within the general name of "baggage."

And it is held in *Whitesell v. Crane*, 8 Watts & S. 369, that on the ground of necessity the plaintiff was competent not only to specify the articles contained in the trunk, but to prove the value of them. The court said that the value of merchandise, bearing, as it does, a determinate price in the market, might be more readily estimated from description than the more uncertain value of clothing in every degree of wear, which the owner would be better able to estimate than a disinterested witness, who must, after all, found his judgment on the description which the owner may choose to give; and that since it is as easy to give a false description as to overstate the value, the plaintiff's testimony as to the latter should be admitted.

But the Ohio court has taken the view that the doctrine of necessity should be extended so as to entitle the owner to testify as to the contents and value of his lost baggage; but it was stated that there was no intention to carry the principle further than to such articles as are ordinarily carried in a traveling bag or trunk, and the whole opinion discusses the matter from the standpoint of wearing apparel. *Mad River & L. E. R. Co. v. Fulton*, 20 Ohio, 318.

37 L.R.A. (N.S.)

And the Alabama court, disapproving *Snow v. Eastern R. Co.* supra, goes still further and holds that where baggage is lost by the carrier, the owner is, *propter necessitatem rei*, entitled to testify as to the contents and value. *Douglass v. Montgomery & W. P. R. Co.* 37 Ala. 638, 79 Am. Dec. 76.

It is held in Illinois that the law permits a party to be a witness in his own cause for the purpose of proving the contents and value of baggage, where he cannot adduce other evidence of these facts; but that where it is clear that the value could have been proved by another, and that no effort to do so was made, the plaintiff's own testimony on the subject cannot be admitted. *Parmelee v. McNulty*, 19 Ill. 556.

The rule of the last case was applied in *Davis v. Michigan S. & N. I. R. Co.* 22 Ill. 278, 74 Am. Dec. 151, in which the court held the plaintiff not entitled to testify as to the value of the contents of the trunk, since by a description of them any dealer in those articles could have established their value. This is held to be such "other evidence" as obviates the necessity for testimony of the plaintiff on the point, and therefore renders his testimony inadmissible. *Illinois C. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois C. R. Co. v. Taylor*, 24 Ill. 323.

It was held in *La Compagnie Generale Transatlantique v. Persaglio*, 91 C. C. A. 610, 165 Fed. 638, that a steerage passenger, the value of the clothing of whose family did not admit of very accurate proof, might, in an action for the loss thereof against the steamship company, testify as to the value of the clothing, notwithstanding it appeared that his wife bought the articles and that he could not tell the

It was at an early date ruled in this state that a witness should not be allowed to state his opinion as to the amount of damages the plaintiff or the witness sustained, or was entitled to recover, in consequence of a given act or omission, the basis of the suit. *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185. In that case the witness was allowed to testify as to the amount of damages done to land by the construction of a railroad thereon. This was held error. This rule has been applied to a great number of subsequent cases, some of which were actions for personal injuries, some for injuries to live stock, and some actions *ex contractu*, as for breaches of contracts. In the case of *Young v. Cureton*, 87 Ala. 727, 6 So. 352, it was ruled that a party could not testify as to the amount of damages he sustained by the breach of the contract on which he had sued. The reason assigned for the rule is that to allow such statements would be to substitute the witness's opinion or conclusion for that of the jury, whose exclusive province it is to draw the inferences and conclusions from the facts and circumstances in evidence.

The general rule, of course, is that witnesses must depose to facts, and cannot be allowed to give their opinions founded on these facts, or the inferences or deductions which they draw from them. To this general rule, however, there are many exceptions, as where the subject involves expert evidence, questions as to value, etc.

prices she paid, although he gave her the money.

And in *Parmelee v. Raymond*, 43 Ill. App. 609, the court disposed of the objection that the plaintiff was not competent to testify as to the value of the articles lost, with the statement that they were mostly toilet articles and wearing apparel in common use, and that everyone is presumed to know the value of articles in common use, and it is not necessary to call a dealer to testify as to the worth of such things. This case is not very strong on the point, and becomes less so when it is noted that the court had previously declared in its opinion that some evidence was admitted which ought not to have been, but that the plaintiff was clearly entitled to a verdict for some amount, and that the evidence properly admitted fairly warranted the verdict rendered. This case was followed without discussion in *Hebard v. Riegel*, 67 Ill. App. 584, holding that the plaintiff was presumed to know the value of the trunk and contents, and that therefore she could testify thereto.

It was declared in *Block v. The Trent*, 18 La. Ann. 664, that testimony of the plaintiff as to the contents and value of a trunk lost by a carrier, while admissible in 37 L.R.A.(N.S.)

1 Greenl. Ev. §§ 440 et seq.; 1 Whart. Ev. §§ 509 et seq.

Mr. Greenleaf says that the "opinion rule" of evidence is based on the thought that the opinion is superfluous and unnecessary, and should not be brought into the case, because, if the opinion of that witness is allowed, then all persons having the same knowledge as the witness could be brought in to state their opinion, and the trial would thus be encumbered, without adding any essential data not already before the jury.

Mr. Wharton says: "When we enter on the discussion of the admissibility of opinion, we strike a topic which is embarrassed by much ambiguity of terms." Anyone who will attempt to examine the texts and adjudicated cases on this subject will be overwhelmed not only as to "ambiguity of terms," but also as to the direct conflict of opinions and decisions upon the subject. The condition of the authorities on the subject is little better than a state of anarchy. There are, however, some abstract principles of law and of evidence as to which the authorities all agree, and which may be looked to in passing upon the question of opinion evidence in concrete cases. Among these are that, when the opinion sought is a mere "shorthand rendering" of the facts, then the opinion can be given, subject to cross-examination as to the facts upon which it is based; that when language is inadequate to state the facts of a concrete case to the jury, and they can

common-law proceedings under proper limitations, is prohibited by the provisions of the Louisiana Code.

In *Nolan v. Ohio & M. R. Co.* 39 Mo. 114, the question was governed by an early statute providing that when baggage has been lost, the owner shall recover the value thereof, and may himself be a witness to prove the contents and their value.

In *Battle v. Columbia, N. & L. R. Co.* 70 S. C. 329, 49 S. E. 849, the objection that the plaintiff should not have been allowed to testify as to the contents of the trunk was disposed of merely with the remark that the objection was made under a misconception of the facts, as the trial court ruled that while the plaintiff could not testify as to the contents, it permitted him, after his wife, in whose possession the trunk was at the time of the loss, had testified as to the contents, to testify as to the value of the articles therein contained.

As to the admissibility of opinion of a witness as to the damaging effect of libel or slander, see the note in 35 L.R.A.(N.S.) 1119.

As to the right of one to testify as to his intent, see the notes in 34 L.R.A.(N.S.) 323, and 23 L.R.A.(N.S.) 367.

L. A. W.

be described only by the effect produced upon the mind of the witness, his opinion may be rendered. A witness may testify that he loaned a slave. A loan is a fact, a compound one, and not a conclusion. *Cole v. Varner*, 31 Ala. 249. Likewise, it is not necessary for a witness to be an expert to enable him to give his opinion as to a matter depending upon special knowledge, when he states the facts upon which he bases his opinion. But the rule, as before stated, is different as to matters upon which the jurors themselves can form opinions if the facts or data are given them.

This court has said that the most ignorant witnesses may be permitted to state the fact of disease, when open to the perception of the senses (*Milton v. Rowland*, 11 Ala. 732); that the apparent condition of the physical system as to health or sickness is certainly a matter of fact (*Bennett v. Fail*, 26 Ala. 605). In such cases, if the observations of the witnesses do not justify their assertions, it is the office of a cross-examination to show this. *Blackman v. Johnson*, 35 Ala. 255; *Barker v. Coleman*, 35 Ala. 221.

Though a nonexpert witness would not be allowed to testify that a patient had malarial or typhoid fever, yet he could testify that a person was ill or had fever. *Dominick v. Randolph*, 124 Ala. 562, 27 So. 481.

At one time opinion evidence as to value was not admissible; but that rule has now been departed from, says Mr. Greenleaf, except by the court of New Hampshire. 1 Greenl. Ev. §§ 441, 442. Witnesses who have sufficient knowledge of the facts may testify as to the value of property. In fact, one of the reasons assigned why a witness should not be allowed to testify as to the amount of damages done to land or personalty, or that resulted from the breach of the contract, is that the witness should be required to testify as to the value of the property before and after, or without and with the injury or wrong complained of. *Hames v. Brownlee*, 63 Ala. 277; *Ladd v. Ladd*, 121 Ala. 583, 25 So. 627; 3 Mayfield's Digest, pp. 492, 493.

While the evidence offered and allowed in this case was not as to the value of the goods, but was as to the value of the use of same during the time they were wrongfully kept from the plaintiff by the defendant, which was the basis of the cause of action, this evidence we think was admissible, and not subject to the objection interposed by the defendant.

The evidence allowed in this case we deem much freer from objection than similar evidence held proper in the case of *South & North Ala. R. Co. v. McLendon*, 37 L.R.A. (N.S.)

63 Ala. 266. That was an action to recover damages for personal injuries, including loss of time, etc. In that case the court, speaking through Stone, J., said: "Some of the answers of the witnesses are clumsily expressed; but, properly construed, we think they are free from error. We note the following: 'In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and she had been injured \$50 within the four months next after the fall from the mare, by reason of and in consequence of the hurts caused by the fall from the mare.' This is, in substance, an assertion that her labor during that time would have been worth \$50. *Parker v. Parker*, 33 Ala. 459."

On these authorities we hold that there was no error in allowing the question objected to, nor in the refusal to exclude the answer.

It is argued in this case that the question and answer substituted the opinion of the witness for that of the jury as to the amount of damages. The record answers this argument, by showing that the witness testified that the value of the use of the goods was \$500, while the jury found only \$150.

Affirmed.

Dowdell, Ch. J., and Anderson and Sayre, JJ., concur.

#### CONNECTICUT SUPREME COURT OF ERRORS.

MARY J. ATWOOD et al.

v.

FRANK G. ATWOOD, Appt.

(84 Conn. 169, 79 Atl. 59.)

#### Evidence — opinion — condition of sick person.

1. A nonexpert familiar with the facts may express the opinion that, on the day when a deed was signed by a sick person, he was so ill as to be "beyond asking him anything, and in a condition to know nothing really."

#### Evidence — unresponsive answer — materiality.

2. An answer which is relevant and material to the issue, although unresponsive,

*Note. — Opinion evidence by nonexpert as to the contractual or testamentary capacity of another.*

The cases relating to such evidence from attesting witnesses have been excluded. The subject excludes expert evidence, and thus the cases relating to the testimony of physi-



should not be stricken out when the witness is competent.

**Appeal — unresponsive evidence — cumulation.**

3. It is not prejudicial error to refuse to strike out unresponsive evidence, if it subsequently comes in, in due course, from other witnesses.

**Evidence — opinion — condition of sick person.**

4. A witness may state that a person who signed a deed while ill was not capable of doing business or making any contract or agreement, as an opinion as to general mental condition and the degree of mental incapacity.

**Same — knowledge of facts — materiality.**

5. Testimony of one alleged to have con-

veyed real estate while ill, that he did not learn of the conveyance until a short time before beginning action to set aside the deed, is material on the question of his mental incapacity to execute the deed.

**Same — grantor's declaration — absence of deed.**

6. One alleged to have conveyed real estate while ill is not estopped by the deed to testify that he gave no paper or any kind of deed, as bearing on the question of his mental capacity at the time; nor is the evidence immaterial upon that issue.

(March 8, 1911.)

**A** PPEAL by defendant from a judgment of the Superior Court for New Haven County in plaintiffs' favor in a suit to set

cians have been excluded, notwithstanding some such cases examined seemed to indicate that the physician was regarded as occupying the same position as a nonprofessional witness.

The function of a witness is to state facts, rather than opinions and his inference that a fact exists because he has formed in his mind, by a process of reasoning, an affirmative impression as to its existence, is in most connections excluded. 17 Cyc. 25. Such opinion evidence involves mixed questions of law and fact. The position of the courts that exclude such evidence is well stated in *Walker v. Walker*, 34 Ala. 469, a case relating to the testimony of a physician,—a class of cases in general excluded from this note,—as follows: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises, hence it is improper to ask and obtain the opinion of even a physician as to the capacity of anyone to make a will. Under our system that question was addressed to the jury."

And in *Fairchild v. Bascomb*, 35 Vt. 398, another case involving medical testimony, the question is discussed as follows: "What is sufficient capacity to transact business or to make a will is a matter of law, depending somewhat upon the nature of the business. A witness may not correctly apprehend the rule of law, and if he uses such expressions, may be misled himself or may mislead the jury. Hence, the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter."

On the other hand, such evidence has been regarded as a manner of stating the degree of mental capacity, and as such receivable. This position is well stated in *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826, *infra*, as follows: "In the case at bar the question, 'Was Mrs. Spencer capable of making a deed of land?' may be fairly regarded as calling either for an opinion as to her legal capacity to make a deed, or merely for one as to her general mental condition and the

degree of her mental weakness. . . . In the latter point of view it would be clearly admissible." In still other cases it has been regarded as receivable from necessity.

**Contracts and deeds.**

In *Kilgore v. Cross*, 1 McCrary, 144, 1 Fed. 578, in an action to set aside a contract on the ground that plaintiff was not of sound mind at the time of entering into the same, opinion evidence by witnesses who had laid a basis for this opinion, as to the capacity of such person to transact business, was held competent.

And in *Woodcock v. Johnson*, 36 Minn. 217, 30 N. W. 894, in an action to set aside a deed on the ground that the grantor was incompetent to make it, opinion evidence as to the capacity of the grantor to transact business during the two weeks before the time of the execution of the deed was held competent.

In *Beller v. Jones*, 22 Ark. 92, it does not clearly appear what the testimony of the witnesses was, but from the opinion it seems that they expressed opinions as to the capacity of a person to make a contract, and this was held competent from witnesses who had laid a basis for their opinion.

In *Scaif v. Collin County*, 80 Tex. 514, 16 S. W. 314, in an action to set aside a deed, opinion evidence as to the capacity of the grantor to understand the nature and effect of such deed was held competent.

But in *Mills v. Cook*, — Tex. Civ. App. —, 57 S. W. 81, in an action brought by a grantor to set aside a deed on the ground of insanity, opinion evidence as to the capacity of the grantor, at the time she executed the conveyance, to contract and make conveyance of lands, and appreciate and understand contracts, was held incompetent.

No objection seems to have been raised in *Smith v. Smith*, 117 N. C. 326, 23 S. E. 270, as to opinion evidence that the grantor in a deed sought to be set aside was a good business man, clear headed and very accurate.

Neither does any question seem to have

aside a conveyance alleged to have been made by plaintiff while ill. Affirmed.

Statement by Wheeler, J.:

On April 17, 1901, the plaintiff Mrs. Atwood was the owner in fee of the property in suit. On April 1, 1901, Mrs. Atwood became ill with typhoid fever, and her mind during her illness seriously affected; and, when she was incapable of managing her affairs and not competent to make a deed or comprehend what she was doing, the defendant caused to be drawn a deed of said premises, took it and a notary with him, on April 17, 1901, to her house, and then the defendant took her hand and made the cross which appears over her signature to said deed above the letter "J." Mrs. At-

wood never signed said instrument otherwise. One of the two witnesses to said instrument was not present when said cross was placed on said instrument, and did not know that she was signing her name as a witness. The notary asked Mrs. Atwood if it was her free act and deed, and she made no intelligible response. The notary signed as one of the witnesses. Except as stated, the acknowledgment was in due form. Mrs. Atwood knew nothing of said instrument until seven years thereafter. There was no consideration for said instrument and no delivery thereof. On December 5, 1907, Mrs. Atwood, without knowledge of said instrument, conveyed said premises to Lillian A. Allen by warranty deed. The rulings on evidence involved in the decision

been raised as to the admissibility of such evidence, in *McLeary v. Morment*, 84 N. C. 235.

In *Clum v. Barkley*, 20 Wash. 103, 54 Pac. 962, it was held that a refusal to receive opinion evidence as to the capacity to execute a deed was not reversible error in an action by a devisee to set aside a deed of testator made a short time previous to her death, where the witnesses were allowed to testify fully as to the facts within their knowledge.

In *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826, in an action for damages against one who obtained property of an alleged incompetent to be deeded by her to a minor of whom he was afterwards appointed guardian, and as such guardian, for fraud and imposition practised upon such incompetent in thus inducing her to convey her real estate, opinion evidence as to whether or not the person was capable of transacting business was held competent as going to the degree of mental weakness and involving no matter of law. It is further stated that there was no prejudicial error in the admission of such evidence in this case.

In *Cram v. Cram*, 33 Vt. 15, in an action by an administrator for the recovery of notes which involved the validity of a contract made by the plaintiff's decedent with defendants, under which such notes were held, opinion evidence by witnesses who had laid the basis for their opinion, as to decedent's capacity to understand the nature of a contract, was held competent.

So, in *Burnham v. Mitchell*, 34 Wis. 117, in an action by an administrator to recover property which it was pleaded belonged to the defendant by virtue of an agreement with the decedent, the validity of which agreement was called in question on account of the mental incompetency of such decedent, opinion evidence as to the capacity of decedent to comprehend the contract was held competent.

So, in *Chickering v. Brooks*, 61 Vt. 554, 18 Atl. 144, another action by an administrator to recover property, opinion evidence by a witness who stated the basis

of his opinion, as to the capacity of decedent to transact business intelligently and understandingly, was held competent if limited in meaning to a statement of the degree of mental capacity.

In *Aiman v. Stout*, 42 Pa. 114, an action by an administrator against an agent of his decedent for mismanagement, in which a release pleaded by the agent was alleged to have been executed by the decedent when he was incapable, opinion evidence as to the capacity of the decedent to understand the release at the time he executed it was held incompetent, but apparently on the basis that it was not founded on proper preliminary investigation.

This question frequently arises in cases between heirs and the devisees of a decedent, involving the validity of a will or a deed executed by the decedent. Thus, in *Culver v. Haslam*, 7 Barb. 314, an action of ejectment which involved the validity of a deed claimed to have been executed when the grantor was of unsound mind, opinion evidence by one who had been acquainted with the grantor for some time previous to her death, and narrated an incident that happened four years previous to the execution of the deed, as to the capacity of such grantor to transact business at that time, was held competent.

So, in *Wilkinson v. Pearson*, 23 Pa. 117, an action of ejectment involving the validity of a deed claimed to have been executed when the grantor was incompetent, it was held competent to inquire of a witness whether, from the general appearance of the grantor in the year in which the deed was executed, he was of the opinion that such grantor was capable of making a contract or transacting important business. The court states that the appearance of the grantor could be inquired into by either party, so as to ascertain upon what the belief was founded, and that the jury were to judge of the correctness of the opinion from the facts.

So, in *Kelly v. McGuire*, 15 Ark. 601, a case involving the validity of deed, opinion evidence as to the grantor's capacity was held competent although it does not

sufficiently appear therein. Other objections and exceptions relate to the questions of want of consideration for the deed and defective execution or acknowledgment, or questions which relate to the charge of fraud, which was not found, and in view of the ground of the decision, became immaterial.

Messrs. George E. Beers, Harry J. Beardsley, and Arthur B. O'Keefe, for appellant:

Mere opinion evidence of nonexperts concerning mental condition is not admissible.

Clinton v. Howard, 42 Conn. 306; Porter

v. Pequonnoc Mfg. Co. 17 Conn. 257; Shanley's Appeal, 62 Conn. 330, 25 Atl. 245; 5 Ency. Ev. 529, 657; Turner's Appeal, 72 Conn. 315, 44 Atl. 310.

So as to testamentary capacity.

Turner's Appeal, 72 Conn. 316, 44 Atl. 310.

The deed cannot be contradicted.

1 Enc. L. & P. 1909, 920-922; 1 Cyc. 619; Brewster, Conveyancing, § 293; Hitz v. Jenks, 123 U. S. 297, 31 L. ed. 156, 8 Sup. Ct. Rep. 143; Baldwin v. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303; Graham v. Anderson, 42 Ill. 514, 92 Am. Dec. 93; Jamison v. Jamison, 3 Whart. 457, 31 Am. Dec.

clearly appear that the testimony went farther in this case than as to the general capacity of the grantor.

In Whitaker v. Hamilton, 126 N. C. 465, 35 S. E. 815, an action to recover property, which involved the validity of a conveyance claimed to have been executed when the grantor was not competent, opinion evidence from a witness who had laid the basis of his opinion was held competent as being an opinion received from necessity.

In Dewitt v. Barley, 9 N. Y. 371, an action of ejectment in which the defendants claimed under a conveyance said to be void because of the incapacity of the grantor, opinion evidence as to the capacity of the grantor to transact business was held inadmissible. This decision seems to be based on the rule relating to evidence as to general mental capacity. In a subsequent appeal of this case, in 17 N. Y. 340, the court distinguishes between an opinion on the general question of capacity, and an opinion as to capacity to transact business, and states that on the first appeal only the latter question was before the court.

This question has arisen also in actions for damages in which the defendant pleads a release, and it is claimed that the release was executed when the releasor was incompetent. Thus, in Nashville, C. & St. L. R. Co. v. Brundige, 114 Tenn. 31, 84 S. W. 805, 4 Ann. Cas. 887, it was held that opinion evidence as to the capacity of plaintiffs to make a contract or transact business at about the time of executing the release was incompetent, the court saying: "The testimony was clearly incompetent and should have been excluded; the degree or quantum of mental capacity which the party whose act is called in question must have to enable him to make a valid contract is a question of law for the court to decide, and whether said party has the required quantum is a question of fact to be found by the jury from all the evidence, and the opinions of witnesses are not competent evidence in cases of this kind upon either point." See Aiman v. Stout, *supra*.

But in Beard v. Southern R. Co. 143 N. C. 137, 55 S. E. 505, a case involving the validity of such a release, opinion evidence 37 L.R.A.(N.S.)

that the releasor did not have "sufficient mental capacity to enable him to have reasonable judgment as to the effect of it, and what it purported to be," was held competent.

And in Galloway v. San Antonio & G. R. Co. — Tex. Civ. App. —, 78 S. W. 32, another case involving the validity of such a release, opinion evidence by a witness who knew the releasor a long time before the injury, and had seen him frequently while at the hospital, and since he left the hospital, and the last time two days before the release was executed, that the plaintiff was not in physical and mental condition to transact business, was held competent as an opinion regarding mental capacity.

In Searles v. Northwestern Mut. L. Ins. Co. 148 Iowa, 65, 29 L.R.A.(N.S.) 405, 126 N. W. 801, opinion evidence as to whether or not one making an assignment of an insurance policy was capable of transacting business at and prior to the time when the assignment was made was held competent, in a case in which the issue raised was as to the ownership of the life insurance policy sued upon.

And in Hilmer v. Western Travelers Acci. Asso. 86 Neb. 285, 27 L.R.A.(N.S.) 319, 125 N. W. 535, in an action on an accident policy, on the issue of the plaintiff's disability, opinion evidence based on facts testified to by a witness as to the capacity of the plaintiff to transact ordinary business was held competent.

In McRae v. Malloy, 93 N. C. 154, in an action upon a contract, in which the defense was surprise and undue influence and false representations, opinion evidence as to the capacity of the defendant to transact business was held competent.

And in Dominick v. Randolph, 124 Ala. 557, 27 So. 481, it was held in an action on a contract where the defense was the insanity of the defendant, that a witness who had already testified to the insanity of the defendant might be asked on cross-examination whether or not the defendant was capable of making a deed at a certain stated time, the deed referred to not being the one involved in the suit in question. It does not clearly appear how near in point of time the making of the deed was to the making of the contract in suit, but ap-

537; *Hartley v. Frosh*, 6 Tex. 208, 55 Am. Dec. 773; 3 Washb. Real Prop. Wurts's ed. § 2198; 2 *Tiffany*, Modern Law of Real Prop. § 405; 1 Ency. Ev. 200; *Hayden v. Wescott*, 11 Conn. 131; *Pendleton v. Button*, 3 Conn. 412.

One must stand behind his own signature.

*Ryan v. World Mut. L. Ins. Co.* 41 Conn. 172, 19 Am. Rep. 490.

**Mr. Charles G. Root**, for appellees:

The testimony as to the mental and physical condition of Mrs. Atwood during the time she was inquired about was admissible.

*Sydeleman v. Beckwith*, 43 Conn. 9; *Burnham v. Sherwood*, 56 Conn. 229, 14 Atl.

715; *Shanley's Appeal*, 62 Conn. 325, 25 Atl. 245; *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309; *Chamberlain v. Platt*, 68 Conn. 126, 35 Atl. 780; *Kimberly's Appeal*, 68 Conn. 428, 37 L.R.A. 261, 57 Am. St. Rep. 101, 36 Atl. 847; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Barber v. Manchester*, 72 Conn. 675, 45 Atl. 1014; *State v. Cross*, 72 Conn. 722, 46 Atl. 148, 12 Am. Crim. Rep. 175; *Vivian's Appeal*, 74 Conn. 257, 50 Atl. 797; *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826; *Parsons v. Litchfield County Hospital*, 80 Conn. 525, 16 L.R.A. (N.S.) 1038, 69 Atl. 352.

parently it was very near. This question was allowed for the purpose of testing the sincerity of the witness.

But in *Conner v. Stanley*, 67 Cal. 315, 7 Pac. 723, in an action to enforce a marriage contract against an administrator of a decedent, it was held incompetent for a witness to testify as to whether the decedent was competent to make a contract with a spiritual medium, as plaintiff was believed by the decedent to have been.

#### Wills.

—as to capacity to make a will.

In the contest of a will, opinion evidence as to the capacity of testator to make a will is incompetent. *Crowell v. Kirk*, 14 N. C. 355; *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218; *Brown v. Mitchell*, 88 Tex. 350, 36 L.R.A. 64, 31 S. W. 621; *Gibson v. Gibson*, 9 Yerg. 329; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

Such evidence is incompetent because it is the issue to be submitted to the jury. *Councill v. Mayhew*, — Ala. —, 55 So. 314; *Hamon v. Hamon*, 180 Mo. 685, 79 S. W. 422; *Re Blood*, 62 Vt. 359, 19 Atl. 770.

But the admission of such evidence was held not sufficient error to reverse the judgment, in *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267.

Opinion evidence as to whether or not the testator was of sufficient mind and memory to understand the will, or whether or not he was able understandingly to execute a will, is incompetent as calling for the conclusion of the witness as to testamentary capacity, the issue the jury is sworn to try. *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410.

So, in *Weitzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085, opinion evidence that the testatrix was unable to understand the business in which she was engaged when she made the will, or able understandingly to execute it, is inadmissible as calling for a conclusion on testamentary capacity, and the witnesses' opinion on the question which the jury had been sworn to try.

So, in *Re Cheney*, 78 Neb. 274, 110 N. W. 731, opinion evidence as to the capacity to make a will was held incompetent as requiring the witness to determine the degree

of mental capacity required to make a will, which is a question of law, and whether the testator when the will was made was possessed of such capacity, which was the principal issue for the jury to determine.

And in *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459, such evidence was held incompetent as involving a question of law and fact, and, to the extent that capacity was involved in the issue, the very question to be determined by the jury, and furthermore a question calling for such evidence assumes that a witness knows the degree of capacity which the law requires for the performance of the act of executing a will.

And in *Re Taylor*, 92 Cal. 564, 28 Pac. 603, such evidence was held incompetent as calling for the opinion of the witness as to the quantum of intelligence or mental capacity that in law is deemed sufficient to enable one to make a valid disposition of his property.

And for the same reason, opinion evidence as to the capacity of the testator at the time he signed the instrument, to engage in making a last will and testament, and understand the nature and effect of the act, was held incompetent, in *Bailey v. Beall*, 251 Ill. 577, 96 N. E. 567.

So, in *Hopkins v. Wheeler*, 21 R. I. 533, 79 Am. St. Rep. 819, 45 Atl. 551, opinion evidence as to the capacity of testatrix to make a will was held incompetent as calling for an opinion of the witness as to the degree of mental capacity required by law for the making of a will.

And for the same reason, in *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137, opinion evidence as to whether or not the testator's mind was sound enough to make a will was held incompetent.

So, in *Page v. Beach*, 134 Mich. 51, 95 N. W. 981, opinion evidence as to the capacity of a testatrix to make a will was held incompetent. The court states that some such questions might be understood as calling merely for the degree of intelligence as bearing upon the understanding, and in such case no harm would be likely to follow, but where a question of law is involved in the interrogatory, it is improper.

And in *Pelamourges v. Clark*, 9 Iowa, 1, the answer of a witness to an inquiry as to the capacity of testator to make a disposi-

Parol evidence is admissible to show the falsity of a certificate of acknowledgment.

Smith v. Ward, 2 Root, 374, 1 Am. Dec. 80.

Wheeler, J., delivered the opinion of the court:

The finding is explicit in its statement that on April 17, 1901, when the deed from the plaintiff to the defendant which this action seeks to set aside purports to have been executed, Mrs. Atwood was mentally and physically incapable of making the deed, and did not then comprehend what she was doing. On this finding no other judgment was possible, and, unless rulings upon the evidence tending to prove the incapacity of the plaintiff materially prejudicial to the

defendant were made on the trial, the judgment must stand.

The witness Mrs. Allen, having stated her means and opportunity of knowledge, testified that between April 11 and 16, 1901, Mrs. Atwood was "very poor indeed," so low it was beyond asking her anything," and in a "condition to know nothing really." This evidence was objected to because the opinion of a nonexpert witness from whom nothing save what the witness saw and heard was admissible.

Opinion evidence, which is based upon special skill or knowledge, or upon facts and conditions which may be reasonably described and made clear to the trier without the aid of the impression or conclusion of the witness gained from them, may not be

tion of his property by will on or about the date of the alleged will, that he regarded the testator as capable of making a disposition of property by will at any time during his acquaintance with him, was incompetent as calling for an opinion on an inquiry which embraced the whole merits of the case.

Such evidence has been rejected on the ground that no sufficient basis had been laid for the opinion of the witness, in Buys v. Buys, 99 Mich. 354, 58 N. W. 331; Hibbard v. Baker, 141 Mich. 124, 104 N. W. 399; Dickinson v. Dickinson, 61 Pa. 401.

So, in Prentiss v. Bates, 93 Mich. 245, 17 L.R.A. 494, 53 N. W. 153, evidence by a witness who was shown the will in question, as to the capacity of testatrix to make it, that she was mentally incompetent of comprehending the will, was held inadmissible, but apparently for the reason that no facts tending to show insanity were testified to, on which such opinion might be based.

In Daniel v. Daniel, 39 Pa. 191, the court disapproves of making a distinction between opinion evidence as to the capacity of testator to understand a will, and as to whether or not he was "fit to make a will," but holds that no reversible error resulted from a refusal of the former opinion when the latter was allowed.

On the contrary, in Spencer v. Spencer, 31 Mont. 631, 79 Pac. 320, opinion evidence by a witness who had stated the basis of his opinion, as to the capacity of the testator to make a will, was held competent.

And in Stuckey v. Bellah, 41 Ala. 700, in an action for the conversion of personal property claimed under a gift from the decedent, opinion evidence as to the capacity of the decedent to dispose of his property was held competent.

And in Ethridge v. Bennett, 9 Houst. (Del.) 295, 31 Atl. 813, opinion evidence by witnesses who had laid a proper basis for their opinion, as to the capacity of the testator to make a will, was held competent evidence, but it is stated further that the jury must rely on the facts, and not upon the opinion of the witness formed from such facts, in forming their judgment. 37 L.R.A. (N.S.)

So, in Lodge v. Lodge, 2 Houst. (Del.) 418, such evidence from a witness who had stated facts on which his opinion was based was held admissible.

In Steele v. Helm, 2 Marv. (Del.) 237, 43 Atl. 153, the trial court held that a question asked of a witness as to whether the testator was of sound and disposing mind and memory, and capable of making a will, was admissible after facts had been stated by such witness on which the opinion was based. No attention seems to have been given to the latter part of this question in the opinion in the case, and nothing is said on this point in the note appended.

In Wogan v. Small, 11 Serg. & R. 141, a question calling for a witness's opinion as to whether testator was fit or unfit to make a will was objected to as a leading question. It was held not to be open to this objection, and in the course of the opinion it is stated that the plaintiff had a right to the witness's opinion on this point.

In Porter v. Throop, 47 Mich. 313, 11 N. W. 174, opinion evidence that the testatrix had sufficient mental capacity to comprehend her property and the relation to her children, so as to be competent to make the will, was held admissible, and also opinion evidence as to the capacity "to make her will to the extent of the paper which you have seen introduced in evidence" was held competent.

No question seems to have been raised as to the admission of such evidence, in Moffitt v. Smith, 153 N. C. 292, 69 S. E. 224.

Nor was there any question raised as to the admissibility of such evidence in a contest before the surrogate, in Weir v. Fitzgerald, 2 Bradf. 42.

—as to capacity to transact business.

On the question of the admissibility of opinion evidence as to the capacity of testator to transact business, the courts are more evenly divided. Such evidence was held admissible in Beaubien v. Cicotte, 12 Mich. 459, 86 Am. Dec. 70, where the court said: "We think that there can be no impropriety in allowing the opinions of the

given by the nonexpert witness. An opinion of a nonexpert witness which does not rest upon facts stated by him, or is not acquired through the use of his senses, may not be laid in evidence. *Turner's Appeal*, 72 Conn. 305, 315, 44 Atl. 310. The witness may state the facts on which the opinion rests. He is not required to do so. He must show that he had the means and opportunity for knowledge. His opinion without this foundation is inadmissible. When, however, a subject is relevant to the matter in suit, and the lay witness has had the means and opportunity of acquiring knowledge of the subject through the use of his senses, and the impression or opinion is formed from constituent facts and conditions which are so numerous or so compli-

cated as to be incapable of separation, or so evanescent in character, they cannot be fully recollected or detailed or described or reproduced, so as to give the trier the impression they give the witness, or so as to enable the trier to draw a fair inference from such facts and conditions, he may be permitted to testify to the impression or conclusion obtained by him from them, leaving it to the cross-examination to develop the foundation for the impression or conclusion. *Spencer's Appeal*, 77 Conn. 638, 643, 60 Atl. 289; *Turner's Appeal*, 72 Conn. 305, 315, 44 Atl. 310; *Chamberlain v. Platt*, 68 Conn. 126, 130, 35 Atl. 780.

The exceptional witness may be able at times to describe the eye or the action of a man; but he cannot convey distinctly to

witnesses upon any measure of capacity which is calculated to aid the jury in coming to a conclusion. . . . Whenever the facts are such that the jury cannot form an unaided opinion, it is essential that the opinions which they receive should enlighten them upon the exact point in controversy, if possible, for otherwise their verdict will be conjectural."

So, in *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740, opinion evidence as to the capacity of the testator to transact ordinary business on the day the will was drawn was held competent. The court refers to *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267, as a decision to the contrary on this point. It seems such evidence was admitted in the latter case, but it is not discussed separately by the court in holding the admission error, but insufficient to reverse judgment.

So, in *Mayville v. French*, 246 Ill. 434, 92 N. E. 919, opinion evidence by witnesses who had laid a proper foundation as to the capacity of the testatrix to transact business was held admissible. Objection was made in this case to the testimony of a witness who had lived in the household with testatrix for two years, that it related to no particular time. The court states that the question implied that it related to the time the witness knew testatrix.

So, in *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310, such evidence was held admissible as showing the extent of the mental impairment.

In *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881, opinion evidence by a witness who resided in the neighborhood for years, and was well acquainted with the testator, as to the testator's capacity to transact the ordinary business affairs of life, was held competent. It appears, however, that the objection to the evidence in this case was on the ground that the witness had not given any facts on which to base his opinion, and it was therefore incompetent. It was held that sufficient facts were given, and the evidence competent.

In *Re Pinney*, 27 Minn. 282, 6 N. W. 791, 7 N. W. 144, objection was made to a question calling for an opinion as to the testa-

tor's capacity to do important business, on the ground that it should have called for an opinion as to ability to do ordinary business. The answer was that the testator was not competent to transact business to any extent, and this was stated by the court not to have been responsive to the question, and it was apparently regarded as removing the objection, and nothing farther was said on this point. It is stated in the course of the opinion that a question calling for an opinion as to capacity to comprehend property and make an intelligent disposition of it by will does not call for an opinion as to capacity to make a valid will, hence is unobjectionable on this point.

So, in *Lodge v. Lodge*, 2 Houst. (Del.) 418, it was held that a witness who stated facts on which his opinion was based could testify to testator's capacity to attend to business.

In *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929, it is stated in the opinion that one witness testified fully concerning ability of decedent to conduct his business affairs, but it does not appear that he was asked his opinion as to this ability.

In *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575, it is stated by the court that the great weight of evidence was that grantor was insane and not competent to understand or transact business of any kind, but it does not appear that the witnesses were asked their opinion as to this.

Neither does it appear in *Weems v. Weems*, 19 Md. 334, that the question called for more than an opinion as to general capacity, although it is stated that opinion evidence as to the testamentary capacity of a testator is admissible without stating the facts on which it is founded, from a witness who was a brother of decedent and intimately associated with him in business, and had opportunities for judging of the condition of his mind.

No objection seems to have been made to the admission of such testimony, in *Baker v. Baker*, 202 Ill. 595, 67 N. E. 410, *supra*. See also *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085, *supra*.

On the contrary, in *Torrey v. Burney*, 113

another the appearance of the man to him, unless he may give the impression made upon him, or the conclusion reached by him, from the man whom such acts and look portray. We cannot express in words the facts and conditions which lead us to the opinion that one is under the influence of hate or love, pain or pleasure, hope or fear. We cannot describe exactly our own emotions, sentiments, and affections, much less those of another. Memory may retain no single detail, indeed one may never have recognized a single detail; yet the appearance of the man may have left upon the minds an indelible impression as to his physical and mental condition. Clear before him is the picture of what he saw,—a man healthy or sick, strong or fragile, well or poorly, changed in health for better or worse, composed or nervous, excited or despondent,

tired or exhilarated, intellectual or weak-minded, conscious or unconscious, suffering or happy. In truth, that which we call opinion is fact. The impression or conclusion is the sum of what he saw, and in its final analysis the offer is to prove a fact, and not an opinion. 3 Wigmore, Ev. § 1918; Turner's Appeal, 72 Conn. 305, 315, 44 Atl. 310.

Every trial, as a rule, is filled with so-called opinion evidence from the nonexpert witness; it is so constant and so common it is not distinguished from other evidence except in the occasional instance. With a better understanding of when and how opinion evidence from nonexpert witnesses may be used, we find in the trials its use increasing and with the growing perplexity of our life this is inevitable and indispensable if we would reach the truth. There

Ala. 496, 21 So. 348, opinion evidence as to the capacity of testator to transact ordinary business was held incompetent for the reason that the witness was not an expert on the question of insanity.

And in Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681, opinion evidence as to the capacity of testator to transact business during the last year of his life, apparently the time within which the will had been executed, was held incompetent. The court treated this opinion as equivalent to an opinion as to the soundness or unsoundness of testator's mind generally, and, in accord with the rule for such testimony, held that the opinion of an ordinary witness must be limited to his conclusions from the specific facts to which he testifies.

In Glass v. Glass, 127 Iowa, 646, 103 N. W. 1013, evidence as to the capacity of testator before and at about the time of the execution of the will, intelligently to transact business or dispose of his property, was held incompetent so far as it related to the time of making the will, or to a time closely approximate thereto, for the reason that in effect it permits the witness to testify that the testator was capable of making the will. As to evidence relating to a time prior to the execution of the will, the evidence was held competent. This was treated by the court as going to the degree of mental capacity.

So, in Hewlett v. Wood, 55 N. Y. 634, opinion evidence as to the capacity of testator to transact business was held incompetent.

And in Stokes v. Miller, 10 W. N. C. 241, such evidence was held incompetent, but this is apparently on the ground that the witness was not qualified to state an opinion.

And in Smith v. Smith, 157 Mass. 389, 32 N. E. 348, opinion evidence from a witness who had testified generally regarding the testator's mental condition, as to the capacity of testator to make a contract or transact important business, was held incompetent in accordance with the general 37 L.R.A. (N.S.)

rule in this state as to evidence relating to mental capacity generally.

On the general question of nonexpert opinion as to sanity or insanity, see note to Ryder v. State, 38 L.R.A. 721.

As to the right of a witness to give an opinion on the exact issue to be tried, in respect to sanity or mental capacity, see note to Brown v. Mitchell, 36 L.R.A. 64.

#### Lunacy proceedings.

In Neely v. Shephard, 190 Ill. 637, 60 N. E. 922, it was held that a witness in a lunacy proceeding might express an opinion as to the capacity of the person to transact his ordinary business, after he had testified to the facts on which such opinion was based.

In Re Coburn, 11 Cal. App. 604, 105 Pac. 924, evidence as to the ability of a person to manage his property, and as to whether or not he was likely to be imposed on by designing parties, was held incompetent under a Code provision that the opinion of an intimate acquaintance respecting the mental sanity of a person may be given if the reason for the opinion is given. It is not clear from the opinion whether the exclusion is based on the fact that there were no facts given on which to base the opinion, or that it called for an inadmissible opinion.

In Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302, opinion evidence as to the competency of an alleged lunatic to manage and control his own business affairs was held inadmissible.

And so in Londonderry v. Fryor, 84 Vt. 294, 79 Atl. 46, opinion evidence as to the capacity of an alleged lunatic to care for himself and his property was held incompetent as calling for a question of law.

And likewise, in Re Carmichael, 36 Ala. 616, opinion evidence as to whether or not an alleged lunatic was capable of taking care of himself and managing his own affairs was held incompetent.

W. A. E.

is only one test for the nonexpert opinion: Is the evidence relevant, is it the best the nature of the case admits of, and does it come from a competent witness? *Hardy v. Merrill*, 56 N. H. 227, 241, 22 Am. Rep. 441. If these conditions are fulfilled, the evidence is admitted from necessity, because either the witness cannot otherwise describe it, or describe it in its force, extent, and meaning so that another may see or know what he saw and knew. The same rule and the same reason for the rule exists whether the opinion relate to physical or mental conditions. 3 Wigmore, Ev. § 1918.

Our decisions with their citations furnish many instances of nonexpert opinion evidence deemed admissible. Among the cases of the last few years in other states are found these illustrations of the proper application of this rule. That one was in good or bad health: *Chicago City R. Co. v. Van Vleck*, 143 Ill. 485, 32 N. E. 262; *Johnson v. Union P. R. Co.* 35 Utah, 285, 100 Pac. 390, 394; *Davis v. Oregon Short Line R. Co.* 31 Utah, 307, 88 Pac. 3, 6. That one seemed very feeble, seemed to be crippled: *Dilburn v. Louisville & N. R. Co.* 156 Ala. 228, 47 So. 210. That one's hearing was acute or dull: *Chicago City R. Co. v. Van Vleck*, supra. That one was in pain or suffering: *Morris v. St. Paul City R. Co.* 105 Minn. 276, 17 L.R.A.(N.S.) 598, 117 N. W. 500, 502; *Davis v. Oregon Short Line R. Co.* 31 Utah, 307, 88 Pac. 3, 6; *Kline v. Santa Barbara Consol. R. Co.* 150 Cal. 741, 90 Pac. 125, 129. That one was excited: *Kinner v. Boyd*, 139 Iowa, 14, 116 N. W. 1044. That one was intemperate: *Taylor v. Security Life & Annuity Co.* 145 N. C. 391, 59 S. E. 139, 13 Ann. Cas. 248. That one was nervous: *Illinois C. R. Co. v. Rothschild*, 134 Ill. App. 504, 511. That one's hearing was truculent: *White v. Metropolitan Street R. Co.* 132 Mo. App. 339, 349, 112 S. W. 278. That one had a sneer on his face: *Ibid.* That one manifests affection: *Spencer's Appeal*, 77 Conn. 638, 643, 60 Atl. 289; *Re Miller*, 36 Utah, 228, 102 Pac. 996, 998. That one's disposition was bright and cheerful: *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315, 318.

The opinion evidence in question was clearly admissible.

The assessment list of Mrs. Atwood embraced the property in dispute. It was offered in evidence as an admission that Mrs. Atwood only owned a life interest in the property. One of the assessors identified the list and stated that the words "Mary J. Atwood life use" were in Assessor Callahan's writing, and he added, "Atwood life use" was put in later. The defendant ex-

cepted to the court's refusal to strike this out.

It is true this was not responsive; but an answer which is relevant and material to the issue, although not responsive, should not be stricken out when the witness is competent. This evidence was of such a character; Mrs. Atwood could not be bound by the act of the assessors without her authority or knowledge. It does not appear that the witness had no personal knowledge of the fact he testified to. When that fact appeared, the motion to strike out might have been renewed. Questions of this character are largely within the discretion of the court, and only in exceptional cases should encumber a record on appeal. In this instance no harm could have been done, for the evidence subsequently came in, in due course, from other witnesses.

Two witnesses were permitted to testify, over the defendant's objection, that during the period of her illness Mrs. Atwood was not capable of doing business or making any contract or agreement. We think this evidence, under the circumstances of this case, was admissible as an opinion as to her general mental condition and the degree of her mental incapacity. If a question of this character called for a legal conclusion as to the capacity of one to make a particular will or a deed or a contract, it would be objectionable. This distinction is pointed out in *Hayes v. Candee*, 75 Conn. 131, 137, 52 Atl. 826, and the admissibility of questions of this character definitely determined in this case and in *Turner's Appeal*, 72 Conn. 305, 315, 44 Atl. 310.

Mrs. Atwood was asked: "How and when did you first discover that Frank G. Atwood claimed to have any interest in it (the property in dispute)?" She replied, "About three or four months ago, when I had to pay taxes they sent on, and I did not know what to make of it." This was objected to as immaterial.

We think it very material upon the question of her mental capacity at the execution of the deed, and whether she ever delivered the deed. It was undoubtedly admissible for other reasons, including the claim of fraud which was at that time a part of the case.

Mrs. Atwood was further asked, "Did you give him any kind of a paper, a blank deed, or any kind of a deed?" and the question and her answer, "No," were objected to because immaterial, and by her deed and acknowledgment she was estopped.

This evidence was admissible on the ground of the former question, which we need not repeat.

Other rulings are unimportant in view of the finding of a want of capacity in



Mrs. Atwood to make the deed. And the finding of a want of delivery would have controlled the decision apart from lack of mental capacity, since there is no ruling on evidence which could in any event disturb this finding.

There is no error.

The other Judges concur.

## NEW YORK COURT OF APPEALS.

KITTIE FULTS, App't.,

v.

JOHN C. MUNRO, Resp't.

(202 N. Y. 34, 95 N. E. 23.)

**Judgment — facts to support — date for ascertainment.**

1. In an action at law, the right to judgment depends upon the facts as they

**Note. — Mere display of invalid process without actual force or threats, as ground of action of forcible entry and detainer.**

Owing to the fact that the force involved in the criminal offense of forcible entry and detainer is private force, unlawfully exercised, and that the public force of the state lawfully exercised cannot be the means of a wrongful entry (19 Cyc. 1117); and that the entry for which the law affords a redress in the civil courts is an entry by a person of his own wrong and by his own mere act, without authority of law; and that the action cannot be maintained where one is put in possession by an officer of the law under and by the command of a court of competent jurisdiction (19 Cyc. 1137)—the question as to the effect of an entry under process invalid as against the one in possession is an interesting one, upon which there is a surprising dearth of authority. The decisions, however, are fairly uniform, the decided weight of authority, as is shown by the following cases, being to the effect that in the absence of actual force or threats, entry under invalid process is under color of title, constituting but a mere trespass, and therefore insufficient as ground for an action of forcible entry and detainer.

Thus, in *Scott v. Newsom*, 4 Sneed, 456, in holding that an action of forcible entry and detainer cannot be maintained against a party put in possession by virtue of a writ of execution issued by a court of competent jurisdiction, notwithstanding the party dispossessed was not a party to the action in which the writ issued, and could not be affected by the decree, the court said that, conceding the latter fact, "the substance of the plea is that the defendant was put in possession by a ministerial officer of the law, under the authority and by the command of a court of competent jurisdiction."

existed at the time of the commencement of the action, and not at the time of the trial. **Same — removal of tenant — assignee not party.**

2. The assignee of a lease who has been recognized by the landlord as rightfully in possession cannot be dispossessed under a warranty in an action for recovery of possession to which he is not made a party.

**Forcible entry — peaceable possession — liability.**

3. One is not guilty of forcible entry upon real property, who, under color of a warrant which is not valid against the one in possession, enters the premises without force, or the display or threat of force, of any kind, and is left in possession by the occupant departing to secure legal advice, although the one in possession of the warrant states that he has come to put the occupant out and is going to do so.

**Forcible detainer — display of force — intimidation — liability.**

4. The one responsible for the conduct of an officer is guilty of forcible detainer,

tion; and the question is, Does that constitute a forcible entry and detainer within either the letter or spirit of the act of 1821, or of any subsequent act? This question needs only to be stated; it admits no debate. The distinction between an entry under the circumstances before stated, and an entry by a party of his own wrong and by his own mere act, without color of authority of law, is sufficiently obvious to every mind of ordinary intelligence upon a moment's reflection. It cannot be tolerated that the judicial tribunals of the country shall in this mode assail and annul each other's solemn proceedings and judgments. The act of turning the plaintiff out of possession may have been unauthorized and contrary to the law, because of the existence of facts not presented to the chancellor in the record before him. If this were so, the plaintiff had an ample and summary remedy by petition to the court, setting forth the facts, and asking to be restored to his possession; or, if he really had a superior title to the land, he might have resorted to an action of ejectment. But, if he were a mere intruder on the land, with neither title nor right of possession, he has no just cause of complaint on the ground of being turned out." This case was followed in *Rook v. Godfrey*, 105 Tenn. 534, 58 S. W. 850, the report of which does not show the facts involved.

And in *Sewell v. State*, 61 Ga. 496, in, in holding that a landlord who enters upon his tenant by means of process duly executed by a lawful officer in the ordinary method of removing a tenant holding over, but issued upon an affidavit which falsely alleged that the term had expired, was not guilty of entry with "menaces, force, and arms, and without authority of law," the court said: "The force involved in the offense of forcible entry is private force, unlawfully exerted. The public force of the

where he, after securing possession of the property peaceably, but wrongfully, paces back and forth before it, carrying a gun, which he occasionally discharges, and orders the person dispossessed, who has remained in the vicinity, to keep off the property.

(April 25, 1911.)

**A**PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Trial Term for Onondaga County in defendant's favor, entered upon the dismissal of an action brought to recover damages for the forcible entry by defendant on certain premises of which plaintiff was in lawful possession under a lease. Reversed.

Statement by Vann, J.:

The material allegations of the complaint are that on the 10th of March, 1908, the

state, lawfully exercised, cannot be the means of a criminal entry. Whoever, in the prescribed mode, calls the law to his assistance, instead of taking the law into his own hands, commits no breach of the peace, though in making the call he may commit perjury."

And in *Janson v. Brooks*, 29 Cal. 214, in holding that an action for a forcible entry and detainer would not lie against a party put in possession by a sheriff in good faith, and without force or threats, by virtue of a process not running against the party dispossessed or anyone with whom he was in privity, the court quoted with approval from the opinion of Chief Justice Cope in *Buckman v. Whitney* (an unreported case decided by the California supreme court at its October term, 1863, upon an almost identical state of facts) as follows: "The statute provides for the maintenance of the action in three cases: First, where the entry is unlawful; second, where it is forcible; and third, where it is lawful and peaceable, but the detainer is unlawful. Wherever the entry is forcible, an action lies; and it lies in the absence of force where the entry is unlawful; but it is obvious that in this respect the language used is not to be taken in its ordinary sense. The term 'unlawful' embraces in its definition whatever is in violation of law; and strictly speaking, a wrongful entry is an unlawful one; but the mere fact that an entry is wrongful does not make it unlawful in the sense of the statute. The statute is penal as well as remedial, and punishment implies criminality in the offense,—not only a wrong done, but a wrongful intent in the party doing it. Both are essential; if either is wanting, the offense is not made out; and to justify the punishment of an entry as unlawful, a wrongful intent is necessary to be shown. An entry in good faith, under color of right, is not 37 L.R.A. (N.S.)

defendant leased to one William Fults, the husband of the plaintiff, a farm of 240 acres, situate in the town of Camillus, county of Onondaga. The lease was in writing, and provided for a term of one year from the 1st of April, 1908. The lessee agreed to market the crops and pay to the lessor as rent for the use of the premises one half of all the proceeds of the farm. On the same day that the lease was made William Fults assigned it to his wife, the plaintiff herein, with the knowledge and consent of the defendant, and thereupon, with like knowledge and consent, she entered into possession of the premises. She further alleged that on the 16th of July, 1908, "said defendant made forcible entry into the lands and premises," fully describing them, and "made forcible entry to the whole of said premises, and has forcibly put the plaintiff out of the possession thereof, and has continued to forcibly and unlawfully hold plaintiff out of possession thereof, and by

within the statute; the remedy was not intended for the adjustment of adverse claims, but as a means of redress and punishment in cases of wilful wrong. It was not intended as a substitute for an action of ejectment, as it undoubtedly would be if the statute were construed as applying in all cases where the entry is wrongful. We regard it as applying only in those cases where the entry is *mala fide* as well as wrongful; and beyond this its provisions cannot with any propriety be extended."

So, in *Wyatt v. Monroe*, 27 Tex. 288, it was held that, regardless of whether process was valid or invalid, an entry by virtue thereof was by exercise of lawful authority and would not support an action of forcible entry and detainer, especially where, in reply to a demand to surrender the premises in obedience to the writ, the occupant peacefully acquiesced. In connection with this case, see *Laird v. Winters*, as set out *infra*.

And in *Stark v. Billings*, 15 Fla. 318, where defendant was put in possession by the sheriff under a void writ, it was held that such entry did not constitute a forcible entry under the statutes relating thereto, as there was no force or violence aside from the mere trespass.

In *Marchand v. Haber*, 16 Misc. 322, 37 N. Y. Supp. 952, the court held that one ejected in a peaceable manner from property of which he had the mere possession without any estate therein, on process void because of defective pleadings, is not entitled to treble damages under a forcible entry and detainer statute, the evident purpose of which is to prevent wanton invasion of rights of property.

In *Seitz v. Miles*, 16 Mich. 456, where the entry was made under an invalid writ, but without real violence, it was held that such an entry, accompanied by threats to put the occupant out of possession under the powers

reason thereof said plaintiff has been damaged by the aforesaid acts of the defendant, his servants and agents, in the sum of \$2,000, for treble which amount the plaintiff claims judgment against the defendant." The plaintiff also described the crops growing upon the premises at the time of the entry, and alleged that she "was receiving profits from seven milch cows, amounting to \$30" per month. The defendant by his answer admitted the execution of the lease, denied all the other allegations of the complaint, and alleged that he was in possession under the judgment and warrant of a justice of the peace duly made and issued in a proceeding in which the defendant was the petitioner and William Fults, the lessee of the premises, was the defendant.

It appeared upon the trial that in July, 1908, the defendant began a proceeding before a justice of the peace to remove his

tenant, William Fults, from the premises for the nonpayment of rent, but he did not make Mrs. Fults, the assignee of the lease, a party, although he knew of the assignment and had recognized her as in possession. After issue joined and a trial had in said proceeding, in which the plaintiff was sworn as a witness, judgment of dispossession was rendered in due form of law, and a warrant regular upon its face issued to a constable for execution." The officer went to the premises, and without using force or threats entered the dwelling house where Mrs. Fults resided and inquired for her husband. She said he was down in the lot, and asked the officer what he wanted. He answered: "I have come to put you out. If you don't take your \$100 and put on your things and leave, I am going to put you out." She said: "Well, I guess you won't put me out." The defendant was not present when this took

conferred in the writ, and the yielding of possession because of such threats, was forcible under the statutes. And in the following additional cases, which passed upon the question of the force essential to render an entry or detainer actionable under the statutes, it was held that facts constituting a cause of action were established, but in each instance there was either actual force or threats, for which reason the true importance attachable to the fact that the process was invalid as against the person dispossessed cannot be determined absolutely, but, from the decisions as a whole, it seems inferable that the courts assumed that something more than the exhibiting of a mere invalid process was necessary in order to render the entry forcible within the statutes relating to forcible entry and detainer. *Chambers v. Collins*, 4 Ga. 193; *Brush v. Fowler*, 36 Ill. 53, 85 Am. Dec. 382; *Hubner v. Feige*, 90 Ill. 208; *Tibbetts v. O'Connell*, 66 Ind. 171; *Vess v. State*, 93 Ind. 211 (holding that even actual force and threats necessary to take and hold possession under the process could be used where the process was issued by a court having jurisdiction and was valid on its face, and that the use of such force and threats did not constitute forcible entry and detainer under the Indiana statutes); *Wallace v. Hall*, 22 Kan. 271; *State v. Anders*, 30 N. C. (8 Ired. L.) 15; *Farnsworth v. Fowler*, 1 Swan, 1, 55 Am. Dec. 718.

A few decisions, however, are to the effect that the fact that the warrant is invalid and the entry against the will of the occupant is sufficient to render the entry forcible under the statute, but in one instance, at least, this conclusion seems to have been due to the unusually broad statute under which the action was brought. Thus, in *Chiles v. Stephens*, 1 A. K. Marsh. 333, it was held that one turned out of possession under color of process not running against him or anyone with whom he was

in privy may maintain a writ of forcible entry and detainer. The facts and grounds upon which this decision was based are not set out in the report of the case, but the case is explained in *Janson v. Brooks*, supra, where it is said that the forcible entry and detainer act under which the action was brought provides that "the forcible entry intended by this act is, and shall be, any entry, with or without multitude of people, against the will or without the consent of the person or persons having the possession in fact of the premises into which such entry shall be made," and that under this act every entry "against the will or without the consent" of the occupant would be a forcible entry, regardless of the question of force. Assuming this statement to be correct, it justifies the conclusion reached by the court, and distinguishes it from those adhering to the general rule. *Norton v. Sanders*, 7 J. J. Marsh, 12, is to the same effect as *Chiles v. Stephens*, supra. But in *Laird v. Winters*, 27 Tex. 440, 86 Am. Dec. 620, it was held under the usual statute that a person who has been turned out of possession by a writ issuing by virtue of a decree to which he was in no sense a party may proceed by action of forcible entry and detainer to recover the possession, and that he ought not to be driven to an action in which the title may be called in question, nor even to a motion in the district court from which the writ issued, to be restored to his possession. And see also *Martin v. Patchin*, 4 Mo. App. 567, where the court held, without stating facts or reasons, that where one who is in lawful possession of premises at the time of the commencement of an action of unlawful detainer to which he is not made a party is dispossessed under and by virtue of a writ of possession issued in such action, he may maintain an action of forcible entry against the party obtaining possession under such writ.

G. J. C.

place. Mr. Wood sat down in a chair, and Mrs. Fults, after saying, "These things are mine, don't you touch a thing in any way, shape, or manner in this house," went out, harnessed a horse, and drove to Syracuse. When she came back with a lawyer, the officer was removing the furniture, and placing it on the opposite side of the road in front of the house. After nearly everything was out, she went in to get some puppies which she swore belonged to her, and the officer told her she could not have them, and, to use her own words: "He took me by the arm and put me right off," taking her to the road, but using no violence to speak of. After this the defendant came to the premises, and she heard him identify certain articles, saying: "That is mine, don't take that out. This is theirs, take that out." Household furniture, horses, cows, wagons, farming implements and tools all belonging to the plaintiff were thus removed from the premises and put on the opposite side of the road, the horses being tied to the fence. That night she slept on the roadside with her things. One Lockwood, an assistant of the officer, walked up and down the road with a shotgun during the entire night. Twice after dark and once in the middle of the night he fired the gun. He told her to keep off of Mr. Munro's land; that he was in possession; that Mr. Munro had left him to keep guard; and that she should keep off.

An appeal was taken by William Fults, from the judgment of dispossession to the county court, and on the 15th of October, 1908, the judgment was modified as to the amount of rent due, and, as thus modified, affirmed, without costs. The next day this action was commenced. On the 13th of November following a further appeal was taken to the appellate division, and on the 2d of March, 1909, the judgment of dispossession was reversed by that court on the ground that the rent and costs were tendered before the warrant was issued, and that no proper demand had been made. The present action was tried in May, 1909, and, when the plaintiff rested, the defendant moved for a nonsuit. The plaintiff asked to go to the jury upon the question whether she was forcibly ejected and detained from the premises, upon the question of the damages sustained by her, and upon all the evidence in the case. The application of the plaintiff was denied, the motion of the defendant granted, and the plaintiff excepted to each ruling. Upon appeal to the appellate division, the judgment entered upon the verdict was unanimously affirmed.

Messrs. Harry H. Stone and Welch & Parsons, for appellant:

Plaintiff was entitled to maintain this action 37 L.R.A. (N.S.)

tion and recover treble damages, under the statute.

Compton v. The Chelsea, 139 N. Y. 538, 34 N. E. 1090; Waterbury v. Deckelmann, 50 App. Div. 434, 64 N. Y. Supp. 60; Myers v. Sea Beach R. Co. 43 App. Div. 573, 60 N. Y. Supp. 284, affirmed in 167 N. Y. 581, 60 N. E. 1117.

The action of the constable and the men helping him in forcibly putting the plaintiff and her goods off from said premises, and in forcibly keeping her off from said premises, is the action of the defendant, and he is responsible therefor.

Hong Sing v. Wolf Fein, 33 Misc. 609, 67 N. Y. Supp. 1109.

Messrs. Thomson, Woods, & Smith, for respondent:

The taking possession of the premises did not constitute a forcible entry and detainer, and this action cannot be maintained.

13 Am. & Eng. Enc. Law, 743; People ex rel. Cooper v. Field, 52 Barb. 198; Carter v. Anderson, 16 Daly, 437, 11 N. Y. Supp. 883; Alexander v. Griswold, 44 N. Y. S. R. 121, 17 N. Y. Supp. 522; Bach v. New York, 23 App. Div. 548, 48 N. Y. Supp. 777; Marchand v. Haber, 16 Misc. 322, 37 N. Y. Supp. 952; Labro v. Campbell, 24 Jones & S. 70, 2 N. Y. Supp. 129; Pharis v. Gere, 110 N. Y. 336, 1 L.R.A. 270, 18 N. E. 135.

No proof was made by the plaintiff upon the question of damages, that could properly have been submitted to the jury, and there was no error in the trial court dismissing the complaint.

Depew v. Ketchum, 75 Hun, 227, 27 N. Y. Supp. 8; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Ecker v. Cottrell, 24 App. Div. 496, 48 N. Y. Supp. 1031; Dickinson v. Hart, 142 N. Y. 183, 36 N. E. 801; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Mack v. Patchin, 42 N. Y. 169, 1 Am. Rep. 506; Kelly v. Sheehy, 17 Jones & S. 518; Denison v. Ford, 7 Daly, 384; Noyes v. French Lumbering Co. 80 Minn. 397, 83 N. W. 385; Sanders v. Thornton, 2 Ind. Terr. 92, 48 S. W. 1015; Hunt v. Hicks, 3 Ind. Terr. 276, 54 S. W. 818; Salmon v. M. E. Blasier Mfg. Co. 123 App. Div. 173, 108 N. Y. Supp. 448; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282; Mott v. Lewis, 52 App. Div. 558, 65 N. Y. Supp. 31.

Vann, J., delivered the opinion of the court:

Statutes relating to forcible entry and to forcible detainer, which are separate and distinct wrongs have existed for centuries. The earliest passed in 1831, provided that "none from henceforth make any entry into lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude

of people, but only in peaceable and easy manner; (2) And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." 5 Richard II. chap. 8; Pollock, Torts, 6th ed. 368.

Later the provisions of the statute were extended to forcible detainer (8 Henry VI. chap. 9), and since then legislation upon the subject in England and in this country has usually been addressed to both forcible entry and forcible detainer, and except in one or two states the offenses are still distinct. As time passed, many changes were made, and various remedies, both civil and criminal, provided, including the recovery of treble damages. The Revised Statutes contained the provision that "if any person be disseised, ejected, or put out of any lands or tenements in a forcible manner, or being put out, be afterwards holden and kept out by force or with strong hand, he shall be entitled to maintain an action of trespass, and shall recover therein treble the damages assessed by the jury or by a justice of the peace, in cases provided by law." 2 Rev. Stat. 1st ed. pt. 3, chap. 5, title 6, § 4. The Code of Civil Procedure provides that "if a person is disseised, ejected, or put out of real property in a forcible manner; or after he has been put out, is held and kept out by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrongdoer. Code Civ. Proc. § 1609.

Under the head of summary proceedings to recover the possession of real property, the Code further provides that "an entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with a multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, undertenants, and legal representatives, may be removed therefrom, as prescribed in this title." Id. § 2233. It is provided by the Penal Code that "a person guilty of using, or of procuring, encouraging, or assisting another to use, any force or violence in entering upon or detaining any lands or other possessions of another, except in the cases and the manner allowed by law, is guilty of a misdemeanor." Penal Code, § 465.

As this is an action at law, the right to judgment depends on the facts as they stood when it was commenced, instead of, according to the rule in equity, as they stood at the date of the trial. *Sherman v. Foster*, 37 L.R.A. (N.S.)

158 N. Y. 587, 593, 53 N. E. 594, and cases cited.

Hence the warrant to dispossess, being valid upon its face and having been issued pursuant to a judgment also valid upon its face, is to be regarded as valid when it was executed, although subsequently the judgment was reversed, not for want of jurisdiction, but for errors committed during the trial before the magistrate.

Mrs. Fufts, however, was not a party to the proceeding in which the judgment was rendered, so that she was not bound thereby, and the warrant was not good as against her. She was in possession as assignee of the lease, and there was evidence tending to show that the defendant had recognized her as lawfully in possession. She should have been joined as a party to the proceeding, and it was a trespass to dispossess her without giving her an opportunity to make her defense. As was said by Judge Van Hoesen in *Croft v. King*, 8 Daly, 265, 268: "She might have paid the rent to protect her possession, or she might have taken a valid objection to some of the landlord's proceedings. At any rate, the statute gave her a right to a hearing, and the landlord ought to answer in damages for the wrong." The following cases cited by the learned judge amply sustain his position: *Sims v. Humphrey*, 4 Denio, 185; *Hill v. Stocking*, 6 Hill, 314; *Starkweather v. Seeley*, 45 Barb. 164; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181. See also *Colt v. Eves*, 12 Conn. 243, 259; *Kendall v. Doctor*, 4 How. Pr. 447. While the warrant would be no protection as against an action for simple trespass brought by her, it has an important bearing upon the question of forcible entry.

At common law and prior to the statutes to prevent forcible entry and detainer, if a lawful right of entry existed, the person entitled to possession was justified by law in regaining possession by force. *Hyatt v. Wood*, 4 Johns. 150, 157, 4 Am. Dec. 258; 2 Hawk. P. C. 64. The present statutes upon the subject are the re-enactment of a long series of laws for the primary purpose of preventing landlords from taking the law into their own hands and ejecting tenants by violence, although they also apply to some other cases. The civil action to recover treble damages is penal in nature, and its object is to redress the forcible and wanton violation of the right to the possession of real estate.

The expression "in a forcible manner," as used in the statute, does not mean any kind of force, such as is involved in a mere trespass. Thus, as was held in a leading case, after a careful review of the authorities: "The entry or detainer must be riotous, or personal violence must be used, or

there must be threats or menaces of violence, or other circumstances must exist inducing alarm or terror in the occupant of the premises." *Willard v. Warren*, 17 Wend. 257. As was said in another case which has frequently been cited: "It has always been held that, to make an entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and therefore an entry which hath no other force than such as is implied by the law in every trespass whatsoever is not within these statutes." *People ex rel. Niles v. Smith*, 24 Barb. 16, 18.

The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury, if he stood up in defense of his possession. *Pharis v. Gere*, 110 N. Y. 336, 345, 1 L.R.A. 270, 18 N. E. 135; *People ex rel. Kline v. Rickert*, 8 Cow. 226; *Waterbury v. Deckelmann*, 50 App. Div. 434, 64 N. Y. Supp. 60; *Bach v. New*, 23 App. Div. 548, 48 N. Y. Supp. 777; *Labro v. Campbell*, 24 Jones & S. 70, 2 N. Y. Supp. 129; *Milner v. Maclean*, 2 Car. & P. 17; 1 Hawk. P. C. chap. 28, §§ 26, 27; *Wharton, Crim. Law*, §§ 2033, 2034; 1 *Bishop, Crim. Law*, § 397; 3 *McAdam, Land. & T.* 3d ed. 187. As was said by Judge Folger in *Wood v. Phillips*, 43 N. Y. 152, 157: "The main object still is to preserve the public peace and prevent parties from asserting their rights by force or violence, though by gradual additions the remedy has become in effect a private as well as a public one."

The entry itself in this case, leaving out of view for the present the detainer, was not made in a forcible manner within the meaning of the statute as read in the light of the authorities. Actual entry was made without force or the display or threat of force of any kind. After such entry the plaintiff of her own accord left the premises, and went off to get legal advice. The mere statement of the officer, made with the warrant in his hands, that he had come to put her out, and that if she did not put on her things and leave, he was going to put her out, with no threat to injure, or any overt act, did not make the entry forcible. While she did put on her things and leave, it was not through fear, but to procure a lawyer. She apprehended no danger, but held her own well in the conversation with the officer. Nothing occurred to suggest a breach of the peace. Moreover, the officer did not go there wantonly and with no semblance of right, but was armed with process valid 37 L.R.A. (N.S.)

against William Fults, the lessee named in the lease, the husband of the plaintiff, and an actual occupant of the premises, although as the hired man of his wife, but invalid as to herself.

The warrant commanded him "to remove all persons from the said property and to put the said petitioner into full possession thereof." It followed the language of the statute, which, however, does not mean literally all persons, but only those in actual possession who are made parties to the proceeding, and their guests, agents, servants, and the like. *Croft v. King*, supra. While the warrant under the facts recited therein did not upon its face authorize the officer to remove Mrs. Fults, the form of the command gave him color of authority to do so, and saved him from the imputation of wilful and reckless conduct such as is necessary to support an action of this character. The primary question in such cases is not who had title to the land, but who had the right to possession; and the next, not whether the entry was made without right, but whether it was made with such force or threats as to disturb the public peace. While the defendant had no right to possession when he entered as the entry was not made by force or through fear, it was not an entry in a "forcible manner" within the meaning of the statute. Although the entry was peaceable, still, if the plaintiff was kept out through fear of personal violence, she was entitled to recover treble damages for a forcible detainer.

After the dispossession was complete, she had the right to re-enter if she could do so peaceably, for she had been deprived of possession without right. *Bliss v. Johnson*, 73 N. Y. 529. Neither the officer nor the defendant had any authority to prevent her if she attempted to, or to keep her out by threats or a display of force. As she was put out wrongfully, she had the right to get in again if she could, and whoever prevented her by menace or intimidation was guilty of forcible detainer. Referring to that subject, Chief Justice Savage said in *People ex rel. Kline v. Rickert*, at page 232 of 8 Cow. supra: "The law is that the same circumstances of violence or terror which will make an entry forcible will make a detainer forcible also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter."

Threats may be made by acts as well as words. There was some evidence tending to show that Lockwood, the officer's as-

sistant, had been stationed on the premises by the defendant with instructions to guard them and keep the plaintiff off, and whatever Lockwood did within the line of this authority the defendant did. *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519; *Newberry v. Lee*, 3 Hill, 523, 525; *Brown v. Feeter*, 7 Wend. 301.

Mrs. Fults testified that she saw Lockwood "there with Wood carrying the stuff out," and that she saw him there while the defendant was on the premises. When asked what Lockwood was doing there that night she answered, "Why, he kept walking back and forth in front of our things, and ordering us and threatening and pointing a gun and such things." Later, on being recalled by the plaintiff, in answer to a similar question she said that Lockwood "kept walking up and down, walking up and down, and during the night he fired that gun three times, while I was living on the opposite side of the road," twice shortly after dark and once in the middle of the night. During the night he told her "to keep off of that side of the road. . . . He said to keep off of Mr. Munro's land. That he was in possession. That Mr. Munro had left him to keep guard and for me to keep off."

The officer's aide, with a loaded gun on his shoulder, marching through the night up and down on one side of the road in front of the plaintiff sitting with her effects on the other side, and at intervals firing the gun, was such a personification of force as naturally to inspire fear. His actions spoke louder than words, with the meaning, as the jury could have found, that, if she attempted to regain possession or enter the house, she would sustain bodily harm. Moreover, threatening words were used, although what they were does not appear, and the gun was pointed, but at whom and under what circumstances was not disclosed. There was at least such a show of force as to strongly tend to bring about a breach of the peace, and to prevent the plaintiff from attempting to re-enter.

All the evidence taken together, if believed by the jury, would have authorized them to find the defendant guilty of forcible detainer, not committed by himself in person, but by an agent for whose acts in the line of guarding the premises and keeping the plaintiff off he was responsible. A case was made for the jury, and as there was some evidence, although slight, on the question of damages, the motion to nonsuit was improperly granted. After hearing the defendant and his witnesses, whose version of the facts has not yet appeared, it will be for the jury to say whether the plaintiff was kept out of possession through fear of

personal violence, and, if so, to assess the damages sustained by her.

The judgment of nonsuit should be reversed, and a new trial granted, with costs to abide event.

Cullen, Ch. J., and Gray, Haight, Willard Bartlett, and Collin, JJ., concur. Chase, J., not voting.

## NORTH CAROLINA SUPREME COURT.

### STACEY CHEESE COMPANY

v.

R. E. PIPKIN, Appt.

(155 N. C. 394, 71 S. E. 442.)

### Courts — jurisdiction — counterclaim — excess — effect.

That a counterclaim pleaded in a justice's court involves an amount in excess of the jurisdiction of the justice does not prevent him from entertaining and applying it to reduce or defeat the principal demand although he may not be able to enter an affirmative judgment for the excess.

(May 31, 1911.)

### Note. — The effect of a counterclaim in an amount in excess of jurisdiction.

#### I. In court of original jurisdiction.

a. Effect upon plaintiff's claim, 607.

b. Disposition of counterclaim,

1. In general, 608.

2. Where counterclaim is pleaded as a defense merely, 611.

3. Where a balance within the jurisdictional amount is claimed,

(a) In general, 611.

(b) Where counterclaim is treated as a payment or extinguishment of plaintiff's claim, 614.

(c) Where there was a waiver of the excess, 615.

#### II. In appellate court.

a. In general, 616.

b. Where counterclaim is first exhibited in appellate court, 616.

c. Where counterclaim is amended in appellate court, 618.

It is intended to include in this note pleas in set-off, reconvention, and other cross demands, as well as counterclaims. But it is not intended to include cases in which the courts have considered the effect of a failure of the defendant to present or set up against the plaintiff a demand involving an amount above jurisdiction, nor those wherein the total of the combined claims of the plaintiff and defendant exceed the jurisdiction. Neither is it intended to include cases, as in replevin, where the de-

**A**PPEAL by defendant from a judgment of the Superior Court for Wayne County dismissing his counterclaim for lack of jurisdiction on appeal from a justice of the peace in an action brought to recover an amount alleged to be due plaintiff by contract from defendant. Reversed.

Statement by Hoke, J.:

The action was instituted by plaintiff to recover \$199 due by contract. Defendant denied the indebtedness, and set up a counterclaim for breach of contract of warranty on other sales of cheese. On the hearing before the justice, there was judgment in defendant's favor for an excess of \$38.36. Plaintiff having appealed on trial in superior court, four issues were submitted, as

follows: "First. In what amount, if any, is the defendant indebted to the plaintiff? Second. In what amount, if any, is the plaintiff, Stacey Cheese Company, indebted to the defendant? Third. What amount, if any, is the plaintiff entitled to recover? Fourth. What amount, if any, is the defendant entitled to recover?" And it was agreed by parties that the court should answer the third and fourth issues according to the findings of the jury in the first and second. The jury rendered verdict as to defendant's indebtedness to plaintiff. Answer first issue \$199, and second issue, as to plaintiff's indebtedness to defendant, \$210. On the verdict defendant moved for judgment that plaintiff take nothing by his suit, and defendant recover his costs. The court being

defendant's answer merely alleges facts showing the amount in controversy to be above the jurisdictional limit. Nor is it intended to go into the question of the effect on the defendant's cause of action in a subsequent suit.

The question as to what constitutes a counterclaim in excess of jurisdiction, or the manner of determining that question, has not been discussed separately, and is considered herein only as it bears upon the main question annotated.

As a general rule a court has no jurisdiction of a set-off or counterclaim in an amount in excess of its jurisdictional limit. But the defendant cannot oust the court of jurisdiction by setting up such a claim. 24 Cyc. 479.

### *I. In court of original jurisdiction.*

#### *a. Effect upon plaintiff's claim.*

The filing of a counterclaim in excess of jurisdictional limit does not oust the court of jurisdiction of the plaintiff's claim. *Alexander v. Peck*, 5 Blackf. 308; *Barber v. Kennedy*, 18 Minn. 216, Gil. 196 (dictum); *Corley v. Evans*, 69 S. C. 520, 48 S. E. 459; *Bennett v. Forrest*, 69 Fed. 421; *McIlroy v. McEwan*, 12 Manitoba L. Rep. 164; *Read v. Wedge*, 20 U. C. Q. B. 456.

In *Hoffman v. Reading*, 3 N. J. L. 561, it was held that the defendant could not oust the justice of jurisdiction by an unverified plea setting up a demand in excess of jurisdiction, where after the plea was filed, the cause was referred to referees by consent.

And in *Montgomery v. Snowhill*, 2 N. J. L. 362, a statement by the defendant, with an offer to make affirmance of the same, that the plaintiff owed him more than \$100 (apparently the jurisdictional amount), was not a ground for nonsuiting the plaintiff.

But the court should proceed to hear and determine the plaintiff's claim. *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437; *Kilgore Lumber Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62; *Gharkey v. Halstead*, 1 Ind. 389; *State, Clancy, Prosecutor, v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154; *Kienzle v. Gard-37 L.R.A. (N.S.)*

*ner*, 73 N. J. L. 258, 63 Atl. 10; *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *Raisin v. Thomas*, 88 N. C. 148; *Holden v. Wiggins*, 3 Penr. & W. 469; *Milliken v. Gardner*, 37 Pa. 456; *Walden v. Berry*, 48 Pa. 456; *Kraus v. Bickhart*, 1 Chester, Co. Rep. 479; *Cain v. Culbreath*, — Tex. Civ. App. —, 35 S. W. 809; *Johnson v. W. H. Goolsby Lumber Co.* — Tex. Civ. App. —, 121 S. W. 883.

In *Ware v. Fambro*, 67 Ga. 515, the Code governing this matter provided that where the defendant pleads a counterclaim in excess of the jurisdictional amount, the plaintiff's debt may be credited on the counterclaim, leaving the defendant free to sue on his claim with this credit, in a court having jurisdiction.

So, in *Beckham v. Peay*, 1 Bail. L. 121, it was held that where the plaintiff was insolvent, and the defendant filed a set-off in excess of the jurisdictional amount, upon a proper case made the plaintiff should be compelled to declare in a higher court, so that the defendant might have the benefit of his set-off; the judgment in this case was reversed on other grounds.

In *Jourdain v. Lichsinger*, 91 Minn. 111, 97 N. W. 740, a statute provided that when a counterclaim is filed in excess of the jurisdictional amount, the court shall certify the same to a court of general jurisdiction, which shall proceed to final judgment; and it was held that the only question the justice could pass upon was as to the sufficiency of the answer to determine whether the claim was such a one as required transfer.

In *Kilgore Lumber Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62, *infra*, the statute provided that the amount due the plaintiff should be ascertained and given him as a credit on the claim used as a set-off or counterclaim. The court does not specifically mention this part of the statute, but it treats the plaintiff as having a right to sue on the contract before the circumstances which gave rise to the counterclaim had accrued, and for this reason says that the matter set up in the counterclaim could not be used merely as a defense to the plaintiff's claim.



of opinion that as the counterclaim of defendant was in excess of the justice's jurisdiction, and that defendant had at no time remitted the excess or offered to do so until after verdict, the court, in accordance with the agreement, answered the third issue \$199, and fourth issue nothing, and entered judgment in favor of plaintiff for said amount of \$199 and costs, and dismissed defendant's counterclaim for lack of jurisdiction, etc. Defendant excepted and appealed, assigning for error that the court refused to sign the judgment as tendered by him; second, to the judgment as entered.

Messrs. Aycock & Winston and W. R. Dortch for appellant.

Mr. M. T. Dickinson for appellee.

And in *Smith v. Burke*, 10 Johns. 110, where the defendant set up a counterclaim in excess of the jurisdictional amount, it was held that if it was proved to the satisfaction of the justice in such excess, the plaintiff should be nonsuited, and if in any sum within the jurisdiction, the judgment should be rendered against the plaintiff for the difference between the amounts so found due.

Where the plaintiff does not object to the jurisdiction, the judgment for the defendant in excess of the jurisdictional amount will not be reversed, under a statute which provides that where set-off is pleaded in the justice court, and satisfactorily proved, the justice shall give judgment for the overplus, provided it does not exceed the jurisdictional amount; and if it exceeds that amount the judgment is to be given for the defendant for costs. *Smith v. Fleming*, 9 Ala. 768. It is not quite clear from the report of this case whether the set-off was filed in the justice court or not until after it reached the appellate court. See *Jackson v. Swope*, 49 Ind. 388, *infra*.

Where the court has jurisdiction to hear and determine the defendant's claim, and an amount is found due him, such amount is used as an offset to any amount found due the plaintiff on his claim. This question is discussed in the division below as to disposition of the defendant's claim, where other questions relating to the effect upon the plaintiff's claim are discussed also.

#### *b. Disposition of counterclaim.*

##### *1. In general.*

The court has no jurisdiction to hear and determine a set-off or counterclaim in excess of the jurisdictional amount. *Cash v. Cash*, 1 Ga. Dec. pt. 1, p. 97; *Holden v. Wiggins*, 3 Penn. & W. 469; *Walden v. Berry*, 48 Pa. 456; *Kraus v. Bickhart*, 1 Chester Co. Rep. 479; *Salsar v. Mackenzie*, 19 Pa. Co. Ct. 280; *Hall v. McGill*, — Tex. Civ. App. —, 38 S. W. 828; *Corley v. Evans*, 69 S. C. 520, 48 S. E. 459; *Robinett v. Nunn*, 9 Mo. 248 (statute provided against jurisdiction L.R.A. (N.S.)

*Hoke, J.*, delivered the opinion of the court:

There is apparent conflict of authority with us on the question presented, and at least two or more decisions of this court would seem to be in direct support of his Honor's ruling. *Raisin v. Thomas*, 88 N. C. 148; *Meneely v. Craven*, 86 N. C. 364. The cause having originated in the court of a justice of the peace, questions of jurisdiction must be considered and determined in reference to that fact, and numerous and repeated cases with us are to the effect "that the jurisdiction of the superior court on appeals from a justice of the peace is entirely derivative, and, if the justice had no jurisdiction in an action as it was before him, the superior court can derive none

tion); *Turgrinson v. Meyer*, 155 Ill. App. 553; *Sullivan v. Owens*, — Tex. Civ. App. —, 78 S. W. 373.

In *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437, an action for damages for breach of contract to deliver goods, it was held that the defendant could not counterclaim for the purchase price of the goods, which was an amount in excess of the court's jurisdiction.

And in *Kienzle v. Gardner*, 73 N. J. L. 258, 63 Atl. 10, an action for the price of goods sold and delivered, it was held that the defendant could not sustain a claim of recoupment in excess of the jurisdictional amount, and the defense of a failure of consideration could not be maintained where the defendant in his notice did not discriminate between the two defenses, under a statute which authorized the defendant to recoup all damages he may have sustained by reason of any cause of action arising out of a contract or transaction set forth in the plaintiff's demand or connected with the subject of the action. There is a *dictum* to the effect that this statute does not authorize entertaining jurisdiction unless the claim in itself, or by an admitted credit, or by a waiver of the surplus, does not exceed the jurisdictional amount. Both the claim and the balance, however, were in excess of the jurisdictional amount.

In *Raisin v. Thomas*, 88 N. C. 148, an action on a note given as evidence of the purchase price of goods, it was held that the court could not entertain jurisdiction of a counterclaim in damages in excess of the jurisdictional amount. It appears that the defendant recovered judgment for an amount in excess of the jurisdiction, and proposed to remit the excess, extinguish the plaintiff's demand with the balance, and obtain judgment for costs. The principal case modifies this holding, as will be seen by reference thereto.

In *Martin v. Eastman*, 109 Wis. 286, 85 N. W. 359, an action for the balance of the price of goods, it was held that the defendant could not set up a breach of warranty as a defense, and counterclaim for an amount in excess of the court's jurisdiction.

by amendment" (*Ijames v. McClamroch*, 92 N. C. 362)—a principle fully approved by the present chief justice delivering the opinion of the court in *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263, and reaffirmed and applied at the present term in *Wilson v. Life Ins.* 155 N. C. 173, 71 S. E. 79.

Considering the present case in that aspect, however, we are of opinion that it is a fair and correct deduction from the better considered decisions of our court, and is in accord with reason and the enlightened policy and expressed purposes of our present Code, that, whenever one is sued in a court of justice of the peace and has a valid counterclaim against plaintiff's demand, though the same may be in excess of the justice's jurisdiction, it may be pleaded,

In *Bennett v. Forrest*, 69 Fed. 421, an action for work and labor, the defendant pleaded a counterclaim in excess of the jurisdictional amount, and then moved to dismiss the action on the ground that the court did not have jurisdiction. This motion was denied, and thereupon the cause came on for hearing, and defendant refused to introduce evidence. Judgment was rendered for the plaintiff. It was held that this judgment would not be reversed, because no error had been assigned on the misleading character of the statement of the court in overruling the defendant's motion, which the defendant claimed prevented him from introducing evidence. There is *dictum* in this case that if the defendant's claim were established, it would defeat the plaintiff's cause of action, and judgment to the amount of the court's jurisdiction could be rendered for the defendant, and he would be presumed to have waived the excess by filing his counterclaim in such court.

In *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803, an action for work and labor, it was held that the defendant could not counterclaim in tort for a sum in excess of the jurisdictional amount. There is *dictum* to the effect that the defendant might reduce his counterclaim to a sum within the jurisdictional amount, in which case the court would have jurisdiction to hear and determine it.

So, in *Cane v. Culbreath*, — Tex. Civ. App. —, 35 S. W. 809, an action for rent, it was held that the defendant could not counterclaim for work and labor and for damages in excess of the jurisdictional amount.

In *Johnson v. W. H. Goolsby Lumber Co.* — Tex. Civ. App. —, 121 S. W. 883, the defendant, with whom others were joined *pro forma*, in an action for materials used in the construction of a house, was held not to have the right to counterclaim against one of his codefendants for an amount in excess of the court's jurisdiction.

In *Henry Bill Pub. Co. v. Curtis*, 1 Ohio S. & C. P. Dec. 476, 7 Ohio N. P. 202, under a statute which provided that after a transcript on appeal was filed, the appellate

and, if established to an amount equal to or greater than plaintiff's claim, it may avail to defeat the action. On a counterclaim resting in contract, no recovery for an excess can be had in favor of defendant except on demands for \$200 or less, or unless the excess over \$200 has been remitted in the justice's court and in apt time (*Ijames v. McClamroch*, *supra*); but whether set up strictly as a counterclaim or not, where it exists, and has been pleaded and established, it should avail as a defense and defeat recovery by plaintiff, where the amount is sufficient for the purpose. This position is not in violation of our Constitution, limiting the jurisdiction of justices of the peace in actions *ex contractu* to cases involving \$200 or less. Though a larger counterclaim

court should proceed in all respects as though the case had been originally brought there, it was held that the defendant could prosecute a counterclaim only in such sum as that of which the magistrate had jurisdiction, unless the plaintiff filed an answer to the counterclaim, or did some other act by which he submitted to the jurisdiction.

And so, in *Malson v. Vaughn*, 23 Cal. 61, an action against the maker and indorser of a note, it was held that the maker could not plead in defense a set-off or counterclaim against the indorser (who was the payee) in excess of the jurisdictional amount of the court.

In *Milliken v. Gardner*, 37 Pa. 456, an action on a duebill given upon the settlement of accounts between the parties, it was held that the defendant could not prove error in settling the accounts, and set up a counterclaim for the amount of the error which exceeded the jurisdiction of the court.

And in *Newman v. McCallum*, 1 Tex. App. Civ. Cas. (White & W.) 111, an action on a note, it was held that the defendant could not plead in reconvention two separate and distinct claims for damages for an amount in excess of the jurisdiction, but that he might be allowed to amend his pleading in reconvention, and ask for an amount within the jurisdiction of the court.

In denying a writ of prohibition to restrain the lower court from proceeding with a case in which a counterclaim in excess of jurisdiction was filed, the court in *People ex rel. Brownson v. Marine Ct.* 36 Barb. 341, states that the court would have power to render judgment not exceeding the jurisdictional limit, and if defendants refused to take judgment for such an amount only, the court should dismiss the suit. It appears from the statement of facts, however, that judgment was asked in the counterclaim only for the jurisdictional amount. The writ was denied, however, on the ground that the action was brought prematurely.

In *Russell v. Conway*, 5 U. C. Q. B. 256, it is stated that the defendant may prove his counterclaim only up to the jurisdictional limit, by pleading set-off to that amount, and making claim to have it allowed, but

may be presented, the question determined is limited to \$200 or less, to wit, the amount required to defeat the plaintiff's claim, and is no more forbidden by the Constitution than in cases where the excess of a larger counterclaim is remitted to \$200, or an equitable defense has been entertained in bar of plaintiff's demand. Under our former system and in actions at law, this principle of balancing one claim against another was much more restricted than at present, and was included in the general term, "set-off," confined usually to actions of debt or indebtedness assumptit for a moneyed demand and of a liquidated nature. It was so held with us in *Linsday v. King*, 23 N. C. (1 Ired. L.) 401, but under the present system, by which actions at law and suits in

equity are instituted and determined in one and the same court, and as far as permissible in one and the same action, the doctrine has been included and very much extended under the general term "counterclaim." In *Smith v. French*, 141 N. C. 6, 53 S. E. 437, the court said: "Our statute on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose." And, after quoting our statutory provisions on the subject, said further: "Subject to the limitations expressed in this statute, a counterclaim includes well-nigh every kind of cross de-

it was held that where he does not so plead, but no objection is taken to the jurisdiction, a judgment for the difference between the plaintiff's demand and the jurisdictional limit will not be disturbed.

In *Davis v. Flagstaff Silver Min. Co.* 38 L. T. N. S. 769, 47 L. J. C. P. N. S. 503, L. R. 3 C. P. Div. 228, 26 Week. Rep. 431, under a statute giving the court jurisdiction when a counterclaim is in excess of the jurisdiction, to dispose of the whole matter in controversy, it was held that the court might consider a counterclaim in excess of jurisdiction, but not grant relief beyond so much as would be a defense, either by way of counterclaim or set-off to the plaintiff's claim. The court distinguished between using a counterclaim as a mere defense and as a counterclaim, but the effect of this decision would seem to be that, at least, it was used merely to defeat the plaintiff's claim. See also *Smith v. Burke*, 10 Johns. 110, *infra*.

So, in *Maxfield v. Johnson*, 30 Cal. 546, there is *dictum* to the effect that the defendant cannot file a counterclaim in excess of the justice's jurisdiction. It is stated, however, that the counterclaim was not legally filed, and it is not clear that jurisdiction would not have been retained if it had been rightly filed.

On the contrary, in *Howard Iron Works v. Buffalo Elevating Co.* 176 N. Y. 1, 68 N. E. 66, reversing 81 App. Div. 386, 81 N. Y. Supp. 452, it was held that a counterclaim for damages growing out of the contract on which the plaintiff sued, in excess of the jurisdictional amount, on which judgment was demanded, could be heard and determined by the court. It is stated that the amount of the plaintiff's claim is the sole test of determining the jurisdiction of the court, and when the plaintiff has brought his action in a court of limited jurisdiction, the right of that court to try and render judgment on any counterclaim the defendant has follows the case as a necessary incident of the jurisdiction, without regard to its amount. A statute governing this case provided that when a court has jurisdiction of an action or special proceed-

ings, it possesses the same jurisdictional power and authority as a court of general jurisdiction.

In *Heigle v. Willis*, 50 Hun, 588, 3 N. Y. Supp. 497, under a jurisdictional statute which is not set out in the opinion, but which is stated by the court to relate only to plaintiff's cause of action, it was held that the court might hear and determine a counterclaim growing out of the transaction which was the basis of plaintiff's claim, in excess of the jurisdictional amount.

In *Wood v. O'Ferrall*, 19 Ohio St. 427, the plaintiff filed a reply to a counterclaim in excess of the jurisdiction, and trial was had, and the parties by their pleadings were held to have waived the jurisdictional question, and the appellate court to have exercised original and not appellate jurisdiction.

So, where a balance is claimed which is in excess of the jurisdictional amount, the court has no jurisdiction. *Picquet v. Cormick*, *Dudley* (Ga.) 20; *Seafkas v. Evey*, 29 Ill. 178; *Alexander v. Peck*, 5 Blackf. 308; *Gharkey v. Halstead*, 1 Ind. 389.

So, in *State, Clancy, Prosecutor, v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154, it is stated that a set-off of an amount in excess of the jurisdiction of the court, and which could not be reduced within the jurisdiction by crediting plaintiff's claim, cannot be heard and determined by the justice. It does not appear, however, in this case, that the defendant offered to reduce his claim by crediting plaintiff's, or that he demanded anything less than the full amount of his claim.

In *Orr v. Foot*, 2 Brev. 379, a summary process on a promissory note, where the defendant gave notice of a discount, and offered in discount as much of a certain note held by him as would be sufficient to satisfy the plaintiff's demand, it was held that the court could not take jurisdiction, the judge stating that the defendant could not divide or reduce his cause of action so as to bring any part or the balance of it within the summary jurisdiction of the court. The defendant apparently sought only to defeat the plaintiff's claim, but it does not appear that it was pleaded as a defense merely.

mand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill would have secured to him on the same state of facts." Several of the earlier New York decisions showed a disposition to establish some of the common-law restrictions on the relief available under their statutory counterclaim, and confine this user of one claim against another to the old technical doctrine of set-off, and Mr. Green, in his work on Code Pleading and Practice, comments on the doctrine of these cases as fol-

lows: "Now, if the term 'counterclaim' includes set-off and recoupment, and, in fact, nearly all counterclaims are either set-offs or recoupments, how is it, and why is it, that a set-off may be interposed as a defense, and that a counterclaim cannot? Or why should the same state of facts be a good defense when called a 'set-off,' and liable to demurrer when called a 'counterclaim?' There seems to be literally no sense at all in the distinction here made between a 'counterclaim' and a 'set-off;' and such hairsplitting is even worse than that under the old system in regard to the distinctions between the actions of trespass and case." And further the author says: "Indeed, it makes no difference what name a party may give to his pleading under the

In *Wells v. Reynolds*, 3 Brev. 407, a defendant in a summary process who had completed a set-off by way of defense, which was over the jurisdictional amount, and on the trial offered to relinquish a part of his demand and set off the remainder, was held not entitled to do this, as the demand consisted of one entire sum. See also *Wood v. O'Ferrall*, 19 Ohio St. 427, supra.

See also on this question *Orr v. Foot* and *Wells v. Reynolds*, supra.

## 2. Where counterclaim is pleaded as a defense merely.

Where the counterclaim is pleaded as a defense merely, the fact that it is above the jurisdictional amount of the court does not prevent the court's determining its validity as such defense. *McClenahan v. Cotten*, 83 N. C. 332. See opinion in *STACEY CHEESE CO. v. PIPKIN*.

So, in *Unitype Co. v. Ashcraft Bros.* 155 N. C. 63, 71 S. E. 61, a counterclaim in excess of the jurisdictional amount of the justice was allowed to defeat a claim of the plaintiff. Nothing is said on the question of defense merely, in the prevailing opinion, except that it relies on the case of *McClenahan v. Cotten*, supra. One of the judges in a concurring opinion discusses this point, and sustains it on the ground that the jurisdiction of the appellate court is original, and not derivative. It does not clearly appear whether this claim was exhibited for the first time in the appellate court or not.

So, in *Temple v. Bradley*, 14 Vt. 254, it was stated that in an action on a book account, the defendant might plead a book account in excess of the jurisdictional amount as a defense merely, but may not obtain judgment for the balance thereon, under a statute which provides that no demand shall be allowed in offsetting any actions before a justice, unless the same would have been within the jurisdiction of the justice if an action had been commenced thereon. It does not appear that this statement was more than dictum, as the defendant's claim was apparently within the jurisdiction of the court, and the decision was based on this ground,  
37 L.R.A. (N.S.)

## 3. Where a balance within the jurisdictional amount is claimed.

### (a) In general.

On this question there is a greater difference in the decisions. The better considered cases hold that where the claims are entirely independent, and where there has been no previous agreement to accept the claim set forth by the defendant as payment of the claim sued upon by the plaintiff, and therefore it becomes necessary to adjudicate or pass upon the entire claim, the court does not acquire jurisdiction to grant an affirmative judgment, even though the balance is within the jurisdictional amount; but where there has been an agreement to accept the claim of the defendant as payment, or a waiver of the excess by the defendant, so that it is not necessary for the court to adjudicate as to an amount in excess of his jurisdiction, it does acquire jurisdiction, where the balance is within the jurisdictional amount. As stated above, however, the decisions are not in accord on this point.

In *General Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288, an action for goods sold and delivered, it was held that the court had no jurisdiction of a counterclaim set up by the defendant in excess of the plaintiff's claim, but which is remitted so that it is equal to the plaintiff's claim, and, in addition thereto, another counterclaim of the defendant in excess of jurisdiction, which excess is remitted by him. The court distinguishes between payment and counterclaim by saying that payment extinguishes the debt and is itself extinguished, while a counterclaim is an assertion of an independent demand which might be the subject of an independent action. Payment extinguishes the debt at the time of payment, while a set-off requires mutual existing debts and operates as payment only when pleaded, and by judgment of the court.

So, in *Lancaster, Ohio, Mfg. Co. v. Colgate*, 12 Ohio St. 345, it was held that the

Code system, if the facts constitute a good cause of action or ground of defense." In the line of these comments, and in direct support of the disposition we make of the present appeal, are the well-considered decisions in our own court of *Hurst v. Everett*, 91 N. C. 399, and *McClenahan v. Cotten*, 83 N. C. 333. In *Hurst v. Everett* plaintiff sued before a justice of the peace in five separate actions on five separate promissory notes, aggregating \$800. These actions were consolidated in the superior court, but this in no way affects the bearing of the decision on the point presented. Defendant claimed damages for breach of warranty in failing to supply goods of the quality contracted for, to the amount of \$400; the sale and warranty attached to one entire trans-

action, to wit, a single sale. It was objected that, as this was for breach of warranty in an indivisible transaction, the claim was not available as a set-off to plaintiff's actions in the court of a justice of the peace. The lower court sustained plaintiff's objection, and on appeal this court, in reversing the judgment, after referring to the effect of our statute extending the doctrine of set-off to all matters embraced within our statutory counterclaim, said further on the question chiefly involved: "This view of the case, founded upon the statutes, the authorities, and the 'reason of the thing,' leads us to the conclusion that when the defendants were sued, no matter whether for goods sold and delivered, or upon one of the notes given in payment therefor, they

court did not acquire jurisdiction to hear the defendant's claim for unliquidated damages in excess of the jurisdiction, by the defendant's asserting only so much of said claim as would not exceed the jurisdiction of the justice, under a statute giving the defendant the right, without remitting excess, to withhold setting the same off, and providing that a recovery for the amount set off and allowed, or any part thereof, should not be a bar to a subsequent action for the amount withheld.

So, in *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569, under a similar statute it was held that an unliquidated demand in excess of the jurisdiction could not be split up and only an amount equal to the jurisdiction pleaded, but that the excess must be remitted, or the justice would be without jurisdiction.

So, in *Kilgore Lumber Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62, supra, an action for goods sold and delivered, it was held that the defendant could not plea a counterclaim in liquidated damages on an independent cause of action, notwithstanding only a balance within the court's jurisdiction was claimed to be due, and a statute which provided that a set-off or counterclaim, though exceeding in amount the jurisdiction of the court, might be used to bar and extinguish the demand of the plaintiff, but that no judgment should be rendered in favor of the defendant for the excess unless such excess was within the limits of the court's jurisdiction as to amount, was held unconstitutional.

So, in *Gimbel v. Gomprecht*, 89 Tex. 497, 35 S. W. 470, an action on an account under which goods had been attached and sold, it was held that the defendants could not plead in reconvention damages, actual and exemplary, in excess of the court's jurisdiction, and, by admitting the plaintiff's claim, bring the balance within the jurisdiction and ask for judgment for this balance only. It is stated that the claim for damages does not operate as an extinguishment of the plaintiff's debt, nor does the plaintiff's debt operate as an extinguishment *pro tanto* of the defendants' claim for 37 L.R.A. (N.S.)

damages, but the two classes of claims are not such as of themselves would have the effect to extinguish each other, until ascertained by the court and by its judgment thus applied.

Similar facts and holding appear in *Smith v. Dye*, 21 Tex. Civ. App. 662, 52 S. W. 981. The court in this case stated that the total amount of damages is in litigation and subject to controversy; that, before the defendant is entitled to extinguishment of any of the demands asserted by the plaintiff, he will be required to prove that he has sustained the damages alleged in his plea of reconvention, and he cannot arbitrarily dispose of a part of those damages and thereby say that it is not in litigation, by undertaking to credit it on the plaintiff's demands, and thus reduce the amount of damages sued for to the jurisdiction of the justices' court.

So, in *Pennybacker v. Hazlewood*, 20 Tex. Civ. App. 183, 61 S. W. 153, an action for rent of a farm and for damages, it was held that the defendant could not plead in reconvention that, under the contract of lease, he had made certain improvements at a stated price, which amounted to a sum in excess of the jurisdiction of the court, and, by admitting his indebtedness for the rent claim, and claiming only a balance due within the jurisdiction of the court, thus give the court jurisdiction.

In *Clark v. Smith*, 29 Tex. Civ. App. 363, 68 S. W. 532, it was held, in passing upon the question as to whether or not the judgment of a court in dismissing a counterclaim in excess of the jurisdiction, and passing upon the plaintiff's claim, was a final judgment for purposes of appeal, that the counterclaim, being in excess of the jurisdictional amount, could not be heard by the court, notwithstanding an attempt to reduce the amount by offsetting part against the plaintiff's claim, and therefore the judgment of the lower court was a final judgment, from which an appeal would lie.

And in *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806, an action on an open account, it was held that the defendant could not plead a breach of contract and

had the right to recoup the damages they had sustained to the amount of the sum claimed in the plaintiff's complaint, and so on in each action, '*toties quoties*,' until the amount of their damages should be exhausted. And this defense, having attached to the action while in the justice's court, followed the cases on appeal; and when the several actions were consolidated in the superior court, the defendants had the right to recoup the whole amount of such damages as they might be able to prove they had sustained, from the plaintiff's recovery." In *McClennahan v. Cotten*, the court spoke of the rights available to a defendant under a counterclaim as follows: "The question now arises, How may a party use and rely on his cross demand? The answer is, he

may plead it or not at his will, but, if he elect to plead it, he may do so, and then, if it be equal to or greater than the opposing demand, he may plead it in bar as formerly, or plead it as a defense, so called, under the Code, the plea or defense having the operation merely to defeat the action, and not to admit of any judgment for an excess; or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counterclaim as introduced by the Code, and then the defendant will have judgment for the excess. This construction is within the words of the Code, and is just in itself, for no reason can be given why A, having a debt of \$200 against B, who has a debt of \$1,000 on him, should have judg-

consequent damages in an amount in excess of the justice's jurisdiction, although he asked for judgment for an amount within the jurisdiction, as the damages alleged were greatly in excess. It is not clear from the report of this case whether or not the amount sought to be recovered was the amount remaining after defeating the plaintiff's claim. It would seem that the defendant had waived the excess from the statement of the case, but nothing is said as to this.

In *Williamson v. Bodan Lumber Co.* 36 Tex. Civ. App. 446, 82 S. W. 340, an action for services, it was held that the defendant could not set up a counterclaim on an account for an amount in excess of the jurisdiction of the justice, and, by admitting part of the plaintiff's claim and pleading his claim as an offset thereto, in addition demand judgment for an amount equal to the jurisdictional amount of the justice. It is stated that the demand was a lump sum, and the court would have been called to inquire into the correctness of the entire claim, and in doing this would have gone into an amount in excess of the jurisdiction. It seems here also that the defendant might have been regarded as waiving the excess, but nothing is said as to this in the opinion. See cases below on waiver of excess.

So, in *Almeida v. Sigerson*, 20 Mo. 497, it was held that a defendant could not, by crediting his claim against the plaintiff's and demanding judgment for the balance only, which was an amount within the jurisdiction, thus give the court jurisdiction, as the effect would be suing on the whole sum, and asking that a sum equal to the amount of the plaintiff's claim be applied in the extinguishment of that claim.

The case of *Reed v. Snodgrass*, 55 Mo. 180, is a case with similar facts, except that the defendant withdrew his set-off after taking exception to the ruling of the appellate court refusing to permit him to support such set-off with testimony, and the reviewing court says that it is perhaps not necessary to pass upon the correctness of the ruling, but cites with approval the case 37 L.R.A. (N.S.)

of *Almeida v. Sigerson*, supra.

So, in *Pioneer Sav. & L. Co. v. Wilson*, — Tex. Civ. App. —, 39 S. W. 1095, an action by a real estate agent for commissions, the defendant was held not entitled to set off a sum paid the plaintiffs, and a claim for damages in an amount in excess of the jurisdiction, although he asked judgment for only so much of the said sum as the court had jurisdiction to render judgment for. The court states that his claim was in excess of jurisdiction, as he had asked judgment for the amount of the payment, and also for an amount equal to the jurisdictional amount on the claim for damages, thus making a total in excess of the jurisdictional amount.

In *Cable Co. v. Rogers*, 44 Tex. Civ. App. 620, 99 S. W. 736, an action on notes given in part payment of the purchase price of goods, the balance of which had been paid in cash and property, it was held that the defendant could not plead in reconvention a failure of consideration of the notes, asking for their cancelation and the return of the money already paid, and the property or its value in money, where the total amount of the property and money, together with the notes sued upon, exceeded the jurisdictional amount of the court, as the effect of the counterclaim was for the rescission of a contract which involved a sum in excess of the jurisdiction. The excess of the counterclaim above the jurisdictional amount was remitted, but the court treated the total amount of the contract as determining jurisdiction.

In *Rylie v. Elam*, — Tex. Civ. App. —, 79 S. W. 326, overruling — Tex. Civ. App. —, 58 S. W. 51, it was held that the court has no jurisdiction of a counterclaim in excess of the jurisdictional amount, although it was sought to bring it within such amount by crediting the plaintiff's claim thereon; but as nothing was allowed on the counterclaim, no reversible error resulted.

In *Pickett v. Edwards*, — Tex. Civ. App. —, 25 S. W. 32, a defendant was held not entitled to plead in counterclaim a note

ment for his debt without the right in B to defeat the action by a plea of his larger debt as a set-off in bar. Such a distinction between set-off set up as a bar and as a technical counterclaim is laid down as proper to be taken, by an intelligent writer (Bliss on Code Pleading, § 368), and is recognized and admitted under the Code in New York. Tillinghast & S. Pr. 158; Burrall v. De Groot, 5 Duer, 379; Prentiss v. Graves, 33 Barb. 621. In our opinion, therefore, the judgment, if not otherwise liable to objection, was properly pleadable as a defense, formerly a plea in bar, without any

remittitur whatever, and that there was no error in the ruling on this point except in requiring the excess above plaintiff's demand to be remitted, which was an error against the defendant of which the plaintiff cannot complain." And in that case the decision of the court expressly holds: "A defendant, sued on contract in a justice's court, may plead as a defense an independent cross demand arising *ex contractu*, the principal of which is beyond the jurisdiction of a justice of the peace." The same principle is applied in many well-considered decisions of this court holding that an equit-

bearing interest on which a payment had been made, and which, if the payment were applied to the principal, would have reduced the note to the jurisdictional amount. The court states that, in the absence of an agreement to the contrary, the payment will be applied to the extinguishment of of the interest first, and the balance to the principal, thus leaving the amount claimed beyond the jurisdiction. A statute in this case provided for determining the jurisdictional amount by the claim exclusive of interest.

In Finch v. Ives, 28 Conn. 115, where the statute provided that a balance in set-off of only a certain amount could be recovered, the defendant, who gave notice of a claim that he would, if necessary, set off against the plaintiff's claim, but asked for no judgment, cannot thereafter obtain a judgment for the balance on a claim that he had previously put in judgment in a separate action, and which had not accrued at the time of the commencement of the plaintiff's suit.

On the contrary, in Mulhaul v. Feller, 1 Tex. App. Civ. Cas. (White & W.) 663, an action of attachment, it was held that the defendant might plead in reconvention damages in excess of the jurisdictional amount, when, by deducting the plaintiff's claim, the balance is brought within the jurisdictional amount, and judgment is asked for this balance. This case relies upon Dalby v. Murphy, 25 Tex. 354, *infra*. The court, in Gimbel v. Gomprecht, 89 Tex. 497, 35 S. W. 470, *supra*, distinguishes the case of Dalby v. Murphy from the facts of the case which the court was considering. The case of Mulhaul v. Feller is referred to in that opinion also, and nothing further is said with reference to it than that the facts do not fully appear, and that it is not in point in the case which the court is there considering. There seems, however, to be little distinction between this case and the case of Gimbel v. Gomprecht, especially with reference to the reason given for the decision in the latter case, and it seems that that case overrules the case of Mulhaul v. Feller.

Likewise, in the following cases it was held that the court had jurisdiction of the counterclaim:

—where the defendant admitted the plain-

tiff's claim, and claimed only a balance within the jurisdiction. Glass v. Moss, 1 How. (Miss.) 519;

—where the defendant claimed judgment for the amount that might be found due him after deducting what might be found due the plaintiff, not to exceed the jurisdictional amount. Pate v. Shafer, 19 Ind. 173;

—where, in an action on mutual accounts, the defendant set off an account, the total amount of which was in excess of the jurisdictional amount, but the balance was within the jurisdictional amount, a statute providing that all claims of each party which do not exceed \$100 shall be brought forward, and also that all debts or demands originally exceeding \$100, if reduced below that sum by fair credits, shall be within the jurisdiction. Nichols v. Ruckells, 4 Ill. 298;

—where a set-off in excess of the jurisdiction was filed, but only a balance within the jurisdiction was claimed. West v. Hatfield, Morris (Iowa) 493; South v. Hall, 1 N. J. L. 29.

**(b) Where counterclaim is treated as a payment or extinguishment of plaintiff's claim.**

Where the counterclaim is in the nature of a payment of the plaintiff's claim, and the balance is within the jurisdictional amount of the court, the court may hear and determine the claim. Thus, in Eule v. Dorn, 41 Tex. Civ. App. 520, 92 S. W. 828, a defendant who previously agreed with the plaintiff to ship some goods to market upon the plaintiff's guaranty that they would sell for a stated sum, and to apply the purchase price thereof to the extinguishment of the plaintiff's debt which was being sued upon, may counterclaim in damages for breach of the guaranty, although the amount of such damages exceeds the jurisdictional amount of the court, but the balance is within such amount.

And in Dalby v. Murphy, 25 Tex. 354, an action on an account and note, it was held that the defendant might plead that he delivered goods in payment of the sum, to an amount in excess of the justice's juris-

able defense may be interposed to defeat a recovery in a justice's court, though affirmative equitable relief in such court is not allowed, as in *Garrett v. Love*, 89 N. C. 205; *Lutz v. Thompson*, 87 N. C. 334. In all the cases examined, except the two heretofore mentioned, which seem to uphold a contrary view, as in *General Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288; *Derr v. Stubbs*, 83 N. C. 539, etc., the claimant continued to insist on his right to recover on his counterclaim an amount in excess of the justice's jurisdiction, and such claim was very properly denied. Even the two cases referred to

—that is, *Raisin v. Thomas*, 88 N. C. 148, and *Meneely v. Craven*, 86 N. C. 364—perhaps permit of that interpretation, but to the extent that these cases hold that a valid demand by way of counterclaim cannot be had as a defense to an action in justice's court, because the entire amount of same is in excess of such jurisdiction. We are of opinion that these cases are not well decided. In the cases themselves, and in others which refer to them with apparent approval, the decisions seem to lay much stress upon the form of the statement that it was set forth as a counterclaim, but substantial

diction, and recover the balance, which was within the jurisdiction.

And in *Bowler v. Osborne*, 75 N. J. L. 903, 70 Atl. 149, reversing 74 N. J. L. 216, 64 Atl. 697, the defendant was held entitled to plead a note on which the amount of principal and interest exceeded the jurisdictional amount of the court, where he admitted the plaintiff's claim, and, without objection from the plaintiff, trial was had, since, there being no objection by the plaintiff to crediting the amount of his claim on the defendant's claim, the amount in dispute would be the balance, and this was within the jurisdiction of the court. It appears in this case that the plaintiff requested an instruction to the jury to the effect that if they should find more than the jurisdictional amount due the defendant, the defendant could not recover. This instruction was refused, and thereupon the defendant waived the excess. No question seems to have been raised as to the effect of the waiver, except as to the right to make it at the time it was made.

*(c) Where there was a waiver of the excess.*

Where the defendant's bill of particulars shows an amount in excess of the jurisdictional amount, but a claim is made for an amount within the jurisdiction only, the court has jurisdiction to hear and determine the cause, under a statute providing that the defendant may waive the excess of his claim over the jurisdictional amount. *State, Loc. anowski, Prosecutrix, v. McKeone*, 60 N. J. L. 118, 36 Atl. 882, affirmed in 61 N. J. L. 288, 41 Atl. 1117.

So, under a similar statute, in *Derr v. Stubbs*, 83 N. C. 539, it was held that the defendant must remit the excess over the jurisdictional amount absolutely, and that he cannot remit all but an amount sufficient to offset the plaintiff's claim, and obtain a judgment in addition to an amount equal to the jurisdictional amount of the court, as the constitutional provision contemplates keeping the claim within the prescribed limits, and to allow such a claim would be to pass upon the validity of an account exceeding those limits.

So, in *Heyser v. Gunther*, 118 N. C. 964, 24 S. E. 712, the court was held to have 37 L.R.A. (N.S.)

jurisdiction where the defendant waived all in excess of the jurisdictional amount. A concurring opinion in this case took a view different from that of the majority as to the amount really waived.

In *Barber v. Kennedy*, 18 Minn. 216, Gil. 196, it was held that the court had jurisdiction to hear and determine the cause where the counterclaim, although in excess of the jurisdictional amount, was reduced by the defendant, and judgment claimed for only the jurisdictional amount, and no objection was made by the plaintiff. It is not clear from the opinion that the defendant objected in the court in which the trial was had, to the jurisdiction of that court on the ground that the amount in controversy was beyond the jurisdictional amount of the court. On one jurisdictional point objection was made by him, and disallowed because made for the first time in the reviewing court.

So, in *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803, it is stated that the defendant might reduce his counterclaim to a sum within the jurisdictional amount, but it does not clearly appear that this statement was more than *dictum* in this case.

So, in *Robinett v. Nunn*, 9 Mo. 248, there is *dictum* to the effect that the defendant may waive a portion of his demand so as to bring it within the jurisdictional amount of the justice.

See also on this point the cases of *Kienzle v. Gardner*, 73 N. J. L. 258, 63 Atl. 10, *supra*; *Newman v. McCallum*, 1 Tex. App. Civ. Cas. (White & W.) 111, *supra*; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806, *supra*; *Bennett v. Forrest*, 69 Fed. 421, *supra*.

In *Scott v. Mexican Nat. R. Co.* 4 Tex. App. Civ. Cas. (Willson) 496, 18 S. W. 136, it was held in an action against a railway company for services as engineer, that the railway company might plead in recoupment damages in excess of the jurisdiction, by waiving such excess. See *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806; *Williamson v. Bodan Lumber Co.* 36 Tex. Civ. App. 446, 82 S. W. 340; and *Mulhaul v. Feller*, 1 Tex. App. Civ. Cas. (White & W.) 663, *supra*; and *Ostrom v. Tarver*, *infra*.

On the contrary, in *Ostrom v. Tarver*, — Tex. Civ. App. —, 28 S. W. 701, it was



rights should not to that extent be made a matter of form.

In numerous and repeated decisions of this court, we have held that neither a particular form of statement nor a special prayer for relief should be allowed as determinative or controlling, but that rights are declared and justice administered on the facts which are alleged and properly established. *Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co.* 155 N. C. 148, 71 S. E. 71; *Williams v. Carolina & W. R. Co.* 144 N. C. 498-505, 12 L.R.A. (N.S.) 191, 57 S. E. 216, 12 Ann. Cas. 1000; *Vorhees v. Porter*, 134 N. C. 591, 65 L.R.A. 736, 47 S. E. 31; *Bowers v. Richmond & D. R. Co.* 107 N. C. 721, 12 S. E. 452. Defendant having pleaded, and the verdict having established, a counterclaim in his favor of \$2.10, and plaintiff's claim being

for a lesser sum, said defendant is entitled to have judgment entered that he go without day and recover costs. *Unitype Co. v. Ashcraft Bros.* 155 N. C. 63, 71 S. E. 61.

He is not entitled to a judgment for the excess, for that would be to uphold the justice's jurisdiction in excess of the constitutional provision, but to the amount required to defeat plaintiff's demand, to wit, \$199, such court has jurisdiction, and may award relief by rendering judgment that defendant go without day.

For the reasons stated, we are of opinion that the judgment of the Superior Court must be reversed, and it is so ordered.

Clark, Ch. J., concurs that *Raisin v. Thomas*, 88 N. C. 148, and *Meneely v. Craven*, 86 N. C. 364, should be overruled,

held that the court did not have jurisdiction of a plea in reconvention setting up an amount in excess of the jurisdiction, but waiving all in excess of such amount. Not a very full report of this case appears, and it is not clear whether or not the defendant sought to recover the jurisdictional amount after defeating plaintiff's claim.

## II. In appellate court.

### a. In general.

The jurisdiction of the appellate court is the same as that of the court in which the action was begun. *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437; *Finch v. Ives*, 28 Conn. 115; *Purcell v. Booth*, 6 Dak. 17, 50 N. W. 196; *Picquet v. Cormick*, *Dudley* (Ga.) 20; *Turgrinson v. Meyer*, 155 Ill. App. 553; *Gharkey v. Halstead*, 1 Ind. 389; *Glass v. Moss*, 1 How. (Miss.) 519; *Raisin v. Thomas*, 88 N. C. 148; *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569; *Hinds v. Willis*, 13 Serg. & R. 213; *Holden v. Wiggins*, 3 Penn. & W. 469; *Walden v. Berry*, 48 Pa. 456; *Temple v. Bradley*, 14 Vt. 254; *Unitype Co. v. Ashcraft Bros.* 155 N. C. 63, 71 S. E. 61; *Cable Co. v. Rogers*, 44 Tex. Civ. App. 620, 99 S. W. 736. See also *Hurst v. Everett*, 91 N. C. 399, *supra*.

On the contrary in *Bowman v. Gary*, *Minor* (Ala.) 326, an early Alabama case, it was held that an appellate court in which the trial is *de novo* acquires jurisdiction to hear and determine a set-off pleaded in the lower court, in excess of that court's jurisdiction.

And so, in *Crannell v. Comstock*, 12 Hun, 293, where the defendant's claim was greatly in excess of the justice's jurisdiction, and the cause was tried without objection apparently, and from a judgment an appeal was taken which was stated by the court not to have been on a question of law, the appellate court was held to have jurisdiction for all purposes of the trial, and judgment the same as if the action had been commenced in that court originally.

37 L.R.A. (N.S.)

In *Hurst v. Everett*, 91 N. C. 399, where separate notes had been given for a purchase of goods which constituted a single transaction, and separate suits were brought on such notes in a court of limited jurisdiction, and the defendants set up a recoupment by way of damages, it was held that they could recoup the damages they had sustained to the amount of the sum claimed in the plaintiff's complaint, and so on in each action until the amount of their damages should be exhausted, and this defense, having attached to the action while in the justice's court, followed the cases on appeal, and when the several actions were consolidated in the appellate court, the defendants had the right to recoup the whole amount of such damage as they might be able to prove they had sustained.

### b. Where counterclaim is first exhibited in appellate court.

So, where the counterclaim was exhibited for the first time in the appellate court, such court does not acquire jurisdiction to hear and determine a claim in excess of the jurisdiction of the court in which the action was begun. *McLeod v. Gray*, — Miss. —, 4 So. 544; *Deihm v. Snell*, 119 Pa. 316, 13 Atl. 283.

So, in *Thompson v. Stone*, 63 Kan. 381, 64 Pac. 969, where the defendant appeared and filed a counterclaim in excess of the jurisdiction of the court in which the action had been begun, without offering to withhold any portion of the same, it was held that the appellate court was without jurisdiction of such counterclaim.

In *Meneely v. Craven*, 86 N. C. 364, an action for the price of goods, in which the defendant set off a breach of warranty of the goods sued upon, it was held that the defendant could not set up a counterclaim arising from such breach of warranty so as to defeat the plaintiff's claim, and be the foundation of a judgment, for an amount which, together with the amount of the plaintiff's claim thus defeated, was in ex-

but finds no authority in the Constitution for the doctrine of derivative jurisdiction. It has been created solely by judicial construction. The jurisdiction of the superior court is fixed by the Constitution, and contains no limitation because the case may have been previously tried in another court. When the case gets into the superior court, its jurisdiction is general and unlimited, and it can make no difference whether the case was brought into the superior court by summons or by appeal. In either event, the case is in that court which has full jurisdiction to give an adequate remedy. I am therefore of an opinion that judgment should be rendered against the plaintiff, and in favor of the defendant, for the excess of the counterclaim pleaded and proven over and above the amount of the claim proven to be due the plaintiff by the defendant.

If, on appeal from the justice of the peace to the superior court, the inquiry were confined to the question whether error had been committed in the court below, there would be a logical basis for the doctrine of derivative jurisdiction. But on such appeal the trial is *de novo*, and it is proceeded with precisely as if it had been begun in the superior court, without any consideration as to whether the action of the justice was erroneous or not. There is therefore no reason to restrict the remedy to the limits of the jurisdiction of the justice of the peace. The case is tried exactly like any other in the superior court, and the remedy should not be restricted to that which might have been granted by a justice of the peace.

cess of the jurisdictional amount of the court. This case is modified by the decision in the principal case. It is stated in the opinion that no amendment can be permitted in the superior court after appeal, which serves to enlarge the sum demanded beyond the jurisdiction of the original court. It does not clearly appear, however, from the facts stated, that this was an amendment; the claim seems rather to have been first exhibited in the appellate court.

So, in *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631, under a statute which provided that when the defendant has a claim against the plaintiff in a sum in excess of the jurisdictional amount, he may withhold setting off such excess, and a recovery for the amount set off shall not be a bar to a subsequent action for the amount withheld, it was held, in an action for the recovery of money only, that a defendant of whom no bill of particulars had been demanded until after the cause had been remanded to the appellate court by the supreme court, and who, upon demand therefor, filed a set-off in excess of the jurisdictional amount of the original court, and demanded the whole amount, was not entitled thus to set up his claim and have it determined by the court.

So, in *Boyett v. Vaughan*, 85 N. C. 363, reversing on rehearing 79 N. C. 528, the plaintiff was held not entitled to file a counterclaim in the appellate court in reply to a counterclaim of the defendant, which, with the amount of the plaintiff's original claim, exceeded the jurisdictional amount of the court in which the action had been begun. It is stated that it is the jurisdiction of the court in which the action was begun, which, on appeal, gives jurisdiction to the appellate court, and if the original court had no jurisdiction, the appellate court could have none, and therefore, by allowing an amendment in the appellate court which enlarges the cause of action beyond the jurisdiction of the original court, it must necessarily oust itself of jurisdiction.

37 L.R.A. (N.S.)

In *Beekman Lumber Co. v. Glendale Lumber Co.* 158 Mo. App. 309, 138 S. W. 90, under a statute which provided that the defendant, to be entitled to set-off and demand, must give notice thereof, the defendant, who did not appear in the lower court, but took an appeal from the judgment against him, and did not plead the counterclaim in the appellate court, but relied on it merely as a defense, was held not to be entitled to introduce the claim in excess of the justice's jurisdiction. This case, however, is put on the ground of notice. It was urged in favor of the admissibility that it could be regarded as payment, but the court states that it could not be brought within that term, but must be regarded as a counterclaim, which, to entitle it to be heard, must be pleaded.

And in *Ramer v. Smith*, 4 Colo. App. 434, 36 Pac. 302, it was held that the jurisdiction to hear and try the plaintiff's claim could not be defeated by a counterclaim filed in the appellate court for the first time, in excess of the jurisdiction of the court in which the action had been begun. It is stated that the counterclaim which was presented in this case was not presented in such a manner as to be available to defeat the jurisdiction, and the case was thus decided upon a question of practice.

Under a statute which provides that where a set-off is pleaded in the justice's court, and the justice finds a balance in favor of the defendant, he shall enter up a judgment against the plaintiff for the sum that may appear due, it was held in *McClain v. Kincaid*, 15 Yerg. 232, that the defendant, against whom a judgment had been rendered in the justice's court, and who had appealed to the higher court, might set up a counterclaim in an amount in excess of the jurisdiction of the justice's court, if the balance, after deducting the plaintiff's claim, is within the jurisdiction.

But the amount of the judgment thus obtained by the defendant cannot exceed the jurisdiction of the justice's court, nor will

the defendant be allowed to remit the excess in the supreme court, and thus validate the judgment. *Crow v. Cunningham*, 5 Coldw. 255.

But under a statute which provided that where a set-off is pleaded in the justice's court and satisfactorily proved, the justice shall give judgment for the overplus, provided it does not exceed the jurisdictional amount, and if it exceeds that amount, judgment is to be given to the defendant for costs, and provided the plaintiff does not object to the exercise of the jurisdiction,—a judgment in excess of the jurisdictional amount will not be reversed. *Smith v. Fleming*, 9 Ala. 768.

On the contrary, in *Boone v. Boone*, 17 Serg. & R. 386, it was held that where the plaintiff appealed from a judgment, the appellate court may hear and render judgment on a claim in excess of the jurisdictional amount of the original court, for the reason that, the plaintiff having brought the defendant before a tribunal that is incompetent to act on the subject of his defense, the jurisdiction of the appellate court will not be limited in this way, as the effect would be to frustrate the very purpose of the appeal.

In *Richardson v. Chynoweth*, 26 Wis. 656, the amounts did not appear, and it is not clear that the counterclaim was in excess of the jurisdiction, but it is stated by the court that the defendant may be allowed to amend by setting up a counterclaim in excess of the justice's jurisdiction, under a statute providing that an appeal case should be tried in the appellate court as if originally brought there. In this case the defendant had asked leave to amend in the lower court and set up a counterclaim, but this was denied as it would require an adjournment for the securing of evidence.

And where the plaintiff makes no objection to the jurisdiction of the appellate court, it was held in *Gregg v. Garverick*, 33 Kan. 190; 5 Pac. 751, that the plaintiff could not object in the supreme court to the jurisdiction of the appellate court of an action in which the defendant set up a counterclaim for an amount in excess of jurisdiction of the court in which the action was begun and trial was had. See also *Smith v. Fleming*, 9 Ala. 768, *supra*.

Where the defendant demanded judgment for costs only, the appellate court was held in *Murphy v. Evans*, 11 Ind. 517, to have jurisdiction of a counterclaim in excess of the jurisdictional amount of the court in which the action was begun, and to be competent to render judgment against the plaintiff for costs.

### *c. Where counterclaim is amended in appellate court.*

In *Boudon v. Gilbert*, 67 Tex. 689, 4 S. W. 578, it was held that a defendant cannot in the appellate court enlarge his counterclaim, on which relief other than the defeat of the collection of the note sued on. 57 L.R.A. (N.S.)

by the plaintiff was asked, to an amount which exceeded the jurisdiction of the court in which the action was begun, under a statute which provided that on appeal no set-off or counterclaim shall be set up by the defendant which was not pleaded in the court below. It was apparently under this prohibition of the statute that this case was decided.

In *Cross v. Eaton*, 48 Mich. 184, 12 N. W. 35, it was held that the appellate court cannot render judgment on a set-off in excess of the jurisdictional amount of the court in which the action was begun, under a statute which provided that if the balance found due the defendant exceeds the jurisdictional amount, the justice shall set off so much of the defendant's demand against the plaintiff's debt as shall be sufficient to satisfy it, if so requested by the defendant, and shall render judgment for the defendant for costs; and if the defendant shall not require such set-off, the justice shall render judgment of discontinuance against the plaintiff with costs.

But where the defendant counterclaimed in the justice's court for a balance within the court's jurisdiction, and after appeal to the higher court amended and asked judgment for a balance greatly in excess of the original court's jurisdiction, and no objection was made by the plaintiff until after the cause had been heard by arbitrators under an agreement, an objection to the jurisdiction of the court was waived, and it had jurisdiction to hear and determine the case. *Jackson v. Swope*, 49 Ind. 388.

Neither can the defendant reduce his claim in the appellate court to an amount within the jurisdiction of the court in which the action was begun. *James v. McClamroch*, 92 N. C. 362; *Brigman v. Aultman, M. & Co.* — Tex. Civ. App. —, 55 S. W. 509. W. A. E.

## PENNSYLVANIA SUPREME COURT.

ANNIE E. PRIMROSE

v.

CASUALTY COMPANY OF AMERICA,  
Appt.

(232 Pa. 210, 81 Atl. 212.)

**Insurance — accident — injury in taxicab — double indemnity.**

A provision in an accident insurance policy, for double indemnity in case of injuries received while riding as a passenger in a public conveyance provided for passenger service and propelled by gasoline, applies

*Note.* — Insurance: scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance.

The general question of the applicability of a provision in an accident insurance policy exempting the insurer in case of ac-

to injuries received while a passenger in a taxicab hired from one engaged in the business of letting automobiles to the public generally for hire, whose chauffeur drove and controlled the vehicle.

(Mestrezat and Stewart, JJ., dissent.)

(July 6, 1911.)

**A**PPEAL by defendant from a judgment of the Court of Common Pleas No. 1, for Philadelphia County, in plaintiff's favor in an action brought to recover the amount alleged to be due under a clause of an accident insurance policy providing for double payment in case of injuries received while riding as a passenger in a convey-

ance provided for passenger service. Affirmed.

The facts are stated in the opinion. Mr. Thomas Leaming, for appellant:

The deceased was not a passenger, nor was the automobile a public conveyance provided for passenger service, within the terms of the contract of insurance.

McColligan v. Pennsylvania R. Co. 214 Pa. 229, 6 L.R.A. (N.S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792.

Messrs. Ira Jewell Williams and Simpson & Brown, for appellee:

Insured was a passenger.

Pennsylvania R. Co. v. Price, 96 Pa. 256; Ryan v. Cumberland Valley R. Co. 23 Pa. 384; Pennsylvania R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229; O'Donnell v. Alle-

#### What constitutes public conveyance.

No case other than *PRIMROSE v. CASUALTY CO.* seems to have passed upon the question whether or not a taxicab hired by an insured falls within the term "public conveyance," but the question as to whether other transportation facilities constitute a public conveyance, within the meaning of such a term as used in an accident insurance policy, has arisen in a few instances. Thus, it has been held that traveling on a steamboat as a passenger is covered by a policy insuring against injuries sustained "while riding as a passenger in any passenger conveyance using steam," although the steamboat was not a "public conveyance in the usual lines of travel as a common carrier of passengers." *Ætna L. Ins. Co. v. Frierson*, 51 C. C. A. 424, 114 Fed. 56.

So, it has been held that injuries received on a steamboat chartered for a lump sum by a society for an excursion were covered by a policy insuring against injuries sustained while "actually riding as a passenger in a place regularly provided for the transportation of passengers, within a . . . steamboat . . . provided by a common carrier for passenger service only." *Dunn v. New Amsterdam Casualty Co.* 141 App. Div. 478, 126 N. Y. Supp. 229, affirming on this point 67 Misc. 109, 121 N. Y. Supp. 686.

And in *Berlinger v. Travelers' Ins. Co.* 121 Cal. 458, 41 L.R.A. 467, 66 Am. St. Rep. 49, 53 Pac. 918, the court held that a provision for double insurance for injuries sustained "while riding as a passenger in any passenger conveyance using steam" covers injuries sustained while riding as a passenger upon a locomotive of a passenger train, at the request of an official, it being said that a passenger train is to be considered as composed of the locomotive and cars forming a conveyance of which the locomotive is a part, and that the policy cannot be construed as excluding the insured 37 L.R.A. (N.S.)

as a passenger while in any part of the conveyance, where not so excluded by apt words in the policy. But in connection with this case, see *dictum* in *Brown v. Railway Pass. Assur. Co.* 45 Mo. 221, to the effect that a locomotive, although a necessary part of, is not itself a conveyance provided for the transportation of passengers, it being said that a passenger would have no right to go upon the engine, and that if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. And in *Travelers' Ins. Co. v. Austin*, 116 Ga. 264, 59 L.R.A. 107, 94 Am. St. Rep. 125, 42 S. E. 522, a coach specially equipped and used as a pay car, and not a vehicle for the transportation of passengers, was held not a passenger car within the meaning of an insurance policy granting double indemnity to the insured if injured while riding as a passenger on a passenger car; and this although it had formerly been used as a passenger car, and was capable of being so used again.

#### What constitutes "traveling by" public conveyance.

In *Champlin v. Railway Pass. Assur. Co.* 6 Lans. 71, an insurance policy insuring against "any accident while traveling by public or private conveyance provided for the transportation of passengers" was held to insure against injuries received in attempting to jump on a moving public omnibus, the insured having succeeded in getting on the steps, where he was injured.

But traveling on foot along a public road from a steamboat upon which insured had been carried, to his home, was held not traveling by "public or private conveyance," in *Ripley v. Railway Pass. Ins. Co.* 16 Wall. 336, 21 L. ed. 469, affirming 2 Bigelow, Ins. Cas. 738, Fed. Cas. No. 11,854. But see *dictum* in *Hendrick v. Employers' Liability Assur. Corp.* 62 Fed. 893, to the effect that going from train to home would be a continuance of insured's journey, and within a policy covering injuries received while traveling "as a passenger in a public conveyance provided by a common carrier." And see *Northrup v. Railway*

gheny Valley R. Co. 59 Pa. 239, 98 Am. Dec. 336; Creed v. Pennsylvania R. Co. 86 Pa. 139, 27 Am. Rep. 693; Hall v. Second & T. Street Pass. R. Co. 14 W. N. C. 242; Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545; Ham v. Delaware & H. Canal Co. 142 Pa. 617, 21 Atl. 1012; Hartzig v. Lehigh Valley R. Co. 154 Pa. 364, 26 Atl. 310; Perry v. Pennsylvania R. Co. 41 Pa. Super. Ct. 591; Fox v. Philadelphia, 208 Pa. 127, 65 L.R.A. 214, 57 Atl. 356; Coryell v. Dubois, 226 Pa. 111, 75 Atl. 25.

The conveyance in which the insured was riding was owned by and operated by a common carrier, and hence there can be

no doubt as to the applicability of the double indemnity clause.

Lloyd v. Haugh, 223 Pa. 148, 21 L.R.A. (N.S.) 188, 72 Atl. 516; Beckman v. Shouse, 5 Rawle, 187, 28 Am. Dec. 653; Smith v. Seward, 3 Pa. St. 342; Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464; Giffin v. South West Pennsylvania Pipe Lines, 172 Pa. 580, 33 Atl. 578; Fuller v. Bradley, 25 Pa. 120; Harrington v. M'Shane, 2 Watts, 443, 27 Am. Dec. 321; Robertson v. Kennedy, 2 Dana, 431, 26 Am. Dec. 466; The Huntress, 2 Ware, 89, Fed. Cas. No. 6,914; Buckland v. Adams Exp. Co. 97 Mass. 124, 93 Am. Dec. 68; Christenson v. American Exp. Co.

Pass. Assur. Co. 43 N. Y. 516, 3 Am. Rep. 724, reversing 2 Lans. 166, where in a traveler's accident policy providing for payment of a certain sum in the event of death "when caused by any accident while traveling by public or private conveyance provided for the transportation of passengers," which contained no double indemnity provision, was held to cover death from injuries received while necessarily walking over the customary route between a steamboat landing and a railway station, for the purpose and in the actual prosecution of continuing by railway the journey with reference to which the insurance was taken; and this although insured might have procured a carriage to make the transfer, the usual method being to walk.

In *Brown v. Railway Pass. Assur. Co.* 45 Mo. 221, under a general accident, as contradistinguished from a mere passenger or traveling, policy, insuring against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers," it was held that a locomotive attached to a passenger train was a necessary part of a conveyance provided for the transportation of passengers, and that, as the policy was not limited to passengers, a locomotive engineer killed while operating his locomotive was within the terms of the policy.

#### Cases interpreting term "in or on."

The question as to what constitutes riding "in or on" a public conveyance has been decided in the following cases: Thus, it has been held that where the policy provides for double indemnity in case of injury "while riding as a passenger in or on a public conveyance," the policy cannot be limited to riding "inside" the cars, but covers death caused by being thrown from the platform of a public conveyance. *Preferred Acci. Ins. Co. v. Muir*, 61 C. C. A. 456, 126 Fed. 926.

But a clause for double indemnity in case of injury received "while riding as a passenger in or on a public conveyance" was held, in *Anable v. Fidelity & C. Co.* 73 N. J. L. 320, 63 Atl. 92, affirmed on opinion 37 L.R.A. (N.S.)

below in 74 N. J. L. 686, 65 Atl. 1117, not to cover the case of one who left the train on which he was traveling to procure a newspaper, and while the train was moving ran to it and grasped the hand rail of a car for the purpose of boarding the train to continue his intended journey, but, failing to retain his hold, fell and was injured, the court saying that in view of the double indemnity it was the obvious intent of the parties that the insured should remain aboard the train during his journey, and not incur the greater risk of getting on and off at intervals.

#### Cases interpreting term "on."

And the question as to what consists in riding "on" a public conveyance was involved in the following cases: Thus, in *James v. United States Casualty Co.* 113 Mo. App. 622, 88 S. W. 125, where insured ran and got a foothold on the platform of a street car just as it started, from which position he was either jostled by passengers or thrown from the car by a sudden jerk, it was held that insured was a passenger, within the meaning of a policy insuring against injury received while "actually riding as a passenger on a public conveyance."

And in *Fidelity & C. Co. v. Morrison*, 129 Ill. App. 360, in holding that insured was riding "on" a public conveyance within the meaning of a double indemnity policy insuring against injuries received while so riding, where he had procured a ticket and caught hold of the hand rail of a moving railway car which he wished to board, and got upon the platform of the car with one foot, the court said that the essential question was whether insured had become a passenger upon the train which he was attempting to board when injured.

So, in *Powis v. Ontario Acci. Ins. Co.* 1 Ont. L. Rep. 54, one injured while boarding a street car after he had got on the step or platform, but before the car had begun to move, was held to have been "riding as a passenger on a public conveyance," within the meaning of an accident policy providing for double indemnity for injuries received while so riding.

15 Minn. 279, Gil. 208, 2 Am. Rep. 122; Sanford v. American Dist. Teleg. Co. 13 Misc. 88, 34 N. Y. Supp. 145; Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Fox v. Philadelphia, 208 Pa. 127, 65 L.R.A. 214, 57 Atl. 356; Parmelee v. Lowitz, 74 Ill. 117, 24 Am. Rep. 276; Central R. Co. v. Lippman, 110 Ga. 665, 50 L.R.A. 673, 36 S. E. 202; New York C. & H. R. R. Co. v. Sheeley, 57 N. Y. S. R. 760, 27 N. Y. Supp. 192; Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L.R.A. 483, 21 Am. St. Rep. 647, 26 N. E. 324; Gordon v. Hutchinson, 1 Watts & S. 285, 37 Am. Dec. 464; Jackson Architect-

tural Iron Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432, 52 N. E. 665; Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392.

**Brown, J.**, delivered the opinion of the court:

The defendant company issued an accident insurance policy to Frank J. Primrose, the husband of the plaintiff, by the terms of which it covenanted to pay her \$10,500 in the event of his sustaining bodily injuries which should result in his death. In addition to this, there was the following clause: "B. Double indemnity.—If

#### Cases interpreting term "in."

A number of cases have decided what constitutes riding or traveling "in" a public conveyance. Thus, it has been held that an insured is "riding as a passenger . . . in an elevator provided for passenger service," within the meaning of a policy providing for double indemnity for injuries received while so riding, where he was substantially in the door, as must have been the case, where his foot was caught between the floor of the car and the grating above the door, while the body was thrown outward. *Ætna L. Ins. Co. v. Davis*, 191 Fed. 343. And an insured was held in *Depue v. Travelers' Ins. Co.* 166 Fed. 183, to have been riding "in" an elevator within a policy insuring against accidents while "in a passenger elevator," where it appeared that the insured was found hanging head down in an elevator, having been caught between the roof of the car and the floor of the building, that no one saw the accident, and that the lever which controlled the operation of the elevator was on the inside. In this case the policy did not contain a double indemnity clause, and this may have led to the liberal construction of the clause under consideration.

So, in *Theobald v. Railway Pass. Assur. Co.* 10 Exch. 45, 26 Eng. L. & Eg. Rep. 436, 2 C. L. R. 1034, 23 L. J. Exch. N. S. 249, 18 Jur. 583, 2 Week. Rep. 528, injuries received in getting off a train were held to be covered by a policy insuring against injuries sustained "from railway accident whilst traveling in any class carriage on any line of railway," the court saying that, as the accident occurred while the insured was doing an act which, as a passenger, he must necessarily have done, he may not be considered as disconnected with the machinery of motion until he has safely descended.

And it has been held that a provision for double indemnity for injuries sustained "while riding as a passenger in any passenger conveyance using . . . electricity as a motive power" covers injuries sustained while attempting to alight from a moving electric street car, such provision, in the absence of words requiring a differ-

ent construction, being said to protect from the moment of entering until the passenger had alighted. *King v. Travelers Ins. Co.* 101 Ga. 64, 65 Am. St. Rep. 288, 28 S. E. 661. And injuries received while necessarily getting on or off a railway train were said, in *Tooley v. Railway Pass. Assur. Co.* 3 Biss. 399, Fed. Cas. No. 14,098, to be covered by a policy insuring against injuries received "while actually traveling in a public conveyance provided by common carriers for the transportation of passengers."

But in *Ætna L. Ins. Co. v. Vandecar*, 30 C. C. A. 48, 57 U. S. App. 446, 86 Fed. 282, a provision for double indemnity for injuries received "while riding as a passenger in a passenger conveyance using steam" was held not to apply to one riding on the platform of a railroad car, it being said that the words "in a passenger conveyance" were doubtless used advisedly, and for the express purpose of limiting the insurer's liability to injuries received while riding "in" a passenger conveyance, which is a comparatively safe place. There was a vigorous dissent in this case, however, on the ground that the opinion of the majority attached undue importance to a single word, was highly technical, and did violence to the probable intention of the parties. But this decision, and the reasoning therein applied, were followed in *Van Bokkelen v. Travelers' Ins. Co.* 34 App. Div. 399, 54 N. Y. Supp. 307, affirmed without opinion in 167 N. Y. 590, 60 N. E. 1121 (two of seven judges dissenting), it being held that a passenger who lost his life by falling from the platform of a railroad car was not killed while "riding as a passenger in any passenger conveyance," within the meaning of a policy providing for double indemnity in case of death while so riding, and single indemnity in other cases.

So, injuries received by an insured after alighting from a railroad train, while crossing the platform of a car to speak to the trainman about a matter entirely disconnected with the relation of a passenger, have been held not covered by a policy insuring one riding "as a passenger in a public conveyance provided by a common carrier." *Hendrick v. Employers' Liability Assur. Corp.* 62 Fed. 893, G. J. C.

those injuries are received while riding as a passenger in or on a public conveyance provided for passenger service, and propelled by steam, compressed air, gasoline, naphtha, electricity, or cable, including passenger elevators, or while in a burning building, the amounts otherwise payable under clause A shall be doubled." While the policy was in force, the insured and several friends were riding in an automobile hired by them from the Pennsylvania Taximeter Cab Company. It was in the charge of and driven by a chauffeur in the employ of that company. The night was dark and foggy, and the machine left the road, striking a telegraph pole with such violence that all of the occupants were thrown out of it. Primrose sustained injuries from which he subsequently died. The appellant paid to the appellee the amount of the single indemnity, and in this action she recovered a judgment in the court below for the additional sum of \$10,500, with interest; the trial judge having held that the injuries to the deceased were "received while riding as a passenger in a public conveyance provided for passenger service and propelled by gasoline." From that judgment, we have this appeal, to be disposed of under undisputed facts. No testimony was offered by the defendant, and there is no assignment of error complaining of anything proven by the plaintiff.

That the automobile in which the insured was riding was a conveyance is not questioned; that it was propelled by gasoline is conceded, and, if it was "a public conveyance provided for passenger service," the deceased was a passenger in it, within the terms of the double indemnity clause of the policy. The only question, then, is whether the conveyance was one embraced within that clause.

The contention of the learned counsel for the appellant is that the double indemnity clause is applicable only to the case of a person occupying a place for which he pays a fare in a railway car or conveyance operated for the common use of himself and of such promiscuous persons as may happen to take passage *en route*, over which conveyance he exercises no control. It is to be noted that the clause was inserted by the insurer itself in the policy of insurance which it issued to the insured, and, if it intended that the same should have the restricted meaning for which its counsel now contend, it could have readily so worded the clause. The insurance company could have so framed it that there would now be no doubt that the appellee could not insist that it was intended to extend to her claim. It is next

to be remembered that, as the words used in the clause are the language of the insurer, a salutary rule of construction requires them to be construed most favorably to the insured (*Hughes v. Central Acci. Ins. Co.* 222 Pa. 462, 71 Atl. 923; *May, Ins.* § 175); and, for the same reason, if the clause is capable of two interpretations equally reasonable, that is to be adopted which is most favorable to the insured. *Bole v. New Hampshire F. Ins. Co.* 169 Pa. 53, 28 Atl. 205; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* 173 Pa. 53, 34 Atl. 16. "If the language of the policy is doubtful or obscure, it will be construed most unfavorably to the insurer. *Merrick v. Germania F. Ins. Co.* 54 Pa. 277. A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain should be preferred. *Humphreys v. National Ben. Asso.* 139 Pa. 214, 11 L.R.A. 564, 20 Atl. 1047." *Frick v. United Firemen's Ins. Co.* 218 Pa. 409, 67 Atl. 743. As applied to the admitted facts in the present case, we regard the double indemnity clause as having but one meaning.

The Pennsylvania Taximeter Cab Company was engaged in the business of hiring automobiles to the public,—“to the public generally,” is the language of the witnesses describing its business. “Anybody at all” who was financially responsible could hire one. The secretary and treasurer of the company testified: “They would be hired to anyone for rides, or for other personal transportation as passengers, from wherever they might get them to wherever they might want to go.” The machines, however, were never turned over to the control and management of those who hired them, but were always operated by a chauffeur or driver in the employ of the company. All that those who rode in them did was to direct where they were to go. They were as much passengers in them as they would have been if riding in a specially chartered car of a railroad company, from which all but themselves were excluded; the only difference being that, as automobiles do not run on rails, the occupants could select their own traveling route; and it is not to be pretended that the double indemnity clause does not include passengers riding on a specially chartered railroad car.

The words, “public conveyance provided for passenger service and propelled by gasoline,” are to receive a reasonable meaning.

All conveyances are either for public or private use. The automobile in the case at bar was not one for merely private use. It belonged to a company which, as already stated, was engaged in the business of hiring automobiles for general public use. The use of no one of its machines was limited to any particular person, but anyone able to pay the price for the privilege of riding in it, while it was under the control of and being operated by one of the company's employees, could do so. In some cases a fare per head was charged for the use of the machine for a stipulated time, or for a specified journey; in other instances, there was a charge for the use of the car of so much by the hour, and, under this arrangement, the deceased and his friends hired the car in which they were riding.

Counsel for appellee have submitted most elaborate briefs in an effort to sustain the judgment of the court below, but no parallel case is found in the innumerable authorities cited by them, and the general principles upon which they rely are not questioned. We affirm the judgment, because the conditions contemplated by the double indemnity clause existed at the time the automobile struck the telegraph pole, and concur with the learned court below in its opinion that "the injuries to the deceased were 'received while riding as a passenger in a public conveyance provided for passenger service and propelled by gasoline,' within the reasonable meaning of, and the proper construction to be put upon, the policy."

Judgment affirmed.

Mestrezat and Stewart, JJ., dissent.

## RHODE ISLAND SUPREME COURT.

CASSIUS C. BALL

v.

MYRTIS A. MILLIKEN.

(31 R. I. 36, 76 Atl. 789.)

### Will — right of entry.

1. A future contingent right to re-enter for condition broken by converting granted property to a use not permitted by the deed

passes by will, under a statute providing that a contingent, an executory, and a future interest, also a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by will.

### Same — right to reconveyance.

2. The contract right of the grantor to demand a reconveyance of land for breach of condition as to the uses to which it may be put will pass by his will.

### Specific performance — contract to reconvey — waiver.

3. Equity will not compel specific performance of a contract to reconvey land on breach of a condition in the deed as to the uses to which it may be put, where violations had occurred by prior owners of the property, so that their grantee, the present owner, might reasonably have believed that the condition had been waived.

### Injunction — breach of condition as to use of property.

4. The devisee of a right to a reconveyance of land for breach of condition as to the uses to which it may be put may be granted injunctive relief against breach of the condition, although he has lost a right to specific performance of the condition by permitting breaches by intermediate grantees of the property.

### Same — absence of general scheme for improvement.

5. Absence of a general scheme for the development of the remainder of a tract of land, a portion of which is granted with restrictions on its use, is not fatal to the right of injunctive relief against breach of the condition.

### Grant — restrictive covenants — absence of indication of purpose.

6. The absence from the deed of language showing that a covenant restricting the uses to which the land can be put is for the benefit of the remaining tract of the grantor will not prevent the enforcement of the condition in favor of subsequent owner of such remainder, if, from the surrounding circumstances, it appears that the intention was to benefit such tract.

### Covenant — restrictive — permitting slight departure — effect.

7. Failure to seek relief in cases of slight departures from the spirit of a restriction imposed by deed on the use of land will not bar a right to enjoin material departure from the letter of the restriction on the ground of laches or under the statute of limitations.

(July 7, 1910.)

**Note.** — *Right of grantee to enforce restrictive covenants in prior conveyances by his grantor of other parcels.*

As to the right of a mortgagee to enforce a building restriction which has been imposed upon neighboring property for the benefit of the property mortgaged, see *Stewart v. Finkelstone* and note, 28 L.R.A. (N.S.) 634.

57 L.R.A. (N.S.)

As to the right to the enforcement of a restrictive covenant, as affected by a change in the neighborhood, see note to *Brown v. Huber*, 28 L.R.A. (N.S.) 705.

As to whether a covenant running with the land may be created by the acceptance of a deed poll with stipulations purporting to bind the grantee, see note to *Atlanta, K. & N. R. Co. v. McKinney*, 6 L.R.A. (N.S.) 436.



**C**ERTIFICATION by the Superior Court for Newport County for the opinion of the Supreme Court of a bill in equity to compel conveyance of certain real estate. Decree for complainant.

The facts are stated in the opinion.

Messrs. Sheffield, Levy, & Harvey, for plaintiff:

Conditions regulating or restricting the use of real property are usually, if not invariably, enforced by courts of equity.

Whitney v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715; Rogers v. Hosegood, [1900] 2 Ch. 388, 69 L. J. Ch. N. S. 652, 83 L. T. N. S. 186, 48 Week. Rep. 659; Schworer v. Boylston Market Asso. 99 Mass. 285; Peck v. Conway, 119 Mass. 546; Pom. Eq. Jur. 263, 276; Aldrich v. Billings,

14 R. I. 233; Greene v. Creighton, 7 R. I. 1.

The right is not barred by laches or the statute of limitations.

2 Pom. Eq. Jur. § 817; Macher v. Foundling Hospital, 1 Ves. & B. 188; Wilmot v. Coventry, 1 Younge & C. Exch. 524; Adams v. Ore Knob Copper Co. 4 Hughes, 589, 7 Fed. 634, 3 Mor. Min. Rep. 183; Jackson ex dem. Bronck v. Crysler, 1 Johns. Cas. 125; Plumb v. Tubbs, 41 N. Y. 442; Gray v. Blanchard, 8 Pick. 284; Kemp v. Sober, 1 Sim. N. S. 517, 20 L. J. Ch. N. S. 602, 15 Jur. 458.

Complainant is entitled to relief.

Douglas v. Hennessy, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583; Thurber v. Carpenter, 18 R. I. 782, 31 Atl. 5; Baily v. De

#### General rules.

To be entitled to enforce such a covenant, the owner of land must either be the original covenantee or hold in privity of estate with him, unless the rights in question are of that class which when once acquired attach to the land and pass with it, irrespective of privity, into all hands, even those of a disseizor. 11 Cyc. 1080.

The right of a grantee to enforce restrictive covenants in a prior conveyance by his grantor of other property depends upon the intention of the parties to the prior conveyance as to the effect of the covenants; that is, if the restrictions were intended for the benefit of the grantor's other land, subsequently conveyed, the subsequent grantee is entitled to enforce the restrictive covenants. 11 Cyc. 1096; Nalder & C. Brewery Co. v. Harman, 83 L. T. N. S. 257; Riverbank Improv. Co. v. Bancroft, 209 Mass. 217, 34 L.R.A.(N.S.) 730, 95 N. E. 216; Coughlin v. Barker, 46 Mo. App. 54; DeGray v. Monmouth Beach Club House Co. 50 N. J. Eq. 329, 24 Atl. 388; Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583 (*obiter*); Fairmount Cemetery Asso. v. First Presby. Church, 60 N. J. Eq. 142, 46 Atl. 213; Hemsley v. Marlborough Hotel Co. 62 N. J. Eq. 164, 50 Atl. 14, affirmed without opinion in 63 N. J. Eq. 804, 52 Atl. 1132; Brouwer v. Jones, 23 Barb. 153; Lydick v. Baltimore & O. R. Co. 17 W. Va. 427.

As said in Clark v. McGee, 159 Ill. 518, 42 N. E. 965: "We think it well settled by the authorities that when the owner of two adjoining lots conveys one, and incorporates into the deed of the lot conveyed a covenant restricting the right of the grantee to build in a certain specified manner, which covenant is intended for the benefit of the other lot held by the grantor, a subsequent conveyance of the lot retained will pass or transfer the covenant to the grantee or grantees of such lot, as an easement for the benefit of the lot, and the grantee may enforce the covenant against the owner of the other lot in an appropriate action."

And a grantee of land, while not entitled to enforce a forfeiture, may enforce in 37 L.R.A.(N.S.)

equity, as an agreement, a condition subsequent inserted by his grantor for the benefit of the latter's remaining land, in a prior conveyance of a lot. Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104.

So, in Hayes v. Waverly & P. R. Co. 51 N. J. Eq. 345, 27 Atl. 648, the court said: "It is settled by adjudication in this state as a general rule that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation, or exception, which restricts the enjoyment of the portion of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land and is binding at law or not, it will be enforced in equity against the grantee and anyone subsequently acquiring title to the land with notice of it, at the instance of the grantor or of the subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land which the complainant in the suit holds."

But if the covenants were intended merely for the personal benefit of the grantor, to enable him to make the most of his remaining property, they cannot be enforced by a subsequent grantee of another parcel of the grantor's land, though the enforcement would greatly benefit him as the owner of such parcel. Clapp v. Wilder, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692; Coughlin v. Barker, 46 Mo. App. 54.

Most of the cases, therefore, involving this right of a subsequent grantee, turn upon the question whether or not the restrictions in questions were made for the benefit of the property subsequently conveyed.

Covenants intended for benefit of grantor's remaining land.

—intention indicated by deed.

Where covenants restricting the use of

Crespigny, 10 Best & S. 12; Brown v. Crookston Agri. Asso. 34 Minn. 545, 26 N. W. 907; Hayden v. Stoughton, 5 Pick. 528; Austin v. Cambridgeport, 21 Pick. 215; Kenner v. American Contract Co. 9 Bush, 202.

The complainant is entitled to have the agreement specifically performed.

Ecroyd v. Coggeshall, 21 R. I. 5, 79 Am. St. Rep. 741, 41 Atl. 260; Field v. Providence, 17 R. I. 803, 24 Atl. 143; Greene v. O'Connor, 18 R. I. 60, 19 L.R.A. 262, 25 Atl. 692; Pawtuxet Baptist Soc. v. Johnson, 20 R. I. 551, 40 Atl. 417; Brown v. Tilley, 25 R. I. 579, 57 Atl. 380; Union College v. New York, 173 N. Y. 38, 93 Am. St. Rep. 575, 65 N. E. 853; Baker v. St. Louis, 75 Mo. 671.

Mr. James Tillinghast for defendant.

land conveyed are expressly made for the benefit of the grantor's remaining land, or where the whole language of the conveyance, alone or in connection with surrounding circumstances, shows that restrictive covenants therein are for such benefit, it is clear, under the general rule, that they may be enforced by a subsequent grantee of the land to be benefited, or any part thereof. Thus, where the owner of a block of land in a city has sold a lot with a restrictive covenant expressly declared to be for the benefit of the owners of lots then owned by the grantor, a subsequent grantee of one of such lots, with "all the easements, rights, covenants, privileges, benefits, and advantages belonging or appertaining" thereto, is entitled to enforce the covenant, so long as it remains of substantial value to him. *Latimer v. Livermore*, 72 N. Y. 174.

And where an owner of building land laid out in plots on each side of a highway, for the erection of large houses and mansions for residential purposes, has conveyed one plot thereof by indenture containing a covenant by the grantee for the benefit of the grantor, his heirs and assigns, and others claiming under him all or any of his land adjoining or near to the plot conveyed, that no more than one dwelling house shall at any one time be erected or be standing on the plot, and the grantor subsequently conveys a neighboring plot with a similar restrictive covenant,—although the second grantee at the time knows nothing of the covenant in the first indenture, the benefit of that covenant, annexed to the land, passes to him therewith, and he is entitled to enforce the covenant. *Rogers v. Hosegood*, 69 L. J. Ch. N. S. 59, 81 L. T. N. S. 515.

So, where a grantee has covenanted with the grantor, his executors, administrators, and assigns, not to erect any building on the part of the premises conveyed adjoining the remaining land of the grantor, a subsequent grantee of such remaining land is entitled to enforce the covenant for the benefit of his land. *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400 (*obiter*).

And where the owner of three adjoining city lots conveys them to different persons 37 L.R.A. (N.S.)

*Sweetland, J.*, delivered the opinion of the court:

This is a bill in equity brought by Cas-sius C. Ball against Myrtis A. Milliken, praying that the respondent be ordered to convey to the complainant by quitclaim deed all her right, title, and interest in a certain parcel of land in the town of New Shoreham; and also, as alternative relief, that the respondent be enjoined from letting, leasing, or subletting said premises or any part thereof for any purposes other than those specifically set forth in a certain deed from Nicholas Ball to John W. Hooper.

It appears from the allegations of the bill and the testimony, that in 1861 one Nicholas Ball owned a tract of land in New

by three separate deeds of the same date, each executed by both parties, and the description in each referring to the adjoining lot or lots as "intended to be this day granted" by the owner to the purchaser or purchasers of such adjoining lot or lots, respectively, the grantee of one of the outside lots may enforce a restrictive covenant in the deed of the middle lot against building thereon farther back than a certain distance from the line of the street, which restriction, by its terms, in the light of the facts, is susceptible of no other reasonable construction than that it was intended to create and did create an easement of light and air in favor of the adjoining lots. *Muzzarelli v. Hulshizer*, 163 Pa. 643, 30 Atl. 291.

Likewise, one holding land through sundry mesne conveyances, under a conveyance by a grantor who had previously conveyed neighboring property with certain restrictive covenants, the language of which permits no other conclusion than that they were made for the benefit of his then remaining land, may enforce such covenants against one deriving his title under the first deed, containing the covenants. *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675.

And a lessee of land may enforce a covenant in a prior conveyance by his lessor of other property, where, from the conveyance itself and the circumstances under which it was made, the intention of the parties is clear that the covenant was made for the benefit of the grantor's other land. *Brockmeyer v. Sanitary Dist.* 118 Ill. App. 49.

And in *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 Atl. 190, it was held that a grantee is entitled to the benefit of a restrictive covenant in a prior conveyance by his grantor of adjoining property, where, by the construction of the prior grant, it appears that it was the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of the other land of the grantor subsequently conveyed.

—intention indicated by surrounding circumstances.

As held in *BALL v. MILLIKEN*, however,

Shoreham. That by deed dated June 12, 1861, he conveyed a certain part thereof about 90 feet square to one John W. Hooper. That said deed contained the following restriction or condition: "And it is expressly understood that the premises herein conveyed is for the specific purpose of a blacksmith and wheelwright shop. The said J. Hooper, his heirs and assigns, shall not convert the shop or building that may be erected to any other purpose than here specified, to wit, blacksmithing, wheelwrighting, repairing tin, copper, saddles, harness, tackle, and the using of a turning lathe, and repairing of firearms, and no other purpose whatever. And the said grantee, for himself and his heirs and assigns, promises to reconvey said estate to said grantor, his

heirs, executors, and assigns, in case of any violation of the foregoing provisions in this deed." That the said lot conveyed to Hooper came by mesne conveyance to the control and management of this respondent, who now holds the legal title of record to said lot. That at the time the said respondent acquired title to said lot, she knew of the said condition contained in the deed from Nicholas Ball to John W. Hooper. That previous to his death the said Nicholas Ball conveyed to this complainant another portion of his said tract of land, upon which was a store in which the said Nicholas Ball had carried on for many years the business of selling groceries and general merchandise, which business was continued by this complainant up to the time of filing this

it is not necessary that the language of the deed should show that restrictive covenants therein were inserted for the benefit of the remaining land of the grantor, provided the intention to benefit such land appears from all the surrounding circumstances; and restrictive covenants in deeds have accordingly been held, in numerous cases, to be enforceable by subsequent grantees of other parcels of the same grantor's lands, where, as in *BALL v. MILLIKEN*, the nature of the restriction and the surrounding circumstances sufficiently show that the covenants were intended for the benefit of the land subsequently conveyed.

Thus, where the owner of two adjoining city lots has sold one of them, a corner lot, with the restriction that the grantee, his heirs and assigns, shall not erect any building on the back part of the lot higher than 10 feet, which restriction is attributable only to the purpose of benefiting the adjoining lot, a subsequent grantee of the latter lot may enforce the restriction by injunction. *Clark v. Martin*, 49 Pa. 289.

And where the representative of an estate has sold a part of the land belonging thereto, with a covenant on the part of the grantee to extend a certain street to the boundary of the land purchased, and to do the work and labor therein, which covenant is for the benefit of the remaining land of the estate, a subsequent grantee of a part of such remaining land is entitled to the benefit of the covenant, and can require the prior grantee, at any time, to extend the street, pursuant to the covenant. *Jayne v. Cortland Waterworks Co.* 107 App. Div. 517, 95 N. Y. Supp. 227.

So, where an owner of property on opposite sides of a city street has conveyed that on one side with a restrictive covenant against building outside of certain lines thereon, without the consent of the grantor or his heirs, which covenant is obviously beneficial to the grantor's sole remaining land, it was held, in *Hemsley v. Marlborough House Co.* 68 N. J. Eq. 596, 61 Atl. 455, reversing 65 N. J. Eq. 167, 55 Atl. 994, that the right to enforce the restriction is appurtenant to that land, and passes with it. *L.R.A. (N.S.)*

it by a subsequent conveyance to another grantee.

And where the owner has granted to a railroad company a right of way through his farm in consideration of an agreement by it, expressed in the deed, to make a switch to his mill door on the farm, which agreement is obviously for the benefit of any owner of the mill, a subsequent owner may enforce in equity the company's agreement. *Lydick v. Baltimore & O. R. Co.* 17 W. Va. 427.

In *Child v. Douglas*, 2 Jur. N. S. 950, it was held that the grantee of a lot on a highway, whose conveyance contains a restrictive covenant against his building within a certain distance of the highway, is entitled to the benefit of, and can himself enforce, a like covenant in a prior conveyance by his grantor to another person, of a neighboring lot on the same highway, as he buys with his lot all the rights of his grantor relating to it, including the right to enforce such prior covenant.

And a grantee of a piece of land on a certain road, subject to a provision that he shall not erect any building thereon nearer to the road than the line of frontage of the then present houses on neighboring lots along the road, may enforce by injunction a like covenant in a prior conveyance by his grantor of an adjoining lot to another purchaser. *Manners v. Johnson*, L. R. 1 Ch. Div. 673, 45 L. J. Ch. N. S. 404, 24 Week. Rep. 481.

In *Peck v. Conway*, 119 Mass. 546, it was held that a grantee of a homestead lot is entitled to enforce in equity a restriction in a prior deed by his grantor of a small adjoining parcel of land, that no building shall be erected thereon,—the fair inference being that the parties to the first conveyance intended the restriction for the benefit of the grantor's adjoining estate.

So, where the owner of two adjoining lots, one of which is his house lot, conveys the other with the restriction and reservation that no building thereafter erected on the lot conveyed shall be erected within 10 feet of the line of the house lot, a negative easement for the latter lot as a dominant estate

bill. That Nicholas Ball died on July 31, 1896. That his last will and testament, dated May 18, 1894, was duly admitted to probate by the probate court of said New Shoreham. That in said will Nicholas Ball devised to this complainant, his son, all of said tract of land owned by said Nicholas Ball as aforesaid, excepting that part which he had conveyed by said deeds to John W. Hooper and to Cassius C. Ball, the complainant, and also devised to the complainant all the right, title, and interest of said Nicholas Ball in and to the said lot conveyed to John W. Hooper. The respondent contends that this interest is not devised by said will to the complainant; but we are of the opinion that it appears by the provision of said will that the testator intend-

ed to devise to the complainant all the interest in the so-called "Hooper lot" which the testator had reserved by his said deed. That the respondent, in violation of the condition contained in the deed to Hooper, has let, leased, and sublet the premises described in said deed for the purpose of making and repairing watches and jewelry, for the sale of intoxicating liquors, for repairing boots and shoes, and for keeping swine and horses.

The respondent, by her answer, admits that since she has owned her said lot and building, she has not used the same for any or either of the specific purposes set forth in said deed from Nicholas Ball to Hooper, and has used and allowed to be used portions of said building for other purposes,

is created over the lot conveyed, which easement a subsequent grantee of the house lot may claim. *Herrick v. Marshall*, 66 Me. 435.

And where the owner of a square of land in a city, near the center of which his own residence stands, conveys a parcel of the square with restrictions as to the nature and location of the improvements to be erected thereon by the purchaser, such restrictions are for the benefit not only of the grantor, but of anyone to whom he may sell adjacent lots; and a subsequent grantee of an adjacent lot may enforce the restrictive covenants in the prior conveyance. *Roberts v. Porter*, 100 Ky. 130, 37 S. W. 485.

A grantee whose deed contains restrictive covenants against certain noxious uses of the premises conveyed, similar to covenants included in very many of the deeds from the same grantor of contiguous land, may enforce a like restriction in a prior conveyance by the common grantor of a neighboring parcel. *DeLima v. Mitchell*, 49 Misc. 171, 98 N. Y. Supp. 811.

And where the owner of several neighboring lots conveys them all with covenants against nuisances and against the erection of steam engines, an easement is created in the lot for the benefit of each of the respective owners of the other lots, which easement may be enforced by any one of such owners against any of the others. *Birdsall v. Tiemann*, 12 How. Pr. 551.

Where the owner of a plot of land in a city has sold lots with restrictive covenants against the erection of any building thereon costing less than a certain amount, it was held in *Isham v. Matchett*, 18 Ohio C. C. 338, 10 Ohio C. D. 267, that the grantee of any lot may enforce such restriction in a prior deed of an adjoining lot.

And in *Francis v. Ziering*, 128 App. Div. 253, 112 N. Y. Supp. 647, it was held that a grantee of a city lot may enforce a covenant against building within a certain distance of the street line, contained in a conveyance by his grantor, of a lot on the opposite side of the street. 37 L.R.A. (N.S.).

—intention indicated by uniform scheme of restrictions.

While, as held in *BALL v. MILLIKEN*, the absence of a general plan for the development of a tract of land from which a parcel is sold with restrictive covenants does not prevent injunctive relief against a breach of the restriction, the existence of such a plan, in accordance with which uniform restrictions are inserted in conveyances of separate parcels of the tract, is the best of circumstantial evidence of an intention on the part of the common grantor of the respective parcels, that the restrictions in each conveyance are for the benefit of all the other land in the tract. *Nalder & C. Brewery Co. v. Harman*, 83 L. T. N. S. 257.

Where the owner of property in a city has laid it off into lots and blocks, and has offered the lots for public sale, proclaiming that the sale will be made in consideration of restrictions to be contained in the deed of each lot sold, that neither the purchaser nor anyone claiming under him shall erect or keep or permit on the premises conveyed to him any milk dairy, etc., the effect of such restrictions inserted in contemporaneous conveyances is to confer a right in the nature of an easement in all the lots in the tract, on each person acquiring by such deeds, and any such person may enforce the covenants contained in any other of the contemporaneous conveyances. *Hall v. Westler*, 7 Mo. App. 56.

And where a city owning a tract of land has divided it into building lots, and has made and duly recorded a plan thereof, and conveys the several lots by deeds subject to the condition that the front line of the building to be erected on each lot shall be placed on a line parallel with, and 10 feet back from, the street, which condition is inserted by the city to establish a general plan of building upon all the lots, for the general improvement of the neighborhood and for the benefit of all purchasers of the lots who derive title thereto through the city, a grantee of one of the lots may enforce such restriction in the deed of a

and she sets up in defense and claims the same benefit of each of the following defenses as if she had pleaded them in bar, or for these reasons had demurred to said bill: (1) That the complainant by his bill shows no right as devisee to maintain it; (2) that the agreement, or whatever it may be called, in the Hooper deed, does not run with the land, and is not obligatory upon the defendant; (3) that the complainant's action is barred by laches, and he is estopped from claiming, and has waived the breach; (4) that under our statute of adverse possession for twenty years, and since the General Laws of 1896 for ten years, the defendant's title has become absolute, and the complainant's action is barred; (5) that the complainant's action is barred by our

statute of limitations. The respondent contends that the right or interest which remained in Nicholas Ball under the deed to John W. Hooper was not such an estate or interest as could be devised by him, either at common law or under chapter 201, § 23, Gen. Laws 1896, and so that the complainant is not entitled to the conveyance of the estate as prayed by his bill.

If it was necessary to determine in the case before us, as to the legal nature of the restriction contained in the deed to Hooper, and what were the rights at law of Nicholas Ball under it, authority would not be lacking to warrant the court in finding that the provision contained in the deed was a condition that there remained in Nicholas Ball a right of re-entry for breach

neighboring lot. *Hamlen v. Werner*, 144 Mass. 396, 11 N. E. 684.

Likewise, where an owner has divided his land into lots, with streets and alleys and in the conveyance of each lot inserts the restriction that no building shall be erected thereon within 20 feet of the street on which it fronts, the restriction inures to the benefit of all the grantees, and any one of them may enforce it against any other. *Fete v. Foerstel*, 159 Mo. App. 75, 139 S. W. 820.

And the grantee of a city lot may enforce a restrictive covenant as to a building line, in a contemporaneous conveyance by his grantor of the adjoining lot, where the adjoining lot was plainly included in the benefits of the restriction, which was imposed as part of a building scheme for that portion of the street. *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708.

Where the owner of a single tract of land in a city, having conveyed two lots without restriction, draws a plan dividing the remainder of the tract into lots, and in accordance with a general plan sells all of the lots which are desirable, for the erection of first-class dwelling houses, by contemporaneous deeds to different parties, with the restriction in each deed that such dwelling houses only are to be erected on the premises, it is clear that the restriction is imposed on each lot for the benefit of the owners of all the others, and anyone of such owners may enforce the restriction in any of the other deeds. *Hano v. Bigelow*, 155 Mass. 341, 29 N. E. 628.

And where the owner of a block of land in a city filed a map showing upon it courtyards 5 feet wide, by which the streets upon two opposite sides of the land were widened along the whole length of the block, and then entered into an agreement with the owners of the adjoining block, under which this restriction as to the use of the 5 feet of the property adjoining the streets for courtyards should be perpetual, and should bind the property in both blocks for all time to come, and should be binding upon all persons who might thereafter become interested in the two blocks as owner, tenant, occupant, or otherwise, and might be

enforced by or against any one or more of those persons, as occasion might require, and subsequently sells lots on the restricted streets to different purchasers by deeds expressly subject to the provisions of the restriction in the prior agreement, an easement is created appurtenant to the lots of each purchaser in the strip of 5 feet, to which the lots of the other purchasers are subject, and which each purchaser is entitled to enforce against the others. *Batchelor v. Hinkle*, 132 App. Div. 620, 117 N. Y. Supp. 542, later appeal in 140 App. Div. 621, 125 N. Y. Supp. 929.

So, where the owner of a tract of land in a city has divided it into lots located on streets, with a strip 10 feet wide along each side of each street between the sidewalk and the lot lines, and conveys each lot "with the privilege of using 10 feet in front of the front line of the lot for yard, vault, porch, piazza, cellar, and bay windows, and for no other purpose," the restriction as to other uses is for the mutual and reciprocal benefit of subsequent adjoining lot owners, and the owner of any lot may enjoin a breach of the restriction on the part of the owner of an adjoining lot. *Vetter v. Flaherty*, 4 Lack. Leg. News, 175.

And where the owner of a city block has laid it out into lots, and conveyed such lots to different purchasers by deeds each containing a restrictive covenant against nuisances and other offensive erections upon the lots conveyed, which covenant was evidently not designed to be made for the benefit of the grantor further than it might be applicable to any portion of the block he might retain, but was for the benefit of persons acquiring the title to the several lots in the block, a subsequent grantee of one of the lots subject to the restriction is entitled to enforce the restriction against the owner of any other of such lots. *Raynor v. Lyon*, 46 Hun, 227.

And where an owner has divided his land into lots, and has caused a map thereof to be filed and copies of the map to be made, stating that "this property, when sold, is restricted, thus making it a first-class residence locality," and thereafter sells the en-

of condition, and that, according to some authorities, the interest remaining in Nicholas Ball was one which he could devise at common law. Whatever may be said as to these authorities, there can be no question that the interest retained by Nicholas Ball was devisable under chapter 201, § 23, Gen. Laws 1896, now chapter 252, § 23, Gen. Laws 1909.

Conditions are not favored in law, as they tend to destroy estates; but conditions may be created if such an intention appears from an examination of the whole deed. There are certain words which are considered appropriate to create a condition; but when these apt words are used, the provision is not always construed as a condition; and without these words condi-

tion tracts in separate parcels to various persons, each of the deeds containing restrictive covenants against the use of the lots for buildings other than detached dwelling houses of a certain description and cost, and against building within certain distances of the street lines, which covenants are expressly made with the grantor, "his heirs and assigns," and are "to run with the land, and are to be construed as covenants running with the land, until" a certain date, any of the owners of the land shown on the map, and thus conveyed, may enforce the covenants in equity. *McDougall v. Schneider*, 134 App. Div. 208, 118 N. Y. Supp. 861.

When the owner has divided a tract of land and conveyed parcels thereof to separate purchasers at different times, by deeds containing similar restrictive covenants, intended for the benefit of all the several purchasers, mutual negative easements are created, and the grantee of any parcel may enjoin interference with his negative easement by any other grantee having notice thereof, actual or constructive. *Landsberg v. Rosenwasser*, 124 App. Div. 559, 108 N. Y. Supp. 929.

And where a general plan has been adopted by the owner for the improvement of a large tract of land, and all of the land sold by him on a certain avenue has been conveyed with a uniform restriction as to the building line, intended for the benefit of each purchaser on that avenue, any purchaser is equitably entitled to enforce the restriction against any other purchaser. *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369.

As said in *DeGray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388: "Where there is a general scheme or plan adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction to be inserted in each deed to a purchaser; and it appears, by writings or by the circumstances, that such covenants are intended

to have been found to exist when such appears to be the intention of the parties. (*Clapp v. Wilder*, 176 Mass. 332, at page 341, 50 L.R.A. 120, 57 N. E. 692. "Whether the words amount to a condition or a limitation or a covenant may be a matter of construction, depending on the contract." 4 Kent, Com. 132. If it clearly appears by the deed that it was the intention of the parties that upon a breach of the restriction the estate conveyed to the grantee should be defeated, and should return to the grantor, such a restriction is a condition. And if it is found that a provision in a deed is a condition, then a breach of that condition works a forfeiture of the estate, and there is a right of re-entry in the grantor without express provision for

for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof; and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan,—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase."

And in *Hyman v. Tash*, — N. J. Eq. —, 71 Atl. 742, it was held that where a grantor had in mind a scheme of improvement for his land along a certain street, a grantee of a lot may enforce a building restriction inserted in a prior conveyance by his grantor or of a neighboring lot pursuant to such scheme for the benefit of all the other lots, although he imposed no restriction upon himself, and the scheme was not made public, and it does not appear that each purchaser was made aware that every other purchaser was to be subject to, and to have the benefit of, the plan.

#### Covenants personal to grantor.

In accordance with the general rule that restrictive covenants in a deed, not intended for the benefit of other land of the grantor, but merely for his personal benefit, to enable him to make the most of his remaining property, cannot be enforced by subsequent grantees of other parcels of the grantor's land, a grantee of a city lot is not entitled to enforce a restriction in a prior conveyance by his grantor of another lot, where there is nothing in the conveyance or in the surrounding circumstances from which it can be inferred that the restriction was inserted for the benefit of the property of the grantor which has been subsequently conveyed. *Badger v. Boardman*, 16 Gray, 559.

And while, as held in *BALL v. MILLIKEN*, and as noted above, it is not necessary, in order that a grantee may enforce a restrictive covenant in a prior conveyance by his grantor of another lot, that the intention of the parties to the prior conveyance to grant a negative easement for the benefit of the land of the grantor subsequent-

forfeiture and re-entry. It clearly appears by the deed to Hooper that it was the intention of the parties that, upon a breach of the provisions restricting the use of the premises conveyed, the property should return to the "grantor, his heirs, executors, and assigns," and in addition to the right to re-enter, the grantor obtained for himself, his heirs, executors, and assigns, the right to demand a reconveyance in case of any violation of the provision in the deed.

The provision for reconveyance in case of breach of a restriction in a deed is not a common one. The authorities throw but little light upon the effect of such a provision upon the estate conveyed. The provision for reconveyance establishes the intention of the parties that the land should

return to the grantor upon a violation of the provision, and the restriction could well be construed to create a condition. If a condition, there was in the grantor a right to claim a forfeiture for its breach and to re-enter. It does not appear that the provision for reconveyance was intended to diminish the rights of the grantor, or was a substitute for a forfeiture and the right to re-enter, but was intended as a right in addition to his rights at law. The future contingent right of entry for condition broken would pass to this complainant by the will of Nicholas Ball, under the provision of Gen. Laws 1896, chap. 201, § 23. This section, in force at the time of the death of the testator, is as follows: "Hereafter a contingent, an execu-

ly conveyed should be expressed in the deed, provided it is otherwise apparent,—the omission from the deed of such an expression is an evidentiary circumstance tending to show that the restriction was made only for the personal benefit of the grantor. *Coughlin v. Barker*, 46 Mo. App. 54.

So, a grantee of a lot with a restriction as to the building line cannot enforce a like restriction in a prior conveyance by his grantor of a neighboring lot, where it does not appear from the language of the respective deeds, when construed with reference to the extrinsic circumstances shown, that it was the intention of the parties to the prior deed to insert the restriction for the benefit of the lot subsequently conveyed. *Ibid*.

And one deriving title to a city lot through a mesne conveyance from the Commonwealth is not entitled to enforce a restrictive covenant in a deed from the Commonwealth of a lot adjoining his lot in the rear, against the building thereon of a stable, where there is no express provision in either conveyance giving him the benefit of the covenant, and the circumstances tend to show that the commonwealth did not intend by this restriction to give the neighboring lots the right to prevent the erection and use of a private stable. *Beals v. Case*, 138 Mass. 138.

Where the owner of a large estate has sold a small portion thereof, the purchaser entering into restrictive covenants for himself, his heirs and assigns, with the grantor, his heirs, executors, and administrators, only as to the character and value of the buildings to be erected thereon, the grantor entering into no covenants as to the land retained; and the grantor subsequently sells several other parcels of the estate to other purchasers, without restrictive covenants, and without informing them of the covenants in the first conveyance, it was held, in *Keates v. Lyon*, L. R. 4 Ch. 218, 38 L. J. Ch. N. S. 357, 20 L. T. N. S. 255, 17 Week. Rep. 338, that the benefit of such covenants is not a benefit reserved by the grantor in respect of the unsold portion of the estate, 37 L.R.A. (N.S.)

which attaches to the land and passes by the subsequent conveyances, and the subsequent grantees cannot enforce the covenants.

Nor can the grantee of a city lot enforce a condition in a prior conveyance by his grantor of an adjoining lot, that no building or edifice of any description exceeding 8 feet in height shall at any time be erected within 32 feet of the rear line of the lot, where there is no reservation in the deed of the condition to the heirs or assigns of the grantor, and no words giving the right of re-entry for condition broken, and the condition is not mentioned or referred to in the subsequent conveyance of the grantor's adjoining lot, but all the facts and circumstances tend to show that the condition was intended as a mere personal restriction for the benefit of the common grantor of the property. *Krekeler v. Aulbach*, 51 App. Div. 591, 64 N. Y. Supp. 908, affirmed in 169 N. Y. 372, 62 N. E. 416.

And while a grantee may enforce in equity a restrictive covenant in a prior conveyance by his grantor of other property, provided the restriction was originally made for the benefit of the remaining land of the common grantor, a grantee of a city lot cannot enforce a restriction as to a building line contained in a prior conveyance by the same grantor of another lot on the opposite side of the street and 150 feet distant, where the prior conveyance contains no statement that the restriction is for the benefit of any part of the grantor's unsold property, and there is no evidence of a general building scheme, or other sufficient evidence that the restriction was intended for the benefit of the land subsequently conveyed to the grantee seeking to enforce the restriction. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938, on final hearing, 74 N. J. Eq. 318, 70 Atl. 965.

In *Master v. Hansard*, L. R. 4 Ch. Div. 718, 46 L. J. Ch. N. S. 505, 36 L. T. N. S. 535, 25 Week. Rep. 570, where the owner of an estate had made a ninety-nine-year lease of a parcel thereof, with a covenant by the lessee for himself, his executors, administrators, or assigns, during the term, not to do anything upon the premises which

tory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, also a right of entry, whether immediate or future, and whether vested or contingent, in-to or upon any tenements or hereditaments of any tenure, may be disposed of by legal conveyance or will; but no such disposition shall, by force only of this section, defeat or enlarge an estate tail."

*Austin v. Cambridgeport*, 21 Pick. 215, was a writ of entry sur disseisin to recover possession of demanded premises. The demandant claimed as devisee under the will of Benjamin Austin, one of the grantors of an estate upon condition, against a grantee of the first grantee. After deciding that the estate in the first grantee was an

estate upon condition subsequent, and that there had been a forfeiture, the court said: "It then becomes important to ascertain whether the interest of Benjamin Austin in the premises at the time of executing his will was a devisable interest, and, if so, whether the demandant acquired a title to the same under the will." And the court decided that the interest of the testator "was not a present right of entry, but a contingent possible estate. That such an interest is devisable in England seems well established by the case of *Jones v. Roe*, 3 T. R. 88, and the cases there cited. Chancellor Kent states the rule to be that all contingent possible estates are devisable. 4 Kent, Com. 498, in notes."

In *Church in Brattle Square v. Grant*, 3

might be an annoyance to the neighborhood or to the lessees or tenants of the lessor, his heirs or assigns, or diminish the value of the adjoining property, and had subsequently made a similar lease of an adjoining parcel with a like covenant, the lessee, however, knowing nothing, at the time, of the covenant in the first lease, which was not mentioned in the second lease,—it was held that the covenant in the first lease was not taken for the benefit of the lessor's land adjoining that leased, but for his own benefit, that he might be able to make the most out of his estate, and that the second lessee accordingly could not enforce the covenant, or require the lessor to do so.

And in *Renals v. Cowlishaw*, L. R. 9 Ch. Div. 125, affirmed in L. R. 11 Ch. Div. 866, 48 L. J. Ch. N. S. 830, 41 L. T. N. S. 116, 28 Week. Rep. 9, where the owner of a mansion house and residential estate, and of certain pieces of land adjoining thereto, had sold two of these adjoining pieces to one who covenanted with the vendor, his heirs, executors, administrators, and assigns, as to the location, character, and use of the buildings to be erected thereon, etc., the conveyance, however, not stating that this restrictive covenant was for the protection of the residential property, or making any statement with reference thereto; and where the owner, without any representation that the purchaser should have the benefit of such covenant, subsequently sold the residential estate by conveyance without covenants like those in the first conveyance, and without any reference to or mention of that conveyance or the existence of the restrictive covenant therein,—it was held that the second grantee could not enforce the restrictive covenant in the first conveyance, as the benefit of the covenant was not a part of the subject-matter of his purchase, having been put in the first conveyance by the grantor, not for the benefit of this particular property conveyed to the second grantee, but for the benefit of the grantor himself.

Where the owner of property has divided it and sold a part with certain building restrictions, while there is a general presumption that such restrictions are for the bene-

fit of the property retained, a subsequent grantee of a lot cannot enforce the restrictions in a prior conveyance, where it appears that they were not in fact intended for the benefit of any particular lot, but were conceived as a part of the general scheme of improvement, and not intended to be operative unless that scheme should be carried out, and the scheme has in fact failed. *Coughlin v. Barker*, 46 Mo. App. 54.

And a grantee of a city lot is not entitled to enforce restrictive covenants as to a building line and as to the sale of liquor, contained in a prior conveyance by his grantor of another lot, although his own deed contains the same restrictions, where they were not inserted in accordance with a general plan,—other lots in the immediate neighborhood having been sold with different restrictions,—and there is nothing else to indicate that the restrictions as to the lot first conveyed were made for the benefit of the lot subsequently conveyed. *Haines v. Einwachter*, — N. J. Eq. —, 55 Atl. 38.

So, a grantee of a city lot is not entitled to enforce a restrictive covenant in a prior conveyance by his grantor of an adjoining lot, although a similar restriction is contained in his deed, where the first deed contained no covenant on the part of the grantor that, on the sale of other lots in the block, all of which he owned, he would impose any restrictions, and the restrictions imposed were not part of a general plan to restrict all the grantor's lots in the block, and some of the lots were sold without restriction, while others did not have the same restrictions, though they were similar. *Clark v. McGee*, 159 Ill. 518, 42 N. E. 965.

And a grantee cannot enforce a covenant against building within a certain distance of a street, contained in a prior conveyance by his grantor of another lot, where the restriction does not constitute part of a general and uniform plan of restriction, and was intended to run only to the grantor personally, and not in favor of the land retained by him or any subsequent grantee thereof. *Schworer v. Leo*, 39 Misc. 505, 80 N. Y. Supp. 399, affirmed without opin-



Gray, at page 160, 63 Am. Dec. 725, the court, in commenting with approval upon *Austin v. Cambridgeport*, supra, says: "That was a grant by deed of an estate, defeasible on a condition subsequent, which was legal and valid. The possibility of reverter was in the grantor and his heirs or devisees; the residue of the estate was vested in his grantee, the parish. The two interests united made up the entire fee simple estate, and were vested in persons ascertainable and capable of conveying the entire estate. . . . The conditional estate in the parish, and the possibility of reverter in the devisees of the grantor, were vested estates, and interests capable of conveyance, and constituting together an entire title or estate in fee simple."

The doctrine laid down in *Austin v. Cambridgeport*, supra, has been followed in a number of Massachusetts cases. In *Dunlap v. Bullard*, 131 Mass. 163, the court held that when an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest. In *Clapp v. Wilder*, 176 Mass. 337, 50 L.R.A. 120, 57 N. E. 692, the court, in considering a deed conveying land upon a condition, held that the right of reverter, remaining in the grantor up to the time of his death, went, upon his death, to his heir or devisees. *Austin v. Cambridgeport*, supra, found in the common law the power to devise the right of reverter. Later cases approve the doctrine of the earlier case that the right remaining in the grantor of an estate upon condition constituted an interest in the land. After *Austin v. Cambridgeport*, a statute was enacted in Massachusetts which provided that lands to which the testator has the right of entry may be devised, and

shall pass to the devisee. The Massachusetts statute was as follows (Rev. Stat. Mass. 1836, chap. 62): "Sec. 2. When any person shall devise lands of which he may not then be seised, but to or for which he has any right of entry, or when, after the making of any devise, the deviser shall be disseised or ousted of the devised premises, they shall nevertheless pass to the devisee, in like manner as they would have descended to the heirs of the deviser, if he had died intestate; and the devisee shall have the like remedy for the recovery thereof, either by entry or by action, as the heirs might have had." This statute has remained in force in practically the same form to the present time, and appears as § 24, chap. 135, Rev. Laws Mass. 1902. The Massachusetts statute gives to testators no greater power of disposition of contingent interests in land by devise than was given in this state by Gen. Laws 1896, chap. 201, § 23.

The case of *Upington v. Corrigan*, 151 N. Y. 143, 37 L.R.A. 794, 45 N. E. 359, cited by the respondent, takes a view of the right remaining in a grantor who conveys land upon a condition subsequent, different from that adopted by the Massachusetts cases. The New York court held that there remained in the grantor no estate or interest in the land, and as, under the New York statute, only an "estate or interest in real property" could be devised, the right remaining in the grantor was not devisable; but there was no statute in New York at the time of the decision in *Upington v. Corrigan*, with reference to the devise of contingent estates, of the nature of the Massachusetts and Rhode Island statutes.

Whether we are prepared to accept the

ion in 83 App. Div. 643, 82 N. Y. Supp. 1114.

Where a land company has sold three parcels of a large tract, with the restrictions that the property shall be used only for residence purposes, that each dwelling erected thereon shall cost not less than a certain sum, and that no liquors shall be sold on the premises; and the grantee has sold one of the three tracts with like restrictions, but there are no restrictions in any other deed from the land company, or in the subsequent conveyances of the other two of the three lots first sold with the restrictions, and nothing to show any intention on the part of the parties to confer upon any other person the right to enforce the restrictions in these two deeds, and the acts and conduct of the parties show that no such right was intended to be conferred,—no subsequent grantee of either the first grantor or the subgrantor can enforce such restrictions. *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298.  
37 L.R.A. (N.S.)

And in *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724, 14 Ann. Cas. 1018, it was held that the grantees of certain town lots were not entitled to enforce a covenant inserted in a prior conveyance of other lots, pursuant to a general plan in the conveyance of town lots, whereby the parties stipulated for themselves, their heirs, successors, and legal representatives, that intoxicating liquors should never be manufactured, sold, or otherwise disposed of as a beverage on the premises conveyed, and that, in case of a breach of the condition, the deed should become void and the property revert to the grantor, "its heirs, successors, and assigns,"—as it did not appear that the covenant was for the benefit of the other lands of the grantor, or for the benefit of subsequent purchasers of other town lots, and the subsequent purchasers did not buy with reference to the general plan, nor did the restrictive covenant enter into the consideration of their purchase.

A. C. W.

doctrine laid down in *Austin v. Cambridgeport*, supra, or not, if at law the estate conveyed to Hooper was one upon condition subsequent, then the right of reverter remaining in Nicholas Ball was devisable, under Gen. Laws 1896, chap. 201, § 23. This complainant, however, is not seeking to enforce any legal right. Whatever may have been the legal interest remaining in Nicholas Ball in the estate conveyed to Hooper, he obtained a certain equitable interest which he had a right to devise, and which he did devise, to his complainant, and the complainant is now seeking to enforce the equitable right which he claims that equitable interest gives to him. When Hooper accepted the deed from Nicholas Ball, he bound himself, his heirs and assigns, to reconvey the estate described in the deed, to Nicholas Ball, his heirs, executors, and assigns, in case of a violation of the provision in the deed. This gave to Ball an equitable interest in the land.

It is well established that a right to demand a conveyance of land constitutes an equitable interest in that land. In *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch. Div. 562, it appeared that the plaintiff was seised of certain land which was no longer required for the purpose of the railway, and the plaintiff conveyed the land to C. P., and the grantee covenanted with the company that he, his heirs and assigns, whenever the land might be required for the railway or works of the company, and whenever thereunto requested by the company, after a certain notice and on payment of a certain sum, would reconvey the land to the company. The land passed by conveyance to the defendant with notice of the covenant, and the company gave the defendant notice and requested him to reconvey the land. It was found that the land was at the time of the notice required for railway purposes. Jessel, master of the rolls, held that the covenant gave an interest in the land, and said: "But if it binds the land, it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase, there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things: He has to give notice of his intention to purchase, and to pay the purchase money. But, as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and, the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

37 L.R.A.(N.S.)

The interest of Nicholas Ball in the land conveyed to Hooper does not differ in its essential quality from the interest of the railway in the land referred to in *London & S. W. R. Co. v. Gomm*, supra. The railway had the right to demand a reconveyance from its grantee or his assigns upon the happening of the contingency that the growth of the railway's business should make requisite the use of the land by the railway. Nicholas Ball had the right to demand a reconveyance from Hooper or his assigns upon the happening of the contingency that the land was used in violation of the provisions of the deed. In such case an equitable interest in the land was given to the grantor.

Where a person has entered into a contract to purchase land, and before he receives a deed, dies, it is well established that, although the purchase money has not been paid, the testator's equitable interest in the land will pass by a devise. *Acherley v. Vernon*, 9 Mod. 69, 3 Bro. P. C. 91, 1 Comyns, Rep. 381, 1 P. Wms. 783, 2 Eq. Cas. Abr. 209, and 10 Mod. 518.

An equitable interest in land, though it is but a contingent equitable interest, clearly might be devised, under Gen. Laws 1896, chap. 201, § 23, and the doctrine that it might have passed by devise, before the enactment of said chapter 201, is well supported by the case, *Bailey v. Hoppin*, 12 R. I. 560. In that case the court held that a certain interest in land, then under consideration, was a contingent equitable interest, and that such an interest conveyed before his death to a testator is transmissible in equity to his devisee, notwithstanding the precarious nature of the subject of the deed. The court said: "Under the English statute [32 Hen. VIII. chap. 1], a devise of equitable estates including estates which have only been contracted for, and even where the contract by its terms is not performable until after the execution of the will, is upheld as good in equity. *Greenhill v. Greenhill*, Prec. in Ch. 320, 2 Vern. 679, Gilb. Eq. Rep. 77; *Acherley v. Vernon*, 9 Mod. 68, 78, 3 Bro. P. C. 91, 1 Comyn's Rep. 381, 1 P. Wms. 783, 2 Eq. Cas. Abr. 209; *M'Kinnon v. Thompson*, 3 Johns. Ch. 307. Under these precedents the only difficulty here is that the estate contracted for was, when the will was made and until after it went into effect, something which might never exist. The contract, however, was, as we have seen, valid in equity; and therefore the contract itself, whatever subtle lawyers may think of the subject of it, was a valuable property, and as such we think it must be held to have passed to William A. Hoppin under the will."

The provision of the deed to John W. Hooper, giving to Nicholas Ball the right to demand a reconveyance of the land upon the violation of the restrictions contained in the deed, gave to said Ball an interest in the land. This interest might be devised, and the right to demand a reconveyance is now in the complainant as devisee of Nicholas Ball, and is not in the heirs of Nicholas Ball.

The next question is whether the complainant shall be given the relief which he seeks, and shall obtain a decree for specific performance ordering a conveyance of the land to him for a breach of the provisions of the deed.

A bill for specific performance is an application addressed to the judicial discretion of a court of equity. "Even if the plaintiff were entitled to a specific performance of the defendant's agreement, such right is not an absolute one, but rests in the discretion of the court, to be exercised on equitable considerations in view of all the circumstances of the case." *Graves v. Goldthwait*, 153 Mass. 268, 10 L.R.A. 763, 26 N. E. 860. From the testimony in the case it appears that in the use of this property by successors in title to Hooper there have been departures from the letter of the restriction in the deed. It is not clear that all of these violations came to the knowledge of Nicholas Ball or of this complainant. These breaches of the condition were known to the respondent, and, not unreasonably, she might have believed that they were known to the complainant, and that the restrictions in the deed had been to some extent waived by him. Now, upon another violation of the restriction on her part, the proceeding to compel a conveyance of the property to the complainant, and thus destroy the estate of the respondent, in the circumstances of the case, would not be viewed with favor by a court of equity. It is one of the principles of equity that it will not decree a forfeiture. It "will never aid in the divesting of an estate for a breach of a covenant on a condition subsequent, although they will often interfere to prevent the divesting of an estate for a breach of a covenant or condition." 2 Story, Eq. Jur. § 1319. It is true that the ancestor in title of the respondent agreed to a reconveyance in the event of a breach; but to grant a specific performance of that agreement is, in effect, to decree a forfeiture. Equity has in some cases taken jurisdiction for the protection of a grantor, and ordered specific performance of a covenant to reconvey in case of a breach of condition, and thus aided in the divestiture of an estate. This has usually been in cases where a conveyance has been

made by an aged or infirm person in consideration that the grantee should support and care for the grantor, with the condition that if the grantee fails in his obligation he shall reconvey. Upon a breach of this condition, equity has taken jurisdiction and decreed specific performance. *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20; *Robinson v. Robinson*, 9 Gray, 447, 69 Am. Dec. 301. In *Baker v. St. Louis*, 75 Mo. 671, affirming and adopting the opinion in *Baker v. St. Louis*, 7 Mo. App. 429, specific performance was compelled of a covenant to reconvey. In that case land was conveyed for a street and market house, with the provision that as soon as the granted premises should cease to be used for that purpose, the parcel of land should revert to the grantor, his heirs and assigns, "and the said parties of the second part, upon failure to use said market house for the purposes aforesaid, [shall] reconvey to said parties of the first part." The court found the justification for the decree for specific performance in the consideration that the covenant "contains an express undertaking on the part of the city to reconvey the property upon a failure to use the market house as stipulated." "The conveyance by Peter and Jesse Lindell, taken with all its reservations and conditions, was in effect nothing more than a dedication upon condition subsequent. . . . The reservation or reversion upon breach of condition was equivalent to a retention of the fee subject to the public easement as appurtenant to the lot from which the strip was severed."

In these cases the circumstances warranted an exercise of the discretion of the court to decree a specific performance. Such circumstances are not presented in the case at bar, and to decree specific performance would be unreasonably to oppress the respondent, and would violate equitable principles.

We are of the opinion that the complainant is entitled to an injunction. He is the possessor of the land which the restriction was made to benefit. In a similar case (*Clark v. Martin*, 49 Pa. 289) the court held that the remedy asked for was one which the law authorizes courts of equity to grant to prevent or restrain "the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals." Cases are numerous in which injunctions have been granted to restrain the violation of similar restrictions in deeds, without reference to pecuniary damage; the courts, apparently without hesitation, placing the right to relief upon the sole ground of the disregard of a duty which the complainant

was entitled to have observed. It is urged that an injunction should not be granted, as it does not appear that the restriction contained in the deed from Nicholas Ball to Hooper was part of a general scheme for the development of the remainder of the tract. It must very frequently happen that such restrictions are imposed by the owner of a platted tract of land as part of a general scheme for the improvement and disposition of the platted lots. This is an incident common to many cases of this nature, and naturally has been taken into account by courts in considering the circumstances surrounding the grant, for the purpose of determining the intent of the restriction. But from these circumstances, which are the common circumstances of many cases, the court is not justified in deducing a principle that, in the absence of such general scheme, complainants are not entitled to the relief of injunction.

As was said in the minority opinion in *Clapp v. Wilder*, 176 Mass. 342, 50 L.R.A. 120, 57 N. E. 696: "The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement; but the rule has been applied in other cases, and has been recognized in cases where it was not applied." And later in the same opinion: "But conditions are construed as restrictions in such cases, not because courts have any special fondness for or leaning towards building schemes or plans of general improvement, but because it would be inequitable and unjust, as against the owners of adjoining and neighboring estates, to construe them otherwise, and to permit a party taking an estate with notice of a valid agreement respecting its mode of use and occupation towards such estates to avoid it." In *Clark v. Martin*, *supra*, the court said: "It was objected at the argument that this remedy [injunction] applies only as a means of compelling an observance of the terms involved in a general plan of lots; and this element actually exists in about half of the cases just cited; yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots, as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made; but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan."

The respondent relies upon the opinion in the case of *Clapp v. Wilder*, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692. The case of *Clapp v. Wilder* is clearly distinguish-

able from that at bar. It is not, and it is not intended as, a departure from the general rule laid down in *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, and a long line of Massachusetts cases, but is a case where an injunction was denied because, from the facts, the court found that the restriction was imposed for the personal benefit of the grantor, and not for the benefit of his remaining land. In *Clapp v. Wilder* the facts were that one Eaton was the owner of lot B, upon which was his dwelling house, and lot A, upon which was a store. While negotiations for the purchase of lot A were pending between Eaton, an invalid, and the defendants, and prior to the delivery of the deed, the grantor told the defendants that if he sold them the property he did not wish his view of Central street from his sitting room window cut off, and he should have some clause inserted in the deed to prevent this, and when the deed was delivered he told the defendants he had put in a clause so that his view of Central street from his sitting room window should not be cut off, and this was the restriction contained in the deed. From these facts the majority of the court found that the condition was imposed for the grantor's personal benefit, and not for the benefit of the land, and, in a suit commenced a number of years after the grantor's death, the court refused to grant an injunction in favor of the owners of lot B.

In the case at bar we cannot consider the provision in the deed to Hooper as a form of idle words. It had some purpose. It was intended either for the benefit of the adjoining land or for the benefit of Nicholas Ball personally. If, upon a reading of the provision by one unacquainted with the circumstances, the advantage sought for the adjoining land is not very clearly shown, the benefit to be derived from the provision by Mr. Ball personally, unconnected with his ownership of the adjoining land, is incomprehensible. The necessary and reasonable presumption in this, as in all such cases, is that the restriction is for the benefit of the remaining land, and courts will never hold it to be for the personal benefit of the grantor in the absence of circumstances indicating it. In addition to the natural presumption that the restriction was not for the personal benefit of Nicholas Ball, we have the assistance of the language of the provision: "The said J. Hooper, his heirs and assigns, shall not convert," etc., and "the said grantee for himself and his heirs and assigns promises to reconvey said estate to said grantor, his heirs, executors, and assigns, in case of any violation of the foregoing promises in

this deed,"—clearly inapt language to impose a restriction for the grantor's personal benefit during his life. And if the provision was not for the benefit of Mr. Ball, it must have been for the benefit of the remaining land. It appears in testimony that on the remaining land was a general store conducted by Nicholas Ball and later by this complainant. In a rural and fishing community, such as Block Island is, it is of great advantage to land containing a general store to have in its immediate neighborhood a building used for the purposes named in the restriction, to which farmers and fishermen will be constantly attracted. Also the restriction would prevent the use of said land for the purposes of a general store in competition with the general store situated on the remaining land, and the restriction in that way was for the benefit of the remainder of the tract. All the surrounding circumstances fail to show any possible benefit to Nicholas Ball except as owner of the land, and the restriction is clearly in some respects of benefit to the adjoining land. It is unreasonable to object that it does not appear by express language that the restriction is for the benefit of the land. Such language is unusual. In a large number of cases appearing in the reports where injunctions have been granted, no such language has been incorporated in the deed.

This case, in our opinion, is not governed by that of *Clapp v. Wilder*. It falls clearly in the rule of *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Hopkins v. Smith*, 162 Mass. 447, 38 N. E. 1122, and other cases in Massachusetts and other jurisdictions.

In *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632, the court said: "Restrictions and limitations which may be put on property by means of such stipulations derive their validity from the right which every owner of the fee has to dispose of his estate either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied. So long as he [the grantee] retains the title in himself, his covenants and agreements respecting the use and enjoyment of his estate will be binding on him personally, and can be specifically enforced in equity. When he disposes of it by grant or otherwise, those who take under him cannot equitably refuse to fulfil stipulations concerning the premises of which they had notice. It is upon this ground that courts of equity will afford relief to parties aggrieved by the neglect or omission to comply with agreements respecting real estate after it has passed by mesne conveyances

out of the hands of those who were parties to the original contract."

In *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, the court considered the effect of a restriction upon the use of land contained in a deed. The case was a suit in equity for an injunction against a subsequent grantee to restrain a violation of the provision in the deed. The court said, at page 364 of 11 Gray: "In like manner, by taking an estate from a grantor with notice of valid agreements made by him with the former owner of the property, concerning the mode of occupation and use of the estate granted, the purchaser is bound in equity to fulfil such agreements with the original owner, because it would be unconscientious and inequitable for him to set aside and disregard the legal and valid acts and agreements of his vendor in regard to the estate, of which he had notice when he became its purchaser. In this view, the precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform. *Sugden, Vendors*, 11th ed. 734-743; *Bedford v. British Museum*, 2 Myl. & K. 552, 2 L. J. Ch. N. S. 129; *Bristow v. Wood*, 1 Colly Ch. Cas. 480, 14 L. J. Ch. N. S. 50, 9 Jur. 99; *Whatman v. Gibson*, 9 Sim. 196, 7 L. J. Ch. N. S. 160, 2 Jur. 273; *Schreiber v. Creed*, 10 Sim. 9, 8 L. J. Ch. N. S. 346, 3 Jur. 625; *Barrow v. Richard*, 8 Paige, 356, 360, 35 Am. Dec. 713. The validity of agreements similar to those in the plaintiff's deed to White has been also recognized and established, and their performance enforced in equity, as against subsequent purchasers with notice, upon the ground that such stipulations create an easement or privilege in the land conveyed, for the use and benefit of the grantor and those who might afterwards claim under him as owners of adjacent land, of which the land granted originally formed a part. In such cases, although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or easement, appurtenant to the remaining land belonging to the grantor at the time of the grant, and arising out of and attached to the land,

part of the original parcel, conveyed to the grantee. When therefore it appears by a fair interpretation of the words of a grant, that it was the intent of the parties to create or reserve a right in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land."

In *Tulk v. Moxhay*, 2 Phill. Ch. 774, it appeared that land had been conveyed with a restriction upon its use contained in the deed. The land had come to the ownership of the defendant. The defendant, with notice of the covenant contained in the conveyance, manifested an intention of acting in violation of the covenant. In a bill praying for an injunction to restrain the defendant, Lord Chancellor Cottenham said: "It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." And further the court said: "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

A case in point is *Post v. Weil*, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145. One Hogan was the owner and occupier of two estates; one "Monte Alta" and the other "Cleremont" in upper New York city. In 1811 Hogan and wife deeded the two estates to trustees. In a few months thereafter, Monte Alta was conveyed to one Mark by deed in which were joined Hogan and wife and the trustees as grantors. The deed, which was a warranty deed, contained in the habendum clause the following provisions, viz.: "Provided always, and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time

hereafter used or occupied as a tavern or public house of any kind." The court said, at page 371 of 115 N. Y.: "If we can construe this clause as an obligation to abstain from doing the thing described, which, by acceptance of the deed, became binding upon the grantee as an agreement, enforceable in behalf of any interest entitled to invoke its protection, I think we are in conscience bound to give that construction." And the court further said: "Now the obvious and only purpose which Hogan could have had in view, when the contract was made, was to protect the adjacent property which he then owned from being injured by the vicinity of an undesirable structure or business. I think we all will agree that the presumption here, as in every other case where a restriction is inserted in a deed against undesirable structures or trades, is that the insertion was for the purpose of protecting rights which the grantor had in adjacent property. In this case the clause obviously was for the benefit of the Cleremont estate. . . . The clause in question in the case at bar was intended as a restriction, created for the benefit of the adjoining property, expressed in the strongest terms, and which was enforceable as a covenant running with the land, and was not a condition subsequent, imposed for the personal benefit of the grantors and their heirs."

*Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 303, 24 N. W. 104, is a proceeding in equity to enforce by injunction a condition contained in a deed restricting the use of premises conveyed. Cooley, Ch. J., writing the opinion of the court, approved those cases in which it is held that the fact that a penalty or forfeiture is imposed for doing a prohibited act is no obstacle to the interposition of equity by injunction. The opinion cites with approval *Clark v. Martin*, 49 Pa. 289, and *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715, in which cases the remedy was sought by a grantee of the party in whose favor the condition was reserved, and an injunction was granted on the ground that the condition was imposed for the benefit of the remaining land of the grantor. In *Clark v. Martin*, supra, the defendant, at the time of filing the bill, was the owner of building and lot immediately adjoining to the south. Both lots were formerly parts of a large lot which, before 1814 was held by one Henry and wife. In 1814 Henry and wife conveyed the lot which, at the time of filing the bill, belonged to the defendant, upon the express condition that the grantees, their heirs and assigns, should not build any buildings except outbuildings for the accommodation of the dwelling house, ex-

ceeding the height of 10 feet from the level of the ground. The defendant's lot passed to him by mesne conveyance, and the other lot passed by conveyance to the complainant. The bill alleged that it was the intention of the defendant to build on the corner lot, without regard to the restriction, under pretense of a right so to do, and prayed an injunction to restrain the defendant. The court said: "Here the duty of the defendant is so plain that one may read it running; it is clearly inscribed on every link of the chain of his title to the lot. He took his title expressly on the terms already briefly mentioned. He was not to erect on the back part of his lot any building higher than 10 feet, afterwards changed to 11. To whom then does he owe the duty? No one doubts that it is to the grantor who reserved or imposed the duty, and to his heirs and assigns. But did the grantor reserve this duty to himself, his heirs and assigns, as a mere personal duty, and thus retain in himself or them the vain right of saying that lot is not mine, but the owner is subject to my pleasure in the mode of building upon it? Common sense forbids this, and the law would not allow itself to be troubled with such vain engagements. . . . We have no other resource, therefore, than to attribute the restriction to the purpose of benefiting the adjoining lot then owned by Henry. Common sense cannot doubt its purpose, and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be."

From this review of the authorities we are of the opinion that the complainant, as the owner of the land for the benefit of which the restriction in the Hooper deed was imposed, should have an injunction as prayed, unless, as the respondent claims, "the complainant's action is barred by laches, and he is estopped from claiming, and has waived the breach," or "the complainant's action is barred by our statute, of limitations."

From the testimony in the case it appears that in the lifetime of Nicholas Ball, and since the ownership of the adjoining land by this complainant, there have been certain slight departures from the terms of the restriction in the deed on the part of the owners of the Hooper lot. At one time a portion of the building was used as a place to build a number of boats; but blacksmithing formed a considerable part of the process of boat building. A portion of the building was for a time used as a place of meeting for the Masonic and Odd Fellows lodges of the town, after their regular meeting place had been destroyed by

fire. A part of the building was used for a considerable time as a cobbler's shop; but it appears by the testimony that the repairing of shoes was carried on in connection with harness making, one of the trades permitted by the restriction in the deed. Another portion of the building was used for the making, repairing, and storing of sails; but the repairing of tackle was permitted by the deed. All these departures were violations of the letter of the restriction rather than its spirit. It is not shown clearly by the testimony that Nicholas Ball was aware of these violations of the condition in the deed. The complainant admits that he went to the cobbler's shop to have harness repaired, but claims that he knew of no violation of the deed until he learned of the acts of this respondent and her tenants, and that then, at once, he commenced this suit. It is abundantly supported by authority, however, that a permission for the use of a portion of the building for some trades, such as shoemaking or as a sail loft, or the temporary use of a portion of the building for holding society meetings, will not prevent an insistence upon the restriction to prevent a violation of the condition by other uses of the building, such as for the sale of intoxicating liquors or for the keeping of horses or swine.

We are of the opinion, from an examination of the testimony, that the complainant's right to an injunction is not barred by laches or by the statute of limitations, and that he has not waived the breach of the condition contained in the Hooper deed. The complainant, as owner of the remainder of the tract of land which was in Nicholas Ball after the deed from said Ball to John W. Hooper, is entitled to an injunction restraining the respondent from any violation of the restriction contained in said deed to Hooper, except as to the trade of repairing shoes, the use of which trade we find that the complainant has permitted in a room upon the second floor of said building, and as to the continued use of said trade in said place in said building the respondent should not be restrained.

The parties may present a form of decree in accordance with the foregoing opinion.

A motion for reargument having been filed, the following *per curiam* response was handed down January 20, 1911 (78 Atl. 625):

We find nothing in the motion for reargument which has not been argued by counsel and considered by the court, or which affects the conclusions set out in the opinion. The suggestions contained in this motion relating to costs can be addressed

to the court more seasonably when the form of decree is presented for entry.

Respondent's motion is denied and dismissed.

### OREGON SUPREME COURT.

C. S. JACKSON, Appt.,

v.

A. W. STEARNS, Resp't.

(58 Or. 57, 113 Pac. 30.)

#### Contract — statute of frauds — sufficiency of letters.

1. Letters passing between an alleged vendor and vendee cannot be read together to constitute a contract for the sale of real estate, if they do not identify the land which is intended to be the subject-matter of the contract, as to which there is a dispute, so that parol evidence would be required to substantiate the truth of the matter.

#### Same — action for breach — recovery for services.

2. The value of services performed in consideration of a parol agreement to convey real estate cannot be recovered in an action for damages for breach of the contract.

(February 7, 1911.)

*Note. — Right to recover value of services rendered in consideration of contract to convey or devise property, which is void by the statute of frauds.*

As to the right to recover for services rendered beyond the statutory period of limitation, upon breach of parol contract to make provision by will, see the note to *Goodloe v. Goodloe*, 6 L.R.A. (N.S.) 703.

As to the right to recover on *quantum meruit* for services performed or material furnished under express contract invalid because the minds of the parties did not meet as to the terms thereof, see the note to *Vickery v. Ritchie*, 26 L.R.A. (N.S.) 810.

And as to the right of one who breaks contract to support another for life, to recover on *quantum meruit*, see the note to *Ptacek v. Pisa*, 14 L.R.A. (N.S.) 537.

Generally, where services are rendered on an agreement which is void by the statute of frauds, an action will lie on the implied promise to pay for such services; but the promise is implied not from the services alone, but from the benefit to defendant as well, and if defendant has received no benefit, there can be no recovery. 20 Cyc. 300.

The law is abundantly well settled that in cases where services have been rendered in consideration of a contract to convey or devise property, or make provision for one by will, which is unenforceable and void by the statute of frauds, and the adverse party has either refused or become unable to per-

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Josephine County in defendant's favor in an action brought to recover damages for an alleged breach of contract. Affirmed.

#### Statement by Moore, J.:

This is an action by C. S. Jackson against A. W. Stearns to recover damages resulting from the breach of an agreement. The facts are that plaintiff, an attorney, prepared duplicate copies of a contract wherein it was stipulated that if he could secure a decree quieting the defendant's title to 320 acres of land, describing the premises, and would advance the court expenses, if so required, the defendant, in consideration thereof, would execute to him a good and sufficient deed to one half of the real property so obtained. The plaintiff subscribed his name to the writings and sent them by mail to the defendant, and thereupon began in the proper court a suit in which Stearns was plaintiff and the parties asserting title to such lands were defendants, alleging in the complaint that the deed executed to them by Stearns was intended as security for the payment of a debt, and praying that the mortgage be canceled. Issue having been joined, plaintiff wrote defendant that the cause had been referred

form his part, the party having rendered the services may treat the contract as a nullity, and sue on a *quantum meruit* for the value of such services. This rule finds support in *JACKSON v. STEARNS* as well as in the following additional cases: *Butler v. Kent*, 152 Ala. 594, 44 So. 863; *Grant v. Grant*, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15; *Watson v. Watson*, 1 Houst. (Del.) 209; *Mills v. Joiner*, 20 Fla. 479; *Bonnon v. Urton*, 3 G. Greene, 228; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Nelson v. Masterton*, 2 Ind. App. 524, 28 N. E. 731 (promise to make one an heir to his estate); *Kettry v. Thumma*, 9 Ind. App. 498, 36 N. E. 919; *Gullett v. Gullett*, 28 Ind. App. 670, 63 N. E. 782; *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; *Miller v. Eldridge*, 126 Ind. 461, 27 N. E. 132; *Stout v. Royston*, 32 Ky. L. Rep. 1055, 107 S. W. 784; *Sutton v. Rowley*, 44 Mich. 112, 6 N. W. 216; *Re Williams*, 106 Mich. 490, 64 N. W. 490; *Schwab v. Pierro*, 43 Minn. 520, 46 N. W. 71; *Ham v. Goodrich*, 37 N. H. 185; *Howe v. Day*, 58 N. H. 516; *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 40; *Udike v. Ten Broeck*, 32 N. J. L. 105; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91; *Erben v. Lorillard*, 19 N. Y. 299; *Re Sherman*, 24 Misc. 65, 53 N. Y. Supp. 376; *Lisk v. Sherman*, 25 Barb. 433; *King v. Brown*, 2 Hill, 485; *Nones v. Homer*, 2 Hilt. 116; *Albee v. Albee*, 3 Or. 321; *Stevens v. Lee*, 70 Tex. 279, 8 S. W.



in order to take the testimony. Upon the receipt of such information, the following letter was written:

Canyonville, Or., Oct. 26, '04.

C. S. Jackson.

Dear Sir:—

I received your letter and agreement, and you did not state whether you would stand good for Ira B. Riddle taking the evidence. If you will pay him, I will sign the agreement and send it down. Please let me know as soon as possible.

Yours respectfully,

A. W. Stearns.

In reply Jackson wrote, *inter alia*, as follows: "Yes; I will advance Mr. Riddle

his costs, and please insert it in the contract and return my copy to me." Stearns did not sign either copy of the contract, but upon the receipt of \$300 from the adverse parties, he, without plaintiff's consent, dismissed the suit. Thereafter this action was commenced, the complaint stating in substance the facts as hereinbefore detailed, and averring that by reason of dismissing such suit plaintiff had been damaged in the sum of \$4,500; that he had performed all the conditions of the contract required of him, and would have recovered the lands, but was prevented from doing so by the wrongful acts of the defendant; that plaintiff was at all times ready, able, and willing to prosecute such suit to final termination, and to recover the lands, the rea-

40; Raycraft v. Johnston, 41 Tex. Civ. App. 406, 93 S. W. 237; Capers v. Stewart, 3 Tex. App. Civ. Cas. (Willson) 355; Clark v. Davidson, 53 Wis. 317, 10 N. W. 334; Tucker v. Grover, 60 Wis. 240, 19 N. W. 62; Ellis v. Cary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; Koch v. Williams, 82 Wis. 186, 52 N. W. 257.

And Burlingame v. Burlingame, 7 Cow. 92, seems to support this rule, notwithstanding it has been cited as sustaining the proposition that in order to recover for services rendered under a void contract to convey, one should found his action on the special contract. It is very clearly pointed out, however, in King v. Brown, 2 Hill, 486, that the whole scope of the doctrine of the Burlingame Case went to show that the plaintiff must recover, if at all, under the general counts, on the ground that the contract was void.

"This doctrine," it was said in Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434, "runs through all the books. The principle underlying it is that parol contracts of this class, although not legally, are morally, binding, and payments made under them cannot be reclaimed so long as the party receiving such payment is not in fault; but if he repudiates the contract, a right of reclamation upon the principles of equity and good conscience accrues to the other party. This doctrine is eminently just, and permeates our entire jurisprudence under this head. It is unnecessary to accumulate authorities thereon."

The rule rests on the strongest equity, compelling a party who has received a benefit from a part execution of a contract which binds neither party, to make compensation for the benefit which he has received. Cohen v. Stein, 61 Wis. 508, 21 N. W. 514.

This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default. And it is the value of the services, not that of the land, that is to be recovered. Erben v. Lorillard, 19 N. Y. 299.

In Koch v. Williams, 82 Wis. 186, 52 N. W. 257, the court, after holding that the plaintiffs, who had rendered valuable serv-

ices to the defendants under a void contract to convey, were entitled to recover what such services were reasonably worth, said: "This, at first blush, might appear to be a hardship on the defendants, who never agreed to pay for such services in money, and have offered to pay according to the oral contract by a conveyance of the lot. But it is inevitable, from holding the contract void. The statute must be complied with as long as it is in force. It is no hardship to put such a contract in writing, and if parties suffer by not complying with the statute, it is a penalty due to their own negligence, and they have no reason to complain."

Where the plaintiff was to pay for land by the rendition of services, it was held in Bonnon v. Urton, 3 G. Greene, 228, *supra*, that if the defendant failed to make payment in the land, the plaintiff was clearly entitled to recover the value of the land at the time payments should have been made, with interest, although the contract was not in writing. It was said: "If the plaintiff worked for a particular object, and performed the work according to contract, he was surely entitled to the object or its value. Law, justice, and common honesty unite in support of this proposition."

In Dix v. Marcy, 116 Mass. 416, where the plaintiff conveyed property to the defendant upon an oral agreement of the defendant to furnish him and his family with support during their lives, and to give a mortgage on the property or a life lease to secure the support, it was held, after the defendant partly performed the contract and then refused to give the mortgage, that, while the agreement was within the statute of frauds and void, the plaintiff was nevertheless entitled to recover the value of the property conveyed, less the value of the support furnished in part performance.

And in Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013, where the premises to be purchased by the promisor were not to be conveyed to the promisee, but to a third party, in consideration of the rendition of services, etc., by the promisee, and

sonable worth of all of which is \$9,000, and the value of the part agreed to be conveyed to plaintiff for his services is \$4,500; and "that by reason of defendant's wrongful acts, he has unjustly enriched himself, and the plaintiff has suffered great damage and loss in the sum aforesaid, which plaintiff alleges to be reasonable compensation for said services." Judgment is demanded for the sum of \$4,500.

The answer admits that plaintiff is an attorney; that defendant retained him to perform the services specified; and that, pursuant to such employment, plaintiff instituted in the proper court the suit referred to, which defendant caused to be dismissed. All the other averments of the complaint are denied, and for a further de-

fense it is alleged that plaintiff and defendant entered into negotiations with a view of making a contract whereby plaintiff was to receive a deed for the east half of the particular 160 acres described in the complaint; and that no writing or memorandum was ever signed by defendant or by any person on his behalf, respecting such negotiations, in consequence of which the verbal understanding referred to in the complaint as a contract is void. A reply having put in issue the allegations of new matter in the answer, the cause was tried, but the jury, failing to agree, were discharged. The parties hereto thereupon stipulated that the testimony taken at that trial, supplemented by the depositions of certain witnesses, should be submitted to

the agreement was unenforceable because not written, in so far as the third party was concerned, it was held that the promisee, having performed the services and the other requirements, was entitled to recover the value of the services rendered in performance of the voidable parol contract, on the implied contract to repay. The court said: "This implied promise is raised, for the reason that the court will not allow the statute of frauds to be made an instrument of fraud."

In *Sims v. McEwen*, 27 Ala. 184, it was held that, notwithstanding the parol agreement in respect to lands was void, so that no action at law might be maintained for its breach, yet for services rendered under it a *quantum meruit* claim might be successfully prosecuted. In *Butler v. Kent*, 152 Ala. 594, 44 So. 863, however, it was said of *Sims v. McEwen*, supra, that "at the time the decision was made, our statute of frauds did not declare parol agreements void. It simply declared that no action could be maintained on them."

In *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384, where the defendant, to induce the plaintiff to leave his home and business in the state of Illinois, orally agreed that if the plaintiff and his family would come to Kentucky to live with the defendant, he would furnish him with a home during the defendant's life, and give the plaintiff his home place at the defendant's death, and then refused to perform, it was held that, while the agreement was within the statute of frauds, the plaintiff could, nevertheless, recover reasonable compensation for what he did under the contract before it was disaffirmed by the defendant. "That is to say, he may recover his reasonable expenses in moving to Kentucky, a reasonable compensation for the time lost in so doing, and a reasonable compensation for any loss that he actually sustained in giving up his home and business in Illinois and coming to Kentucky."

And the measure of damages in such cases is the value of the services, and not the value of the property agreed upon. *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107; 37 L.R.A. (N.S.)

*Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666.

In assumpsit for the recovery of services rendered upon a void contract for the conveyance of lands, the measure of the plaintiff's relief is the reasonable value of the services rendered, without reference to, and disconnected with, the express contract; the defendant's liability in such case rests upon an implied promise or assumpsit, and evidence of the value of the land stipulated to be conveyed in the express void agreement is inadmissible as a measure of the value of services rendered by plaintiff. *Fuller v. Reed*, 38 Cal. 99, wherein it was said: "To permit such testimony for the purpose of establishing the reasonable value of services rendered by plaintiff . . . would, in effect, allow a party in one breath to disaffirm a contract, and in the next to affirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract."

But it has been held that the unenforceable contract, in which the rate or mode of compensation for the services is fixed, is competent evidence on the question of the value of the services. *Capers v. Stewart*, 3 Tex. App. Civ. Cas. (Willson) 355.

The rule in Kentucky, it was said in *Waters v. Cline*, 121 Ky. 611, 123 Am. St. Rep. 215, 85 S. W. 209, is "that the statute [of frauds] is a shield, not a sword, and that, where the party has received the consideration of the contract, the court will not allow him to rely upon the statute and keep the consideration. . . . In applying this rule in cases where the party who has performed the contract cannot be restored to the situation in which he was before the contract was made, and it is impossible to estimate by any pecuniary standard the value of what the other party has received, this court has adopted the rule that in such cases the contract itself is the best evidence of the value of what has been received, and, while it will not enforce specific performance by decreeing a conveyance of the land, it will adjudge compensa-

the court, which, considering the evidence, found the facts in effect as stated hereinbefore, and as a conclusion of law based thereon found, *inter alia*, as follows: "The contract sued upon is for the conveyance of real property, and in order to be valid it must be shown to have been in writing and signed by the defendant. The evidence failing to show that defendant signed the alleged contract, the plaintiff cannot recover in his action,"—and from a judgment rendered in accordance therewith, the plaintiff appeals.

Messrs. R. G. Smith and C. S. Jackson, for appellant:

Every contract implies a duty to be performed, the violation of which gives in law a cause of action to the opposite party.

8 Am. & Eng. Enc. Law, 553.

If the services were to be paid for by the conveyance of lands, the value of the lands agreed to be charged is the fixed damages.

4 Cyc. 984; 8 Am. & Eng. Enc. Law, 543, 637; Sedgw. Damages, §§ 669, 670;

tion for what has been received by the defendant under the contract, measured by the consideration which, by the contract, he agreed to as the value of what he received."

But as is held in JACKSON v. STEARNS, while the rule is clearly established that one who renders services under an unenforceable contract is entitled to recover on *quantum meruit* the fair value of such services, he is not entitled to recover their value in an action for damages for breach of the contract. See, to the same effect, the following cases: Baxter v. Kitch, 37 Ind. 554; Hershman v. Pascal, 4 Ind. App. 330, 30 N. E. 932; Banta v. Banta, 103 App. Div. 172, 93 N. Y. Supp. 393, reversing on another point 84 App. Div. 138, 82 N. Y. Supp. 113; Hamilton v. Thirston, 93 Md. 213, 48 Atl. 709; King v. Brown, 2 Hill, 485.

And so in Howard v. Brower, 37 Ohio St. 402, it was held that a verdict rendered in a suit on a void agreement to devise property could not be regarded as a finding of the value of services as upon a *quantum meruit*, where the case was not submitted to the jury for such finding, but under instructions to assess the damages according to the terms of a void agreement.

And in an action to recover on *quantum meruit* the value of labor and services rendered under a contract void by the statute of frauds, an instruction which rests on the theory that part performance validates the contract, and permits a recovery in precise accordance with its terms as if it were valid, constitutes error. Leslie v. Smith, 32 Mich. 64.

But in Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013, *supra*, where it was insisted that the complaint was not in proper form, it was said: "The case of King

Sutherland, Damages, 2040-2042; 13 Cyc. 156, 159, 168; Jack v. McKee, 9 Pa. 235; Bash v. Bash, 9 Pa. 260; Malaun v. Ammon, 1 Grant, Cas. 123; Weil v. Fineran, 78 Ark. 87, 93 S. W. 568; Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046; Stoutenburgh v. Fleer, 87 N. Y. Supp. 504; Keener, Quasi Contr. p. 278; Davis v. Webber, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 88, 49 S. W. 822; Scarisbrick v. Parkinson, 20 L. T. N. S. 175, 17 Week. Rep. 467; Ham v. Goodrich, 37 N. H. 185.

Messrs. Fullerton & Orcutt, for respondent:

Agreements to convey real estate for professional services to be performed are within the statute of frauds, and are invalid unless in writing and signed by the party to be charged.

29 Am. & Eng. Enc. Law, 2d ed. 878; Russell v. Briggs, 165 N. Y. 500, 53 L.R.A. 556, 59 N. E. 303; Preston v. Casner, 104 Ill. 262; Sands v. Arthur, 84 Pa. 479; Lyman v. Lyman, 133 Mass. 414.

Where an attorney makes a special con-

v. Brown, 2 Hill, 485, is cited as requiring a complaint to be upon the common counts. That case, however, was decided when different forms of actions were required and technical pleading was necessary. Since the abolition of forms of actions by the Code, a plaintiff may simply state the facts upon which he claims relief, and, if the facts stated are sufficient to authorize relief, his complaint cannot be challenged as not in any particular form. The complaint in this case alleges a parol contract to convey land, unenforceable by the statute of frauds, a repudiation of that oral contract by the promisor, the payment of money and the performance of labor and service upon the faith of said contract by the plaintiff, and seeks to recover therefor. These allegations would seem to contain all the allegations necessary to a cause of action upon the contract, which the law implies where services are rendered under a contract void by the statute of frauds, which the promisor refuses to fulfil."

In Johnston v. Myers, 138 Iowa, 497, 116 N. W. 600, while one was held to be entitled to recover the reasonable value of services rendered under an unenforceable contract to devise property, she was not entitled to a lien on a specific lot, since it did not appear that she will intended to charge the specific lot with a lien for the payment of the services.

But in Pragoff v. Flood, 7 Ky. L. Rep. 636, where one by parol was promised a gift of realty in consideration of services rendered, and the promisor died before drawing the deed, it was held that the promisee was entitled to a lien on the realty for the value of his services.

E. M. S.

tract with the client in a suit or action for a certain fee contingent upon success in the case, and the client afterwards dismisses the case or settles the same without the attorney's consent, the attorney is not entitled, as a matter of law, to recover the whole contingent fee, but he may recover on a special count or a *quantum meruit* for the reasonable value of his services.

*Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Jones v. Van Patten*, 3 Ind. 107; *Shannon v. Comstock*, 21 Wend. 457, 34 Am. Dec. 262; *Western U. Teleg. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Badger v. Mayer*, 8 Misc. 533, 28 N. Y. Supp. 765.

*Moore, J.*, delivered the opinion of the court:

1. The question to be considered is whether or not the conclusion of law quoted is deducible from the facts as found. As a matter preliminary to a determination of the inquiry, attention will be called to certain clauses of our statute: "No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared, otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law." L. O. L. § 804. "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement, shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: . . . 6. An agreement . . . for the sale of real property, or of any interest therein." Id. § 808.

It will be remembered that Jackson signed duplicate copies of the contract which he mailed to Stearns. but the defendant never subscribed his name to the writing, and no memorandum was executed by him, unless it can be said that his letter of October 26, 1904, when read in connection with other correspondence, is sufficient to answer the requirements of the statute of frauds. In the communication referred to Stearns promised to sign the agreement if Jackson would pay the referee's fees. The plaintiff's answer presupposes an insertion in the contract of his consent to advance such fees, a provision 37 L.R.A. (N.S.)

which, in substance, was originally included therein. It will thus be seen that both parties intended some affirmative acts should be performed by Stearns before the contracts would become effective.

Separate writings exchanged by parties and relating to the same subject-matter cannot constitute a contract between them, unless it was then their intention that an agreement should be consummated by their correspondence. *Bishop, Contr.* 2d ed. § 165. The writings stipulated that Jackson should receive from Stearns a deed conveying one half of all the lands for which a decree quieting the title could be secured. The complaint avers that the land thus agreed to be granted to plaintiff for his services is a particular 160 acres, which is a variance, while the answer alleges that the part promised by defendant was only the east half of such quarter section. As the contract did not specify the particular land which plaintiff was to receive, and as an issue was joined in respect to the tract which he asserts was to have been conveyed to him, and that which the defendant claims was promised, oral evidence was necessary to substantiate the truth of the matter, and in such cases the writings cannot be read together so as to constitute a contract between them. 12 Enc. Ev. 16; 2 Page, *Contr.* § 688; *Longfellow v. Huffman*, 57 Or. 338, 112 Pac. 8. We conclude therefore, that no written contract was effectuated by the parties.

It is maintained by plaintiff that the services which he agreed to perform were to have been compensated by a conveyance of land, and such being the case the value of the premises is the measure of the damages which he sustained in consequence of the defendant's conduct. Some of the cases relied upon to support the legal principle asserted will be examined. In *Jack v. McKee*, 9 Pa. 235, the declaration alleged that a parol agreement was entered into whereby defendant's testator, in consideration that plaintiff would continue to live at and take care of his house until he died, would give her a certain piece of land; that pursuant thereto she performed the service, but the testator did not keep his part of the agreement, and devised the premises to others. In a suit to recover the value of the services on a breach of the contract, it was held that the agreement, though not evidenced by a writing, was not within the statute of frauds, and that the damages sustained were the value of the land, and not a *quantum meruit* for the services rendered. The legislative assembly of Pennsylvania never adopted § 4 of the statute of 29 Car. II, chap. 3, which provides that "no action shall be brought

... upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, . . . unless . . . some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized" (Browne, Stat. Fr. 5th ed. p. 648); or enacted any other clause in lieu thereof. Bell v. Andrews, 4 Dall. 152, 1 L. ed. 779; McDowell v. Oyer, 21 Pa. 417, 425. In Hertzog v. Hertzog, 34 Pa. 418, 419, Mr. Justice Woodward, referring to the failure to accept such provision, remarks: "The omission from our statute of frauds and perjuries, of the 4th section of the British statute, after which ours was modeled, left us free to sue on parol contracts for the sale of lands." In that case the doctrine announced in Jack v. McKee, supra, was expressly overruled, and it was held that in an action for the breach of an oral contract to convey land, in consideration of money paid or services rendered, the damages were to be measured by the amount of money expended, or the worth of the labor performed, and not by the value of the land. In Hertzog v. Hertzog, 34 Pa. 418, 435, a dissenting opinion rendered in the case of Malaun v. Ammon, 1 Grant, Cas. 123, 145, is incorporated, wherein Mr. Justice Woodward, alluding to errors which might be committed by a court of last resort, and relied upon as a controlling precedent, observes: "For myself, I take occasion to say that when, through accident, press of business, or misconception, a decision is pronounced which subverts a fundamental rule of property, and by consequence renders every man's estate insecure,—which, under color of compensating personal services, strips families of their patrimonial acres, which, in short, subjects land titles to the changes and chances of parol evidence,—the maxim of *stare decisis* bids us to go back to the old, straight, safe paths, and not to blunder again and again, because we have blundered once."

In Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046, it appeared that a written contract had been executed, acknowledged, and recorded as required by law concerning agreements affecting real property, whereby plaintiffs, who were attorneys, stipulated to prosecute all suits necessary to recover for their client certain lands, in consideration of which service, if successful, she was to execute to them deeds for one half of the real property secured by decree, or if a compromise were effected, they were to receive a moiety either of the money or premises obtained in settlement. Pursuant to the agreement, plaintiffs began for their client proper suits, pending which

she, in consideration of \$600, compromised the controversy, executed to the parties who asserted titles to the lands deeds of all her interest therein except as to 13 acres, and thereupon dismissed the suit without the consent of her attorneys. They thereafter brought suits against the persons to whom she had executed deeds, to recover one half of the land that was claimed, under the contract with their client, which suits were compromised by the attorneys, who paid to one of the parties a sum of money for a quitclaim deed of his interest, and executed to another party a deed to a portion of the land in consideration of a conveyance to them of the remainder. The attorneys thereafter instituted a suit against Adams who, by mesne conveyances, held the legal title to the 13 acres, which were not included in the compromise, to recover a moiety of the land, and it was held that they were entitled thereto. It was further determined that a contract whereby attorneys, if successful in litigation for the recovery of land, were to receive one half thereof, the moiety being worth \$1,500 or \$2,000, was not so unreasonable as to be unenforceable in equity, though the amount of labor actually performed by the attorneys was small because of a compromise of the suit by the client without their consent. In that case the contract having been duly executed and recorded, the parties who purchased any of the real property described in agreement took the title to the premises with notice of the attorney's claim to an interest in the land, and as the memorandum was in writing, expressing the consideration, and subscribed by the party to be charged, the contract was not within the statute of frauds.

In Weil v. Fineran, 78 Ark. 87, 93 S. W. 568, which was an action by an attorney against his client, the complaint averred in the first count the plaintiff's employment to perform services for the defendant, and that she refused to permit him to do so, whereby he was damaged; and also alleged in another count that defendant was indebted to him for services rendered and money spent at her request, of the reasonable value of a stated sum, and it was held that plaintiff was not entitled to recover on *quantum meruit* as he had not elected to treat the contract as rescinded. In that case it appears from an instruction that the defendant had agreed to pay \$100 for plaintiff's services, and also promised to reimburse him for all sums of money expended on her account, and further to give him 20 per cent of her interest in a certain estate in case he could establish her right thereto and recover the same for her, and also, by a power of attorney, she appointed

him her agent to procure such interest. It is impossible to state from an examination of the facts disclosed whether or not the estate to which the client's claim was to have been established consisted of personal or real property, but if it be conceded that it comprised only the latter class, the power of attorney, which must have been in writing and duly subscribed, undoubtedly afforded a memorandum sufficient to take the case out of the statute of frauds. Though the judgment was reversed in consequence of an erroneous instruction having been given, it was intimated that, while the plaintiff was suing for a breach of the contract and asking for the resulting damages, the action was maintainable.

In *Wright v. Kansas City, Ft. S. & M. R. Co.* 141 Mo. App. 518, 126 S. W. 517, which was a suit to enforce an attorney's lien for a fee based on a written agreement entered into by the attorney and his client, whereby the latter was to pay the lawyer 50 per cent of any sum that might be secured in consequence of personal injuries which he had sustained, the contract stipulated that the client should not compromise or settle the claim without the written consent of the attorney. The defendant, having notice of the lien, demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, because the clause not to compromise the claim for damages rendered the contract unenforceable. The demurrer was sustained and the action dismissed, but upon appeal the judgment was reversed, the court holding that the contract was not void as contrary to public policy, and that the validity of the provision could only be called in question in case the attorney undertook to enforce it against his client. In that case the agreement did not relate to real property, and, as the contract was in writing and signed by the client, the statute of frauds was not involved.

In *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 89, 49 S. W. 822, which was a suit to recover a stated sum for services performed by an attorney for his client, in securing a judgment, and to declare and enforce a lien upon certain property, it was held that, though the written contract, subscribed by the parties, was void because of a stipulation that the client should not settle or compromise the controversy without the attorney's consent, compensation might be granted the attorney for his services under the rule of *quantum meruit*, and the contract might be examined to ascertain what value the parties themselves considered the services reasonably worth. In that case the agreement, being in writing, was not within

the statute of frauds. It is fair to assume that the suit was for the recovery of the reasonable value of the services performed by the attorney, for Mr. Justice Wood, in referring thereto, says: "Now, Webber, under the *quantum meruit*, should receive pay only for the services actually rendered."

In *Ham v. Goodrich*, 37 N. H. 185, an agreement to convey land in consideration of services to be rendered was held to be within the statute of frauds, yet, upon a *quantum meruit* to recover the reasonable worth of the services performed, it was ruled that the value of the land was not the fixed measure of the damages, though such value was competent evidence to be considered in determining the question of damages. In that case one of the counts in the declaration in assumpsit was as follows: "That on the 1st day of January, 1824, the deceased, in consideration that the plaintiff agreed to live, with his family, with the deceased, take care of him, and serve him till his death, promised to pay him so much money," etc.; and alleged that he deserved to have \$5,000. It will thus be seen that a *quantum meruit* was relied upon as a basis for the recovery.

Attention has been called to the case of *Ingersoll v. Coram*, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92, which in effect overrules the decision in *Harris v. Root*, 28 Mont. 159, 72 Pac. 429, as sustaining plaintiff's theory. In the principal case referred to, the contract stipulating for the payment of a fee in case of a successful termination of the controversy did not provide that a performance of the service by the attorney should have been compensated by a conveyance of real property, and hence the agreement was not violative of the statute of frauds.

2. An examination of the averments of the complaint in the case at bar will show that the cause of action undertaken to be stated is founded on the contract to recover the damages resulting from a breach of the agreement. It will be remembered, however, that the pleading referred to states that \$4,500, the damage sustained, is the reasonable compensation for the services performed. While this clause is expressed in the form of an averment of fact, it would seem to be nothing more than a conclusion of law that was not predicated on any allegation of the complaint.

3. The rule seems to be well settled that where, under a contract void by the statute of frauds, services have been performed in consideration of a conveyance of land, and the execution of a deed to the premises is refused, the agreement can be abandoned by the party rendering the service, who may recover the value of the labor on a *quantum*

*meruit*. 3 Sutherland, Damages, 3d ed. p. 2054; Browne, Stat. Fr. 5th ed. 125; Mills v. Joiner, 20 Fla. 479; Clark v. Davidson, 53 Wis. 317, 10 N. W. 384; Tucker v. Grover, 60 Wis. 240, 19 N. W. 62.

4. The plaintiff, having failed to pursue this remedy, instituted an action for damages, which presupposes the enforcement of the contract, and, such being the case, the conclusion of law complained of is deducible from the facts as found, and no error was committed as alleged. It follows that the judgment is affirmed.

### NEW HAMPSHIRE SUPREME COURT.

#### TRUSTEES OF PEMBROKE ACADEMY v. EPSOM SCHOOL DISTRICT et al.

(75 N. H. 408, 75 Atl. 100.)

#### Trust—will—precatory words.

1. A trust is created by a bequest of money to trustees of a school, the income of which testator states "I wish" to be expended in a certain manner.

#### Note.—Creation of trust by precatory words in a will.

- I. American cases, 646.
- II. English cases, 673.
- III. Recommending the employment of an agent or attorney, 685.

#### I. American cases.

Wherever the objects of the supposed recommendatory trust are not certain or definite, or wherever the property to which it is to be attached is not certain or definite, or wherever a clear discretion or choice to act or not to act is given, or wherever the prior dispositions import absolute or uncontrollable ownership, a trust is not created.

#### Ask.

A letter written to testator's wife after a devise in fee to her: "All I ask when you go, you will not leave all to yours; but that you will share some of it with Ellen Thruston,"—was held not to create a precatory trust, because, first, the letter was not testamentary in character, and, second, if the words had been in the will, they would not have established a precatory trust. Thruston v. Prather, 25 Ky. L. Rep. 1137, 27 S. W. 354.

#### Assume.

The will said: "I assume, first, that if my dear wife shall survive me (which does not seem probable), my said sons will take pleasure in providing for all her wants; second, that my eldest son, John B. Treat, will understand and appreciate my reasons 37 L.R.A.(N.S.)

#### Trust—cy pres—education.

2. In case, after a devise of a fund to an academy in trust to pay the tuition of worthy poor boys of a certain town, the academy is by law made a free high school for such town, the fund may be applied in establishing scholarships for such boys, rather than in relieving the tax payers of the town of the burden of maintaining such school, or in aiding the academy in paying its general expenses.

(January 4, 1910.)

**T**RANSFER by the Superior Court for Merrimack County without ruling of a bill asking for directions as to the disposition of a charitable trust fund. Case discharged.

The plaintiffs acquired the fund in 1892 under the following provision of the will of Ephriam Locke, deceased: "I give and bequeath to the trustees of Pembroke Academy, the sum of one thousand (\$1,000) dollars in money, the annual income of which sum I wish to be expended in paying the tuition, at said academy, of such poor boys in said town of Epsom, of good moral character, as may be recommended from time to time to the trustees of said academy by

for giving whatever property I may have at my decease to his younger brothers; and, third, that they on their part will not fail to do for him and his family all that in the circumstances the truest fraternal regard may require them to do." It was held that it was left to the discretion of the two younger sons to do what in their judgment was fair. Rose v. Porter, 141 Mass. 309, 5 N. E. 641.

#### Believing.

The use of the word "believing" has been generally held not to create a precatory trust. But where it is clearly shown that the testator's intention was to have his directions carried out, a trust is created.

Where the language was: "During her life, believing that she will make use of it to the best advantage for the benefit of our children, as well as her own comfort," it was held that no trust for the children was created, and the word "believing" was not intended to be precatory. McCreary v. Burns, 17 S. C. 45.

"All the rest and residue of my property, real, personal, and mixed, I give, bequeath, and devise to my dear wife, . . . believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death,"—was held not to be precatory, as the final distribution was left absolutely to the wife. Cheston v. Cheston, 89 Md. 465, 43 Atl. 768.

The will said: "All the remainder of my estate, real, personal, and mixed, I give to my beloved wife, Hattie H. Page, believing that she will do justice between her rela-

a majority of the board of selectmen of said town of Epsom, as worthy and deserving this privilege."

The legacy was accepted and expended in accordance with the wish of the testator, until N. H. Laws 1901, chap. 96, whereby school districts maintaining no high school or school of corresponding grade are required, within certain limits, to pay the tuition of all children from such district attending approved high schools or academies elsewhere, was enacted. Pembroke Academy is an approved school within the statute. Epsom district has no high school. Since this legislation various Epsom children have attended Pembroke Academy, among which are several poor children recommended as within the terms of the

bequest. The academy has charged the entire tuition of Epsom students to the defendant district. Defendant claims that the income of the Locke fund should be applied to that account, while plaintiffs contend that the administration of the fund is in no way affected by Laws 1901, chap. 96, and that it cannot be applied to the benefit of the whole body of Epsom taxpayers.

Further facts appear in the opinion.

Mr. Fred. C. Demond, with Messrs. Streeter & Hollis, for plaintiffs:

The testator did not intend to have his bounty so applied as to relieve the taxpayers in any measure of the burden of the support of the public schools.

Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522.

tives and mine at her death." It was held that there was so much uncertainty that an attempt to enforce a trust would be a mere guess, and would virtually result in the court making a will. *Hill v. Page*, — Tenn. —, 36 S. W. 735. In this case it was said that to create a trust and make precatory words operative in a will, it should be clear, first, that the estate vested in the first taker is not absolute, nor disposition thereof unrestricted; second, that the subject of the bequest or devise is certain, the trust certain and definite; and, third, the objects of the bounty certain and clear; and, further, that the language used, as gathered from the whole context, is intended to be imperative and controlling, and not a mere matter of discretion.

"In their own right, trusting nevertheless and believing that under a proper sense of their obligations to their own consciences and their accountability to God, they will, as near as they possibly can, in conformity with what I have herein indicated, pay over and contribute the same to charitable objects and purposes,"—was held to create no trust enforceable in equity. *Frierson v. General Assembly*, 7 Heisk. 683.

But "believing" was construed as imperative, and not discretionary, in "believing that she will make an equitable distribution of the property, at her death, among our children, as she knows better than any other person what part each one of them has already received." *Anderson v. McCullough*, 3 Head, 614. This was on the ground that the intention of the testator, that the widow at her death should distribute the property equitably amongst the children, was clearly manifested.

#### *Confidence.*

This word creates a trust in some cases, where it is used in connection with words indicating that a distribution is required. In determining that precatory words in a will create a trust, the courts give great weight to the fact that the person or object to which the precatory words apply is clearly pointed out, and the quantum of the estate to be given to such person or object is also clearly defined. But no trust is created

where the will so indicates, or where the devisee has full power of disposition, or full power to consume, or absolute title.

The provision: "Having entire confidence in the discretion of the trustee, he is to dispose of the fund for the benefit and comfort of the brothers and sister, as he may from time to time judge the testatrix would have done if she could have foreseen the circumstances,"—clearly indicated an intention that the direction should be mandatory, with some discretion as to the division. *Portsmouth v. Shackford*, 46 N. H. 423. The court said: "The current of American authority and the later English cases is against converting the discretion of the donee into an absolute trust, and in favor of giving effect more fully than formerly, to the intention of the testator, giving to his words their natural and ordinary sense."

And "having full confidence in my sons aforesaid, and in their dispositions to deal justly and liberally, I leave it to them to make proper and suitable provision for their sisters,"—was held to vest the legal title to the estate in the sons, and to charge the estate in their hands with the maintenance or suitable provision for his daughters. *Cockrill v. Armstrong*, 31 Ark. 580.

And a devise to brothers who were appointed executors, "with full confidence that they will settle my estate according to this my will, and that they will dispose of the residue and remainder that may remain in their hands, among our brothers and sisters and their children as they shall judge shall be most in need of the same. This to be done according to their best discretion,"—was held to be imperative, and not discretionary, and to create a trust in favor of the brothers and sisters and their children. *Bull v. Bull*, 8 Conn. 47, 20 Am. Dec. 86, distinguished in *Gilbert v. Chapin*, 19 Conn. 342.

"With full power to her, to use, expend or appropriate any part or all of the same for her own use only, and as to the portion that may remain thereof at her death, I give, devise, and bequeath the same to her brothers, share and share alike,—the child or children of a deceased brother to take



When a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode.

*Adams Female Academy v. Adams*, 65 N. H. 225, 6 L.R.A. 785, 18 Atl. 777, 23 Atl. 430; *Jackson v. Phillips*, 14 Allen, 539; *Philadelphia v. Girard*, 45 Pa. 27, 84 Am. Dec. 470; *Atty. Gen. v. Glyn*, 12 Sim. 84; *Women's Christian Asso. v. Kansas City*, 147 Mo. 103, 48 S. W. 960; *Inglish v. Johnson*, 42 Tex. Civ. App. 118, 95 S. W. 558.

Locke's bequest for the better education of poor Epsom students is a charity.

*Chapin v. School Dist. No. 2*, 35 N. H. 445; *Adams Female Academy v. Adams*, 65 N. H. 225, 6 L.R.A. 785, 18 Atl. 777, 23

Atl. 430; *Clement v. Hyde*, 50 Vt. 716, 28 Am. Rep. 522; *Moore v. Moore*, 4 Dana. 354, 29 Am. Dec. 417; *Crow ex rel. Jones v. Clay County*, 196 Mo. 234, 95 S. W. 369.

*Messrs. Martin & Howe and Joseph A. Donigan*, for defendants:

The bequest of a fund in trust for the education of poor children of a certain district in a state is valid, though the free education of all the poor children in the state is provided for by law.

*Green v. Blackwell*, — N. J. Eq. —, 35 Atl. 375.

When it has been found impracticable to administer the gift in a will of the income of a fund, for the support of a school in a certain school district in a town, precisely according to the terms of the will, it will

the share which its or their father surviving her would have received. And I make this provision for her with tender and affectionate solicitude for her comfort and well-being through life, and with full confidence in her ability and conscientious sense of duty, but mindful of the experience of the past, I solemnly enjoin her to hold this as a trust, and at once with the aid of competent counsel, by her will properly executed, so to arrange her affairs that my wishes herein indicated may be carried out," —was held to declare a trust for others as to what might remain at her death unexpended. *McClernan v. McClernan*, 73 Md. 283, 20 Atl. 908.

After the gift of the life estate, "in the full confidence that upon my decease he will, as he has heretofore done, continue to give and afford my children [enumerating them] such protection, comfort, and support as they or either of them may stand in need of," —was held to create a trust, as the objects of the supposed trust were certain, and the property was clearly pointed out, and the relations were such as to indicate a strong motive in making them a partaker of his bounty. *Warner v. Bates*, 98 Mass. 274. The court said: "If the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, the just and reasonable interpretation is that a trust is created, which is obligatory, and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended." This case was distinguished in *Field v. New York*, 38 Hun, 590, and limited in *Poor v. Bradbury*, 196 Mass. 207, 81 N. E. 882.

"In the utmost confidence in my beloved wife, I leave to her all my worldly goods to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and person, are left in fee simple to her, only requesting her to make an equal distribution amongst our heirs; and desiring her to do for some of my faithful servants, whatever she may

think will most conduce to their welfare, without regard to the interest of my heirs," —was held to be an express declaration of a trust in favor of the children of the marriage, by which they were entitled to distribution of the estate amongst them, —a distribution, however, not immediate or unqualified, but subject to a power and discretion on the part of the wife, to enable her, at her own election, to enjoy the whole subject during her life for her own benefit. *Harrison v. Harrison*, 2 Gratt. 1, 44 Am. Dec. 365. In this case it was said that it was well settled that, in order to effectuate the testator's intention, words of request, recommendation, or hope might be treated as imperative, and should be so treated where the objects of the precatory language were certain, and the subjects contemplated were also certain, unless a clear discretion or choice to act or not to act be given, or the prior dispositions of the property import absolute or uncontrollable beneficial ownership.

By the language, "having full confidence in my said wife, and hereby request that at her death she will divide equally, share and share alike, in equal portions, as tenants in common, between my sons and daughters," a clear intention was held to be manifested, to create a trust in favor of the children named in the will, and the language used by the testator was held to be intended by him to govern and control the conduct of his wife in the disposition of his estate. *Knox v. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. 155. The court said: "While, on the one hand, we are inclined not to go to the extent of the older cases in England and in this country, in establishing trusts upon the strength of precatory words used by a testator in his will, on the other, we are not disposed to repudiate the whole doctrine of such trusts. We are disposed to apply the doctrine only in cases where it is clear that, on the whole, it was the intention of the testator to create such trust by the use of such words, and where the words used show with reasonable certainty that the testator intended to control the legatee or devisee in the

not be extending the effect of the gift beyond the proper scope of the doctrine of *cy pres*, if a scheme be framed which will not fully carry out the testator's intention.

Atty. Gen. v. Briggs, 164 Mass. 561, 42 N. E. 118; *English v. Johnson*, 42 Tex. Civ. App. 118, 95 S. W. 558; *Crerar v. Williams*, 145 Ill. 625, 21 L.R.A. 454, 34 N. E. 467; *Adams Female Academy v. Adams*, 65 N. H. 225, 6 L.R.A. 785, 18 Atl. 777, 23 Atl. 430; *Philadelphia v. Girard*, 45 Pa. 27, 84 Am. Dec. 470; *Jackson v. Phillips*, 14 Allen, 539.

A gift for the education of poor children in a certain district is not defeated by the subsequent adoption by the legislature of the common-school system, and the abandonment of the district schools.

6 Cyc. 972.

use and control of the property devised or bequeathed."

The provision: "I have entire confidence that they will make such disposition of such residue as, under the circumstances, were I alive and to be consulted, they know would meet my approval,"—was held not to imply that they were to take the land or its proceeds as individuals. The testator evidently supposed that the secret trust would be carried out. It was held that while this trust was unauthorized, it would not be construed as a gift to them as individuals, and as such they could not convey the land. *Forster v. Winfield*, 142 N. Y. 327, 37 N. E. 111.

The will provided: "To the Roman Catholic Parish Priest of Zweibruecken, with verbal instructions I have this day given my said executor as to the disposition I desire and direct to be made of my estate, in trust and confidence that the said Roman Catholic Parish Priest of Zweibruecken shall and will faithfully carry out and perform my said wishes and instructions as given to my said executor as to the disposition I desire to be made of my estate." It was held that the object of the gift was shown to be in trust, and could be enforced in equity. If the legatee accepted the bequest, it could be only in aid of the trust. As there was a direct bequest to the parish priest, if the words "in trust and confidence" be construed precatory, and not mandatory, then no trust was created. In either event, it was held that the legatee was entitled to the bequest, and not the next of kin. *Franken's Estate*, 15 W. N. C. 455.

After bequeathing property to John H. Reel, "to apply to charity according to his best discretion," the will continued: "I hope, that Mr. Reel aforementioned will consent to act as my executor, and desire to save him all trouble and annoyance in that regard, and have every confidence, good faith and discretion, and have explained to him to what charities I desire him to appropriate the monies herein bequeathed to him, it is my will that my said executor

Peaslee, J., delivered the opinion of the court:

The plaintiffs' first position is that the words of the bequest are merely precatory, and therefore there is no enforceable obligation to carry out the wish expressed by the testator concerning the application of the income of the fund. "The words 'desire,' 'request,' 'recommend,' 'hope,' 'not doubting,' that the executor will conduct in a specified manner, when they come from a testator who has the power to command, are to be construed as commands, clothed merely in the language of civility; and they impose on the executor a duty which courts have in repeated instances enforced." *Erickson v. Willard*, 1 N. H. 217, 229. "Precatory words in a will, equally with direct fiduciary expressions, will constitute

be held to no accountability whatever for the nonperformance or illperformance of the trust herein confided to him; he will use his best discretion in the matter, and the receipt of the acting Archbishop of St. Louis of the Roman Catholic Church in Missouri or Kansas shall be a full discharge to him *pro tanto* for any monies applied by him to charities according to my request." This was held to be a trust, but the purposes were not defined so that a court could carry them out, and the written wishes of the testator showed that these were trusts prohibited by the state Constitution. *Schmucker v. Reel*, 61 Mo. 592. The court said: "The prevailing doctrine is that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish, or expectation will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust."

But the courts recognize the difference between the intent of a testator to create a legal direction on his devisee, and the intent solely to create a moral obligation, and the latter does not create a trust. While a secret trust to apply the devised property to an illegal purpose will render the devisee a trustee for the heirs at law or next of kin, the trust must be established in such manner that, if legal, it would have been binding upon the trustee.

Where the will provided: "This bequest and devise I make absolute in order that there may be no legal or technical difficulty or embarrassment in effecting the end I desire, and having entire confidence that those four gentlemen will, although under no legal obligation so to do, observe my wishes; and my wish is (although this is not to be taken as a legal direction) that my residuary estate so bequeathed and devised, and any proceeds thereof, shall under the name of 'The Richard L. Dugdale Fund,' be applied as those four gentlemen, or such

a trust. "Technical language is not necessary to constitute a trust. It is enough if such intention is apparent." 1 Perry, Tr. 3d ed. § 114, note." Foster v. Willson, 68 N. H. 241, 242, 73 Am. St. Rep. 581, 38 Atl. 1003. These authorities seem applicable here. The intent of the testator was to direct the disposition of the income of the fund. It was a command "clothed merely in the language of civility."

What disposition shall be made of the income under the changed circumstances? The plaintiffs suggest that they should apply it to their general purposes, wherein the intended beneficiaries may have a share, as was done in Adams Female Academy v. Adams, 65 N. H. 225, 6 L.R.A. 785, 18 Atl. 777, 23 Atl. 430. The Epsom school district claims that the income should be applied according to the strict letter of the bequest, thereby relieving its taxpayers, while but slightly, if at all, aiding those the testator had in mind. No brief has been

filed in behalf of the "poor boys of Epsom." But their interest is here paramount, and the fund is to be so administered as to aid them, rather than the trustee designated in the will, or those who pay taxes in Epsom. It seems that this can easily be done by applying the income to scholarships for boys designated in the manner pointed out in the will. Free tuition will not always enable a poor and deserving boy to attend an academy. He may need further assistance. Furnishing this will comply exactly with the wish of the testator.

It does not appear that this plan has been considered by the parties. They may apply to the superior court for further findings, if such course is deemed essential to the final disposition of the case. As the matter is now presented, only the general outline of what is to be done can be determined.

Case discharged.

All concur.

persons as they may associate with them, or a majority of them may deem wise to,"—it was held that the devisees took the property as their own, and there was no trust. Bowker v. Wells, 2 How. Pr. N. S. 150.

And in *Re Havens*, 6 Dem. 456, "in the confident belief that they will apply my estate and property so vesting in them in accordance with my wishes, but it is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title,"—was held not an illegal disposition, but a confidence and reliance by the testator on the devisees to whom he had bequeathed the estate absolutely.

A provision: "I make this disposition of my estate as I have heretofore expressed to my said nephew my desires concerning the division and disposition of my estate and I have full confidence that he will respect my wishes and will carry them out so far as possible. I request him to make testamentary disposition of such portion of my estate as may call for the same in his judgment,"—was held no trust. *George v. George*, 186 Mass. 75, 71 N. E. 85. The court said: "On the other hand, the thing dealt with in the paragraph relied on is 'disposition' as well as 'division,' and the testatrix seems to have used the word 'disposition' to express a testamentary disposition, and not a division during the life of the nephew. It is also to be remarked that the 'full confidence' expressed by the testatrix was not that the nephew would 'respect' and 'carry out' her wishes, but that he would 'respect' and 'carry them out so far as possible.'"

After an absolute gift, a clause, "having full confidence that she will leave the surplus to be divided at her decease, justly amongst my children," was held to create no trust. *Re Pennock*, 20 Pa. 268, 59 Am. Dec. 718. This was on the ground that

words expressive of desire, recommendation, or confidence would not be *prima facie* sufficient to convert a devise or bequest into a trust, and the old Roman and English rule was not a part of the common law of Pennsylvania. It was said that such words might amount to a declaration of trust, when it appeared from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion. In this case it was said that the rule in regard to precatory trusts was fading away even in England, and this could be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation, and in the fact that it was degraded into the class of implied or constructive, and not express, trusts, and would not be regarded in England as creating a trust, unless on the whole the words ought to be construed as imperative, and any words or expressions would be eagerly seized hold of as indications of a contrary intent, and when it appeared that the kindness or justice or discretion of the devisee was relied on, no trust would arise. And if it could be implied from the words that a discretion was left to withdraw any part of the subject from the objection of the wish, or to apply it to the use of the devisee, no trust was created. This case was followed in *Paisley's Appeal*, 70 Pa. 153.

The provision: "In willing all my estate, real and personal, in favor of my wife Catharine I do it with the fullest Confidence (that should she survive me), she will Carry my intentions, as to the ultimate distribution of it into effect, . . . so far as in her opinion, my Children and Grand Children, respectively, may prove worthy of her attention,"—was held not to be a precatory trust, and, the testator having made an unqualified devise, no precatory

**FLORIDA SUPREME COURT.**  
(In Banc.)

ALVINA LEWIZA FLOYD, Appt.,  
v.

AUGUSTUS V. S. SMITH et al.

(59 Fla. 485, 51 So. 537.)

**Trust — creation — will — construction.**

A testatrix devised and bequeathed all her estate of every kind to her grandson, B, to have and to hold to him and to his heirs and assigns, to his and their own proper use, benefit, and behoof forever; and stated therein that it was her intention to make no provision for her daughter, C, or her granddaughter, D, as in her judgment they will be more amply provided for by her grandson, B, than they could be by her in her will.

Held, that no trust in favor of C was created by the will, which a court of equity could enforce.

(February 1, 1910.)

Headnote by HOCKER, J.

words to his devisee could defeat the estate previously devised. *Bowlby v. Thunder*, 105 Pa. 173.

The clause, after an absolute bequest and devise, "feeling entire confidence that she will use it judiciously for the benefit of herself and our children," was held not to create a trust, as the mode of use, or extent of enjoyment, by the children, was not indicated. *Lesesne v. Witte*, 5 S. C. 450. The court said: "Though the language used may convey the wish or desire of the testator as to the use of the property devised, if it does not impose an obligation which can be enforced in a court of equity, it cannot be held to control or qualify the absolute interest which is conferred by the previous disposition. Where an absolute right is given, words which are to annex a limitation to its free and uncontrollable exercise must not only be mandatory, but, in themselves, show the manner in which they are to operate, so that the purpose of the testator may clearly appear."

And the provision, "feeling entire confidence that she will use it judiciously for the benefit of herself and our children," was held not to construct a trust, as the rule in regard to the effect of devises by words of recommendation would not be extended. *Ibid.* The court said that the rule should "be narrowed to the limits prescribed by the authority of decided cases, where there is no mode of ascertaining, as is the one before us, to what extent the trust is to operate."

The clause, "to be hers and to be disposed of as she may think best; I have full confidence in my said wife, and have abiding faith that she will deal justly with our children and the descendants of them,"—was held not precatory. *Rector v. Alcorn*, 88 Miss. 788, 41 So. 370. The court said: "If they are construed as not merely expressions of confidence in her acting wisely,  
37 L.R.A. (N.S.)

**A** PPEAL by complainant from a decree of the Circuit Court for Duval County dismissing a bill filed to establish a trust under the will of Augusta Levi, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Stripling & Noble for appellant.

Messrs. George M. Robbins and Stewart & Bly for appellees.

Hocker, J., delivered the opinion of the court:

The appellant filed a bill in the circuit court of Duval county on August 12, 1907, against Augustus V. S. Smith, to which a demurrer for want of equity was opposed, and the demurrer sustained. Subsequently two amended bills were filed by leave of court, in the last of which Pearl Thorn Floyd Rowan and her husband, Thomas G. Rowan, were made parties defendant. A demurrer to the first of these amended bills

but as imperative to control her as trustee, it seems to us the whole purpose as indicated by the language used in reference to her, to make independent provision for her, is defeated."

And a devise and bequest "to my beloved wife, Jane G. Hunt, having the fullest confidence in her capacity, judgment, discretion, and affection, to properly bring up, educate, and provide for our children, and to manage and dispose of my said property in the best manner for their interests and her own,"—was held to be an absolute devise, and not to create a trust. *Hunt v. Hunt*, 11 Nev. 442. The court said: "If the event has failed to justify his confidence in her capacity, judgment, and affection for his children, it can only be said that his will is to be interpreted, not by the event, but in the light of the confidence which he reposed in her at the time it was made. If she has wasted and mismanaged an estate for which she is morally, if not legally, accountable to her children, it is a misfortune for which they cannot be compensated by taking from a bona fide purchaser property which she had full power to sell, and he an undoubted right to purchase."

The provision: "I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives,"—was held to impose no obligation on the wife to divide the property, and therefore one of the features of the precatory trust was wanting. *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449.

A provision, "in the confidence that he will use it in the prosecution of his work against the encroachments of the Roman Catholic Church upon our common school system," was held to be an absolute gift. *Poor v. Bradbury*, 196 Mass. 207, 81 N. E.

was filed for want of equity, which was sustained. To the other amended bill was filed a demurrer for want of equity on October 5, 1908, and on December 9, 1908, a decree was entered dismissing the bill for failure to set down the demurrer for argument. An appeal was taken from this order.

The matter before us involves the construction of the will of Augusta Levi, mother of appellant, Alvina Lewiza Floyd, and grandmother of appellees, A. V. S. Smith and Pearl Thorn Floyd Rowan. The items of the will which are to be construed are as follows:

"Second. I give, devise, and bequeath to my grandson, Augustus V. S. Smith, all the rest and residue of my estate, real, per-

sonal, and mixed, of every name and nature whatever and wherever situated, and which I may hereafter and from time to time in any way acquire, or to which I may be rightfully entitled, to have and to hold to him and to his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

"Third. It is my intention to make no provision in this my last will and testament for my daughter, Alvina Lewiza Floyd, widow of G. Wash Floyd, or my granddaughter, Pearl Thorn Floyd, daughter of said Alvina Lewiza Floyd, as in my judgment they will be more amply provided for by my said grandson, Augustus V. S. Smith, the son of my said daughter, Alvina Lewiza Floyd, by her first husband, than they could

882. The court said: "The words, 'in the confidence that he will use it for the prosecution of his work,' speak the reason for the disposition, and do not establish a trust. In effect she says: I give the other half of the residuum of my estate to my friend, for the reason that I have absolute confidence that he will use it in the prosecution of his work."

*Desire.*

This work has been held to amount to a declaration of trust, when it appeared from the parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal to his kindness, justice, or discretion.

A provision: "It is my will and desire, that, until distribution of my estate shall be made according to item No. 9, my executors provide for the sustenance and support of my wife, A. C. Porter, and my two daughters [naming them], or such of them as shall survive me,"—was held to be a trust confided in the executors, and a court of equity would compel them to perform their duty; but the widow and children could not contract debts so that creditors could force the executors to pay them. *Reid v. Porter*, 54 Mo. 265.

And a trust was held to be created by a provision after a life estate: "It is my desire that the property of which I may die possessed, after the payment of the legacy of eleven hundred dollars to my son, John Chapman, shall be kept together, my younger children receive an education equal with what my three eldest sons have received, and made equal with them;" as, construing the whole will, this was meant to be peremptory. *Major v. Herndon*, 78 Ky. 123.

The will provided: "It is my desire that my children be all supported, and that the girls under sixteen, and the boys under eighteen, be as well educated out of the annual profits of my estate as they will allow up to the time of division, the profits to be first applied to their support." It was held that the support and education was a condition annexed to the previous gift, and the appropriation of the profits showed 37 L.R.A.(N.S.)

that the testator had a confidence that the wife would so apply them. It was held that the whole will showed that the disposition in favor of the wife was made in confidence that it would result to the children. *Lucas v. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766.

And where \$800 was given to a trustee for the testator's sister, and the will continued: "I desire that in case my sister Sarah aforesaid should at any time need assistance or come to want, that my executor should expend such part of said eight hundred dollars as will make her comfortable and keep her so during her lifetime,"—it was held that the words, "I desire" do not limit the use of the trust previously declared, but rather enlarge the powers of the trustee. *Coburn v. Anderson*, 131 Mass. 513.

A provision: "I desire that the said Joseph Willard should at his discretion appropriate a part of the income of my estate aforesaid not exceeding fifty dollars a year to the support of the widow Margaret Erickson my sister's daughter during her natural life, and it is my express direction that my executor place the aforesaid Margaret in some pious and Christian family in the country at a distance from this town where she may be removed from temptation,"—was held to be a trust, as the object was certain, and the subject was certain. *Erickson v. Willard*, 1 N. H. 217.

The will provided: "In case my wife survives me, I desire that she have entire control of my estate, and divide and pay to our children only when and as she may desire." It was held that this was a precatory trust. *Ide v. Clark*, 5 Ohio C. C. 239, 3 Ohio C. D. 120. This was on the ground that where, from the entire scope of the will and its terms, it appeared that the testator intended to charge the estate in the hands of his immediate devisee with a trust in favor of others, the court would give effect to that intention, whether the terms be in form dispositive, peremptory, or precatory only.

A provision: "I desire that all my just debts and those of Herron Brithers be paid as soon as conveniently can be after my

be by me in this my last will and testament."

The will was probated in Volusia county, Florida, on the 22d of May, 1902, and Augustus V. S. Smith was named and qualified as executor. The bill alleges, in substance, that the property involved is of the value of about \$30,000; that the oratrix has no estate or income, and for many years prior to her mother's death, she was dependent upon the latter to a large extent for maintenance and support; that oratrix is a widow, with no one upon whom she has any legal right to call for support except her son, the appellee A. V. S. Smith; and that since her mother's death she has been in very straitened circumstances, and, although she has made repeated de-

mands upon her said son for aid and assistance, he has persistently refused to make any provision for her, either out of the ample estate of her late mother, or out of his own funds, and has left oratrix to earn a living by sewing or such other employment as she has been able to obtain.

The bill alleges that by the third paragraph of her mother's will the defendant, A. V. S. Smith is constituted a trustee of the whole estate of her deceased mother, for the benefit of oratrix and her daughter Pearl, a moiety to each, and that she is entitled to an accounting, etc.; to have him removed as such trustee; and a moiety of the property conveyed and turned over to her, or a new trustee should be appointed by the court. The bill prays for the ap-

dissolution," was held mandatory. Both the persons of the legatees and the amount to be paid to each were capable of legal ascertainment. *Burt v. Herron*, 66 Pa. 400.

The will provided: "I desire all my other estate, real, personal or mixed, shall, as soon after my decease as practicable, be sold, and the proceeds arising therefrom be invested in first bonds and mortgages." It was held that the words "I desire" were equivalent to "I will," while the added words left no discretion except as to time. *Philadelphia's Appeal*, 112 Pa. 470, 4 Atl. 4.

The will gave property "for his support, and if he should be spared to have family, I desire the above estate to go to use of his children." It was held that the giving of the farm "for his support" indicated that a life estate was intended, and the further "desire" was held not merely precatory, but as mandatory as if the words, "I will" or "I order and direct," had been used. *Oyster v. Knull*, 137 Pa. 448, 21 Am. St. Rep. 890, 20 Atl. 624.

The word "desire" in the clause, "should my husband not expend the whole of my estate, then it is my desire at his death to give so much of it as remains to," was held to be mandatory, and not precatory. *Dickinson's Estate*, 209 Pa. 59, 58 Atl. 120.

The will said: "It is further my desire that my executor will purchase, if practicable, my son, out of the funds of my estate, previous to a division of the same." It was held that the executor was bound to purchase him, and should take a bill of sale to himself. This was held no violation of the statute against manumission of slaves. *Fable v. Brown*, 2 Hill, Eq. 378.

The will provided: "I desire the residue of my estate, real and personal, to be sold by my executors . . . at such times as they may deem best," and that the proceeds be divided. It was held that this language manifested the intention of the testator, and amounted to an imperative direction that the sale be made. *Carr v. Branch*, 85 Va. 597, 8 S. E. 476.

Testator stated: "I give and bequeath to my beloved wife, Agnes C. Cresap, in trust 37 L.R.A. (N.S.)

and for her support and maintenance during her life, all my estate, both real and personal, with full power and privilege to sell and convey any, all, or so much of my real estate in such a manner as she may see fit, in as full and complete manner as I myself can do, to sell and dispose of my personal estate, or so much as she may see fit, for her own support, according to her condition in life, and for the benefit of my estate, so far as she may see proper. At the death of my dear wife, Agnes C. Cresap, I desire the residue of my estate, both real and personal, to be distributed as follows." It was held that it was clear that there was a trust applied both to the real and personal estate. *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527. This was because the trust limited her support to her condition in life.

The will provided: "At the settlement of my executor's account in probate court I desire the said probate judge to appoint my said executor, Edward F. Hansen, trustee, to assume control of all my estate, both real and personal, to prosecute and execute the business of said estate, especially and generally for the best interests of said estate." This request was held to be a precatory trust. *Wolbert v. Beard*, 128 Wis. 391, 107 N. W. 663. The court said: "When words of recommendation, request, or the like, contained in a will, must necessarily be followed in order to carry out the clear purpose of the testator, they are to be regarded as words of command or direction."

Desire is mandatory when applied to charities.

From a provision: "After the decease of my mother, Mary Elder, I desire that my interest in the said above-mentioned farm, together with all interest accruing therefrom shall be appropriated to Foreign Missionary Work," it was held that the manifest purpose was, in the first instance, to give the devisee a life estate, and that it was just as clear that after her decease the testator intended that the estate should be devoted to foreign missionary work. *Pres-*

pointment of a master to take an account, that A. V. S. Smith be compelled to convey to oratrix one half of the real and personal estate, that he be compelled to execute the terms and directions of said last will and testament of Augusta Levi, and to make suitable provision from said estate of Augusta Levi in such amount and in such manner as to the court shall seem meet and proper in the premises, and for general relief. We do not think it essential to set forth other allegations of the bill.

It is evident the circuit judge considered that by the terms of the will the appellant was given no interest in the estate of her mother which a court of equity could enforce. It is admitted that by the second paragraph of the will, all the estate, real,

personal, and mixed, of the testator, is devised and bequeathed to Augustus V. S. Smith and his heirs and assigns in fee simple; but it is contended that the third paragraph fixes upon the said estate a trust in favor of appellant.

It is said in *Lines v. Darden*, 5 Fla. 51, that, "in the construction of a will, the intention of a testator, as therein expressed, shall prevail over all other considerations, if consistent with the principles of law. To this first and great rule in the exposition of wills, all others must bend. Courts allow of no rule of construction of mere words, to control the intention, but the whole instrument is to be considered, and, if possible, effect given to every part of it. The relative situation of the parties, the

byterian Bd. of Foreign Missions v. Culp. 151 Pa. 467, 25 Atl. 117. This was on the ground that where words of recommendation, request, and the like are used in direct reference to the estate, they are prima facie testamentary and imperative, and not precatory.

The will provided: "I desire that my entire estate with the accumulations shall be used in establishing and conducting a School for Apprentices and Young Mechanics on plans to be hereafter described by me; or in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the Board of Trustees herein named and who shall approve of final practical plans in keeping therewith." It was held that the trust failed for indefiniteness, and that reference could not be had to another writing to ascertain the testator's plans. *Smith v. Smith*, 54 N. J. Eq. 1, 32 Atl. 1069. The court said: "Suppose a purpose to create a charity appears,—not generally, but of a limited and special character,—and the will fails to disclose the limitation, can this court, in defiance of the plain requirement of the statute that the will shall be in writing, add to it verbal expressions of the testator which will supply and define the limitation? And is the case made stronger by the testator's direction that the reference shall be had to these expressions?"

A clause, "I desire the same to be then distributed among and applied to such objects and purposes of benevolence or charity . . . as the trustees for the time being shall deem worthy thereof,"—was held to create a valid trust, and the words "I desire" to mean a command in a polite form. *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203.

In *Maught v. Getzendanner*, 65 Md. 527, 57 Am. Rep. 352, 5 Atl. 471, the clause in question was "desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner as will in his judgment, best promote the cause of Christ." It 37 L.R.A. (N.S.)

was held that the trust was void, because too vague and indefinite to be carried into effect.

Where testator provided: "It is my will and desire that my beloved husband shall have all my property. . . . It is my will and desire that at his death, should he have any of said property still remaining in his possession not disposed of or used by him, that the same shall be given by him to," it was held that, the words "will" and "desire" being mandatory in one part of the will, they should be held so in the other, in the absence of anything in the will showing that the testatrix did not so use them. It was held that there was a trust for the beneficiaries, except as their right was limited by the disposition in the lifetime of the legatee. *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412.

And the word "desire," in "I desire that at such time as may be agreeable and mutually consent to by my wife and my son, Charles, the homestead be sold and one purchased in lieu thereof by them," was held not to be used in a precatory sense, where it was not used in such sense in other parts of the will. *Stewart v. Stewart*, 61 N. J. Eq. 25, 47 Atl. 633. The court said: "There is nothing in the context to indicate that 'desire' was used in paragraph 3 in a different sense from that clearly indicated by its use in paragraph 4 and paragraph 7. In every case the word is applied to the same subject-matter, that is, the disposition of parts of testator's estate. It follows, in my judgment, that 'desire' in paragraph 3 bears the sense of 'I direct,' as it evidently does in paragraphs 4 and 7."

A provision: "Desire that my two said brothers shall . . . have the care, custody, and control of my said children, and provide for, educate, and maintain them until they arrive at the age of twenty-one years, and longer if necessary, that they make to them the same advancements as they make to their own children, no request, direction, or bequest made herein shall be so construed as to create a charge or encumbrance upon any of the property bequeathed to my brothers,"—was held to

ties and affection subsisting between them, besides the motives which would naturally influence the mind of the testator, are proper to be considered in expounding the import of doubtful words." It is further held that "to constitute a trust, three circumstances must concur: Sufficient words to raise it, a definite subject, and a certain and ascertained object. No commendatory terms of a will expressing a 'wish,' 'will,' or desire, etc., are sufficient, unless there be certainty as to the parties who are to take and what they are to take. Whenever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and quantum of the sub-

ject, as well as the indefinite character of the objects, are always used by courts as evidence that the mind of the testator was not to create a trust. The words 'will' and 'desire' are not necessarily mandatory. They would be sufficient to raise a trust, if not coupled with the words inconsistent with such construction." In the opinion the history of the doctrine pertaining to recommendatory or precatory trusts is examined, and it is said: "The current of decisions of late years has been against converting the legatee into a trustee, and the English courts have manifested a strong disposition to retrace their steps and restrict the doctrine of recommendatory trusts, by giving to the words of a will their ordinary sense, unless it is clear they were

give a discretion, and to give the devisee an estate absolute, and not to create a trust for the children. *Burnes v. Burnes*, 70 C. A. 369, 137 Fed. 781, affirmed in 199 U. S. 605, 60 L. ed. 330, 26 Sup. Ct. Rep. 746.

And a provision: "I will and bequeath to my wife, Hanchi Strauss, all my property, real, personal, and mixed, of which I may die seised and possessed, with the right to sell and convey the two lots on Pullen street and one lot on Scull street for the purpose of supporting the family, and I desire that my said wife do not marry again, but live single with the children of my family and take care of them,"—was held to impose no trust upon the life estate given the wife. So, the phrase, "and take care of them," was held not to refer to property, but to personal care and attention. *Bloom v. Strauss*, 73 Ark. 56, 84 S. W. 511. The court said: "It is a common matter for husbands to devise property to wives in the expectation that it will be used for the benefit of their children, but the mere fact that this is the reason that underlies a devise or bequest does not create a trust in favor of the children."

The clause, "desire that one half of the property bequeathed to her shall be devised by her to my relatives," was held not to be mandatory, on the ground that, while the desire of the testator for the disposition of his estate will be construed as a command when directed to his executor, it will not, when directed to his legatee, be construed as a limitation upon the estate or interest which he has given to him in absolute terms. *Re Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071.

In *Doe ex dem. Reese v. Campbell*, 5 Blackf. 539, the clause in question was "my desire is for my son Morgan [the plaintiff's lessor] to have the land situate in Wayne county [the property in dispute] when he comes of age, if it remains in my wife's hands till that time." It was held that by the widow's conveyance the claim of the son was lost.

And the provision: "It is my desire that my wife, with . . . the interest she will receive on the moneys invested in registered 37 L.R.A. (N.S.)

government bonds, will provide and keep a good and comfortable home for my two sons and herself, and that she will use every endeavor to give them a good education,"—was held rather as enlarging than restraining the power of disposition, and not to create trust. *Van Gorder v. Smith*, 99 Ind. 404.

And the provision after an absolute devise: "It is my desire that the business be so conducted that all of our children, or their heirs, shall finally share equally in the distribution of our property. I would advise that the said Nancy Adamson shall at some suitable time call to her counsel two or three good discreet men to assist her in making a proper and equitable division of the real estate, as well as other property that she may think proper, among all the children aforesaid, restraining, however, if she choose so to do, the title and possession of said property to herself until after her death,"—was held not to create a precatory trust, as it was followed by the clause that "nothing in the above shall be construed to affect a perfect and indefeasible title to her." *Lumpkin v. Rodgers*, 155 Ind. 285, 58 N. E. 72.

And the provision, after an absolute bequest: "It is my desire that at the death of my said wife, whatever property may be left shall thus be disposed of, and request of my said wife that she will and provide that the property so received from me shall be devised, after her death, as follows,"—was held not to affect the absolute character of the bequest. *Rona v. Meier*, 47 Iowa, 607, 29 Am. Rep. 493. This was on the ground that if the first taker has the power, by the terms of the will, to dispose of the property, he must be considered the absolute owner, and any limitation over is void for repugnancy.

And after an absolute devise, testator continued: "All the real and personal property herein bequeathed to my wife, Irene Bills, remaining at her decease, I desire to be divided into five equal shares, to." It was held that the devisee was invested with the fee simple in the land, and the absolute property in the subject of the bequest. *Bills*



designed to be used as peremptory, . . . in which case, though precatory in form, they become imperative in fact. There can be no doubt but that words of recommendation will create a trust, provided all the requisites are to be found in the will concurring for that purpose. They are held in many cases to import an imperative devise, and will so operate, if there is nothing in the will inconsistent with such a construction. The true question in every case is whether the intention of the testator is manifest and mandatory in favor of the object of the bounty, or is merely suggestive and advisory to the first taker. If the testator in this case designed to determine the specific amount which his daughter should loan to her children, why should he

not have said so in his will? Why leave a matter of such importance to speculation and inference, and that, too, of the most doubtful character?"

In this case a testator by one clause of his will gave and bequeathed to his beloved and only daughter all his estate during her natural life, and at her death directs the property to be equally divided between the children of the tenant for life; and by another clause expresses his "will" and "desire" to be that, should either of his grandsons arrive at the age of twenty-one, or any of his granddaughters marry previous to the time of final distribution, then that such grandson, or such granddaughter, shall receive a portion of the estate as a loan, to have the management and receive the bene-

v. Bills, 80 Iowa, 269, 8 L.R.A. 696, 20 Am. St. Rep. 418, 45 N. W. 748. In this case it was said that "cases cited by defendant's counsel are not in conflict with the doctrines we have stated, in that the instruments interpreted therein, by their express language, did not vest the devisee with the fee of the land, nor the legatee with the absolute property in the subject of the bequest, a contrary purpose clearly appearing in the wills."

The provision: "'Greatest desire' to be that his executor would see that his two brothers were well taken care of as long as they might live, 'that they may lack nothing that will render them comfortable and happy in this life,'"—was held not a precatory trust, as the property was indefinite, and the prior disposition showed that the testator intended the devisees to take it free of any burden. *Hazelwood v. Webster*, 7 Ky. L. Rep. 164 (abstract).

After giving all his property to his wife, testator continued: "At the death of my wife, I desire that . . . the balance of what she will leave on the day of her decease shall be divided equally between my natural heirs and her own." It was held that no charge was imposed upon his wife to preserve anything. *Dufour v. Deresheid*, 110 La. 344, 34 So. 469.

And a will which provided: "I give and bequeath to my wife the further sum of ten thousand dollars which I desire her to use for the benefit of her brothers and sisters, Eugene, Louise, Mathilde and Louis H. Malarcher, according to her best judgment and discretion, which is to be paid after the discharge of the debts; and, provided further, the same shall not exceed the full amount coming to the heirs and children aforesaid of Robert S. Yancey,"—was held not a trust, but simply addressed to the conscience of the devisee. *Jacob v. Maccon*, 20 La. Ann. 162.

And a clause, after a bequest to Mrs. Mason absolutely, "I desire the said Maria Rachel Mason and her daughter, Edith Hyter Mason to have the exclusive benefit of the above bequeathed estate free from any control of Robert V. Mason,"—was held not

to curtail the devise to Mrs. Mason, and not intended to give the daughter any interest in the land. *Balliett v. Veal*, 140 Mo. 187, 41 S. W. 736.

A provision: "My desire is that the monument be erected at the junction of Olney and Fruit Hill avenues," was held precatory, not imperative, and evidently intended only as a personal recommendation of a site, and as such not binding on the town. *Ogden's Petition*, 25 R. I. 373, 55 Atl. 933.

And a provision: "I desire that my wife shall advance to such child or children such an amount, either in property or money, as she deems prudent," was held to raise no trust, but rather to indicate that no legal duty was intended to be imposed, and that the testator left that matter entirely to his wife's discretion. *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. 902. In this case the court said the rule was that precatory trusts or recommendatory words implied discretion, and should be so construed, unless a different sense is irresistibly forced upon them by the context.

A will provided: "I desire Fifteen Thousand (\$15,000) to be given to our foster son, Edward Woods Hunt, at any time convenient to my executrix. . . . Should the revenues from my estate not be sufficient for my wife's support, she, as executrix, has full privileges to use such part of the principal as she may require, without any contests or objections from any other heir or heirs." It was held to be permissive, and to authorize the wife at her convenience to give the \$15,000, but that it was not mandatory. *Hunt v. Hunt*, 18 Wash. 14, 50 Pac. 578. In this case it was said: "A precatory trust arises out of words of 'entreaty, wish, expectation, request, or recommendation, frequently employed in wills,' and a trust has been created by such words as 'hope,' 'wish,' 'request,' etc., if they be not so modified by the context as to amount to no more than mere suggestions to be acted upon or not, according to the caprice of the interested devisee, or negated by other expressions indicating a contrary intention, and the subject and object be sufficiently certain."

fit of the same, until the final distribution shall take place, when the property thus loaned shall return to the estate to be equally divided. It is held that the will did not create a trust for the benefit of the grandchildren, but merely vested a power in the daughter (the tenant for life) to be exercised at her discretion.

In *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164, the words of a will were: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seised or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." These

words were construed as giving the mother and sister of the testator a beneficial interest in the estate given to the wife, to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It is held it was the duty of the court to ascertain, determine, and declare what provision would be suitable and best under the circumstances, and all particulars and details for securing and paying it. It is also held that "when property is given by will absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence; but if

In *Re Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071, it was held that, according to the ordinary use of the English language, the word "desire" does not import a trust or charge.

A will provided: "Should either of my grandsons arrive at the age of twenty-one years or any of my granddaughters marry previous to the time of final distribution, viz., before the death of my daughter, Sarah Ann Lines, then, in that case, my will and desire is, that such grandson so arriving at the age of twenty-one years, or such granddaughter so marrying, as aforesaid, shall receive a portion of the estate as a loan, to have the management, and receive the benefit of the same, until the final distribution shall take place, and then to return the same to be equally divided with the rest of my estate." It was held that the life estate given to the widow in a prior clause was not subject to a trust under the clause quoted in favor of the grandchildren, but a discretionary power was vested in the legatee, which would not be controlled by the court. *Lines v. Darden*, 5 Fla. 74. In this case it was said: "There can be no doubt but that words of recommendation will create a trust, provided all the requisites are to be found in the will concurring for that purpose. They are held in many cases to import an imperative devise, and will so operate, if there is nothing in the will inconsistent with such a construction. The true question, in every case, is whether the intention of the testator is manifest and mandatory in favor of the object of the bounty, or is merely suggestive and advisory, to the first taker?"

Under a provision: "But out of this inheritance he is desired by his mother to pay as soon after as possible that it comes into his ownership Five hundred dollars (\$500) to her grandniece," it was held that the word "desire" showed an intention to make this a gift. *Re Copeland*, 38 Misc. 402, 77 N. Y. Supp. 931. The court said: "There is no doubt therefore but that the testator firmly believed when she made this will that she was making an effectual pro-

vision by which the person toward whom she was kindly disposed would receive the contemplated gift, and this case is also free from any of the questions as to whether any trust is created, which arise in the cases quoted by the executor in his brief."

#### *Desire and hope.*

Where property is given absolutely and without restriction, a trust will not be imposed upon mere recommendation and confidence. *Hess v. Singler*, 114 Mass. 56. In this case the court held that to construe, "desire and hope that he will so provide, by will or otherwise, that in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares" to certain nephews and others, as creating a trust, would be inconsistent with the intention of the testator to give the son an absolute title.

#### *Desire and trust.*

Whether the precatory words in a will shall be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. Where to impose such a trust would be to nullify previous expressions in the will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt. When the object or the property is not certain or definite, or where a clear discretion and choice to act is given, and whenever prior dispositions impart uncontrollable ownership, it is held that the courts will not create a trust from precatory words.

After an absolute gift, the following words appeared: "Request and desire that my wife Eliza Anderson should, by last will and testament, devise and bequeath all of the said property at her death remaining in her possession, to." It was held that the power of disposition implied in the absolute gift of the property to the devisee was not limited by subsequent words which re-

the objects of the supposed trust are definite, and the property clearly pointed out, if the relation between the testator and the supposed beneficiary are such as to indicate a motive on the part of the one to provide for the other, and if the precatory clause expressing a wish, entreaty, or recommendation that the donee shall apply the property to the benefit of the supposed *cestui que trust* warrants the inference that it is peremptory, then it may be held that an obligatory trust is created, which may be enforced in a court of equity." It is further held that "no technical language is necessary for the creation of a trust in a will, and no general rule can be formulated for determining whether a devise or bequest carries with it the whole beneficial

interest, or whether it is to be construed as creating a trust." These cases seem to set forth the modern doctrine with reference to those trusts to which it applies. The cases on this subject are very numerous, and numbers of them have been examined; but we do not think it is necessary to encumber this opinion with a specific examination of them. The real question is: What was the intention of the testator, —did he (or she) intend that the words expressing the wish, desire, recommendation, or confidence, or the like, should govern the conduct of the party to whom they may be addressed, or whether they are an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the

ferred only to such property as might remain in her possession at the time of her death. *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 86. The court said: "We have found no well-considered case in which a trust of this kind has been supported, where the gift to the first devisee was absolute in its terms, followed by precatory words indicating the disposition to be made of what might be left, or what might remain, of the property, at the death of the first devisee."

The will provided: "It is my further desire and request that my wife do make the said Lucretia M. Wood and my nephews and nieces, the children of my brothers Caleb S. Clay and George Clay, joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." It was held that where there was an absolute gift of real or personal property, in order to qualify it or cut it down, the latter part of the will should show an equally clear intention to do so, by the use of words definite in their meaning, and by expressions which must be regarded as imperative. It was held in this case that the desire and request were only a suggestion, and were only morally binding upon the widow. *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274, affirming 91 Hun, 407, 36 N. Y. Supp. 317, distinguished in *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 67 N. E. 490.

A provision: "It is my desire and request that Frank L. Smith, mentioned in the preceding clause in my will, shall watch over and care for my friend, Lena Wilde, who at one time lived in my family, and see that at no time is she allowed to suffer or want for the necessities of life," was held not to constitute a trust. This was on the ground that if the testatrix intended to subject this devise to the trust, she would have used other more obligatory words. *Wilde v. Smith*, 2 Dem. 93. The court said: "They are simply a wish or recommendation, appealing to the discretion of the residuary legatee, and cannot therefore impose any legal obligation upon him in favor of the petitioner." 37 L.R.A. (N.S.)

The will provided: "If at her death she should have unconsumed any of said property, I desire and request that she give to Mrs. John B. Clark the sum of \$200. But this provision in favor of Mrs. Clark is in no way to interfere with the enjoyment of said property by my wife. It is to be hers to dispose of as she sees proper." It was held that his did not impose any trust upon the property in the hands of his wife, as such construction would be contrary to her unlimited power of enjoyment, consumption, and disposition. *Clark v. Hill*, 98 Tenn. 300, 39 S. W. 339.

#### *Desire and intention.*

The provision: "It is my desire and intention that Adeline Sibert, the mother of said children, shall use and occupy said land until the youngest of said children shall become twenty-one years of age, to support and educate said children,"—was held to create a trust in favor of the children. *Sibert v. Cox*, 100 Ind. 392. This was held to entitle the mother to the rents and profits of the land, as against the guardian of the children.

#### *Direct.*

A provision: "I direct my wife, Amelia A. Scranton, out of the property hereinafter given and bequeathed to her by this will, to use so much thereof for the support and benefit of my niece, Georgie S. Collister, as my said wife shall from time to time in her discretion think best so to do,"—was held to create a trust, and the positive direction of the testator to point out the fund and create a charge thereon. The amount for support and benefit was to be taken out from time to time. The sum necessary was alone left to the discretion of the wife, and it was held that the residuary legatee was charged with a reasonable amount for the support of Georgie S. Collister. *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 67 N. E. 490, affirming 23 App. Div. 466, 48 N. Y. Supp. 792, distinguished in *Post v. Moore*, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482, 2 Ann. Cas. 591.

#### *Not doubting.*

The provision: "for her use and com-

party to exercise his own discretion? It does not seem to have been found possible to formulate any definite statement of principles which will apply to every case. See 22 Am. & Eng. Enc. Law, 2d ed. 1163 et seq.; Post v. Moore, 181 N. Y. 15, 73 N. E. 482, 106 Am. St. Rep. 495, 2 A. & E. Ann. Cas. 591, and note; 3 Pom. Eq. Jur. 3d ed. chaps. 1014 et seq.; Gardner, Wills, pp. 536-538. Also see Robinson v. Randolph, 21 Fla. 629, text 644, 58 Am. Rep. 692.

Applying these general principles to the third paragraph of the will of Mrs. Augusta Levi, can we say that she intended thereby to create a trust in the estate which she had given in the previous paragraph to her grandson, in favor of her daughter? In the first line we are confronted with her ex-

pressed intention,—an expressed intention to make no provision in her will for her daughter or granddaughter, as in her judgment they will be more amply provided for by her grandson than they could be in her will. It is true that the allegations of the bill assert conditions which, if true, it seems to us, should have appealed strongly to her motherly feelings to make some provision for her daughter, but she did not do it, and gives her reasons for not doing so. She seems to have trusted entirely to the son to provide for his mother. The will contains no precatory words,—it expresses no wish, desire, recommendation, entreaty, or the like, in regard to the use to be made of her estate. The testator simply expresses her judgment that her daughter and grand-

fort, and to be disposed of as she pleases, at or before her decease, when no doubt she will make such distribution of the same as she may then think most proper,"—was held to pass an estate in fee simple. Kinter v. Jenks, 43 Pa. 445.

#### *Enjoin.*

This word is held not to create a trust, where the legatee has discretion, but to create one where the property is given for that purpose.

Under the provision: "The other two thirds I leave in her power, and bequeath to her for support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve," it was held that the widow took at least an estate for life with the power to convey the fee and to receive the proceeds, and that no trust was created by the will in favor of the children. Gibbins v. Shepard, 125 Mass. 541.

And under the provision: "I enjoin upon her to make such provision for said grandchild out of my residuary estate now in her hands, in such manner, at such times, and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate," it was held that the residuary estate was absolutely vested in the devisee; that the testator reposed confidences with which the court would not interfere. Lawrence v. Cooke, 104 N. Y. 632, 11 N. E. 144, reversing 32 Hun, 126, distinguished in Collier v. Fassitt, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490.

But in Whittingham v. Schofield, 23 Ky. L. Rep. 2444, 67 S. W. 846, the clause: "The object of this bequest is not only to make a provision for the said Martha, but enable her to assist in the support of her father and mother, William O. and Maggie Whittingham, as long as they shall live, and this duty I strictly enjoin upon her,"—was held to create a precatory trust, and 37 L.R.A. (N.S.)

the father and mother to be entitled to a support from the income.

#### *Enjoin and direct.*

By a clause after giving a fee: "Should my wife during her lifetime not consume or use all my property, real and personal, for her proper support, then I do hereby enjoin and direct her to make and publish her last will and testament, that after her decease all the rest and residue not consumed, used, or sold by her shall be divided," etc.,—the testator was held to give a fee simple absolute to his widow, with the express power to consume or convey, desiring his wife to devise the unconsumed residue, putting his request in strong words ordinarily importing command, but so used as to indicate only an intent not to reduce the estate, but to control one of its incidents. It was held that where that was the intent, no words, however strong, ordinarily importing command, amount to more than a request. Good v. Fichthorn, 144 Pa. 287, 27 Am. St. Rep. 630, 22 Atl. 1032.

#### *Expect and desire.*

Where testator provided: "And I expect and desire that my said wife will not dispose of any of said estate by will in such a way that the whole that might remain at her death shall go out of my own family and blood relation," it was held that the estate was not qualified by the precatory words of the concluding paragraph. Re Gardner, 140 N. Y. 122, 35 N. E. 439. The court said: "Similar terms have sometimes been construed to create a trust, or rather a power in trust, but never, so far as we have been able to discover, where, as in this case, the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use, and benefit to the donee." This case was distinguished in Collier v. Fassitt, supra.

#### *Faith.*

Testator provided: "I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have un-

daughter will be more amply provided for than they could be by her in her will. It is not the function of the courts to make or reconstruct wills according to their notions of what testators should do. Words should be given their usual meaning, unless some other meaning is intended.

The will in the instant case was not contested so far as the record shows. It was probated in 1902. Five years after its probate we are asked to construe it, and,

dertaken to raise and educate." It was held that the deceased intended that her husband should provide for the children out of the property devised to him. *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. 239. This was on the ground that in construing a will, the intention of the testator was to be ascertained if possible, and that, in looking for the intention, the surrounding circumstances might be taken in consideration if possible.

#### *Hope and trust.*

A will provided: "And I admonish and charge my said grandchildren that this gift is made in the hope and upon the trust that they will provide for their parents during their lives." It was held that these words amounted to nothing more than an expression of a wish and hope, and that they did not create a charge or fix a trust upon the property devised to the children absolutely in fee simple. *Arnold v. Arnold*, 41 S. C. 291, 19 S. E. 670.

A will provided: "Give, devise, and bequeath the same to my brother Samuel Carusi, to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death, the same, or so much thereof as he, the said Samuel Carusi, shall not have disposed of by devise or sale, shall descend to my three beloved nieces." This was held to give the devisee an estate in fee simple, with an absolute power and disposition, and the limitation to the nieces was void. *Howard v. Carusi*, 109 U. S. 726, 27 L. ed. 1090, 3 Sup. Ct. Rep. 575.

A hope that the testator's indebtedness might not sweep away the estate, and leave the wife without support during her life, without means to help his children from time to time as they may need it, and without something which she may at the end give to his children, and a confidence that she may so help his children from time to time, and finally, "what is left give to all the children alike,"—were held not to create a trust in favor of the children. *Orth v. Orth*, 145 Ind. 184, 32 L.R.A. 298, 57 Am. St. Rep. 185, 42 N. E. 277, 44 N. E. 17. These recommendatory words were in a letter to the wife, informing her that she was the sole beneficiary of the will.

37 L.R.A. (N.S.)

though we are not insensible to the ethical and sentimental considerations presented by the record, we are constrained to hold that no such trust was created by the will in favor of the appellant as a court of equity can enforce.

The decree appealed from is affirmed.

All concur, except Taylor, J., absent on account of illness.

Petition for rehearing in this case denied.

#### *Knowing.*

The will provided: "The remainder of everything that I possess I leave as a sacred trust to my daughter, Mary C. Wooldridge, knowing that she will faithfully carry out my wishes regarding it," the sacred trust referred to was contained in a separate paper signed by the testator. This was held to leave no doubt as to the identity of the beneficiaries, or of their interest in the estate devised. *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931.

#### *May.*

A will provided: "I will and bequeath to my daughter, Mary McIntyre, the one half of the land that I possess above the road, that is the north end. She will not have power to sell, but may leave the same to her children." It was held that the word "may" was precatory only, and not obligatory, and if so it could not defeat the otherwise operative effect of the devise. *McIntyre v. McIntyre*, 123 Pa. 329, 10 Am. St. Rep. 529, 16 Atl. 783.

#### *Recommend.*

This is usually held to be suggestive only, and not mandatory.

A provision: "Will and bequeath unto my beloved wife, Catharine M. Ellis, my whole estate . . . recommending to her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters; say to each, one thousand dollars," was held not to create a trust as the words were not imperative. It was held that the rule is to give such recommendatory words their natural, ordinary, and familiar sense. *Ellis v. Ellis*, 15 Ala. 296, 50 Am. Dec. 132. Speaking of the early English rule, the court said: "We only refuse to follow a rule of construction which many of them acknowledge to have been founded in error, and from which they would gladly have receded if they could. That they, upon this point, have erred but confirms the declaration in the Book, that 'great men are not always wise.'"

And the clause: "Recommend to my said nephew to leave his portion thereof, after his own death, and the death of his wife, in trust for the said Charles Whitcomb Tuttle, and to his children or descendants, if any be alive at the time of the death of his said son, and if there be none so alive, to Harvard College,"—was held not to create a trust in favor of Harvard College. *Re Whitcomb*, 86 Cal. 265, 24 Pac. 1028. This

construction was on the ground that the testator meant to leave the devisee free to act upon his advice or not.

And by the use, after a devise to the wife in fee, of the words, "recommending to her to give the same to my children, at such time and in such manner as he shall think best," it was held that there was no trust, as it was uncertain who the parties were who should take, and what they were to take, and there was a discretion given to the devisee. It was further held that the wife took an absolute fee, and there were no subsequent words which restricted this. *Gilbert v. Chapin*, 19 Conn. 342. The court said: The early adjudications, a trust was raised where not only the property devised, but the persons who were to take, by the commendatory terms of the will, were left quite doubtful; thereby in effect leaving it to the devisee in trust, or to the court, in enforcing the trust, to dispose of the estate instead of giving effect to the testator's will, made and executed by himself, as the statute of wills required.

And "I recommend her not to dispose of them, or convert them without the distinct advice of my friend, Mr. Bruce,"—was held not to use the word "recommend" in the sense of a command. *Re Whitcomb*, supra.

And the advisory paragraphs, after a devise to the Tulane University: "It is contemplated," "I recommend," "In furtherance of the purpose of the bequest,"—were held not to be in the nature of a precatory trust. *Hutchinson's Succession*, 112 La. 656, 36 So. 639.

The will provided: "In case of the death of either of my sisters, the property herein bequeathed to them is to go to the survivor or survivors, and at the death of all the persons herein named as taking on the death of my child, it is recommended the amount of property coming to them shall go to the lineal descendants of John Moffat." It was held that the recommendation did not affect the title of the devisees or legatees. *Field v. New York*, 38 Hun, 590, affirmed in 105 N. Y. 623.

A will recommended testator's wife to increase a gift to a church, also to increase a gift to Perolin. The testator then interlined the will between these gifts,—"at her Pleasure if she My Wife feel dispose to do so but it is not obligatory Also." This was held not imperative, but discretionary with the widow. *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510.

But in *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353, where the provision was: "If in their judgment there should be a sufficient amount of said surplus, I would recommend that the same be used to establish a school . . . for the education of young persons in the domestic and useful arts; but in case there is not enough of my estate to meet the above legacies, that the deficit may be borne *pro rata* between,"—it was held that the word "recommend" in connection with this will would

be construed as meaning a command or direction to use such surplus to establish the school.

*Rely.*

A provision "I rely on her [testator's wife] to make all needful provisions for the future wants of my brother, Sylvester," was held to create an implied trust. *Blanchard v. Chapman*, 22 Ill. App. 341. The court said: "The testator wants the trust executed in behalf of his brother, and he relies upon her as the trusty instrument to carry out his will. The will does not provide that the future wants of his brother may be supplied or not at her option, but she is relied upon to do the acts desired."

A will provided: "The sum of one hundred thousand dollars, relying upon them to dispose of the same for the benefit of such charitable and benevolent and educational purposes as they shall judge will most promote the comfort and improve the condition of the poor; or in case any of my descendants should become poor and needy, then to apply, in whole or in part, to such descendants." It was held at special term that, "in the present case it is apparent the testator did not intend to bequeath the \$100,000 to the seven persons named, for their own use, but to make them the medium through which the \$100,000 should be distributed to others." *Willets v. Willets*, 20 Abb. N. C. 471. On appeal to general term, this was reversed (35 Hun, 401), *Davis, P. J.*, holding that "relying" was only an utterance of confidence; that it did not command or impose a duty. On appeal, the court of appeals (103 N. Y. 650) reversed the general term, and the judgment of the trial court was affirmed.

*Request.*

A request will be held mandatory and the same as a devise, if made use of in a direct devise; but the rule is different, where, having made a disposition, testator expresses a desire that the donee should make a certain use of his bounty.

The word "family" in the clause, "I request my seven sons above named, to take care of their brother John Tolson and his family," was held not sufficiently definite, to create a trust, although one was created as to John Tolson v. Tolson, 10 Gill & J. 159.

A trust was not created by a clause, "and give to her all not before specified in this and request her to give as I may direct or sell from what remains." *Wyman v. Woodbury*, 86 Hun, 277, 33 N. Y. Supp. 217.

And a devise and bequest "unto my said executors for their use and benefit, with a request to them, that a portion of said residue be used for Masses for the repose of my soul, and the balance given to some deserving charity,"—was held a gift to the executors personally, and the request not to impair their ownership. *Re O'Reagan*, 62 Misc. 592, 117 N. Y. Supp. 96.

A "request that she, my said wife, shall assist any of my brothers or sisters if they

should be in need, and at her decease she divide her property among them as she may think best," was held not to create a precatory trust, as whether this clause referred to all his brothers and sisters, or only those who might be in need, was not definitely stated, and the only way she could make division would be by some instrument or by a will. It was held that she had the discretion. *McDuffie v. Montgomery*, 128 Fed. 105. The court said: "She was at liberty to divide the same as 'she may think best.' If this means anything, it means that she had the option to give to some more, and to others less, or nothing at all. It makes no provision for the death of any of the brothers and sisters during her life. There is to my mind an utter lack of the necessary conditions upon which to raise a precatory trust. The language used, in my judgment, created an absolute estate in the wife."

And "Request my wife if she should not require the whole of my estate as a support, that she will will at her death the remainder to the children of my brother,"—was held not to be a precatory trust. *Bryan v. Milby*, 6 Del. Ch. 208, 13 L.R.A. 563, 24 Atl. 333. This was on the ground of uncertainty.

And "I request that if, at the time of her decease, any of the personal property shall remain undisposed of, it be given to the children of my son,"—was held to give the widow the whole interest in the property. *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571.

And "I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected,"—was held not to create a trust. *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468. This was on the ground that the mere request by the testator, that his wife should look to the interests of the children in the estate upon a certain contingency, would not defeat the plain purpose of the testator to vest in his wife the fee simple title to his land.

And "I request, but without intending to create any trust therefor, that she allow and pay Ann Tasco, a mulatto, who has been for some time in our service, the sum of fifteen dollars per month, at the end of each month, so long as said Ann may live, to be used and applied toward her maintenance and support,"—was held not to establish a precatory trust. *Enders v. Tasco*, 89 Ky. 17, 11 S. W. 818. This was on the ground that it would be a difficult task for a testator so to express himself as not to create a trust, in expressing a mere wish to the object of his bounty, but leaving it entirely optional with the object of the bounty as to carrying out the wish, if this clause established a trust.

"I make it as a request of my children that if any of them should die without issue, that in so far as they may have received any estate from me, that at their death they

'will' the same to my surviving children or the issue of those that may be dead. I think this is but a reasonable request, and I have confidence that it will be complied with by my children,"—was held not to be imperative, as it did not refer to any special property and the devisee took a fee simple. *Igo v. Irvine*, 139 Ky. 634, 70 S. W. 836.

And a devise of a slave, "hereby requesting him, said Stephen, however, as soon as he can with convenience, to have the said slave taken to some State or country, where slavery and involuntary servitude is not known, there to be and remain free and emancipated forever,"—was held to be a bequest to the legatee to hold in his own right, and would not be treated as a compulsory trust in Louisiana. *Young v. Egan*, 10 La. Ann. 415. In Louisiana the emancipation of the slave by will was forbidden by law.

And after a bequest, an added clause: "And it is my request that John A. Whipple may provide for her a chaise, or other suitable conveyance, and attend her whenever and wherever she may wish to go, for a suitable compensation, if she shall desire it,"—was held to be so vague and indefinite that it could not be construed as entitling the widow to the legacy. *Whipple v. Adams*, 1 Met. 444. The court said: "Was a horse as well as a chaise to be kept solely for her use; or did he expect that Whipple would accommodate her with the use of his own horse and chaise, as occasions might require? It is also uncertain how Whipple was to be compensated for his services, whether by the widow out of the property given to her, or from the rest and residue of the testator's estate."

A provision: "Whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter," was held not to be a trust, and the devisee not required by any obligation to dispose of the property to any particular person. *Davis v. Mailey*, 134 Mass. 588.

And a bequest to Susan B. Anthony, followed by a provision: "I request said Susan and Lucy to use said fund thus given to further what is called the Woman's Rights Cause. But neither of them is under any legal responsibility to any one or any court to do so,"—was held to be an absolute gift, and no trust to be imposed on the property. *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473.

And a provision: "It being my request that my dear husband assign by will what of this property I now leave him he has not expended to such of my relatives as he in his judgment may think may need it. It is also my request that what property my dear husband may leave to our beloved son, Harry M. S. Holmes, may be left to him in trust,"—was held not to constitute a trust, but a recommendation, and not to

affect the title of the husband. *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190.

The will provided: "It is my request that she shall, either before her death by gift, or in such other manner as she shall deem proper or after her death by will, transfer, grant and give to the foregoing legatees the sums and amounts hereinbefore set forth out of whatever may remain of the proceeds of my property, real and personal, over and above what she may have used, or desire to use, during her lifetime, for her own maintenance, or for other purposes to which she may desire to apply it." Previous to this will, a present interest had been conveyed by deed, and it was held that the testator had no legal authority to direct by will what disposition should be made of the real estate. *Hillsdale College v. Wood*, 145 Mich. 257, 108 N. W. 675. The court said: "The essence of the doctrine of precatory trusts is that the words creating them, while in form the expression of a request, wish, or recommendation on the part of the testator, are, in fact, intended by him as a positive direction or command, obligatory upon the person to whom they are addressed."

And a bequest and devise to the wife of all the property, the proceeds of which are to be employed for her support and that of her children, followed by a provision: "And it is my further request that no sale or mortgage be made of any of my real estate during the minority of any of my children. After which time my wife will be at liberty to make such disposition of the property here bequeathed as she may deem proper for the use and benefit of my children,"—was held to impose no trust; and after the youngest child became of age, she had the right to dispose of it in any way she might deem proper. *Courtenay v. Courtenay*, 90 Miss. 181, 43 So. 68.

The provision was "to the mayor, aldermen and commonalty of the city of New York, with the request that the same be expended, if such expenditure is sanctioned by law, in the erection of a drinking fountain in the city of New York, to my memory." It was held not to limit the absolute gift of the residue, or to create a precatory trust. *Re Crane*, 12 App. Div. 271, 42 N. Y. Supp. 904, affirmed in 159 N. Y. 557, 54 N. E. 1089. This was because, to create a trust of the latter description, the precatory expression should concern individuals other than the trustee.

Testator stated: "Doubts having arisen as to the validity of the bequests made for charitable purposes in my said will, I hereby modify said will dated February 18, 1889, by making my friend Townsend Wandell my residuary legatee and devisee, and hereby request him to carry into effect my wishes with respect thereto, but this is not to be construed into an absolute direction on my part, but merely my desire." It was held that the bequest was absolute to the legatee, and not upon any trust. *Re Keleman*, 126 N. Y. 73, 26 N. E. 968. The court said: "It is true that the expression of a

wish or a desire may sometimes serve to found a trust or effect a charge, but such expressions are by no means conclusive. We must still examine the will to discover the testamentary intention."

The provision was, "Should my son, John Faulcon, die without lawful issue, then and in that case it is my request (inasmuch as it was his father's wish) that the above given legacy be by him conveyed by will in writing to his brother J. N. Faulcon, or to one or more of my grandchildren." It was held that John Faulcon had an estate in fee simple, absolute under the will. *Batchelor v. Macon*, 69 N. C. 545. This was on the ground that whenever a donor by will gives an estate to one and his heirs forever, direct words should be used in order to cut down the estate to a life estate or what is in effect the same thing, and that no expression of hope or request can be allowed to have that effect.

A provision: "And I request my executors in dividing and apportioning the said residue to require of my said daughters, that their respective daughters shall receive of my estate, as far as practicable, severally, about double the amount that my said daughters' sons receive severally,"—was held not to give anything to the daughters or the sons of the donees mentioned; and there was nothing to indicate that the donees had not the ultimate disposal of the estate, and there was nothing to qualify the language previously used, in which a fee was given to the donees. *Bellas's Estate*, 176 Pa. 122, 34 Atl. 1003.

Property was given to a devisee "to dispose of as she may please, requesting her that she will so dispose of her property at her death as to make my youngest son, Samuel Stillman Speairs, an equal legatee with the balance of my children." It was held that no precatory trust was created. *Speairs v. Ligon*, 59 Tex. 233.

A codicil, "Do request my executors, H. J. Chandler and L. A. Alderson, to give the entire proceeds of my estate, when said estate shall fall into their hands, according to my will, to the propagation of the Gospel in foreign lands,"—was held void for uncertainty, and it was refused probate and was held not to revoke a prior will. *Carpenter v. Miller*, 3 W. Va. 174, 100 Am. Dec. 744. The court said: "According to the will then, they would take the residuum in absolute and uncontrollable ownership, and the objects of the recommendatory trust mentioned in the codicil being uncertain and indefinite, a court of equity cannot, according to the authorities, construe the words of the codicil to create a constructive trust, which would fail for uncertainty, merely for the purpose of working a revocation of the will to defeat the residuary devisees." In this case it was said: "The rule then is that wherever the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation of a former will, and whenever the words are precatory, or expressing hope, desire, or request, if the ob-



ject of the hope, desire, or request be certain and definite, the words are considered imperative, and are held by the courts to create a trust for the purpose indicated, and operate a revocation of a former will. But whenever the prior dispositions of the property are complete, and the words are precatory, or expressing hope, desire, or request, and the object of the hope, desire, or request be uncertain and indefinite, the words will not be held to create a trust, or be construed to revoke a former will."

A clause in a bequest to devisee: "Only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren, as shall seem to her good,"—was held to be a mere recommendation, and not to create a legal obligation. *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572. The court said: "Indeed, the peculiar and qualified language used, 'only requesting,' etc., seems also to indicate that the omission to provide for them was deliberate and intentional, and that they may have been so referred to under an impression of the testator, or the writer of the will, that unless in some manner they appeared to be in the mind of the testator at the time of its execution, the will would, as against them, be invalid." This case was distinguished in *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490, affirming 23 App. Div. 466, 48 N. Y. Supp. 792.

And precatory words in a devise were held not to constitute a trust, where the words were not peremptory, in *Young v. Egan*, 10 La. Ann. 415. This was a request to free a slave made in Alabama. It was held that the devisee could hold him as a slave in Louisiana.

And, in order to construct a valid trust, it was held that three things must concur,—sufficient words to raise it, a certain subject, and a definite object. It was further held that there was no certainty as to subject-matter in, "requesting her to make at her death such equitable distribution of what remains among my children, giving first, before such disposition of the property that may at her death remain, etc." *Coulson v. Alpaugh*, 163 Ill. 298, 45 N. E. 216.

But in New Jersey, a clause, "with the request that, upon his death, he leaves the same, in equal portions, to," was held to create a trust. *Eddy v. Hartshorne*, 34 N. J. Eq. 419. It was said: "The rule of the English chancery is that when, by will, property is given absolutely to a person, and the same person is, by the giver, 'recommended,' 'entreated,' 'requested,' or 'wished' to dispose of that property in favor of another, the recommendation, request, or wish is held to be imperative, and to create a trust, if the subject and objects are certain. That rule is recognized and established here."

By the Supreme Court of the United States, a provision: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall

die seised or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise,"—was held to create a precatory trust, because it did not give the devisee the absolute right to use or dispose of the estate. This was construed mandatory on account of the subsequent clause requesting her to make such gift and provision for them as in her judgment will be best. *Colton v. Colton*, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164, reversing 10 Sawy. 325, 21 Fed. 594. The court said: "And in such a case as the present, it would be but natural for the testator to suppose that a request which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command." In this case, it was held that the Civil Code of Cal. §§ 1317, 1328, providing that the testator's intention is to be ascertained by the words of the will, taking into view the circumstances, and that all parts of the will are to be construed in relation to each other, and the words are to receive an interpretation which will give to every expression some effect, was merely declaratory of pre-existing law.

A provision: "Then I request him to expend for her benefit, in such manner, at such time, in such time, or to settle upon her in such way, at such time, and on such terms as he, in his judgment, may think her interest requires, the sum of \$10,000; . . . he being fully advised of my wishes concerning the said Lillie, and also concerning the said sum of \$10,000, which I request him to use for her benefit on the conditions aforesaid,"—was held to create a trust. *Bohon v. Barrett*, 79 Ky. 378. The court said: "The discretion was not intended to be arbitrary. Those terms do not relate to his power to make or not to make the expenditure according to his own caprice. In such a case as the present, where the utmost freedom is conferred in the exercise of the discretion, it is clear a court of equity would interfere and control the discretion where it is abused, abandoned, or refused to be exercised." This case was distinguished in *Enders v. Tasco*, 89 Ky. 17, 11 S. W. 818, and *Sale v. Thornberry*, 86 Ky. 266, 5 S. W. 468.

Property was given to testator's wife, "with a special request that at her death she give the said lands to be equally divided between her near relatives and mine." It was held that the wish expressed was clear, the time indicated was her death, the mode of disposition was described, the class of beneficiaries was defined, and the object clearly pointed out. *Handley v. Wrightson*, 60 Md. 198. In this case the court said: "Nor is the doctrine of the creation of

trusts by words of recommendation, desire, hope, and the like, without distinct recognition in the decisions of this court. In the cases of *Tolson v. Tolson*, 10 Gill. & J. 159; *Chase v. Plummer*, 17 Md. 165, and *Williams v. Worthington*, 49 Md. 572, 33 Am. Rep. 286, whilst the court, in the first of these cases, does not explicitly dwell in its opinion upon this rule of construction, and in the last two cases decides that under their particular circumstances no trusts were created, the decision in *Tolson v. Tolson*, as that case was presented and argued, and the tenor and citations of the opinions in the cases of *Chase v. Plummer* and *Williams v. Worthington*, which were decided upon grounds not in conflict with the principles of the rule itself, clearly indicate the binding force in the judgment of this tribunal, of the doctrine of precatory trusts in all such cases to which it is properly applicable."

Testator provided: "I request the said Susan McCallum at her death to give the same to her two daughters, . . . the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor." It was held that a trust was created. *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75. The court said: "This is not a case where there is uncertainty as to the objects of the trust, or as to the amount of it, or where there are any words, as, for instance, 'if she thinks best,' or 'at her discretion,' expressly giving her a clear discretion or choice, or where there are words like 'absolutely,' directly expressing that the bequest is absolute. On the contrary the objects of the bounty, namely, the two granddaughters, are clearly specified, the amount of the trust fund is clearly stated, it is not mingled with any other property, and the relations of the testatrix to the objects of the trust are such as to indicate a strong motive for the bounty and for this method of providing it."

Under a devise, "with one request, that he give my father, J. A. Sample, \$200 a year as long as he lives," it was held that the devisee could be garnished. *Red v. Powers*, 69 Miss. 242, 13 So. 586.

#### *Request and direction.*

A provision: "To avoid all contentions and disputes, it is my request and direction that said Annie E. Hall shall, immediately upon my decease, by will, devise and direct that such portion of said estate as shall be left at her decease be divided between the survivors of my brothers and sisters, according to my intention as expressed in this will. I wish it distinctly understood that I place no restriction upon my said wife in regard to her use of my said estate,"—was held to leave to the surviving brothers and sisters all that was left of the estate after the decease of testator's widow. *Hall v. Otis*, 71 Me. 326.

#### *Request and wish.*

A provision: "It is my request and wish that in the event that my wife survives me, that she will, during her life, make such

provisions by will or otherwise, so that at her death my son, William C. Mitchell, may share equally of the estate and property herein willed to her with my other children,"—was held not to charge the devisee and bequests with a trust in favor of testator's son. *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465. This was on the ground that a devise in fee clearly and distinctly made cannot be taken away, cut down, or modified by subsequent words not clearly and distinctly manifesting the testator's intention to limit such devise.

And a provision that I "request my dear wife Jane in whose affection and generosity I have full confidence to pay to her or her caretaker such sum or sums of money as may be requisite for her every comfort; . . . and it is my wish and expectation that when my wife Jane shall make her will disposing of the property left by me that she will generously remember the children of my deceased brother William and such others as she may choose,"—was held, in regard to a nephew, to give the devisee a greater discretion than the provision for the support of mother and sister. It was held that the testator's expression was one of hope and confidence, rather than of command. *Russell v. United States Trust Co.* 69 C. C. A. 410, 136 Fed. 758, affirming 127 Fed. 445. This was on the ground that "wish and expectation" are not so forcible as "request."

#### *Require.*

A provision: "Requiring him to pay to my little niece, Bessie Curd Field, \$500 when she arrives at the age of twenty-one or when she gets married,"—was held to create a trust. *Curd v. Field*, 103 Ky. 293, 45 S. W. 92.

#### *Suggest.*

A provision: "I suggest if the spire or steeple of the said church property be unfinished at the time of my death, that the funds received, or such part thereof as may be necessary, be used for the purpose of completing the same,"—was held not a precatory trust. *Williams v. Baptist Church*, 92 Md. 497, 54 L.R.A. 427, 48 Atl. 930. The court said: "There is nothing in the word 'suggest,' either in its meaning as ordinarily employed, or as affected by the context of the will, that can be regarded as expressive of confidence or belief or desire or hope or will, or as the equivalent of a word of entreaty or recommendation. 'Suggest' is, in fact, therefore, not a precatory word at all, in the ordinary sense, and there is nothing in this will to justify us in attributing to it any other than its ordinary meaning. If this interpretation of this word be correct, there was no duty upon the committee to perform the acts suggested."

#### *Trust.*

In some cases the use of the word "trust" was held mandatory, but not where the testator cautioned against such construction.

Where testator provided: "I may have given to one more than I intended," and then added, "I trust to the sense of justice

of my said sons, that if I have given more to one than to the other, that they will do right, and authorize my wife, as trustee, to assist them in arriving at justice,"—it was held that these terms imported a trust. *Hadley v. Hadley*, 100 Tenn. 446, 45 S. W. 342. This was on the ground that where it is a difficult matter to determine whether words of recommendation or entreaty are imperative or not, there is always a tendency to construe them as obligatory, in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action.

But where the provision was: "I do this in full trust and confidence that she will provide for the distribution of the same by her last will and testament among our children . . . but this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution,"—it was held that the words of the will clearly showed that the testator intended that the words were merely advisory, and not obligatory. The widow's right of ownership was an absolute fee simple. The testator said his expression of trust and confidence was not to be construed as limiting this right. *Tabor v. Tabor*, 85 Wis. 313, 55 N. W. 702. This case was distinguished in *Swarthout v. Swarthout*, 111 Wis. 102, 86 N. W. 558.

Martha Dunlap made a will, constituting Daniel W. Powers executor and trustee, and providing: "Upon the trust and confidence reposed in the said Daniel W. Powers, that he will dispose of the said property among the charitable and benevolent institutions or corporations in the city of Rochester as he shall choose, and such sums and proportions as he shall deem proper." It was held that the gift was too indefinite, and could not be carried into effect, for the failure to designate a beneficiary or a class or kind of beneficiary to whom distribution was practicable. The trust attempted was held to be unenforceable. *People v. Powers*, 147 N. Y. 104, 35 L.R.A. 502, 41 N. E. 432.

After a devise apparently for life, the following words appeared: "Trusting and expecting that she will use and dispose of the whole thereof as she may desire, and that she will give the residue, if any remains at her death, by her will, to such persons and for such purposes as she may desire." It was held that the latter clause negated the intention to limit the grant to a life estate, but the intention was to give an absolute power of disposal not of a life estate, but of the whole thereof by deed or will. *Judevine v. Judevine* (*Powers v. Judevine*) 61 Vt. 587, 7 L.R.A. 517, 18 Atl. 778.

#### *Want.*

This is held not to impose a trust where the wish is vague. But where it is definite as to amount and object, it is held to impose a trust.

57 L.R.A. (N.S.).

So, where testator said: "I want to give my wife an executrix's power to give out of my estate before division, as much as \$15,000 of bequests to my kinfolks, say, to Melville Williams, \$5,000 or \$10,000, in her discretion, and the balance to someone else who may be needy,"—it was held that a trust was imposed in favor of Mr. Williams to the extent of \$5,000 of the bequest, and that a discretion was vested in the executrix to increase it in his favor to \$10,000, if she saw proper. *Ensley v. Ensley*, 105 Tenn. 107, 58 S. W. 288.

But where testatrix said: "I want her to give any presents to my sister, Euphemia Cunningham Webster, that she may need, and that my estate can afford. I want Hettie as far as possible, to look after my sister Euphemia's interests, and to protect her as far as lies in her power,"—it was held that a trust was not created as the wish of benefaction to her sister was too vaguely worded as to the subject-matter to be carried into execution. *Webster v. Wathen*, 97 Ky. 318, 30 S. W. 663.

#### *Will.*

Testator provided: "I will that the balance of my lands not willed shall be sold and the money given to my wife for charitable purposes. I will that the balance of my bonds not willed shall be collected and the money given to my wife for charitable purposes." It was held that no trust was thereby created, and the gifts mentioned were void for uncertainty, and, taking the whole will together, it was clearly the intention of the testator to provide his wife with the fund which would enable her, solely at her discretion, to dispense charities in such a manner as she might choose. *Baker v. Baker*, 53 W. Va. 165, 44 S. E. 174.

#### *Will and desire.*

Where the will said: "It is further my will and desire that my beloved wife, Statura, shall pay two hundred dollars, commencing 1st of January, 1861, to my nephew, John Lyell, for the purpose of educating him," it was held that "will and desire" and "shall pay" were mandatory; and it would have been difficult so to use language more expressive of positive intent. *Anderson v. Hammond*, 2 Lea, 282, 31 Am. Rep. 612.

In the following clause: "My will and desire is that the property given to them shall not, in any instance, be liable for the debts of their husbands, but shall descend from my daughters aforesaid to their children," "will and desire" were held not to be used as merely precatory words, indicating a desire or recommendation, but to create a remainder in the children of the devisees. *Collins v. Williams*, 98 Tenn. 529, 41 S. W. 1056.

A will provided: "I give, devise and bequeath unto my friend, Mary S. M. Hardwicke, my negro woman, Phillis, together with her future issue and increase, trusting that the said Mary S. M. Hardwicke

will fully comply with my wishes, respecting the said negro woman, Phillis, and her children which may hereafter be born; and it is further my will and desire, that the said Phillis should be allowed to keep with her, and have the services of her child, Martha, during the lifetime of the said Phillis." It was held that the legal interest in Martha was given to the residuary legatees, and the recommendation that she might be allowed to attend and serve Phillis was addressed to their benevolence and good faith, and could not affect the title of the residuary legatee. *Skrine v. Walker*, 3 Rich. Eq. 262.

#### *Will and intention.*

The following language, after a devise of a life estate: "And it is my will and intention that the said Seth Wells may dispose of the furniture, plate, pictures and all other articles now in my house, absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him,"—was held not to create a trust, but to give the devisee the absolute property in the articles. *Wells v. Doane*, 3 Gray, 201.

#### *Wish.*

Precatory words in a will, following a bequest or devise in general terms, expressing a desire or wish as to the ultimate use or disposition of property devised or bequeathed, or some portion thereof, by the person taking the title in the first instance, are construed as creating a trust in such first taker for the benefit of the other person or persons named, if that, under all the circumstances, appears clearly to have been the intent of the testator, and such intention can be read from the language used by him, by the aid of those liberal rules which obtain for the purpose of giving effect to testamentary words.

And where the will provided: "After the children arrive at age I leave it discretionary with Susan my loving wife what donation to make them out of the property, and in case of her decease or marriage to be left with the executors whom I shall hereafter name, but in every respect I wish them made as near equal as can be,"—it was held that it was the intention to give the property to the wife in trust for herself and children while she lived and remained a widow, that the property was to be used for their mutual benefit, "in such manner as she might think proper," except as specified by the testator, and that the wife could not dispose of the property by will. *Ward v. Peloubet*, 10 N. J. Eq. 304.

Where the language was, "of the \$1,000 devised to my daughter Amelia, in case she should die not leaving any child or children living, then the \$1,000 I wish to have go to my daughter Emily's children,"—"wish" was held to be used in the same sense as if he had said "I will" or "I devise." *Bliven v. Seymour*, 88 N. Y. 469.

The will provided: "If she find it always convenient to pay my sister Caroline Buck the sum of three hundred dollars a

year, and also to give my brother, Edwin W. during his life the interest on ten thousand dollars (or seven hundred dollars per year), I wish it to be done." It was held that the testator meant to charge upon the gift to the wife the annuities to his sister and brother provided only that their payment should occasion her no inconvenience. *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411. The court said: "The use of the word 'always' implies a conviction in the testator's thought, which would quite naturally exist, that in view of the large estate he had given his wife, and her own ample fortune, it would usually and ordinarily, when the time of payment came, prove to be easy and convenient for her to spare the money for that purpose, but that such a state of facts might not always and upon every occasion exist; that in her management of the property there might come misfortune, reducing or destroying income, or some exceptional increase of expenses due to an under-estimate of incurred expenditure; and if that happened at any one or more of the times of payment, he desired that not she, but his sister and brother, should bear the consequent inconvenience." This case was distinguished in *Collister v. Fassitt*, 163 N. Y. 281, 79 Am. St. Rep. 586, 57 N. E. 490.

A will provided: "It is my wish that said persons apply the said rest, residue and remainder of my estate and property to the creation of some charitable or educational institution in the city of New York. I desire to place no restriction upon them with regard to the character of such charitable or educational institution, excepting that I desire the same to me nonsectarian." It was held that the testator left the selection of the institution to the discretion of the trustees, and it would be assumed that at the proper time they would discharge their duty under the trust without interference on the part of the court. *Rothschild v. Schiff*, 188 N. Y. 327, 80 N. E. 1030, modified in 103 App. Div. 235, 92 N. Y. Supp. 1076.

And the provision: "My wish is, that at her death, she will give the one half of all I give her," was held to have certainty as to the subject-matter, certainty as to the object of the bounty, and certainty as to the intention of the testator, and this created a trust which a court of equity would enforce. *Cook v. Ellington*, 59 N. C. (6 Jones, Eq.) 371.

And under a devise and bequest, "to my beloved wife Elizabeth, all my real and personal estate, she at no time to give or bequeath any portion of said estate out of my family, as at her decease I wish my estate which remains to go to my nephews and nieces which may be living at that time," it was held that the widow took only a life estate. *Fox's Appeal*, 99 Pa. 382. This was on the ground that the words were not precatory, merely expressing the wish that his wife should give or bequeath the estate or what remains to his

nephews and nieces, but that the words "I wish" were as mandatory as the words "I will."

Testator said: "It is my wish that my son David shall take especial charge of, maintain and support my brother, Edward Busby, during his, the said Edward's life. . . . It is my wish that my homestead, and five hundred and fifty-nine acres of land, with the improvements thereunto attached, as mentioned in item first, shall be set apart to my son David." It was held that there were no discretionary expressions in these clauses, but that they established a trust upon the homestead. *Busby v. Lynn*, 37 Tex. 151, subsequent trial, 46 Tex. 600.

Under a will providing: "I give, devise and bequeath unto my wife, Cora F. Swarthout, all and singular my property and estate real and personal. It is my wish that such property and estate above devised, or so much thereof as my said wife may be possessed of at her decease, shall go to or be by her given to our child or children, if any there be then living,"—it was held that it would be construed as giving the property to the widow for life, and making her a trustee for the children in remainder. *Swarthout v. Swarthout*, 111 Wis. 102, 86 N. W. 558. This was because there were no words guarding against the precatory expression being construed as a command, and the expression was to a wife in the "language of civility," and two children were born after the will was executed.

And where a will gave a testator's son \$200 to be paid him at the death of his wife, "which said two hundred dollars it is my wish my son Stephen shall add to the advancement he may make his son Sampson S. Reed, when Sampson comes of age," it was held to create a trust in favor of the grandson, although he might have received other advancements. *Reed v. Reed*, 30 Ind. 313.

The provision: "As to my property and wealth, I first wish all my just debts and funeral expenses punctually paid, and the balance of my estate, wholly, I leave to my beloved wife, Nancy Carlisle, and to be disposed of by her and divided among my children at her discretion,"—was held to give the widow a life estate, and so far as she acted under the will, her acts were conclusive. But as to property she did not dispose of, the children became entitled to it, under the will of their father. *Collins v. Carlisle*, 7 B. Mon. 14.

Directing that "I wish that the indebtedness of Thos. J. Stewart & Co. shall be deducted from the shares and property so given and devised to the said wives of my sons Charles, Edward and Rowland, and that the property so as above given to said three wives of my three sons be for the education of their children and the support of their families respectively—and I enjoin upon them so to use and expend it,"—was held to create a trust to the extent of the education of the children and the support of the families. *Clifford v. Stewart*, 37 L.R.A. (N.S.)

95 Me. 38, 49 Atl. 52. It was said that it was not indefinite as to the children, for they were of a class whose membership was definite and known.

But where the devisee had discretion without any restrictions, no trust was held to exist, so where the title was absolute in the devisee, and where a trust would be inconsistent with the other parts of the will.

A will provided: "If for any reason any legacy or legacies left by my will or by any codicil, either pecuniary or residuary, shall lapse or fail, or for any cause not take effect in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect, absolutely to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely, and without limitation or restriction." It was held that here was no trust created by the devise to the three persons named as executors. *Adson v. Bartow*, 15 Misc. 179, 37 N. Y. Supp. 99. The court said: "They had the full right to receive the residuum as their own; they had the full power to follow the dictates of their conscience in devesting themselves of that property, and placing it where they knew the testatrix wished it to go."

A provision: "So long as she shall remain my widow, and my children shall be under age, to be used and applied by her to the maintenance, support and education of my children who may be under age, but without being called upon to give any account of the manner in which she may have applied it; as it is my wish that she shall have the absolute control of its use and disposition so long as she shall remain my widow,"—was held to create no subtrust, but was purely the expression of confidence as to the use and disposition of the income to be paid to her. *Biddle's Appeal*, 80 Pa. 258.

And a provision: "I have full faith and confidence in my beloved wife, Mary, that she will do what is best and proper with my effects, and that she would do with my property the same as I would wish to have done, that she will take care of the proceeds,"—was held not to create a precatory trust, as there was given an absolute power of disposal. *Giles v. Anslow*, 128 Ill. 196, 21 N. E. 225. In the first clause of the will the absolute estate in the property was devised to the wife.

And a provision: "Knowing that in case any of my immediate relatives, or her sister, Julia Frances Owen, who has always been a kind sister and devoted friend should, by misfortune or otherwise, need or require any aid or assistance, that she would cheerfully and generously share with them; and therefore feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein. . . . It is my wish that such property as my wife may have remaining undisposed of at her death, that she should previously will and

devise the same to her sister, and to my surviving brothers and sisters, in equal proportions, leaving it entirely with her to make such use and disposition of her property by will as her kind heart and good judgment shall dictate, merely expressing my desires and wishes in the premises; and if change of fortune, or other causes, shall, in her judgment, make it unwise to carry out any or all of the foregoing wishes or requests, she is absolved from carrying out the same,"—was held not to be imperative, and it was held that the property to which it was claimed a trust attached was not certain or definite, but depended upon the wife's generosity. It was further held that the desire that she should will the property was subject to the discretion of the wife. It was further held that the property was given to her absolutely. *Toms v. Owen* (C. C.) 52 Fed. 417.

And a provision: "I wish it, or whatever may be left at their death, to be divided equally among all those who are now my legal heirs,"—was held not to bind the legatee to preserve and return; but the legatee became absolute owner. *Hudson's Succession*, 19 La. Ann. 79. The court said: "To constitute a prohibited substitution, the donee must be charged to preserve and return the thing donated, to a third person. Civil Code, art. 1507. The motive of the law is that property should not be tied up and taken out of commerce, which would be the case if the donor had the right and power to direct to whom should go the donation after the death of the original donee, for the donor might do so *ad infinitum*."

And after an estate was devised by will, it provided: "At her decease what remains I wish to be equally divided between Jacob J. Brown and Nellie Washburn, children of my wife's sister." It was held that however strong the language of recommendation or request might be, a trust would not be implied, if such construction of the words was repugnant to, or inconsistent with, other parts of the will. *Taylor v. Brown*, 88 Me. 56, 33 Atl. 664.

The will said: "I do intrust my dear child to his care and guardianship, knowing his tenderness and sound judgment will insure the well-being of my child, so far as lies in his father's power; and it is my wish that my dear husband shall so arrange his affairs that, at his death, whatever may remain of the said rest, residue, and remainder of my estate, shall go to my son, if he be then living, or if he be not living, to his issue." It was held that the wish expressed was merely words of solicitation, and not meant to control the husband's discretion in the disposition of the property. *Nunn v. O'Brien*, 83 Md. 198, 34 Atl. 244.

And the clause: "I express the wish that my children shall continue to live together as they now do, and use the income of my property for their support until the expiration of said ten years from my death,"—was held not to create a precatory trust. *Clark v. Clark*, 99 Md. 356, 58 Atl. 24. The court said: "In the case now be-

fore us the words employed in making the gift of the residue of her estate to her children clearly point to an absolute enjoyment of that residue by the donees themselves, and therefore the subsequent precatory words used by the testatrix should be construed as merely expressive of her wishes as to the manner in which the children should enjoy the legal estate in the property, and not as intended to create a trust."

Under a devise of property to the wife on condition "that on the marriage of my daughter Catherine to William Gray, Jr., I gave her by deed through him, two acres of land, considered as good as any I had, and that I wish at the death of my wife Catherine that she should make an equal division of her estate to such children as shall survive her, or their representatives, and out of the portion that shall come to Catherine to deduct the value of two acres, at as high a valuation as any there is, and to let the amount be absorbed in the whole amount to be divided, and to place all the parts in trust for them, as many as there shall be; this of course is not to interfere with that part of her estate already in trust,"—it was held that the children were given no legal or equitable estate, and that the first clause of the will gave the wife an estate in fee, and that the succeeding clause was only recommendatory, and not imperative. *Sears v. Cunningham*, 122 Mass. 538.

And the following clause: "Wishing to contribute my mite towards suppressing the Rebellion and restoring the Union, I give and devise the rest and residue of my estate, after paying the donation and providing for the payment of the annuities aforesaid, to the United States of America,"—was held merely to express the motive of the testator, and in no way defined or limited the purposes to which the property should be applied by the devisee. *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230.

The will provided: "I give and bequeath unto my beloved wife, Margaret, all my estate, real and personal, wheresoever situate, for her use and enjoyment during the term of her natural life, and after her death it is my wish, unless she shall have earlier divided the same or disposed of it by will, that the same shall be equally divided among my children, part and part alike. Provided, however, that it is my wish that any essential advance made by me to any one or more of my children in my lifetime should be first deducted from the share of the child having such advance. It is my wish that my wife should sell and dispose in her lifetime of just so much of the real estate that I may die seized of as may be necessary to pay debts and to raise the necessary means on which she and my children, who may choose to make a home with her, may economically and plainly live and no more, though that is a matter of discretion with her and my children, who, I hope, will seriously and carefully advise." It was held to give absolute title to the

devisee, and not to create a trust. *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21. The court said: "Though he adds that the gift is for her use and enjoyment during her life, and that it is his wish that after her death, unless she should have divided or disposed of the property by will, it shall be equally divided among his children. That is not intended as a limitation of her estate to a life interest, with a gift in remainder to the children."

A will provided: "It being my wish that said trustees will be guided, in the distribution of such income, by the officers of the Ladies' Sewing Society connected with said church, preferring benevolent to ordinary church expenses, hoping such use will compensate for the burden of this trust." It was held a bequest to the corporation, and the wish of the testatrix would be treated as merely precatory, as the testatrix previously had indicated her intention that the church should have the property absolutely for its uses and purposes. *First Presby. Church v. McKallor*, 35 App. Div. 98, 54 N. Y. Supp. 740.

Construing a provision: "To use it for the benefit of himself and my other hereinbefore named children," which included the respondent, "in such proportions and at such times and in such manner as he . . . shall in his judgment and discretion deem proper, right and advisable, . . . in . . . full confidence in the ability, integrity and sense of justice and fairness of my said son, and in his love for me and regard for my wishes,"—it was held that these precatory words did not impose any legal duty or trust upon the son. *Re Steiner*, 134 App. Div. 162, 118 N. Y. Supp. 833.

The court said: "The language of the will in *Re Conner*, 6 App. Div. 594, 39 N. Y. Supp. 900, is different. There the direction was to 'distribute and apportion' among wife and children, and only the manner and time were left to the judgment of the executors, and not the proportion that should be given to each."

The will provided: "My wish is, that after the sale of my real estate by my wife, Margaret aforesaid, without charging my said real estate, that she will, if she has a sufficient sum of money to do so, to give to my daughter Mary's children as follows." "My further request is that at the death of my wife Margaret aforesaid, that she will so divide what she may have among our daughters, Martha and Eliza's children, share and share alike." It was held that no subsequent language in the will converted into a trust the property which had previously been devised to her absolutely in fee. *Hopkins v. Glunt*, 111 Pa. 287, 2 Atl. 183. The court said: "Expressions of a desire or a wish of the testator as to a specific disposition of his property, standing by themselves alone, may constitute a valid devise or bequest thereof. The rule is different when such expressions are used after an absolute disposition of the property has been made. After an unqualified

devise by the testator of his property, no precatory words to his devisee can defeat the estate previously granted." This case was distinguished in *Bellas's Estate*, 176 Pa. 122, 34 Atl. 1003.

After a devise and bequest to friends "in fee simple, absolutely and forever," testator continued: "It is my wish that my said friends shall hold the property thus devised to them free from all trust whatever. Nevertheless, I have devised and bequeathed the same to them, in the confident expectation and hope that they will permit my children by Sally Bryson, to wit." By a previous clause the testator had given to these four children one fourth of his whole estate. South Carolina act of 1795 declared void any gift or provision beyond one fourth of a man's estate in favor of a woman with whom he lives in adultery, or of his illegitimate child or children, he having a wife or lawful children of his own living. It was held that this gift was rendered void by the act only to the extent of the excess. *Bouknight v. Brown*, 16 S. C. 167.

A will provided: "And it is my wish that the said Mary shall at such times as she shall deem it advisable, and after using all the property she may wish for her own comfort and support, provide for the distribution of all my property to our children in a manner that shall be just and equal between them, having regard to such as may have received property from my property, and other circumstances which should have an influence in the distribution of the property which I shall have at my decease." It was held that the trust was rather a recommendation than a direct trust. *Van Amee v. Jackson*, 35 Vt. 173. In this case it was said there is no doubt that precatory words used by a testator in his will, or words expressing hope, desire, or request, may amount to an imperative direction, creating a trust or beneficial interest in favor of the object of the trust; but in giving a construction to precatory words in a devise, a court of equity will look at the circumstances existing at the date of the will, and, if necessary, will construe words importing a trust as mere expressions of recommendation or confidence.

Testator provided: "I wish you to take the negroes to Penn'a, where they will be free." It was held that the assent of the administrator with the will annexed was necessary in a suit for freedom, in order to maintain this action. *Reid v. Blackstone*, 14 Gratt. 363. The court said: "The devise of the testator's whole estate, including negroes, is to his nephew, John Reid; and whether it be to him in his own right, or as trustee in whole or in part, he alone can maintain an action at law for the estate, or any part of it. He is entitled to receive the whole estate, or so much of it as may remain after the payment of debts and expenses of administration."

A provision: "If my executors find there will be sufficient funds, I would wish a public dispensary, as in New York, on a simi-

lar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and also daily at the dispensary,"—was held to be void as uncertain in amount, and on other grounds. *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269.

*Wish and desire.*

Where the will provided: "Shall remain and continue to live together as one family, of which my mother shall be the head; and that my said mother and my said four sisters shall continue to occupy the house now occupied by them, and make it a home for herself and my said sisters. But this clause of my will is not to be considered or treated as a direction or instruction; but, simply as a suggestion of my wish and desire,"—it was held that the concluding clause forbade the implication of any trust. *Wood v. Seward*, 4 Redf. 271. The court said: "Precatory words will not create a trust, where, either by a consideration of all of the provisions of the will, or by the express words of the testator, it appears that the recommendation was not intended to be obligatory."

Testator said: "It is my wish and desire, in case my sister Mimy die without issue, that she shall will and devise all my negroes to be free, or manumit them in any other way she may think proper; this request I hope she will comply with in time, so as to carry my wish into effect." It was held that the legatee had a discretion, and as she did not manumit the slaves, the court would not set them free. *Chase v. Plummer*, 17 Md. 165.

Where a previous clause gave the property absolutely and without restrictions, a provision that I "wish my beloved wife and daughters to receive an income from all my real and personal estate during their natural lives after they have got their portions. . . . It is my desire that my property of whatever kind should, after the decease of my wife and daughters, descend to the children of my daughters respectively if they are married,"—was held not to create a trust, as it should appear that the words used were intended to be imperative, and a trust would not be imposed upon mere words of recommendation and confidence. *Barrett v. Marsh*, 126 Mass. 213.

The will provided: "It is my wish and desire that if my wife has received from my daughter and her family the affection and respect, to which she is entitled, that she then will appoint said share of said trust estate to my daughter and her children, in such way and manner, and in such proportions, as to her may seem best." It was held that the words, "wish and desire," did not constitute a trust, but were merely an expression of hope on the part of the testator. *Holmes v. Dalley*, 192 Mass. 451, 78 N. E. 513.

A provision: "It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law," was held only the expression of a wish, and the whole matter rested in the 37 L.R.A. (N.S.)

discretion of the wife. The will gave the property absolutely to the wife. *Post v. Moore*, 181 N. Y. 15, 106 Am. St. Rep. 495, 73 N. E. 482, 2 Ann. Cas. 591.

And a provision that "it is my wish and desire that my said wife Elizabeth Hamilton will leave at the time of her death the property thus left to her by me, or any part that may be then remaining in her hand, for the benefit of young men that are unable to educate themselves,"—was held not to limit a fee previously given. *Second Reformed Presby. Church v. Diabrow*, 52 Pa. 219. It was held that the precatory words in which he expressed his desires did not create a trust, but strengthened the conclusion that an absolute interest was vested in the wife.

A provision that "it is my wish and desire that my said daughter shall consult fully and freely with her brothers in relation to the investment and management of the ten thousand dollars in money bequeathed by me to her; and further that she shall not consume any part of the principal thereof, but preserve the same undiminished, and that at her death the said principal sum shall go to the persons entitled under this my will to the real estate herein devised to her for life,"—was held to be a mere expression of a wish, and did not cut down, by positive direction, the absolute interest which the testator had already granted. *Heck's Estate*, 170 Pa. 232, 32 Atl. 413.

But the presumption that "wish and desire" are precatory merely in wills, and not mandatory, is held not to arise when the words are used to express the intention and will of the testator; in such cases they are held to be mandatory.

So where a will gave a friend the entire estate, "having the utmost confidence in my long tried friend, William Fraley, that he will entirely carry out my wishes and desires, as they may be expressed by me, either verbally or in writing; and well knowing that my friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done,"—it was held that a trust was created, and the legatee held only as trustee for the next of kin. *Ingram v. Fraley*, 29 Ga. 553. The testator having failed to declare the trust, the legatee did not take beneficially.

And a provision: "It is my wish and desire that my grandson William Armstrong Cocke be brought up and educated at the cost and expense of my estate,"—was held to create an express trust, and to declare a charge upon the testator's estate. *Cockrill v. Armstrong*, 31 Ark. 580. The court said: "The terms 'wish' and 'desire' must be construed as imposing a direct obligation upon the executors to make such expenditure, and to charge the estate with the expense."

Testator provided that I "wish and desire that my wife continue to provide for the care, comfort and education of Thomas Joseph Murphy, now aged nearly five years, who has been raised as a member of my



family since his infancy, and to make suitable provision for him in case of her death, providing that he continue to be a dutiful child." It was held that the fact that the whole estate was bequeathed absolutely, and immediately before the precatory words were used, did not prevent the trust from attaching. *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 690, 20 S. W. 786. This construction was from a consideration of the will, which had left \$1,000 to another adopted child, and the testator certainly did not intend to leave this one dependent on the good will of his wife.

Under the laws of Georgia, a testator could not manumit his slaves by will. A testator made a will giving all his property to his nephew, and stating: "My house servant Adeline and her child Tolbert have been good, trusty, and faithful servants to me, it is my wish and desire that the said Adeline shall not be separated from her child Tolbert, . . . I wish him to treat them just as he may at all times think I would treat them if I were in life; this confidence I repose in him with the full assurance that it is not misplaced, and that it will not be abused." This slave Adeline was his mistress and her child was his, and the evidence showed that he wanted to manumit these slaves, and it was held that there was a secret trust in the provision for them of \$20,000, and that as to this legacy there was no will; but that this did not affect the rest of the will. *Cobb v. Battle*, 34 Ga. 458.

Testator said: "But it is my wish and desire that he shall furnish a home, maintenance and care to and for my said father during life, should he need and require it." It was held that the devise was made in trust to furnish such maintenance as should be needed. *Foster v. Willson*, 68 N. H. 241, 73 Am. St. Rep. 581, 38 Atl. 1003. This was apparent from the intention of the testator as shown by the whole will, and because the subject-matter and object were clearly defined.

After a devise absolutely of all the testator's property, he said: "It is also my desire and wish, after my wife's death, that my house and lot, number 2,007 Fitzwater street, shall go to my daughter Mary." It was held that the testator intended to give to his wife a life estate only. *Taylor v. Martin*, 6 Sadler (Pa.) 125, 20 W. N. C. 27, 8 Atl. 920.

A will provided: "It is my earnest wish and desire that my executors, hereinafter named, shall take the custody and guardianship of all my minor children, and to them, under God, I commit them, requesting that, if their lives are spared they shall be well and thoroughly educated." It was held that it was the intention of the testator to provide for the support and education of his minor children. *Alexander v. Thompson*, 38 Tex. 533.

*Wish, desire, and bequest.*

A will provided: "I give and bequeath to my beloved wife Nancy, for her sole

use and benefit, and for the rearing, nurture and education of my minor children. . . . And it is my wish, desire and bequest, that at her death all that remains of my said real and personal property, and its rents, issues, and increase, shall fall to and be owned by my said heirs David Russell, Archibald, and Susan, to be divided between them, and if possible by them share and share alike." It was held that only a life estate was given to the widow. *Williams v. McKinney*, 34 Kan. 514, 9 Pac. 265, distinguished in *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965. *Wish, desire, and intention.*

In the will the testatrix declared that in the event of her death the following was her "wish, desire, and intention." It was held that the use of the word "wish" in this connection had the same force as though the word "direct" had been used. *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. Supp. 57.

*Wish and request.*

Testator provided: "It is my wish and request that my said wife shall, before the time of her death, make and execute her last will and testament, and therein give and bequeath the property herein given and bequeathed to her to my children therein-before named, share and share alike." It was held that the intention of the testator was that the wife should take the property absolutely. *Street v. Gordon*, 41 App. Div. 439, 58 N. Y. Supp. 860. This conclusion was had because of the emphasis on the request that she should make her will giving the property to the children equally.

*Wish and will.*

After making an absolute devise, testator continued: "It is my wish and will that the income from my said residuary estate shall be used to complete the present buildings and grounds and for the erection of such other buildings or building as will accommodate not less than two hundred additional inmates, and after that the income from my foregoing donation shall be devoted mainly to the care of the indigent insane in the most advisable manner at very low charges or absolutely free, as the trustees of said corporation in the exercise of their best judgment as to the rate to be charged may deem best and wisest to promote the object of this donation." This was held not to raise an imperative trust. *Pratt v. Sheppard & E. P. Hospital*, 88 Md. 610, 42 Atl. 51. The court said: "Had Mr. Pratt intended to give this residuum in trust, he could have used precisely the words he employed in the third clause, where he designed to found a trust. . . . There is not only no suggestion of a trust in the donating words, but the very scheme of the gift, and the particular method prescribed for the conveyance and transfer of the property by the executors to the beneficiary, forbid the inference that these deeds or transfers were to contain provi-

sions fettering the estate with any trust whatever."

But in *McRee v. Means*, 34 Ala. 349, a devise to the husband, "his heirs and assigns forever, to his use, behoof, and benefit, in fee simple. But should my said husband die without issue of his body, it is my wish and will, he shall give all of said property to Robert P. Means,"—was held to create a trust, as the use of the word "will" was held to be the antithesis of words of recommendation and request, and the use of the word "wish," was held to import an obligatory direction by the testatrix. *Would like.*

A provision: "I would like these sums to be given to any society that assist poor needlewomen (seamstresses) whose toil is so poorly requited. If no such organization exists the money to be divided for the benefit of incapacitated sailors and their families,"—was held to be a trust for charitable uses, the object of it being the assistance of poor needlewomen, and this could be accomplished through the medium of any incorporated society having that kind of work. *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149, modified in 66 Misc. 388, 123 N. Y. Supp. 129.

The will provided: "I would rather prefer not to have a division made of my estate until the youngest child of Henrietta arrives at the age of twenty-one years." It was held that these words in the form of a wish were imperative, and did not mean that the distribution was to take effect at the death of the testator. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210.

## II. English cases.

The rule was that courts would seize upon any precatory words in order to fasten a trust upon the property devised. This was carried to such an extreme that the courts really made the will for the testator. This doctrine has been repudiated, and the courts there now lean the other way. They will sustain a precatory trust, but it must be clear. It may be very safe in general, to say that when there is uncertainty as to the subject-matter, or as to the objects in whose favor the request or hope or recommendation is expressed, precatory words cannot have been intended to be absolutely binding. But the converse of the proposition is by no means equally true. The subject-matter of the bequest, and the objects of the testator's bounty, may be perfectly ascertained, and yet the context may show that words of hope or request or recommendation were not intended to interfere with the absolute discretion of the legatee. It is well said that no two wills are alike. In determining the intention of the testator, the whole will is examined, and it is generally now held that where an absolute estate is given to the legatee, it will not be cut down by precatory words unless such a construction is clearly required by the whole will, and the subject and object of the trust are well defined and certain.

57 L.R.A. (N.S.)

"I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it amongst all my children. If they die single, of course they will leave what they have amongst their brothers and sisters, or their children,"—was held not to create a trust. *Lechmere v. Lavie*, 2 Myl. & K. 197. This was on the ground that the words were too vague to be construed equivalent to a testamentary disposition, and amounted to no more than an expression that the daughters would be prompted by natural affection to leave their property to their nearest relations, as to which the daughters had exercised their discretion. *Advise.*

The use of this word was held to create a trust, and the devisee took only a life estate, where testator appointed "Thomas sole executor of this my will, and, after my death, do advise him to settle it upon himself, and his issue male." *Parker v. Bolton*, 5 L. J. Ch. N. S. 98.

## *Assurance and confidence.*

These words were held not to create a precatory trust, except in a case where such phrase was directed towards a defined disposition of the property. No trust exists where action is discretionary.

Testator made a certain disposition of his property, "being well assured she would, at her decease, dispose of the lands amongst all or such of his children as she, in her discretion, should think most proper, and as they by their conduct, should deserve." It was held that under the word "such" the devisee had full power to devise the whole to a daughter. *Macey v. Shurmer*, 1 Atk. 389.

The property was devised "absolutely and forever, in the full assurance and confident hope that she would bring up his children in the fear of God, and educate and provide for them, the same as it would have been his intention." It was held that the trusts were too obscure to be effective, and that the widow took absolutely. *Macnab v. Whitbread*, 17 Beav. 299.

The property was "to go to my dear wife, being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her." It was held that these words amounted to no more than advice, and did not constitute a trust. *Scott v. Key*, 11 Jur. N. S. 819.

But a devise "to and for her own sole use and benefit forever, feeling assured and having every confidence that she will hereafter dispose of the same fairly, justly and equitably amongst my two daughters and their children,"—was held to be a precatory trust. The widow was entitled to the property for her life, and on her death the property would go to her daughter and their

children, as she should appoint. *Gully v. Cregoe*, 24 Beav. 185.

*Beg.*

This word creates a trust where there is suggested apportionment, but not where the apportionment is to be made by will, as this indicates a fee in the legatee.

The will said certain property "I leave to my sister, and I beg she will apportion between the above-named Susan Corbet, Anne, Mary, and Theresa Corbet; and as my nephew John Corbet has a less secure position in life than his brothers, to him such portion or portions as she shall see fit. I would also wish that she should have power to give some small amounts for charity, especially to Daniel Laffin's family, etc. These are my desires on these matters, should death overtake me on the journey." It was held that there was a trust, and the testator's sister took the property as trustee for the individuals and purposes named. *Corbet v. Corbet*, 7 Ir. Eq. Rep. 456. This was on the ground that the subject-matter was certain, that the objects were clearly ascertained, except as to the charity for Laffin's family.

But where the will provided: "I beg and request that at her death she will give and bequeath the same in such shares as she shall think proper unto such members of her own family as she shall think most deserving of the same," it was held that as to this property there was no trust, but that the wife took absolutely. *Green v. Marsden*, 1 Drew. 646. This was on the ground that the precatory clause imported that the widow was to devise, which she could not do if she had not a fee in the whole.

*Belief.*

This word creates a trust as applied to a directed disposition.

A devise "in the full belief that she would so dispose thereof by deed, will, or otherwise, that at her decease the whole might be equally divided between his children, share and share alike," was held to create a precatory trust in favor of the children. *Fordham v. Speight*, 23 Week. Rep. 782.

*Confidence.*

The latest and highest authority in England has held that "in full confidence" imposes no trust. This settles in a measure the fluctuating decisions. The modern tendency in that country now is not to work out a trust, if the testator has not done so. The current of modern authority goes to show that such words are to be construed in accordance with the intention of the testator not to create a trust, where he simply expressed his confidence that his wife would do that which, according to her own judgment, unfettered and uncontrolled, would be for the benefit of her children.

A will provided: "I seriously and warmly entreat my said wife at her decease to settle and assure. . . . In full confidence, and with the firmest persuasion, that in her future disposition and distribu-

tion thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference." It was held that by the latter clause no trust was raised for the heirs for the testator's father. *Heneage v. Andover*, 10 Price, 230. *Richards, L. C. B.*, said: "I shall only observe for a moment that the words 'I seriously and warmly entreat,' etc., in the clause respecting Miss Pigott, though very amply sufficient to raise a trust in a proper place, are used by this testator where, if my construction is right, they were not to imply a trust; and this consideration may be applied to other words of the like import, unless the accompanying words in the clause where they occur prove the intention to create a trust."

Where the clause in dispute was, "to be disposed of by him, as to him may appear just, having every confidence he will act fairly and in accordance with my wishes," it was held that there was no precatory trust. *Creagh v. Murphy*, 7 Ir. Eq. Rep. 182.

And a devise "to and for her own use and benefit, absolutely, having full confidence in her sufficient and judicious provision for my dear children," was held not to be a precatory trust, as the subject-matter should be certain, and the objects to take clearly defined. *Fox v. Fox*, 27 Beav. 301.

Under a gift to one of "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces,"—it was held that the widow took the property absolutely, and that no trust was created in favor of the nieces. *Re Hambury* [1904] 1 Ch. 415. *Kekewich, J.*, said: "When you 'confide' in persons, you trust them, not trusting them in the technical sense of making them trustees, but leaving to them the power to do what you wish them to do, and being sure that they will fulfil those wishes. The idea of trust in the legal sense is entirely out of the question."

Under a devise "to my dear wife, Hannah Roe, absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so." It was held that the wife took absolutely, as the words were merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. *Re Hutchinson*, L. R. 8 Ch. Div. 540, followed in *Re Adams*, L. R. 24 Ch. Div. 199, 52 L. J. Ch. N. S. 758, 48 L. T. N. S. 958, 32 Week. Rep. 120.

Where the devise was "unto my said dear wife (and which she must acknowledge not to be inconsiderable) unfettered and unlimited, in full confidence, and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference,"—it was held that no trust was created. *Meredith v. Heneage*, 1 Sim. 542. This was on the ground that the testator boasted that he had given a benefit unfettered and unlimited. The Lord Chief Baron said: "In this case the words 'unfettered and unlimited,' which are used by the testator to show his opinion of the extent to which he had devised, are certainly as strong to manifest an intention to convey the absolute dominion to the party, as if words had been used more directly authorizing her to spend it, or to deal with it as she pleased."

Where the devise was "to my dearly beloved wife, Mary Anne Raynor, the whole of my property, both real and personal . . . feeling confident that she will act justly to our children in dividing the same when no longer required by her," it was held that the widow took an absolute title, and that there was no precatory trust. *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321. Sir Arthur Hobhouse said: "No case has been cited, and probably no case could be cited, in which the doctrine of precatory trusts has been held to prevail when the property said to be given over is only given when no longer required by the first taker. Now these rules are clear with respect to the doctrine of precatory trusts, that the words of gift used by the testator must be such that the court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be well defined and certain. If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be,—his appeal to the conscience of the first taker,—to be imperative."

A provision: "As I have full confidence in him, that if he should die without lawful issue he will, after providing for his widow during her life, leave the bulk of my said residuary estate unto the said,"—was held not to create a precatory trust, as the subject of the confidence was not sufficiently certain. *Palmer v. Simmonds*, 2 Drew. 221. The use of the word "bulk" was held indefinite, and not to show a definite, clear, certain part of the estate, or the whole of it. This case was distinguished in *Shovelton v. Shovelton*, 32 Beav. 143. 37 L.R.A. (N.S.)

So under a devise "to my dearly beloved wife, Lydia Greene, well knowing her sense of justice and love to her family, and feeling perfect confidence that she will manage same to the best advantage for the benefit of her children," it was held there was no precatory trust for the benefit of the children. *Greene v. Greene*, 3 Ir. Eq. Rep. 90.

A clause in the first codicil of the will provided: "In confidence that they will distribute and dispose of the same as I may, by memorandum or otherwise, direct or request," and in the second codicil: "I am sure that my executors will do according to what they consider right and what is customary. . . . These wishes written by myself, and only concern the interest of my executors, will I feel sure, be quite sufficient for them to fulfil all herein named but will perhaps be more correct if I sign my name in the presence of two witnesses." It was held that, assuming that the first codicil would have no effect on the will, the second codicil explained that, in using the words "in confidence," the testatrix meant a confidence which she felt in the legatees, irrespective of the power of any tribunal to compel the fulfilment of her wishes, and it was held that the entire residue was bequeathed to the executors for their own benefit. *Shepherd v. Nottidge*, 2 Johns. & H. 766.

A will gave property "to the absolute use of my dear wife Harriett Smith her heirs executors administrators and assigns in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by her will after her decease." It was held that the widow was entitled to an estate for life, and the children had no present interest, and the court would not make a declaration of their future rights. *Smith v. Gibson*, 20 Week. Rep. 88.

In *Wright v. Atkyns*, Turn. & R. 143, property was devised to a Mrs. Atkyns in fee, in confidence that she would leave it by will to the testator's "family." Sir William Grant (17 Ves. Jr. 255) and Lord Eldon (19 Ves. Jr. 299) held that "family" meant heir at law, and that Mrs. Atkyns took only an estate for life. It followed from this that she was not entitled to commit waste. The House of Lords reversed this decision (see note in 17 Ves. Jr. 263) and held that Mrs. Atkyns took an estate in fee, and could not be restrained from committing waste. The injunction which had been granted pending the appeal (1 Ves. & B. 313) was, of course, dissolved. The case came again before Lord Eldon upon an application to restrain Mrs. Atkyns from applying the proceeds of the sale of any timber she might cut to her own use. Turn. & R. 143. Lord Eldon there stated that on reconsideration he had no doubt that the House of Lords was right in deciding that Mrs. Atkyns took an estate in fee, and not for life (Turn. & R. 154); but he nevertheless directed that the proceeds of any timber cut by her should be preserved until it could be decided to whom they would

belong on Mrs. Atkyns's death. She again appealed from this decision to the House of Lords; and the House of Lords reversed it, and held her entitled to those proceeds for her own benefit. This case was followed in *Re Williams* [1897] 2 Ch. 12, 66 L. J. Ch. N. S. 485, 76 L. T. N. S. 600, 45 Week. Rep. 519.

A gift "to the absolute use of my wife Harriet Smith, her heirs, executors, administrators and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her decease," was held to give the widow an absolute interest in the property, and there was no trust in favor of the children. *Re Adams*, L. R. 24 Ch. Div. 199, following *Lambe v. Eames*, L. R. 6 Ch. 597, 40 L. J. Ch. N. S. 447, 25 L. T. N. S. 175, 19 Week. Rep. 659, 25 Eng. Rul. Cas. 471.

The will provided: "And I bequeath the said proceeds to the said John Browne and Lankester Webb, their executors, administrators, and assigns, in the full confidence that they will carry out my wishes in respect thereof." It was held that parol evidence of a conversation in which the testator told a witness that he had given his wishes to the legatee was inadmissible. There was no suggestion that the testator's wishes were communicated to the legatees. *Re Downing*, 60 L. T. N. S. 140.

But some cases, especially in the lower courts, have held the opposite view. They are not now regarded of much weight.

The will in *Curnick v. Tucker*, L. R. 17 Eq. 320, gave property "for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at her decease, doing equal justice to each and all of them." It was held that there was a gift to the widow for life, with a trust imposed on the property in favor of the children, with the power of disposition between or amongst them as she might think best. This case was disapproved in *Re Adams*, L. R. 24 Ch. Div. 199, 52 L. J. Ch. N. S. 758, 48 L. T. N. S. 958, 32 Week. Rep. 120.

And the clause, "confiding in her, my said daughter, that she will not (by the said instrument) alienate or transfer my said estate from my nearest family,"—was held to impose a trust on Mary Evan in favor of the testator's heir at law, where she died without issue, as this was construed to be the meaning of the words "my nearest family." *Griffiths v. Evan*, 11 L. J. Ch. N. S. 219.

A will gave property to testator's wife "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just, true, and equitable spirit, and in such manner and way as she feels would meet with my full approval." It was held that the widow took the property only for life, with the power of bestowing or appointing it amongst the children, and all that was necessary to be decided now was what interest the children had. *Le Marchant v. Le Mar-* 37 L.R.A.(N.S.)

*chant*, L. R. 18 Eq. 414, distinguished in *Parnall v. Parnall*, L. R. 9 Ch. Div. 96, 26 Week. Rep. 851, 25 Moak, Eng. Rep. 801, and disregarded in *Re Adams*, supra.

The clause, "to and for her own absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children," was held to create a precatory trust in *Shovelton v. Shovelton*, 32 Beav. 143, distinguished in *Greene v. Greene*, 3 Ir. Eq. Rep. 90, 629, 17 Week. Rep. 487.

*Re Hutchinson*, L. R. 8 Ch. Div. 540, 39 L. T. N. S. 86, 26 Week. Rep. 904, followed *Lambe v. Eames*, L. R. 6 Ch. 597, 40 L. J. Ch. N. S. 447, 25 L. T. N. S. 175, 19 Week. Rep. 659, 25 Eng. Rul. Cas. 471, in preference to *Shovelton v. Shovelton*, 32 Beav. 143, 1 New Reports, 226; *Curnick v. Tucker*, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414, 22 Week. Rep. 839; and *Pigg v. Clarke*, L. R. 3 Ch. Div. 672, 45 L. J. Ch. N. S. 849, 24 Week. Rep. 1014.

After devising property to his wife, testator continued: "Entertaining as I do the most entire and implicit confidence that my said dear wife will during her life appropriate the same . . . and that she will bequeath so much and such part of my said estate and property hereby devised to her, as may be by her judicious management preserved for our family, unto and equally between and amongst all and every our dear child and children." It was held that the widow did not take the property absolutely. *Smith v. Smith*, 2 Jur. N. S. 967. This was on the ground that there was certainty of the gift and object, and that the words did not give a discretion to the widow to defeat it, but pointed out an increase of the fund for the benefit of those who were to take subject to her management. The only question decided was that the widow did not take the property absolutely.

With respect to a devise, "in full confidence that she, my said wife, will in every respect appropriate and apply the same unto and for the benefit of all my children," it was held that the widow took a life estate, with the power of appointment among all the children. *Ware v. Mallard*, 16 Jur. 492.

Property was devised with the statement: "Having a perfect confidence she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease." After the death of the testator, a bill was filed by two natural children, claiming that the widow had been previously instructed to give the whole of the property after her death to them. It was held that if this had been proved, it would have been a trust. *Podmore v. Gunning*, 7 Sim. 644.

#### Conjuncture.

Where a will provided: "I nevertheless earnestly conjure her, under the advice of my executors, to proceed, forthwith, to make ample provisions, by deed or will, for our only child and granddaughter. . . . All

the rest, residue, and remainder of my estates and affects, I give unto my said dear wife,"—it was held that no trust was created by the will. *Winch v. Brutton*, 14 Sim. 379. This was on the ground that the last clause showed that the intention of the testator was to give everything to his wife.

#### *Conviction.*

Where property was devised "under the firm conviction that she will dispose of and manage the same for the benefit of our children," it was held that the wife took the property as trustee for the benefit of the children. *Barnes v. Grant*, 26 L. J. Ch. N. S. 92, 2 Jur. N. S. 1127, distinguished, in *Greene v. Greene*, 3 Ir. Eq. Rep. 90, 629, 17 Week. Rep. 487.

#### *Desire.*

Where testator said: "It is my desire that she allows to my relative and companion, Anne Gregory, now residing with me, an annuity of £25 during her life, and that the said Anne Gregory shall if she desire it have the use of such portions of my household furniture, lien, etc., as may not be required by my daughter,"—it was held that there was no trust to pay the annuity, but only a request, and that was not binding in law. *Re Diggles*, L. R. 39 Ch. Div. 253. *Bowen, L. J.*, said: "But just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion."

With respect to the portions of wills set out, the following rulings were made: "I desire that, out of the residue of my property, my said executor will pay, or cause to be paid, to the aforesaid Caroline Anne Horde, over and above her said legacy, the sum of £180 annually during the term of her natural life, to be by her distributed in charity according to her own discretion and judgment, either to private individuals or public institutions, in such sum or sums, way and manner, as she shall from time to time choose, without limitation or control from any person whomsoever." It was held that the distribution of the charitable bequest was left to the absolute discretion of the legatee. *Horde v. Suffolk*, 2 Myl. & K. 59.

"Desiring her to provide for my daughter Anne out of the same, as long as she my said wife shall live, and after her decease to dispose of what shall be left among my children in such manner, as she shall judge most proper." It was held that there was no absolute trust for the children. *Pushman v. Filliter*, 3 Ves. Jr. 7. *Arden, M. R.*, said: "According to what the lord chancellor in *Malim v. Keighley*, 2 Ves. Jr. 333, says of *Cunliffe v. Cunliffe*, 2 Ambl. 686, if the mother could spend it, there is no trust; otherwise, if she could not; therefore *Cunliffe v. Cunliffe* is an authority for this decision."

"In trust for such of my nieces, Martha Paulton and Ursula Mellor Taylor as shall

be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." It was held the legatees took the residue for their own benefit. *Stead v. Mellor*, L. R. 5 Ch. Div. 225.

"It is my absolute desire, that my sister Mrs. Bridget Cruwys, which I have made my only executrix, bequeaths at her own death to those of her own family what she has in her own power to dispose of, that was mine, provided they behave well to her with decency and affection." The legatee made a will declaring that she made no disposition of her sister's property. It was held a trust for the next of kin of the last testatrix. *Cruwys v. Colman*, 9 Ves. Jr. 319.

But "desire" has been held mandatory in some cases, as follows:

Although property was given to testator's wife, yet it was his desire that if his children conducted themselves to her approbation, she would leave such property equally amongst all his children. It was held that this amounted to a trust in favor of the testator's children, and the class of the children to take were those who were living at the death of the widow. *Bonser v. Kinnear*, 6 Jur. N. S. 882, 2 Giff. 195.

The will provided: "It is my desire that my sons and daughters shall meet at the last place of my residence to compound and agree together and with each other for the division of my said goods and chattels, lands and tenements, by me given and bequeathed to them." It was held that the words, "it is my wish," were equivalent to "I will." *Moross v. McAllister*, 26 U. C. Q. B. 368.

A testator desired in his will that his executor should give the plaintiff £200. It was held to be a good legacy. *Brest v. Offley*, 1 Ch. Rep. 246.

Testator gave certain property to his wife, "but did desire her at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations, as she should think most deserving and approve of." She, by her will, gave her interest in the house to one, and the residue of her personal estate to others, but did not give the goods or jewels to her husband's relations. It was held that the "desire" was mandatory, and that the residue undisposed of would go to his next of kin. *Harding v. Glyn*, 1 Atk. 469, note.

A daughter by parol desired her mother to give £180, if she saw fit, to plaintiff, who brought suit for the same; the defendant admitted the request, but said she did not think fit. It was held to be a trust for plaintiff. *Jones v. Nabbs*, 1 Eq. Cas. Abr. 404, pl. 3.

In *Mason v. Limbury*, cited in *Vernon v. Vernon*, 1 Ambl. 4, the provision: "I give to my brother Robert Mason £2,000, which I desire him at his death to give to his son and his children, and to the children of his late daughter, as he should think fit,"—was held mandatory.

Under a clause, "If there is money left unemployed I desire it may be given in charity," it was held that the residue was properly given to charity. *Legge v. Asgill*, Turn. & R. 266, note.

#### *Entreat.*

The following provision: "Convinced of the high sense of honor, the probity and affection of my son-in-law, Edward Clarke, I entreat him, should he not be blessed with Children by my Daughter, and survive, that he will leave at his decease to my Children and Grandchildren the share of my Property I have bestowed on her,"—was held to create a trust. *Prevost v. Clarke*, 2 Madd. Ch. 458.

#### *Hope.*

In *Civil v. Rich*, 1 Ch. Cas. 309, the lord chancellor said: "He also remembered a case . . . in Lord Egerton's time where one possessed of leases for years devised them to his wife, and hoped she would leave them his son, and died. Her second husband granted the leases away; the son sued to be relieved, but was dismissed, for it was no trust for the son."

A devise "to my dearly beloved husband Admiral Watts, hoping that he will leave it after his death to my son, W. C. Watts, if he is worthy of it,"—was held not to create a trust, as the words of confidence were weaker than in most cases, while the expression giving control to the object of the gift was extremely strong. *Eaton v. Watts*, L. R. 4 Eq. 151. In this case the court said: "In some of the cases there is an uncertainty as to the property given; in others, as in *Meredith v. Heneage*, 10 Price, 306, uncertainty as to the person, which was the view Lord Eldon took of that case. The court ought to look not only at the particular passage, but at other expressions in the will explanatory of the degree of interest or power or control given to the person who is the object of the gift. None of the authorities appear to me to be inconsistent with Lord Alvanley's view in *Malim v. Keighley*, 2 Ves. Jr. 333, where he says the test is, 'Can the object defeat the gift?'"

Where the provision was "I give to my brother John Harland forever, hoping he will continue them in the family," it was held that there was no precatory trust, as the words did not clearly demonstrate an object. *Harland v. Trigg*, 1 Bro. Ch. Cas. 142.

#### *Knowing.*

Testator gave property "unto his son Charles Bardswell, his heirs, executors, administrators, and assigns, to and for his and their own use and benefit, well knowing he would discharge the trust the testator reposed in him, by remembering his (the testator's) sons and daughters." It was held that no trust was created for the sons and daughters. *Bardswell v. Bardswell*, 9 Sim. 319. This was on the ground that the testator had given the property to his

son absolutely, and had given a recommendation merely, of his other children, to the kindness of his son.

But in *Briggs v. Penny*, 3 Macn. & G. 546, the clause, "unto the said Sarah Penny of Great James Street, Bedford Row, her executors, administrators and assigns, well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes," was held to create a trust, and the legatee could not take beneficially. This case was distinguished in *Cowman v. Harrison*, 17 Eng. L. & Eq. Rep. 290; *Stead v. Mellor*, L. R. 5 Ch. Div. 225, 46 L. J. Ch. N. S. 880, 36 L. T. N. S. 498, 25 Week. Rep. 508; and *Irvine v. Sullivan*, L. R. 8 Eq. 673, 38 L. J. Ch. N. S. 635, 17 Week. Rep. 1083.

#### *May.*

The testator by parol said: "You may, if you please, give 180*l.* to my niece; but I leave it entirely to you." It was held that the niece was entitled to the money. *Nab v. Nab*, 10 Mod. 404. The excuse of the daughter was that the niece had behaved so that she had resolved to give her nothing.

#### *Not doubting.*

The phrase, "not doubting but that she will dispose of what shall be left at her death to our two grandchildren," was held not sufficiently certain to raise a precatory trust. *Wynne v. Hawkins*, 1 Bro. Ch. Cas. 179.

But in *Massey v. Sherman*, 1 Ambl. 520, "Not doubting but that my wife will dispose of the same to and amongst my children as she shall please,"—was held to raise a trust.

#### *Recommend.*

In case his son Ellis should happen to depart this life without a son or sons born of his body in his lifetime, or in due time after his death, then and in such case testator recommended it to him to give and devise the said sugar houses and joint stock in trade there to his brother. This was held not to be a trust but a mere recommendation. *Cunliffe v. Cunliffe*, 2 Ambl. 686. This decision has been considered overruled by *Pierson v. Garnet*, 2 Bro. Ch. 43. See *Pushman v. Filliter*, 3 Ves. Jr. 9. But see *Malim v. Keighley*, 2 Ves. Jr. 533. *Cunliffe v. Cunliffe* was distinguished in *Kirkbank v. Hudson*, 7 Price, 212.

*Pierson v. Garnet*, 2 Bro. Ch. 38, purported to distinguish the case on the ground that the opinion rested upon *Bland v. Bland*, 2 Cox, Ch. Cas. 349, and *Pynsent v. Pynsent*, saying: "This latter is not found, but upon the note we have of *Bland v. Bland*, we may say that case was not like *Cunliffe v. Cunliffe*. Certainty of the property, though one of the *sine qua nons*, was wanting."

A will provided: "I, however, beg to recommend to the consideration of my dear wife, in the event of her surviving me and making a will, the propriety of securing by

her will a portion of what she may dispose of to female relations. . . . But it is my express will and determination that this precautionary clause or power lastly provided for is not to do away with, or in the least deprive my said wife from exercising the entire right and will over my said property, should she be enabled to carry it into effect in the way I have before left it to her, or in any other most agreeable to herself." It was held that these words were merely precatory, and did not create a trust. This was on the ground that the words "most agreeable to herself" plainly showed that the desires and wishes which the testator before expressed were merely precarious. *Huskinson v. Bridge*, 4 De G. & S. 245.

A provision: "And after her decease, as to 2,000l., part of the said principal money, I give the same to be disposed by her will in such way as she shall think proper; but I recommend her to dispose of one half thereof, to her own relations, and the other half among such of my relations as she shall think proper,"—was held not to create a trust. *Johnson v. Rowlands*, 17 L. J. Ch. N. S. 438. *Bruce, V. C.*, said: "That the word 'recommend' in a particular instrument may amount to a command, and create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation, consistent with the legal and equitable power of the person recommended, to depart from the recommendation."

In *Prec. in Ch.* 201, note, it was said: "*Le Maitre v. Bannister* in *Can. MSS.* 26 November, 1770. The testatrix gave her fortune to Captain Roach, and if he should die without issue, she recommended it to him to do justice to A. and her children, if he should think them worthy of it; but if any unforeseen accident should make the whole, or any part, acceptable or serviceable to him, he might dispose of it, if he should think fit. It was held to be no trust."

Under a provision: "I earnestly recommend as part of this my last solemn will and testament, as follows: that if my grandson Frederick Solly Flood shall, during his future life, adopt and follow such line of conduct as shall merit her full approbation, my wish is," etc.,—it was held that these precatory words did not create a trust. *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1. This was on the ground that there should be a complete withdrawal of discretionary power from the legatee, or there would be no trust created. Besides, the words "earnestly recommend" were strong, but the next expression, "wish," was weaker, and when testator mentioned the subject of the wish, the first property to which he referred was not under his control, and this indicated the meaning of the word "wish."

A provision, I "recommend to my sister to settle and convey or join with her husband in settling and conveying all my estates and property, which she may derive from me after my own decease, to the use of her two daughters," was held to be discretionary, 57 L.R.A. (N.S.)

and not imperative. *Meggison v. Moore*, 2 Ves. Jr. 632.

And where the bequest was to such of the children of A. as his wife should by will direct: "Hereby expressly recommending to my said wife, in case my said daughters should have any more children, to provide in her Will for such child or children as may be hereafter born of my said two daughters, or either of them, so as to make as nearly equal with my present grandchildren as may be,"—it was held that the disposition by will in favor of the children living at the death of the widow was established against the claim of those born afterwards. *Paul v. Compton*, 8 Ves. Jr. 380. This was without any decision upon the word "recommendation." The lord chancellor said: "The cases upon words of commendation have, I take it, now settled this rule: Whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with regard to whom such terms are used are certain, and the subjects of property to be given are also certain, the words are considered imperative, and create a trust. But the questions are very different, whether the words of a will create a trust or a power. If the words are imperative, they do not create a power; but they execute themselves by the force of the terms."

So, under the sections of the wills set out the following rulings were made: "I strongly recommend her to execute a settlement of the said estate, and thereby to vest the same in trustees, to be chosen and approved of by her, for the use and benefit of herself and her assigns for her life; with remainder to her husband and his assigns for his life; with remainder to all and every the children she may happen to have, if more than one, share and share alike." It was held that the words of recommendation did not amount to a trust. *Ex parte Payne*, 2 Younge & C. Exch. 636.

"I leave to my dear wife aforesaid, recommending to her and not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her." It was held there was no trust for the next of kin; that the widow took absolutely. *Sale v. Moore*, 1 Sim. 534. The vice chancellor said: "Supposing that the words in this case would create a trust, those words are coupled with some degree of uncertainty. Who are the objects of the trust? Did the testator mean relations at his own death, or at his wife's death? Did he mean that she should have the liberty of executing the trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain. There is no ground for taking from the widow what the testator has not taken from her, but vested in her absolutely."

"Might be finally appropriated as she pleased, with the sum of £4,000 in money, but which sum he recommended her to divide in certain proportions." It was held



that no trust was created by these words. *White v. Briggs*, 15 Sim. 33.

"To be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her, for the purposes mentioned; at the same time recommending her not to diminish the principal, but to vest it in government or freehold securities." It was held that the wife took a life estate to use as she saw fit for herself and children. The court would not control her discretion, as it was not a trust for the children. *Hart v. Tribe*, 18 Beav. 215.

A devise was to Mary, who, "if she pleased, by will or assignment in her lifetime, might give that her estate to the children born of her body; and if she died without issue, it should be in her power to leave the same to whom she thought most deserving of it, recommending her to have a due regard to the aiding and assisting the relations and kindred of the testatrix's mother." Mary died and left the estate to her husband. It was held in a suit by other heirs that the recommendation was not mandatory. *Randal v. Hearle*, 1 Anstr. 124.

"And I do particularly recommend, desire, and direct my said wife, at her decease, by will or otherwise, to divide and dispose of what money or property she may have saved from the yearly income hereinbefore given to her, amongst all my children, in equal shares,"—was held too indefinite to constitute a trust for the children. *Cowan v. Harrison*, 17 Eng. L. & Eq. Rep. 290.

But in *Cholmondeley v. Cholmondeley*, 14 Sim. 590, under a provision: "I earnestly recommend her to take such measures as she may deem best for making it sure that, whatever she may inherit under this my will may go, at her decease, to her children; or, if she should not have any, then to the children of my dear sister Eliza,"—it was held that the children, at the mother's death, were entitled to the property. Vice chancellor said: "That it was quite clear that the plaintiffs, on the death of their mother, became entitled to the testatrix's residuary estate, as joint tenants, absolutely."

"I recommend to my said daughter and her said husband, that they do forthwith settle and assure the said sum of £10,000, together also with such sum of money of his own as the said William Ford shall choose, for the benefit of my said daughter Sarah Matilda, and her children." It was held that a trust was created. *Ford v. Fowler*, 3 Beav. 146. The court said: "The word 'recommend' as here employed is imperative, according to the authority of several cases; the subject of the recommendation, the disposition of which the testator had power to command, was the certain definite sum of £10,000, and the objects of the recommendation were the children of the daughter."

"Recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts

aforesaid, unto and among the children of my said daughter Anne Malim and my nephew John Lowe of Ferry Bridge; desiring, that his reputed daughter Emilia, though born before marriage, may be considered as one of his children." It was held that there was a trust under this recommendation. *Malim v. Keighley*, 2 Ves. Jr. 333. Arden, M. R., said: "If I was deciding upon the weight of the words, I rather think 'recommend' is stronger than 'desire.'"

This case was distinguished in *Trench v. Hamilton* [1895] 2 Ch. 370, 64 L. J. Ch. N. S. 799, 12 Reports, 355, 72 L. T. N. S. 748, 43 Week. Rep. 577.

"Recommending to them that the boys receive a classical education to fit them for the learned professions, and the girls to fit them for the purpose of teaching in respectable private families." It was held that these children were entitled as beneficial legatees. *Presant v. Goodwin*, 1 Swabey & T. 544. Sir C. Cresswell said, "By the words, 'all my remaining property,' it is manifest that the testator intended to deal in some manner with the whole of his residuary estate; he directs it to be placed in proper securities and appropriated to the education of his sister's children; not that a sufficient portion, or so much as his executors should think necessary, should be so appropriated, but 'all his remaining property.'"

"And I recommend that at a convenient time my money shall be collected together, and laid out in the purchase of a freehold messuage and tenement or lands which are freehold, to be a perpetual endowment for the two schools,"—was held to come within the statute of 9 Geo. II. chap. 36, providing that no manors, lands, etc., nor money to be laid out in lands,—be given for charitable uses unless by deed indented and executed before two witnesses, twelve months before the death of the donor; and such money and residue was held to belong to the next of kin. *Kirkbank v. Hudson*, 7 Price, 212.

*Rely.*

A gift was made: "To my wife and her heirs all my real and personal estate relying on her doing what is right." It was held that the words were too vague to create a trust; that the testator meant that the wife should dispose of the property as she saw fit. *Re Crockford*, 17 Week. Rep. 1004.

Where the provision was "to have, hold, and enjoy in the fullest and amplest manner for the term of her natural life, with full power to dispose of all the aforesaid property both real and personal, as she may judge best and wisest, relying with implicit confidence on her discretion, and well satisfied in my mind that she will make such distribution or disposal of it as will perfectly accord with my wishes on that subject, with all of which she is thoroughly acquainted,"—it was held that there was no precatory trust established by these words. *Reid v. Atkinson*, 5 Ir. Eq. Rep. 373, s. c. 5 Ir. Eq. Rep. 162. This was on the ground that the subsequent clause could not be used

to abridge the operation of the words preceding it. The objects of the alleged trust were not defined. This case was distinguished in *Corbet v. Corbet*, 7 Ir. Eq. Rep. 456.

But in *Horwood v. West*, 1 Sim. & Stu. 387, John Powell bequeathed to his wife, "relying on her, that if she should thereafter intermarry, she would secure to herself whatever she should possess herself of by virtue of his will, so that the same should not be subject to the debts, etc.," of her husband; and he "thereby recommended his wife that she should, by her will, give and bequeath what she should die possessed of under his will, in the manner following." It was held that the latter part of the bequest might seem to allude only to what might be undisposed of at her death, but that that intention was negated by the direction upon her marriage, which might happen at any time, to settle the whole, and it was held to be a trust for the parties named.

#### *Request.*

It has been frequently held that this has imposed a trust where the subject-matter was certain and the object was defined. The clauses of the wills involving the question, and the rulings made, were as follows:

"It is my request to him, that after reserving for his own absolute use and benefit the sum of £2,000, and applying all the interest, rents, and dividends arising from the above settled property to his own sole use and benefit during the term of his natural life, he will make such disposition of the remainder by will, deed, or settlement, as he may deem most desirable to carry out my wishes often expressed to him by word." It was held that as to the remainder a trust was intended. *Bernard v. Minshull*, 1 Johns. V. C. (Eng.) 276. This was on the ground that the testatrix never intended her husband to have any benefit from the appointment. While the whole of the £13,000 was appointed in the first instance to the husband absolutely, the testatrix did not use the words "for his own use and benefit," which she did in the subsequent part.

"I make no provision expressly for my dear daughter [the plaintiff] knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my said wife, in that case, I hereby request my friends Stables and Hunter to take care of and manage to the best advantage for my lovely daughter Harriot Nowlan." It was held to give the widow the whole estate for life, with the remainder absolute to the daughter. *Nowlan v. Nelligan*, 1 Bro. Ch. 489. It was claimed in this case that the words were precatory, and raised a trust for the benefit of the daughter.

"To my wife, requesting her to will the same to our children as she shall think best." It was held that the words were not precatory, but were directory, and a devise by the widow to one child was held insufficient. *L.R.A. (N.S.)*

cient, as it should be divided amongst all the children. *Finlay v. Fellows*, 14 Grant, Ch. (U. C.) 66.

"I request him to have the same, when paid out of the produce of the sale of the estate charged therewith, vested in good real security by mortgage, or in the purchase of real estates, and settled to the use of himself for his life, with remainder to his child or children, as he may appoint." As the devisee during life had elected to take under the will, it was held that the precatory words constituted a valid trust for the grandchildren. *Moriarty v. Martin*, 3 Ir. Ch. Rep. 26. This was on the ground that if the testator shows a desire that a thing should be done, unless there are plain words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated, the party should be considered as acting under a trust.

"To my brothers John and James, to be divided equally; with a request to John, that should he die without lawful issue, the property which I bequeath him shall revert back to my nephews." It was held that the words of request were imperative. *Re O'Bierne*, 1 Jones & L. 352.

"It is my dying request to the said Peter Pierson, that, if he shall die without leaving issue, living at his death, that the said Peter Pierson to dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt Anne Coppinger." It was held that the clause was imperative and created a trust. *Pierson v. Garnet*, 2 Bro. Ch. 38.

"I request my wife Ellen to pay to Philip Randeland' by whom it is admitted he intended this plaintiff, 'at her death, or should she sell the farm on which I now live before her death, four hundred dollars.'" It was held that this created a precatory trust. *Renehan v. Malone*, 1 N. B. Eq. Rep. 506. This was on the ground that the sentence containing the gift of the property for her use was immediately followed by that in which she was requested to pay. "A form of expression short of a positive direction, as strong as one could well select."

A bequest of heirlooms was made, "to my nephew, John Shelley, to go and be held as heir looms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on, to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heirlooms as aforesaid." It was held to be a trust, as the objects of the trusts were certain, being a series of eldest sons. *Shelley v. Shelley*, L. R. 6 Eq. 540.

And where a marriage jointure had been made, but was deficient by reason of the rents falling, and testator "requested and earnestly recommended it to his son to make up the same £500 per annum he would add thereto," it was held to be mandatory

and to raise a trust. *Vernon v. Vernon*, 1 Ambl. 4. This was because the object and the property were certain.

But in *Bland v. Bland*, 2 Cox, Ch. Cas. 349, the clause was: "And it is my earnest request to my son Sir John Bland, that on failure of issue of his body, he will some time in his lifetime, either by will or any other writing, settle the said premises or so much thereof as he shall stand seized of at the time of his decease, so and in such manner as that on failure of issue of his body the same may come to my daughter." It was held that the words of the testatrix were not imperative, as there was no request to settle any of the land, but a power to dispose of during life; and only so much as he should stand seized of at his death, she requests he should settle.

"It is my request, should my Mother survive me, that she will leave £500 a piece to each of my Sister Jemima's three Daughters, and £1,000 to Alicia Blakeney's eldest Daughter; £500 to Mrs. E. Harvey; and the remainder of my property to my Sister Alicia Blakeney, to dispose of amongst her Children as she may think proper." It was held that Alicia Blakeney took no interest under this will. *Blakeney v. Blakeney*, 6 Sim. 52.

"Requesting that she will at her death leave £200 to each of the Miss Nortons, and leave the remainder of her Property to my Nephews, George and William Eade, in such proportions as she thinks proper." It was held that the legacies to the Miss Nortons were secured, but the testator's wife held the residue in exclusion of the nephews. *Eade v. Eade*, 5 Madd. Ch. 118. The vice chancellor said: "I cannot say that by the remainder of her property at her death, he meant the remainder of his property." This case was distinguished in *Cowman v. Harrison*, 17 Eng. L. & Eq. Rep. 290.

"Unto my said son John requesting him that if he should not find an opportunity to dispose of my freehold estate at Whitchurch greatly to his advantage and for the benefit of his family that the said estate should belong after him to his eldest son." It was held that no trust was created and that the son took the estate for his own benefit. *House v. House*, 23 Week. Rep. 22. *Satisfied*.

Under a will giving property "to my beloved wife Mary Reeves, her heirs and assigns, forever, being fully satisfied that, if it please God to take me first, she will dispose of the same, by will or otherwise, in a fair and equitable manner, to our united relatives," it was held that this was not a precatory trust. *Reeves v. Baker*, 18 Beav. 372. The court said: "The subject of the trust may be said to be certain, because it is the property given to the wife; but the objects are uncertain, and the course or manner in which they are to take is left in the most perfect state of obscurity."

*Trusting*.

This word was generally held not to im-

pose a trust. But where the devisee took only a limited estate, and the objects and subjects were clearly defined, it was held to impose a trust. The provisions of the wills and the rulings thereon are as follows:

"Trusting that she will, in fear of God and in love to the Children committed to her care, make such use of it as shall be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the Poor." It was held that the wife took absolutely, as she could at her pleasure diminish the capital. *Curtis v. Rippon*, 5 Madd. Ch. 434.

"I hereby give and bequeath the same to Emblyn D'Arcy Irvine, widow, absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator before making the will had told the legatee what he wanted done and she made a memorandum. It was held that the legatee took the property subject only to the testator's wishes, which he had previously communicated to her, and as to the balance of the property she took it absolutely. *Irvine v. Sullivan*, L. R. 8 Eq. 673. The court said: "The testator does not merely direct that 'the money shall be paid by my said trustees to Mrs. Irvine,' but he directs that it shall be paid by the trustees to her, 'trusting that she will carry out my wishes.' Then he introduces emphatically the words, 'and I hereby give and bequeath the same to her absolutely.'" This case was approved in *Re Williams* [1897] 2 Ch. 12, 66 L. J. Ch. N. S. 485, 76 L. T. N. S. 600, 45 Week. Rep. 519.

"I trust to the liberality of my successors to reward any others of my old servants and tenants, according to their deserts; and to their justice, in continuing the estates in the male succession, according to the will of the founder of the family, my above-named grandfather Richard Knight,"—was held not to raise a trust and created no obligation. *Knight v. Boughton*, 11 Clark & F. 513, affirming *Knight v. Knight*, 3 Beav. 148. In this case the testator himself had suffered a recovery, and thereby converted the entail into a fee simple; besides the clause was not confined to his immediate successors, but was without limit. It was not clear to what property it referred. It might be confined to the estate which the grandson took from his grandfather, but this was not defined. *Knight v. Knight* was distinguished in *Shelley v. Shelley*, L. R. 6 Eq. 540, 37 L. J. Ch. N. S. 357, 16 Week. Rep. 1036.

"For her own use and disposal, trusting that she will make such a disposition thereof as shall be just and proper among the children." It was held that this gave an absolute title to the widow. *Nelles v. Elliot*, 25 Grant, Ch. U. C. 329. This was on the ground that the language used gave the wife a discretion to exercise her judgment.

"And my reason for so doing is the constant abuse of trustees which I daily wit-

ness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be for their good." It was held that no trust was created for the children. *Pope v. Pope*, 10 Sim. 1. *Shadwell, V. C.*, said: "But it seems to me that the expression, 'what property there may be,' means such property as might happen to exist, having regard to the fact that the wife might sell or alien a part of it."

"Upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children." It was held that there was no trust created for the children. *Webb v. Wools*, 2 Sim. N. S. 267, 21 L. J. Ch. N. S. 625. This was on the ground that, the expressions of trust and confidence being in the same sentence in which an absolute gift was made, they were stated only in a way of expressing his gift. This case was distinguished in *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414, 22 Week. Rep. 839.

"Trusting and wholly confiding in his honor, that he will act in strict conformity with my wishes." It was held that the legatee took the personal property absolutely, subject only to the legacies specified, and others which he admitted the testatrix, had personally directed. *Wood v. Cox*, 2 Myl. & C. 684, reversing 1 Keen, 317. The court said: "Certainly she did not use these words in their absolute and unrestricted sense, as to the whole of her property, namely, as to that part which would be required to pay the legacies given to others, or in other words to execute her wishes."

A devise in tail was made "upon special trust and confidence in his said son that in case he should leave no issue of his own body lawfully begotten, he his said son would not do or suffer any act in law or otherwise to obstruct or prevent the following devise, trusts, and limitations of the said testator's estate and plantations from taking effect; but, on the contrary, that he the said Richard would do or cause to be done every act in his power to establish or confirm the same." The devisee suffered a recovery. It was held that there was no express trust, but an injunction against barring the estate tail, and that this could not be done. *Dawkins v. Penrhyn*, L. R. 4 App. Cas. 51.

But in *Baker v. Mosley*, 12 Jur. 740, "trusting that he would preserve the same, so that after his decease it might go to and be equally divided between his then present son and three daughters,"—was held to create a trust, as the intention of the testator was clear.

In *Fordham v. Speight*, 23 Week. Rep. 782, the Master of Rolls approved *Baker v. Mosley*, 12 Jur. 740; *Ware v. Mallard*, 16 Jur. 492, and *Palmer v. Simmonds*, 2 Week. Rep. 313, 2 Drew, 221.  
37 L.R.A. (N.S.)

"Trusting that she would thereout provide for and maintain his family and particularly his only son; and, at her decease, give and bequeath the same to her children by him, in such manner as she should appoint." It was held that the wife could appoint only by will, and that the children living at her death were alone entitled to share in the portion which was not appointed. *Walsh v. Wallinger*, 2 Russ. & M. 78.

And where a devise was made of the copyhold estate, and "gave and bequeathed to her all his effects whatsoever or wheresoever for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects might be left in money, goods, or otherwise, to his children,"—it was held that the widow was entitled to the copyhold estate for life only, with a trust as to the capital for the heirs. *Wilson v. Major*, 11 Ves. Jr. 205. This was on the ground that the wife took only a life estate by the first words, and could not take an absolute interest by the subsequent words.

Where a testator devised to stated trustees, "but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of," it was held that the subject and object were pointed, out, and the object was charitable uses, and the trust was held void under the statute mortmain, and the estate passed to the right heirs of the testator. *Pilkington v. Boughey*, 12 Sim. 114.

#### *Will and desire.*

Under a provision: "My will and desire is, that he will give the said three hundred pounds unto his daughter Susan," it was held that the words "I desire" or "I will" amounted to an express devise. *Eeles v. England*, 2 Vern. 467.

The will provided: "I give to my dear wife, Ann Cotterel, the sum of £500; and it is my will and desire that my said wife, Ann Cotterel, may dispose of the same among her relations, as she by will may think proper." It was held to be a trust for the relations of the legatee. *Forbes v. Ball*, 3 Meriv. 436.

But a devise of a perpetual advowson to the testator's mother-in-law, "willing and desiring her to sell and dispose of the said perpetual advowson and patronage, with the appurtenances, as soon as she conveniently and lawfully may sell and dispose thereof, to the fellows of Eton college in the county of Buckingham, and their successors,"—was held not to be a trust for the heirs. *Hill v. London*, 1 Atk. 618.

#### *Wish.*

The real question in cases where the word "wish" is used is whether the wish that was expressed by the testator was meant to govern the conduct of the party to whom it was addressed, or whether it was merely an indication of that which he thought

would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion. In the following cases it was held not a trust:

"It is my wish that whatever property my wife might possess at her death be equally divided between my children." *Parnall v. Parnall*, L. R. 9 Ch. Div. 97.

"And I do hereby declare it to be my earnest wish, that my said sister shall reside at Gravesend with my dear wife, during her life." *Graves v. Graves*, 13 Ir. Ch. Rep. 182. (The lord chancellor said: "If these ladies cannot agree to live together on friendly terms, I cannot compel them.")

"It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one, not of your family, should be the better for what, I feel confident, you will so well direct the disposal of." *Williams v. Williams*, 1 Sim. N. S. 358. (The vice chancellor said: "By the same codicil, the testator shows a clear intention that the wife might, in her discretion, give to remoter descendants; and this latter intention can be effectuated only by supposing that all his expressions narrowing the wife's absolute interest were intended merely as an expression of the testator's wishes, without meaning to make them obligatory.")

"And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable." *Bank of Montreal v. Bower*, 18 Ont. Rep. 226, affirming 17 Ont. Rep. 548. (Boyd, C., said: "If the entire interest in the subject of the gift is given with super-added words expressing the nature of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created.")

"And I wish them to bequeath the same equally between the families of." *Re Hamilton* [1895] 2 Ch. 370. (This was on consideration of the whole will, the court preferring to follow the rule in *Re Adams*, L. R. 27 Ch. Div. 394, on this point. The judge said: "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust," rather than *Malim v. Keighley*, 2 Ves. Jr. 333, which held: "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." It 37 L.R.A. (N.S.)

was also said that the word "families" was a vague word.)

Where a letter expressing the testator's desires was admitted to probate, stating: "It is my wish that you should have some one nephew (son of Henry or George, should either of them marry, and have male offspring) educated as a physician, and that you bequeath to such nephew, being so educated, all or the greater part of the property, the interest of which I now bequeath to your dear aunt, and after her to yourself. It having been the toil of my days to accumulate this property, I wish it first to benefit your dearest beloved aunt, next yourself, and finally such nephew as you may select as your successor,"—it was held to be recommendatory only, and not mandatory. *Re Pinckard*, 4 Jur. N. S. 1041. The court said: "The expression in the letter, 'that you bequeath to such nephew, being so educated, all or the greater part of the property,' left the testator's nephew Richard in a position which enabled him to dispose of the remainder as he might think fit."

Where a person left by his will all his property to his executor, and also wrote him a letter denoting how he wished some of the money to be given, but left it to the executor, "as he might think best," and entirely to his judgment,—it was held there was no trust created. *McCormick v. Grogan*, L. R. 4 H. L. 82.

Where a testator left his property in secret trust, and said: "I will leave the property to the two Jacksons: they know my wishes, and I am satisfied they will carry out my intentions." It was held that the trust was void. *Russell v. Jackson*, 10 Hare, 213.

"In case there is any money remaining I should wish it to be given in private charity." It was held that the private charity was too indefinite to enable the court to execute the trust, and that the executors could not take beneficially, and the next of kin were entitled to the same. *Ommanney v. Butcher*, Turn. & R. 260. The master of the rolls said: "Can the trust be discovered from the expression 'I desire it may be given in private charity?' Because a trust, to be carried into execution by the court, must be of such a nature that it can be under the control of the court (*Morice v. Durham*, 10 Ves. Jr. 539); if the trust cannot be ascertained, the court cannot see to the execution of it; it becomes too general and indefinite, and the consequence is that the fund must either go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin; if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take; and on the other hand, if the party selected to make the distribution is to take, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion of the party to apply the fund or not."

But it was held imperative in the following cases:

Where a testator had power to appoint the produce of a policy amongst his children, and by his will he bequeathed his personal property to his daughter, and by another writing he directed her as to the insurance money, and stated: "The money from the Equitable Insurance Office I would have equally divided between my daughters, Frances, Gertrude and Agnes." *Proby v. Landor*, 28 Beav. 504.

"It is my dying wish that the property which I now bequeath to my wife shall be used as to her seemeth best for her own and her children's welfare." *Godfrey v. Godfrey*, 11 Week. Rep. 554. (Wood, V. C., said: "The word 'wish' used by the testator did not render the direction to apply the property for the benefit of the children less imperative. In several of the cases where precatory words were held to create a trust, there were very strong indications of an absolute gift, followed by a wish that the property should be applied for certain objects. Here the words amounted only to an ordinary gift to the widow in trust for herself and her children.")

"I wish and desire that my daughter shall make a competent provision for my niece Mrs. Baby, at Hamilton." *Baby v. Miller*, 1 U. C. Err. & App. 218. (Robinson, Ch. J., said: "I take it to be the law still, that words of a testator intimating a request, wish, or desire are sufficient, when they are so plain and unequivocal as in this case, to create a trust, provided there be certainty of the gift and of the object to be benefited.")

"It is my particular wish and request, that my dear wife and Walter Williams, Esq., the grandfather of the said William Walter Foley, will superintend and take care of his education, so as to fit him for any respectable profession or employment." *Foley v. Parry*, 2 Myl. & K. 138, affirming 5 Sim. 138. (It was said: "It cannot be denied that the precatory words are as strong as in almost any of the cases on the subject, and much more precise than in most of them.") This case was distinguished in *Shaw v. Lawless*, 5 Clark & F. 129, 1 Drury & Wal. 512, Lloyd & Goold (t. Plunket) 558.

### III. *Recommending the employment of an agent or attorney.*

It is generally held that there is no trust in favor of a person recommended to be retained or employed, and such a request is not binding on the devisee.

A will provided: "I direct and desire that my friend, Charles McLouth, the draftsman of this will, who has been my attorney and adviser for many years and has had charge of all my legal business, shall be continued in the management of my estate, so far as legal advice or assistance shall be necessary or had by my executors." It was held that this was not a trust in favor of the attorney, and that the execu-

tors could employ others at their discretion. *Re Thistlethwaite*, 104 N. Y. Supp. 264. The clause in question was held to be one merely of suggestion, and not of direction or command, and did not create a trust.

A will provided: "It is also my particular desire, that my said executors, whilst acting in the management of all or any of my affairs under this my will, as also my friend William Shaw, when he shall be entitled to enter into the receipt and perception of my said rents of Kentstown, Veldanstown, and Knockirk, shall continue the said Barry Edward Lawless in the receipt and management thereof, and shall likewise employ and retain him in the receipt, agency, and management of the rents and issues of all such other lands and premises as shall or may be purchased." It was held that there was no precatory trust requiring the owner of the life estate to retain the agent as his rent collector. *Shaw v. Lawless*, 5 Clark & F. 129.

Under a provision that "my solicitor, W. E. Foster, shall be the solicitor to my estate and to my said trustees in the management and carrying out of the provisions of this my will," it was held that the direction in this will imposed no trust on the trustees to continue the solicitor in his position. *Foster v. Elsley*, L. R. 19 Ch. Div. 518.

A will provided: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitles him to." After this the employee remained some time with the firm, although his salary had been cut down; the firm changed hands, and he was finally discharged. This was held not to create a trust, and it was held not to be a charge of annuity on the widow. *Jewell v. Barnes* (*Jewell v. Louisville Trust Co.*) 110 Ky. 329, 53 L.R.A. 377, 61 S. W. 360. The court said: "The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business."

Testator provided: "I hereby select as the attorney of my estate John W. Mitchell, and direct my executrix to consult and employ him in all matters pertaining to the distribution of my estate, and the requirements of this my last will." It was held that this did not constitute a selection which was binding upon the executrix, but was simply an advisory provision which she could disregard if she chose. *Re Ogier*, 101 Cal. 381, 40 Am. St. Rep. 61, 35 Pac. 900.

A will provided: "I recommend she appoint a good agent to take charge of my real estate. I also give her discretionary power to give such sums of money to any as she may think prudent of my relatives." It was held that the discretionary power was inconsistent with the knowledge on his part that he had literally given her his whole property absolutely. It was therefore held that the widow only took an estate for life in the real and personal property. *Re McClure*, 136 N. Y. 238, 32 N. E. 758. The

court said: "It is quite true that where there is a primary devise so framed as to convey a distinct and definite estate, it will not be cut down by later words which are merely ambiguous and inferential (*Clarke v. Leupp*, 88 N. Y. 231), and that, if the gift here in question had stopped with the words 'to have and to hold,' it would have been sufficient to have passed an absolute estate. But it did not stop there, and some of the after words are not at all ambiguous. They are clearly repugnant, for they take away the absolute power of disposition, or they mean nothing. On the other hand, the words of primary devise are not inconsistent with a life estate (*Terry v. Wiggins*, 47 N. Y. 515); and the theory of such an estate intended harmonizes and makes consistent all the words of the testator."

But in *Tibbits v. Tibbits*, 19 Ves. Jr. 657, testator said: I "recommend to my said son to continue his cousins James Tibbits and Richard Tibbits in the occupation of their respective farms in the county of Warwick as heretofore and so long as they continue to manage the same in a good and husband-like manner and to duly pay their rents." This was held to be a trust for the cousins. Eldon, L. C., said: "This is not like the plain uncertainty that occurs in the case of words of recommendation or confidence applied to 'what shall be left' at the death of the testator's wife, to whom the property is given in the first instance." This case was distinguished in *Shaw v. Lawless*, 5 Clark & F. 129, 1 Drury & Wal. 512, *Lloyd & Gould (t. Plunket)* 558, and *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1.

In some cases and by some writers the term "precatory trust" was used where there were no precatory words, as, "I give my wife my property for the purpose of taking care of and educating our children." In such cases the trust attaches or not according to the purpose of the gift being annexed to the gift. This distinction does not seem to have been noticed in some cases where they say this was or was not a precatory trust. This class of cases is not intended to be included in this note, as they belong rather to the general subject of trusts, and the cases considered herein are only those where precatory words were used by the testator. I. T.

#### CALIFORNIA SUPREME COURT. (In Banc.)

SAN PEDRO, LOS ANGELES, & SALT  
LAKE RAILROAD COMPANY, Resp't.,  
v.

LOUISE M. HAMILTON et al., Appts.

LOUISE M. HAMILTON et al., Appts.,  
v.

SAN PEDRO, LOS ANGELES, & SALT  
LAKE RAILROAD COMPANY, Resp't.

(— Cal. —, 119 Pac. 1073.)

#### Water — tide land — definition.

1. A constitutional provision forbidding  
37 L.R.A. (N.S.)

the grant into private ownership of tide lands fronting on bays or harbors will be construed to embrace all lands submerged by tidal water, and not limited merely to that which is covered and uncovered by the daily influx and reflux of the tide.

Statute — special legislation — confirming leases.

2. Confirming leases made by municipalities of tide lands lying within their bays or

*Note. — Public lands: prohibition of grant as including lease.*

An extended search discloses no case except *SAN PEDRO, L. A. & S. L. R. Co. v. HAMILTON* in which the question under annotation has arisen. The general question whether the terms "grant" and "sell" include or exclude leases, however, is one not generally dependent upon precedent, since in practically every instance the scope of such terms must be determined from their connection and the manner of their use; and for this reason, if for no other, each case would be a law unto itself, except, of course, in rare instances, where the facts involved in any two or more cases might be identical or nearly so. As illustrative of this dependency upon the purpose and context of the enactment under consideration in each particular instance it may not be amiss to refer to a few cases involving the question whether or not a lease is included in the terms "grant," "sell," etc., although no attempt has been made to compile the decisions on any point other than that stated in the title. Thus, in *Falls County v. De Laney*, 73 Tex. 463, 11 S. W. 492, a constitutional provision permitting a county to "sell or dispose of its [school] lands in whole or in part" was held to confer power upon counties to derive a revenue from their lands by lease, if such a disposition would be deemed best for the interests of the public schools. And that the term "grant" may include leases, see *Carlton v. Williams*, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. 185, wherein it was held that a lease was a "grant" within the meaning of a statute providing that "no estate in real property of a married woman passes by any grant purporting to be executed or acknowledged by her unless the grant or instrument is acknowledged by her in the manner," etc. Here, however, it is obvious that the term "grant" was used in a broad sense.

But aside from the question of the obvious purpose of a statute, or of the use of other words indicative of the meaning of the words attached to the term "grant," it would seem that a lease is not a grant within the meaning of that term, and that therefore merely prohibiting the sale or grant of public lands would not prohibit the leasing thereof. In fact, as late as 1893, the supreme court of Iowa, in *Des Moines County Agri. Soc. v. Tubbesing*, 87 Iowa, 140, 54 N. W. 68, said: "We are unable to find a single instance where the word 'grant' is construed as 'lease,' without other words to control its meaning." G. J. C.

harbors is not within the constitutional inhibition of special legislation.

**Government land — prohibition of grant — lease.**

3. A constitutional prohibition of the grant or sale of tide lands fronting on any harbor or bay within 2 miles of any municipality does not forbid leases of such lands.

(December 19, 1911.)

**A** PPEAL by defendants from a judgment of the Superior Court for Los Angeles County in plaintiff's favor in an action brought to quiet title to certain lands. Affirmed.

**A** PPEAL by plaintiffs from a judgment of the Superior Court for Los Angeles County in defendant's favor in an action brought to recover damages for wrongfully withholding certain land from plaintiffs. Affirmed.

The facts are stated in the opinion.

Messrs. Grant Jackson and Keefer & Bowers, for appellants:

The act of the legislature of 1907, approving the execution of the lease, is special legislation.

Rauer v. Williams, 118 Cal. 401, 50 Pac. 691; People v. Central P. R. Co. 83 Cal. 402, 23 Pac. 303; Philadelphia v. Westminster Cemetery Co. 162 Pa. 105, 29 Atl. 349; Com. ex rel. Fertig v. Patton, 88 Pa. 258; Pennsylvania R. Co. v. Burlington, 58 N. J. Eq. 547, 43 Atl. 700, 50 N. J. Eq. 259, 38 Atl. 849; State ex rel. Columbus v. Mitchell, 31 Ohio St. 607; State ex rel. Atty. Gen. v. First Judicial Dist. Judges, 21 Ohio St. 11.

The act of the legislature ratifying the lease was enacted in violation of the provisions of § 3, article 15, of the Constitution of 1879.

Denning v. State, 123 Cal. 321, 55 Pac. 1000; People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878; Van Deventer v. Lott, 103 C. C. A. 524, 180 Fed. 378; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Oakland v. Oakland Water Front Co. 118 Cal. 160, 50 Pac. 277; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Williams v. San Pedro, 153 Cal. 44, 94 Pac. 234.

The terms "convey," "grant," "sale," and "sell" include "leases."

Jones v. Marks, 47 Cal. 242; Garber v. Gianella, 98 Cal. 527, 33 Pac. 458; Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130; Sanford v. Johnson, 24 Minn. 173; Lembeck & B. Eagle Brewing Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 794; Cross v. Weare Commission Co. 153 Ill. 499, 46 Am. St. Rep. 905, 38 N. E. 1038; McDonald v. 57 L.R.A.(N.S.)

Hanlon, 79 Cal. 442, 21 Pac. 861; Carlton v. Williams, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. 185; San Francisco & O. R. Co. v. Oakland, 43 Cal. 502; Davis v. Pollock, 36 S. C. 550, 15 S. E. 718; Darby v. Callaghan, 16 N. Y. 72; Krider v. Lafferty, 1 Whart. 314; Whitney v. Richardson, 59 Hun, 601, 13 N. Y. Supp. 861; 1 Devlin, Deeds, § 9; 2 Bl. Com. 310, 317; Jackson ex dem. Webber v. Harsen, 7 Cow. 326, 17 Am. Dec. 517; McKee v. Howe, 17 Colo. 538, 31 Pac. 115; Craig v. Summers, 47 Minn. 189, 15 L.R.A. 236, 49 N. W. 742; Gray v. La Fayette County, 65 Wis. 567, 27 N. W. 311; State ex rel. Winston v. Morrison, 18 Wash. 664, 52 Pac. 228; Crouse v. Michell, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32; Chandler v. Jost, 81 Ala. 411, 2 So. 82; Shakespeare v. Alba, 76 Ala. 354; Warren v. Wagner, 75 Ala. 197, 51 Am. Rep. 446; State v. Baxter, 50 Ark. 453, 8 S. W. 188.

Messrs. John W. Shenk, Leslie R. Hewitt, and Anderson & Anderson, *amici curiæ*, for the city of St. Louis: Tide lands proper,—that is, lands which are covered and uncovered by the flux and reflux of the tides,—constituting the shore of navigable waters, are held upon the same tenure that the totally submerged lands are held.

Ward v. Willis, 51 N. C. (6 Jones, L.) 183, 72 Am. Dec. 572; People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 735, 125 Am. St. Rep. 93, 93 Pac. 878; Oakland v. Oakland Water Front Co. 118 Cal. 160, 50 Pac. 277; State ex rel. McKenzie v. Forrest, 11 Wash. 227, 39 Pac. 684; Columbia & P. S. R. Co. v. Seattle, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725.

Mr. W. R. Kelly, with Messrs. A. S. Halsted and Miner P. Goodrich, for respondent:

Whether or not the city of Long Beach had authority to execute the lease of October 2, 1905, cannot be questioned by defendants on this appeal.

Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Hendricks v. Feather River Canal Co. 138 Cal. 423, 71 Pac. 496; Hanna v. DeGarmo, 140 Cal. 174, 73 Pac. 830; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Doyle v. Franklin, 48 Cal. 537; Spencer v. Houghton, 68 Cal. 86, 8 Pac. 679; Cameron v. San Francisco, 68 Cal. 301, 9 Pac. 430; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; Beardley v. Clem, 137 Cal. 328, 70 Pac. 175.

The act of the legislature of March 23, 1907, ratifying the execution of the lease in question, is valid.

Hellman v. Schoulters, 114 Cal. 147, 44 Pac. 915, 45 Pac. 1057; Ex parte Sohnecke, 148 Cal. 262, 2 L.R.A.(N.S.) 813, 113 Am. St. Rep. 236, 82 Pac. 956, 7 Ann. Cas. 475; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352;



State ex rel. Board of Education v. Brown, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; Flynn v. Little Falls Electric Light & Water Co. 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; State v. Squires, 26 Iowa, 340; Fair v. Buss, 117 Iowa, 164, 90 N. W. 527; Givens v. Hillsborough County, 46 Fla. 502, 110 Am. St. Rep. 104, 35 So. 88; Redlands v. Brook, 151 Cal. 474, 91 Pac. 150.

The act of the legislature ratifying the lease is not in violation of the provisions of § 3, article XV., of the Constitution of 1879.

Taylor v. Underhill, 40 Cal. 471; Upham v. Hoaking, 62 Cal. 258; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Williams v. San Pedro, 153 Cal. 46, 94 Pac. 234; Grogan v. San Francisco, 18 Cal. 590; Hart v. Burnett, 15 Cal. 530; McCracken v. San Francisco, 16 Cal. 623; Rowell v. Perkins, 56 Cal. 226; People ex rel. State Harbor v. Broadway Wharf Co. 31 Cal. 40.

The words "grant" or "sale," in the state Constitution, and the words "sell" or "convey," in the municipal corporation act, do not prohibit the making of "leases."

Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Gross v. Fowler, 21 Cal. 392; Houghton's Appeal, 42 Cal. 52; Weill v. Kenfield, 54 Cal. 111; Farrell v. Sacramento, 85 Cal. 413, 24 Pac. 868; Re McCoy, 10 Cal. App. 143, 101 Pac. 419; Oakland Paving Co. v. Hilton, 69 Cal. 491, 11 Pac. 3; Simonson v. Burr, 121 Cal. 582, 54 Pac. 87; Sullivan v. Barry, 46 N. J. L. 1; New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Toney v. Brace, 8 Paige, 598; Perkins v. Morse, 78 Me. 17, 57 Am. Rep. 780, 2 Atl. 130; Mott v. Ruckman, 3 Blatchf. 71, Fed. Cas. No. 9,881; Des Moines County Agri. Soc. v. Tubbessing, 87 Iowa, 138, 54 N. W. 68; Hutchinson v. Bramhall, 42 N. J. Eq. 372, 7 Atl. 873; Den ex dem. Mayberry v. Johnson, 15 N. J. L. 116; 7 Am. & Eng. Enc. Law, 2d ed. 487; Jeffers v. Easton, E. & Co. 113 Cal. 352, 45 Pac. 680; Abendroth v. Greenwich, 29 Conn. 356; Stewart v. Powers, 98 Cal. 518, 33 Pac. 486; Dayton v. Nell, 43 Minn. 246, 45 N. W. 231; Coutant v. Servoss, 3 Barb. 133; Spicer v. Norton, 13 Barb. 546; Bradish v. Yocum, 130 Ill. 391, 23 N. E. 114; Grant v. Levan, 4 Pa. 425; McDonald v. Campbell, 2 Serg. & R. 474; Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; Grubbe v. Grubbe, 26 Or. 363, 38 Pac. 182; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; Grant v. Ede, 85 Cal. 418, 20 Am. St. Rep. 237, 24 Pac. 890; Martin v. Ede, 103 Cal. 160, 37 Pac. 199; Lambert v. Gerner, 142 Cal. 403, 76 Pac. 53.

Messrs. W. C. Petchner and Benjamin E. Page, *amici curiæ*.

The lands in question were submerged lands, and not tide lands, and therefore are 37 L.R.A.(N.S.)

not within the prohibition of the Constitution, article XV.

Oakland v. Oakland Water Front Co. 118 Cal. 160, 50 Pac. 277.

Mr. H. M. Barstow, *amicus curiæ*:

The confirmatory act of March 23, 1907, confirming tide-land leases, is a general law.

Upham v. Hoaking, 62 Cal. 259; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352; Redlands v. Brook, 151 Cal. 474, 91 Pac. 150.

Henshaw, J., delivered the opinion of the court:

The above-entitled cases involve a consideration of the same legal questions. The former case is an action to quiet title, the latter an action in ejectment, both between the same parties.

The facts found by the court, over which there is no controversy, may be briefly stated. In 1903 the government of the United States was engaged in the improvement of the harbor of San Pedro. The work contemplated a deepening of the "inner harbor" (an estuary or arm of the sea), the rectification of the inner harbor lines, the construction of jetties delimiting those lines, and to the seaward the construction of an enormous breakwater which, in a great sweep or curve, extends across the entrance to the inner harbor, and, while protecting it, affords safe anchorage to vessels on its landward side. Much dredging was necessary to deepen the inner harbor. The disposition of the material dredged was important. If cast into the ocean, the refluxing tides would carry it back to the inner harbor. This being the condition in April, 1903, the United States government entered into a contract with the San Pedro Railroad Company, by which it was agreed that the corporation would build in the Pacific ocean, east of the inner harbor and of the government jetty bounding that harbor upon the east, a sea wall and retaining wall which would protect and confine not less than 2,500,000 cubic yards of the material dredged by the government from the inner harbor, and permit the government to pump its dredged material onto the corporation's land. The object to be attained was one of mutual benefit to the contracting parties. The government, upon the one hand, would thus safely and economically dispose of the dredged material, and the corporation, upon the other hand, would receive the benefit of this dredged material in the contemplated reclamation of tide and submerged lands fronting on the Pacific Ocean. Thereafter the railroad company obtained a lease from the city of Long Beach, a municipality of the sixth class, whose jurisdiction then extended over the territory in question, to a tract of land including the lands in contro-

veray. It then proceeded, at an expense of \$30,000, to build the retaining wall. The government deposited the materials dredged from the inner harbor within the confines of the wall, and thus were reclaimed from the Pacific Ocean the lands here in controversy. Thereafter, on March 23, 1907, the legislature of the state of California passed a validating act, ratifying leases of a certain class, within which class this lease admittedly comes. Of the greater part of the lands in controversy, the railroad company has been in possession under its lease. To a minor portion of the lands, in the possession of Louise M. Hamilton and her husband, the railroad company has claimed the right of possession.

The foregoing outlines the railroad company's claim of title. Louise M. Hamilton, defendant in the one action, plaintiff in the other, claimed a right of possession to a portion of the lands by virtue of her attempt to comply with the provisions of the possessory act of 1852. Stat. 1852, p. 158. Without regard to the question whether this act has been repealed, it is sufficient to say that the act contemplates the occupation of public lands "for the purpose of cultivating or grazing the same." The court found that none of the lands was suitable for purposes of cultivation or grazing,—a finding which, under the circumstances, will excite no surprise. In truth, no serious attempt is made to support the asserted claim of title of the Hamiltons; their possession of a small portion of the land, however, affording sufficient standing ground from which to attack the title of the railroad company.

It was made to appear that the city of San Pedro had made leases similar to the one here in question, and that the city of San Pedro had subsequently become annexed to or amalgamated with the city of Los Angeles. The city of Los Angeles had also from the state acquired certain rights to the lands contiguous to the harbor of San Pedro, which rights, it is asserted, include the lands here in question. The city of Los Angeles, however, did not connect itself with this litigation, but was permitted through its representatives to file a brief. Other briefs were filed in answer thereto by others interested in the principal question here to be considered.

That question may be thus broadly stated: When the Constitution (art. 15, § 3) declares: "All tide lands within 2 miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations,"—does this language forbid

the leasing for a term of any part of such lands?

For the consideration of the question thus broadly stated, "tide lands," as thus used in the Constitution, will be construed more broadly than in the ordinary signification of lands covered and uncovered by the daily efflux and reflux of the tide. It will be construed to embrace lands properly described as submerged lands (*Ward v. Willis*, 51 N. C. (6 Jones, L.) 183, 72 Am. Dec. 570), such as, in major parts, the lands here in controversy unquestionably were. The phrase will be so construed to carry out the manifest intent of the framers of the Constitution to protect the harbors of cities and towns from falling into private monopolistic ownership. *People ex rel. Harbor Comrs. v. Kerber*, 152 Cal. 731, 125 Am. St. Rep. 93, 93 Pac. 878. Such being the undoubted purpose, it would result in the absolute destruction of that purpose to hold that a city might not convey its tide lands proper, but might convey into private ownership all of the submerged lands beyond the tide lands proper. For there thus might be erected an impassable barrier between the city and its own harbor waters, with the resulting monopolistic control of the harbor itself. It will further be assumed that the lands here in controversy front on a "bay." They certainly do not front upon the harbor of San Pedro, for the maps in evidence in the case establish that between these lands and the harbor of San Pedro is a wide jetty, wholly under the ownership and control of the government of the United States. To seaward these lands front upon the Pacific Ocean. They do not even front upon the outer harbor, but upon the open sea. The slight indentation in the shore line upon which they do front is San Pedro bay, and, as has been said, it will be assumed that this bay is used for purposes of navigation, so as to bring the lands within the purview of the language of the Constitution.

The legislature, by its general validating act, as has been said, admittedly confirmed the lease made by the city of Long Beach. Stats. 1907, p. 987. If this confirmatory act is valid, it, of course, cures any defects in the lease from the town of San Pedro which may be thought to exist by reason of the lack of power in that municipality. Against the validity of the act, it is contended that it is special legislation. But this contention is completely answered by *Upham v. Hosking*, 62 Cal. 250; *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352; and *Redlands v. Brook*, 151 Cal. 474, 91 Pac. 150. The principle of decision is that such curative acts do not come within the constitutional inhibition against special legislation. Elsewhere the same principle of decision is uni-

formly applied. *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *State ex rel. Board of Education v. Brown*, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; *State v. Squires*, 26 Iowa, 340.

This conclusion, then, is a declaration that the legislature did not violate this particular constitutional inhibition against special legislation in the passage of the curative act, and thus clears the way for the consideration of the ultimate question first above stated. In passing, it may be said that it is, of course, recognized that the legislative department of the state, like the Congress of our national government, has plenary power over the management and disposition of state lands, subject, of course, in the case of lands under navigable waters, to the paramount right of the national government to exercise a control in the interest of commerce and navigation, and subject, also, to the trust for the whole public upon which these lands are held by the state,—a trust which would forbid the alienation into private ownership of any such considerable part of them as would interfere with the proper exercise of the public trust upon which they are all held. But with none of these questions does this case concern itself. The question before us is a much narrower one. It is the question of the extent of the limitation of this general power imposed upon the legislature by the constitutional mandate. The Constitution has clearly forbidden the legislature from granting or selling lands of the character of those here in controversy. The question is: Did the Constitution by this language mean to forbid the legislature from leasing, as contradistinguished from disposing of the fee, any such lands?

Over the meaning of these words "grant or sale," as thus employed in the Constitution, many niceties of reasoning are indulged in, and many authorities upon either side are cited. Thus it is pointed out that § 1053, Civil Code, provides that a transfer in writing is called a "grant," or "conveyance," or "bill of sale," and that the term "grant" in that section and in the succeeding articles includes all these instruments. Again, it is pointed out that § 1091, relating to the transfer of real property, provides that an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing; that § 1092 provides that a "grant of an estate in real property may be made in substance as follows;" and that this contemplates a leasehold interest exceeding one year. Again, § 1105 provides that a fee-simple title is presumed to be

intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended, and that by this section the lesser estate referred to must be a life estate or a leasehold estate for years. Again, § 1108 deals with "a grant made by the owner of an estate for life or years." Still further it is pointed out that in *San Francisco & O. R. Co. v. Oakland*, 43 Cal. 502, it is declared that at the present day the word "grant" is effectual to convey an estate in a corporeal hereditament; that the word has now become a generic term, applicable to the transfer of all classes of real property; and that in *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 130, a lease of land for a term of five years is construed to be a conveyance of real property, within the meaning of § 1215 Civil Code. Upon the other hand, respondent points out that these interpretations have to do generally with recordation acts, and that, while § 1053, as above set forth, declares that "a transfer in writing is called a grant or conveyance or bill of sale," a transfer itself, defined by § 1039 of the same Code, is "an act of the parties or of the law by which the title to property is conveyed from one living person to another;" and that in the case of leases the title is not transferred. Attention is directed to such cases as *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87, where it was contended that the lease of the homestead was an abandonment of the homestead right, under § 1243 of the Civil Code, which declares that a homestead is abandoned "by a grant thereof," and this court held that a lease was not embraced within the meaning of "grant," as there employed; and *Mott v. Ruckman*, 3 Blatchf. 71, Fed. Cas. No. 9,881, where the statute provided that no conveyance of a vessel should be valid, unless recorded, and the vessel had been leased, the United States circuit court held that a lease was not included in the word "conveyance;" and *Des Moines County Agri. Soc. v. Tubbessing*, 87 Iowa, 138, 54 N. W. 68, where the court declared: "We are unable to find a single instance where the word 'grant' is construed as a 'lease,' without other words to control its meaning." And, finally, the *American & English Encyclopedia of the Law*, 2d ed. vol. 7, p. 487, is cited to the following effect: "Blackstone enumerates leases as among the primary 'conveyances' at common law, and in several cases the term 'conveyance' has been held to include a lease; but the weight of authority is to the effect that in its ordinary significance the term does not embrace a chattel interest in realty."

Enough has been said to show that the meaning of the word "grant" has by judicial

interpretation been narrowed or enlarged to meet the exigencies of specific cases and the spirit of the law in which the word is employed. We are still left to determine the specific meaning as employed in the Constitution. And here resort first must be had to the rule of construction that, in interpreting the Constitution, as in construing a legislative statute, unless a special definition has been given to a word, the word shall be taken in its ordinary and generally accepted sense. *Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600; *Houghton's Appeal*, 42 Cal. 35. These cases have to do with the construction of statutes. The applicability of the same rule in constitutional interpretation is declared in *Oakland Paving Co. v. Hilton*, 69 Cal. 491, 11 Pac. 3. Indeed, even if the word have a technical, as well as popular, meaning, the latter will be given it, unless the context forces the conclusion that it was otherwise used. *Weill v. Kenfield*, 54 Cal. 111. It cannot be gainsaid but that, in the ordinary and general acceptance of the word "grant" and of the word "sale," and particularly where the two are used in conjunction, as here, they convey the idea of parting with the fee for a monetary or other consideration, and do not embrace the concept of a lease. It would require no explanation if a man declared that he had granted his farm. But it would require explanation if he desired to be understood thereby that he had merely leased it. It would require no explanation if a man should desire to convey the idea that he had sold his horse or his house, but it would require much explanation if he said that by the use of the word "sold" he meant to convey the idea that he had leased his house or let his horse. Only by a resort to meanings given to the words in extreme cases, and not to their generally accepted meaning, can they be stretched to cover and include the idea of leasing.

A resort to the constitutional debates to which we are invited throws no light upon the question. An amendment to the provision as it now stands was offered, authorizing boards of supervisors to lease for a limited period of years, excepting from this provision the board of supervisors and the water front of the city and county of San Francisco. In the debate which followed, little light is thrown upon the question, because the attack was directed principally to the whole section, with or without its amendment. It cannot be determined from the debates, under any consensus of opinion expressed by the debaters, why the amendment was stricken out, and for aught that appears to the contrary, it might have been

under the view that the section as it now appears authorized leases without the amendment. It might have been because the term of leasing in the proposed amendment was deemed too great or too small; or it might have been because the city and county of San Francisco was excluded from the operation of the provision. It might have been for any of these or for a multitude of other reasons.

Much more light, however, is thrown upon the question by the interpretation put upon it by the body which first declared it, and which, saving for the constitutional restrictions, has supreme charge and control over the public lands; namely, the legislature. The constitutional provision itself was originally a legislative enactment. It will be found in the early statutes (see *Pol. Code*, § 3488), which, making provision for the sale of swamp, marsh, and tide lands, excluded from the operation of the law all such lands within 5 miles of the corporate limits of either San Francisco or the city of Oakland, or within 2 miles of any other incorporated city or town. The advocates of the constitutional amendment declared in debate that by subdivision 3 they were merely putting into the Constitution what for years had been upon the statute books of the state. As this provision originated with the legislature, its interpretation of its own enactment is peculiarly persuasive. Throughout it will be found that the legislature has never regarded its provision or the constitutional declaration as forbidding the leasing of such lands. The act of the legislature ratifying this lease does not stand alone. An act of the legislature in 1889 (*Stat.* 1889, p. 305) creates a board of state harbor commissioners for the bay of San Diego. By this act certain sections were added to the Political Code, and one of them (§ 2605) declares: "The commission shall have the right to lease said lands under such established rules and regulations as it may adopt." In 1901 (*Stat.* 1901, p. 601) the lease of China basin in the bay of San Francisco was ratified and confirmed by the state. By act of March 26, 1895 (*Stat.* 1895, p. 194), the state board of harbor commissioners of San Francisco was authorized "to lease such portion or portions of the sea wall as they may deem expedient for such purposes solely as will be most advantageous to the commerce of the port." The legislature of 1909 ratified and approved amendments to the charter of the city of Los Angeles. *Stat.* 1909, p. 1289. And herein was the provision that the city may "lease by ordinance from the water front in excess of said 10,000 feet so owned

by the city . . . alternate frontages," etc. While in an act granting to the city of Los Angeles the tide lands and submerged lands of the state within the boundaries of the city (Stat. 1911, p. 1256), it is declared "that said city or its successors may grant franchises thereon for limited periods for wharves and other public uses and purposes, and may lease said lands or any part thereof for limited periods for purposes consistent with the trusts upon which said lands are held by the state of California." And prior to the adoption of the Constitution of 1879, authority to make leases of the tide lands had been frequently granted by the legislature to the harbor commissioners of San Francisco. Stat. 1863, p. 406; Stat. 1865-66, p. 853; Stat. 1867-68, p. 408; Stat. 1869-70, pp. 799-800. Finally, it may be said that by this court there has been a judicial acceptance of the soundness of this interpretation expressed in *Pacific Coast S. S. Co. v. Kimball*, 114 Cal. 414, 46 Pac. 275, where the city of Monterey had leased land to a steamship company, which had erected thereon its private wharf; the land being within the corporate limits of the city. In discussing the power of the municipality to make such a lease, the court, speaking through Justice Temple, said: "Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose, not injurious to the harbor or an inconvenience to commerce. This being so, I see no reason why it might not lease a small portion to a steamship company for its special use."

But if, after all this, doubt can be entertained, that doubt must be resolved in favor of the power of the state so to lease, from the manifest benefits which will follow such construction, as contrasted with the most obvious detriments to commercial development which would attend the other. The purpose of the constitutional provision was not to blight commercial development, but to foster it. It designed to foster it by preventing the alienation into private ownership of the fee of such lands, whereby all might be acquired and held in private ownership to the destruction of the public use. But it did not mean to abort commerce in embryo or to strangle it in its infancy by putting a ban upon the activities of private commercial enterprises. Saving in San Francisco, most of the improvements of our harbors have been made by private capital. The case last referred to in 114 Cal. 414, 46 37 L.R.A. (N.S.)

Pac. 275, is typical of it, where the sole wharf of the town of Monterey, at which five steamers a week landed, was due wholly to private enterprise and private capital. To hold that the state, or that municipalities acting as its mandatories, may not lease, with proper restrictions of time and proper regard to public and quasi public use, lands such as these, so that private enterprise and capital may build up the commerce of our seaport cities, is to declare that all such commerce must await the slow and frequently incompetent initiative of the municipalities themselves,—municipalities which frequently are unwilling to incur the expense and risk which would be accepted under reasonable terms by private enterprise. If municipalities may not so lease these lands, they may not even grant franchises in connection with them; for, notwithstanding the well-recognized legal distinctions existing between a lease of land and a franchise involving the use of land for specific purposes, in practical effect the franchise is nothing other than a lease, with a right of possession and use for the indicated purposes. Pol. Code, § 2911. Nor need the slightest apprehension be felt that the power so to lease may result in a monopoly comparable to that which might follow the power to sell. In the case of sale, the title and control over the land are gone. In the case of leases, all proper restrictions may be cast about the use. An entry by the lessor may be had for breach of covenant; possession of the land, with its improvements, after the term of years, returns to the municipality and state, and in the meantime the interests of navigation and commerce are not impaired, but are in the highest degree stimulated and fostered. The lease in this instance is typical. Vast expenditures were made which the lessor would never have made, and to a portion of land—a mere fragment of all of the like water-front lands—access is given to a transcontinental railroad for all purposes of inland and marine commerce, while at the expiration of the term of the lease the possession of the lands returns to the state. What policy more beneficial to the state itself than this, it would not be easy to point out. No other matters call for special mention.

For the foregoing reasons, the judgments and orders appealed from are affirmed.

We concur: Shaw, J.; Sloss, J.; Angellotti, J.; Melvin, J.; Lorigan, J.

Petition for rehearing denied.

## IDAHO SUPREME COURT.

RE HENRY SCHRIBER et al.

(19 Idaho, 531, 114 Pac. 29.)

**Bail — right of convict.**

1. The Constitution of this state (§ 6, art. 1), which provides that "all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great," has reference only to those cases in which the party has not yet had a trial, and applies to all persons prior to conviction, but does not refer to cases wherein a conviction has been had in a court of competent jurisdiction.

**Constitution — former construction — adoption.**

2. Where a constitutional provision has been adopted from another state, and the court of last resort of such state had construed the provision in that state prior to its adoption in this state, the presumption arises that the framers of the Constitution in adopting such provision meant and intended to also adopt the construction that had been placed upon it by the highest court of the state from which it was taken.

**Bail — appeal — right.**

3. Under the provisions of § 8104, Rev. Codes, a defendant who has appealed to the supreme court from a judgment imposing a fine only is entitled to bail as a matter of right; but where a defendant appeals from a judgment which imposes a term of imprisonment, admission to bail is a matter of discretion.

**Same — discretion — habeas corpus.**

4. Where a defendant who has been convicted and sentenced to serve a term of imprisonment appeals from such judgment,

Headnotes by AILSHIE, P. J.

**Note. — Right to release on bail pending appeal under a general statute.**

With slight variations the common form of constitutional guaranty of bail is that all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption of guilt great. 5 Cyc. 63.

In *Ex parte Voll*, 41 Cal. 29, a prisoner convicted of manslaughter claimed admission to bail as of right under the Constitution of California, providing that "all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great," and, as infringing upon this clause, denied the constitutionality of the state statute which provided that a person charged with such an offense as manslaughter may be admitted to bail after conviction as a matter of discretion merely, in so far as it enacted that a conviction already had should take away the right of bail and leave it to the discretion of the court. It was insisted that the language of the Constitution was sufficient

and applies to the trial judge for admission to bail, such application is addressed to the sound legal discretion of such judge or court, and, unless it clearly appears that such discretion has been abused, the action of the trial judge or court will not be disturbed or interfered with by the supreme court on application for a writ of habeas corpus.

(March 11, 1911.)

**A**PPPLICATIONS for writs of habeas corpus to secure the release of petitioners from the custody of the sheriff of the county jail, to which they had been committed pending their appeals to the Supreme Court, after conviction for a violation of the local-option statute. Granted as to petitioner Schriber. Denied as to petitioner Haggerty. The facts are stated in the opinion.

Messrs. John A. Bagley, K. I. Perky, T. L. Glenn, and E. J. Hornibrook for petitioners.

Messrs. D. C. McDougall, Attorney General, J. H. Peterson, and O. M. Van Duyn for the State.

Ailshie, P. J., delivered the opinion of the court:

Two petitions have been filed for writs of habeas corpus. In the one case, it appears that Henry Schriber was convicted of a violation of the local-option statute, and was sentenced to pay a fine of \$250, or, in default thereof, to be imprisoned in the county jail for one day for each \$2 of such fine. He thereupon took an appeal from the judgment, and on application to the trial judge was admitted to bail. Haggerty was likewise convicted of violation of the local-

option statute, and was sentenced to pay a fine of \$250, or, in default thereof, to be imprisoned in the county jail for one day for each \$2 of such fine. He thereupon took an appeal from the judgment, and on application to the trial judge was admitted to bail. Haggerty was likewise convicted of violation of the local-

ciently broad to embrace not only a case where no trial had been had, but equally a case in which a conviction of an offense less than capital in degree had occurred; that the Constitution did not regard the particular stage of proceedings which the prosecution may have reached, but only the grade of the offense involved as being less than the capital grade. The court held that such a statute was not unconstitutional as being more restrictive than the Constitution, for the provision of the latter was designed only to alter the rule of the common law as to certain criminal cases before conviction, and that bail after conviction was still left discretionary as at common law, with the modifications wrought by the statute. The court was of the opinion, by a bare majority of its members, two judges not expressing an opinion, that the Constitution, in declaring bail to be a matter of right, had in view only those cases wherein the guilt of the party had not already been judicially ascertained; cases in which the prisoner as yet stood upon his plea of not guilty, supported with all the presumptions of

option statute, and was sentenced to pay a fine, and also to serve a term of imprisonment in the county jail. On application to the trial judge he was granted a certificate of probable cause and was admitted to bail. The appeals were taken in these cases in June, 1910. Up to the present time, however, the records on appeal have not been filed in this court.

There has been apparently some delay in the matter of prosecuting the appeal. On the 1st day of March, 1911, Hon. Alfred Budge, judge of the district court, and from whose district these convictions were had, made an order revoking the previous order admitting both parties to bail, and directed the sheriff to arrest them and commit them to the county jail. The order recited

innocence with which the law delights to surround him; but when his trial is had, and his plea proven untrue, the law will not stultify itself by presuming him other than it has adjudged him to be. It was said in the course of the opinion that the absolute right to bail after conviction as well as before would lead to the result that no convict would be punished for his crime if he had either wealth or friends, and would operate as a mere money commutation for the infamous corporeal punishment which the law provides for the perpetration of crime; and construing the language of the Constitution in its literal sense, bail must be taken in any case, whether or not there be an appeal; and that this absurd result was not contemplated by the framers of the Constitution.

A constitutional clause identical with that set out in the above case is contained in the Constitutions of other states, and when relied upon to support a claim for bail after conviction, the courts have generally ruled as in *Ex parte Voll*, supra.

In *Mississippi* (*Ex parte Dyson*, 25 Miss. 356) such a clause was held to have no application after conviction, where one convicted of manslaughter was denied bail in the absence of circumstances warranting the court in exercising its discretionary power to bail.

So, such a clause in the Missouri Constitution was held inapplicable after conviction in *Ex parte Heath*, 227 Mo. 393, 126 S. W. 1031, where petitioner, convicted of murder, and sentenced to life imprisonment, applied for bail pending appeal, on the ground that the assessment of punishment and sentence for life imprisonment repelled and effectually removed not only all weight of evident proof and great presumption of capital guilt, but established the fact that he was not guilty of a "capital" offense. It was held that the statute denying bail in such a case did not infringe the Constitution, and governed petitioner's application.

And in a North Carolina case (*State v. Ward*, 9 N. C. [2 Hawks] 443) where defendant was convicted of passing counterfeit money, the court said: "I think that the clause in the Constitution which declares

that the defendants are not prosecuting their appeals with diligence and in good faith. Counsel for the parties insist that under the provisions of § 6 of article 1 of the state Constitution, all persons are bailable as a matter of right, except in capital cases, and that this is true both before and after conviction, provided an appeal is prosecuted.

Section 6, art. 1, of the Constitution reads as follows: "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. . . ." The Constitution of California contains a like provision, and § 6 of article 1 of our Constitution was evidently adopted from the California Constitution. As early as 1871, the

that all prisoners shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or the presumption great, relates entirely to prisoners before conviction; for although the words, 'where the proof is evident or the presumption great,' relate to capital cases only, that is, to prisoners in capital cases, the meaning is evidently prisoners before conviction; for after conviction there is no such thing as proof and presumption . . . we think the spirit of our law requires a middle course to leave it to the sound discretion of the judge before whom the appeal is taken."

So, in *Ex parte Ezell*, 40 Tex. 451, 19 Am. Rep. 32, a conviction of felony, and in *Ex parte Schwartz*, 2 Tex. App. 74, a conviction of assault and battery, it is held that the constitutional provision guarantying bail except in capital cases relates to persons who are accused, before trial and conviction.

So, in *Re Boulter*, 5 Wyo. 263, 39 Pac. 875, where petitioner, convicted of manslaughter, insisted upon bail as matter of right under such a constitutional clause, claiming the statute denying bail after conviction for felony repugnant thereto, it was held that the constitutional guaranty of the right to bail was inapplicable after conviction of felony. The court said: "This statute expressly forbids the admission to bail of a person convicted of a felony, after sentence, by directing that he shall be imprisoned until his cause in error is disposed of, and the Constitution extends the right to bail to persons before judgment has been passed in crimes of this magnitude, under the construction that we are compelled to give to the provisions of that instrument conferring the right of admission to bail. While we recognize the right of the legislature to enlarge this constitutional grant so as to include persons sentenced for a felony, this court has no power and no inclination to invade the domain of the legislature and confer such a right in the face of the unambiguous direction of a valid statute."

And in *Hampton v. State*, 42 Ohio St. 401, it is held that in a criminal case, "ex-

supreme court of California in *Ex parte Voll*, 41 Cal. 29, passed upon this provision of the California Constitution, and held that it applied to all persons prior to conviction, but that it had no reference to any person after a conviction by a court of competent jurisdiction and pending an appeal. This case has been uniformly followed and approved by the California court ever since that time, as may be seen by an examination of the following cases: *Ex parte Hoge*, 48 Cal. 5; *Ex parte Smallman*, 54 Cal. 36; *Ex parte Brown*, 68 Cal. 177, 8 Pac. 829, 6 Am. Crim. Rep. 55. According to the rule heretofore announced by this court in *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246, "When a statutory or constitutional provision is adopted from another state,

where the courts of that state have placed a construction upon the language of such statute or Constitution, it is to be presumed that it was taken in view of such judicial interpretation, and with the purpose of adopting the language as the same had been interpreted and construed by the courts of the state from which it was taken." The courts of this state would be most strongly inclined to follow the interpretation placed upon the like constitutional provision by the California court prior to our adoption of the same. This construction appeals to us as being reasonable and just, and fairly within the contemplation of the framers of the Constitution. It would certainly be disastrous if we should hold that this provision of the Constitution grants to a per-

cept for capital offenses where the proof is evident or the presumption great," after a verdict of guilty, and before sentence, the court may, in its discretion, take a recognition for the appearance of the prisoner to abide the judgment of the court, the court's power to admit to bail having been taken away by statute after sentence. The court said: "We do not say that after a verdict of guilty of felony the prisoner, on tendering sufficient bail, can demand as of right his discharge from the sheriff's custody pending his motion for a new trial; we only say, the court, in the exercise of a wise judicial discretion, may so admit to bail."

But in the case of *Re Longworth*, 7 La. Ann. 247, where a prisoner was convicted of larceny and sentenced to one year's imprisonment at hard labor in the penitentiary, it is said by the court that the people of Louisiana have, by their Constitution, restrained the discretion of the courts and judges at common law and enlarged the liberty of the citizens by declaring "that all prisoners shall be bailable by sufficient securities, unless for capital offenses, where the proof is evident or presumption great," and, against the interpretation given in *State v. Ward*, supra, to a clause of the North Carolina Constitution identical with the one here involved, the court held that a prisoner was entitled to bail as a matter of right pending an appeal after conviction of larceny, notwithstanding an act of the general assembly directing the sheriff in all cases where persons convicted of crimes shall be sentenced to death or to imprisonment to hard labor to take such person into custody and keep him confined for a prescribed period, notwithstanding any appeal or reprieve. The court manifests great reluctance in holding unconstitutional the statute requiring the imprisonment of the person convicted of a felony during the pendency of the appeal, and suggests the probability of an amendment of the Constitution in that respect, so as to take away the right of bail after conviction, which was afterwards done by inserting "unless after conviction for any offense or crimes punishable with death or imprisonment at hard labor." Mr. Justice 37 L.R.A. (N.S.)

Rost, dissenting, adheres to the opinion in the North Carolina case of *State v. Ward*, supra, decided under an identical constitutional provision.

The provision of the Louisiana Constitution on this subject was subsequently amended by expressly excepting the case of conviction for an offense punishable with death or imprisonment at hard labor from the guaranty of the right to bail; and under the amended provision it was held in *State v. Anselm*, 43 La. Ann. 195, 8 So. 583, that in case the defendant is charged with and has been convicted of a crime which is necessarily punishable with imprisonment at hard labor, and upon motion in arrest of judgment the indictment is held to be defective and wanting in essential averment, and set aside, he is not entitled to bail pending a suspensive appeal on the part of the state.

And in *State ex rel. Collette*, 106 La. 221, 30 So. 746, 12 Am. Crim. Rep. 51, where relators convicted of petty larceny were admitted to bail pending appeal from sentence to five months imprisonment in the parish jail, and to work during that sentence on the public roads and other public works of the parish, it was held, construing together the constitutional clause set out in *State v. Anselm*, supra, and a state statute requiring imprisonment after conviction, that it is only where persons convicted of crime shall have been sentenced to death or to imprisonment at hard labor that such persons are to be kept in confinement notwithstanding an appeal in their case.

In *Re Comolli*, 78 Vt. 337, 63 Atl. 184, it was held that where a defendant convicted of a misdemeanor and sentenced to the house of correction for a term was in the custody of the sheriff on the mittimus, he was "in execution," within the meaning of Const. art. 2, § 33, providing that "all prisoners, unless in execution, or committed for capital offenses, when the proof is evident or the presumption great, shall be bailable by sufficient sureties," and was not entitled as of right to bail pending appeal under such provision, though the final commitment had not been made.

J. D. C.



son convicted of crime the absolute right to be admitted to bail pending appeal, irrespective of the merits of the case.

Turning now to the statutes, we find that § 8104 of the Revised Codes provides as follows: "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail: 1. As a matter of right, when the appeal is from a judgment imposing a fine only. 2. As a matter of discretion in all other cases."

It would seem clear that, under the provisions of the foregoing statute, the defendant Schriber is entitled by statute to be admitted to bail until his appeal is finally disposed of. Whether his appeal be in good faith or not must be ultimately determined by this court. If he fails to prosecute it with diligence, it may be dismissed on motion by proper showing in this court; but until the appeal is disposed of, either by being dismissed or determined on its merits, he is clearly entitled to admission to bail. This court will therefore order and direct the trial judge to admit the petitioner Schriber to bail in such sum as he may deem just and sufficient to insure his appearance for final judgment in the case.

A somewhat different question arises with reference to the petitioner Haggerty. He has been sentenced both to pay a fine and to serve a term of imprisonment. Under the provisions of § 8104, above quoted, the admission to bail in such a case after conviction is "a matter of discretion." The trial judge exercised his discretion in admitting the petitioner to bail. For some reason the judge subsequently concluded that he should no longer be admitted to bail. So far as we are informed by the petition, the trial judge bases this conclusion on the fact that the petitioner is not prosecuting his appeal in good faith. We would not feel justified in interfering with the discretion of the trial judge under the facts and circumstances as they present themselves to us in this petition. The petitioner can again apply to the judge for admission to bail, and if he can possibly convince the judge of his good faith in the prosecution of his appeal and the merits thereof, he may be again admitted to bail. He has also applied to this court for admission to bail in the event the court does not see fit to release him from custody, but we are not inclined to do so. We are not familiar with the situation and the circumstances of the petitioner, and we think that is a matter with which the trial judge can deal more justly and wisely. He is familiar with the parties and their ability to give bail, and also knows the facts surrounding the commission of the offense for which he was convicted.

37 L.R.A.(N.S.)

The trial judge is directed to admit the petitioner Schriber to bail pending the appeal. The application of the petitioner Haggerty is denied.

Sullivan, J., concurs.

## NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA,  
Impleaded, etc., Appt.,

v.

W. J. STAPLES.

(157 N. C. 637, 73 S. E. 112.)

**Billboard — right to regulate.**

A municipal corporation may forbid the construction of billboards nearer than 24 inches to the ground, when not placed against solid walls.

(December 20, 1911.)

**A**PPEAL by the State from a judgment of the Superior Court for Buncombe County quashing a warrant issued by the police judge of the city of Asheville, charging defendant with violation of the billboard ordinance. Reversed.

Statement by Hoke, J.:

Criminal action tried on appeal from police court of the city of Asheville. It appeared that the defendant was arrested, tried, and convicted on a warrant issued by the police judge of said city, and the testimony showed a violation by defendant of an ordinance of the city in terms as follows: "Sec. 773. That no person, firm, or corporation shall erect or maintain within the city of Asheville any billboard or other similar structure used solely for the purpose of displaying posters or other public advertisements, the boards of which shall be nearer the ground than 24 inches, except where said billboards are erected and maintained against the wall of a building or other solid wall, and any person violating any of the provisions of this section shall,

**Note.** — The specific question of municipal power as to regulation of signs and billboards is considered in the note to *People ex rel. Wineburgh Advertising Co. v. Murphy*, 21 L.R.A.(N.S.) 735, and the general question as to the exercise of police power for esthetic purposes in the note to *Haller Sign Works v. Physical Culture Training School*, 34 L.R.A.(N.S.) 998. In this connection see also note to *Welch v. Swasey*, 23 L.R.A.(N.S.) 1160, on the constitutionality of statute or ordinance limiting height of building; note to *Small v. Edenton*, 20 L.R.A.(N.S.) 146, on the power of municipal corporations to compel removal of awnings or signs.

upon conviction, be subject to a penalty of \$25 for each and every such offense." In the superior court, on motion, there was judgment quashing the warrant which was based on and recited the ordinance, and the state excepted and appealed.

Messrs. T. W. Bickett, Attorney General, and G. L. Jones, Assistant Attorney General, for the State.

Mr. J. Frazier Glenn, for the city:

The charter of the city of Asheville gives its mayor and board of aldermen the right to enact ordinances on the subject of billposters and billboards.

State v. Whitlock, 149 N. C. 543, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765.

The ordinance is a reasonable regulation.

People v. Havnor, 1 App. Div. 459, 37 N. Y. Supp. 314, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Rochester v. Simpson, 57 Hun, 36, 10 N. Y. Supp. 499, 134 N. Y. 414, 31 N. E. 871; People ex rel. Oak Hill Cemetery Asso. v. Pratt, 38 N. Y. S. R. 598, 14 N. Y. Supp. 804, 129 N. Y. 68, 29 N. E. 7.

Charter authority to license billposters and prescribe the terms and conditions upon which any such license shall be granted includes the power to regulate the height and distance from the ground of boards erected for the purpose of billposting; so far, at least, as such regulations are necessary for the safety and welfare of the inhabitants of the city.

Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Whitmier & F. Co. v. Buffalo, 118 Fed. 773; McQuillin, Mun. Ord. § 463, pp. 723-725.

Messrs. Craig, Martin, & Thomason for appellee.

Hoke, J., delivered the opinion of the court:

It is well recognized in this state that "courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion." Rosenthal v. Goldsboro, 149 N. C. 128, 20 L.R.A.(N.S.) 809, 62 S. E. 905, 16 Ann. Cas. 639; Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767. There was some limitation placed on the principle in the case of State v. Higgs, 126 N. C. 1014, 48 L.R.A. 446, 35 S. E. 473, but that case was expressly overruled in Small v. Edenton, 146 N. C. 527, 20 L.R.A.(N.S.) 145, 60 S. E. 413, and the opinion of the present chief justice in Small's Case is in 37 L.R.A.(N.S.)

full approval of the position as it had formerly prevailed. The charter of the city of Asheville confers ample power to pass an ordinance of the general character in question. State v. Whitlock, 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765.

And in the learned and well-considered brief of the counsel for the city it is suggested in support of the ordinance in question here that the same is reasonable and "necessary to protect the public generally from the unsafe condition caused by the accumulation of leaves, papers, and other waste material which accumulate against billboards when constructed against the ground. It is a necessary restriction to protect adjoining and other buildings contiguous thereto from the danger of fire, which could so easily be conducted from such condition. It is also necessary for the purpose of keeping vacant property in a sanitary condition." On authority here and elsewhere these considerations should, in our opinion, be allowed to prevail, and the ordinance upheld as a valid exercise of the powers conferred. Rosenthal v. Goldsboro; State v. Whitlock; and Small v. Edenton,—supra; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Rochester v. West, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co. 71 N. J. L. 75, 58 Atl. 343; Re Wilshire (C. C.) 103 Fed. 620.

In our present decision we do not intend to qualify or question in any way the disposition made of Whitlock's Case, supra. In that case it appeared that the ordinance prohibited the erection of billboards on private property, regardless of whether the same were secure or insecure. It seemed to have been based on esthetic considerations alone, having no reference whatever to the protection and security of the public, and, on that account, it was held to be an unwarranted and unreasonable interference with the rights of the individual owner. In his forcible and learned opinion in Whitlock's Case, Associate Justice Brown states the doctrine applicable and the reasons upon which it rests as follows: "Esthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the state may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of nat-

ural right, and make them conform to the safety and welfare of established society, that the police power of the state is invoked.

"While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others. Tiedeman, Pol. Power. 439. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a secure structure upon private property, and one which is not *per se* an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited,"—citing *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; 1 Dill. Mun. Corp. 374. There is error, and this will be certified, that the cause be further proceeded with.

Reversed.

#### WASHINGTON SUPREME COURT. (Department No. 1.)

MARY L. HOLLENBAEK, Appt.,

v.

J. H. CLEMMER, Respnt.

(66 Wash. 565, 119 Pac. 1114.)

#### Theater — step in exit — negligence.

1. The proprietor of a moving-picture show is not negligent in maintaining a step at the exit of the darkened room where the pictures are shown, into the corridor, so as to render him liable to a patron who, in attempting to use the exit, falls down the step, to his injury, although a light is maintained over it which tends to dazzle the eyes of persons who emerge from the darkness.

#### Same — unfamiliar exit — directions to use.

2. The proprietor of a moving-picture show is not negligent in directing patrons to use exits with which they are not familiar, if they are reasonably safe, so as to render him liable to a patron who falls down

a step, to his injury, in attempting to use the exit to which he is directed.

(January 12, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Spokane County sustaining defendant's motion for a directed verdict, and dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Harris Baldwin for appellant:

Whether this case is to be determined upon the question of the defendant's negligence, or upon plaintiff's contributory negligence, the whole question in either instance is: Can the minds of reasonable men differ? If, upon the evidence, the minds of reasonable men cannot differ, the question presented is a question of law; if, however, upon the evidence the minds of reasonable men can differ, the question presented is a question of fact.

*Anderson v. Pacific Nat. Lumber Co.* 60 Wash. 415, 111 Pac. 337; *Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488; *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051, affirmed in 199 N. Y. 546, 93 N. E. 377; *Weiner v. Scherer*, 64 Misc. 82, 117 N. Y. Supp. 1008; *Currier v. Boston Music Hall Asso.* 135 Mass. 414; *Stair v. Kane*, 84 C. C. A. 126, 156 Fed. 100; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, affirmed in 163 N. Y. 559, 57 N. E. 1109; *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636; *Thompson v. Lowell, L. & H. Street R. Co.* 170 Mass. 577, 40 L.R.A. 345, 64 Am. St. Rep. 323, 49 N. E. 913; *Bedford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650.

Messrs. Skuse & Morrill, for respondent:

Plaintiff's injury was caused by her own contributory negligence, and not by any negligence of defendant.

*Barrett v. Lake Ontario Beach Improv. Co.* 68 App. Div. 601, 74 N. Y. Supp. 301; *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563; *Hunnewell v. Haskell*, 174 Mass. 557, 55 N. E. 320; *F. W. Woolworth & Co. v. Conboy*, 23 L.R.A.(N.S.) 743, 95 C. C. A. 404, 170 Fed. 934; *Loftus v. Union Ferry*

**Note.**—The general subject of the liability of proprietors of places of amusement for the safety of patrons is treated in notes to *Williams v. Mineral City Park Asso.* 1 L.R.A.(N.S.) 427; *Higgins v. Franklin County Agri. Soc.* 3 L.R.A.(N.S.) 1132; *Blakeley v. White Star Line*, 19 L.R.A.(N.S.) 772; and *Greene v. Seattle Athletic Club*, 32 L.R.A.(N.S.) 713. 57 L.R.A.(N.S.)

The liability of one conducting a fair or exposition, for injury to a patron through negligence of concessionary, is discussed in the note to *Hollis v. Kansas City, Missouri, Retail Merchants' Asso.* 14 L.R.A.(N.S.) 284, and the liability of the operator of a scenic railroad or similar device to passengers, in the note to *O'Callaghan v. Dellwood Park Co.* 26 L.R.A.(N.S.) 1054.

Co. 84 N. Y. 455, 38 Am. Rep. 533; Dunn v. Kemp, 36 Wash. 183, 78 Pac. 782.

Mount, J., delivered the opinion of the court:

The plaintiff brought this action to recover for personal injuries. At the close of plaintiff's case, the trial court sustained defendant's motion for a directed verdict, and dismissed the action. Plaintiff has appealed.

It appears that on October 11, 1910, the respondent was conducting a moving-picture show in the city of Spokane. The plaintiff and two other ladies purchased tickets, and entered the room where the pictures were being shown. The exhibition was in progress when they entered. The room was darkened. When they entered, an usher met them at the entrance, and conducted them to seats about two thirds of the way down an aisle. They remained seated until the pictures had all been shown and a repetition was begun, when the plaintiff stated to her companions that it was time to go. Plaintiff walked into the aisle on her way out of the building, and proceeded a short distance out by the way she had entered, when she was met by an usher and directed to go out through an exit at the side of the room. She proceeded to the exit indicated, where a bright light was located directly in the corridor, and where there was a step down of about 7 inches,—an ordinary step to the floor of the corridor. She did not notice this step. She testified that the bright light dazzled her as she came out of the darkened room, and as she stepped into the corridor she fell and broke her leg. The plaintiff had never been in the place before, and was not acquainted with the arrangement thereof.

It is argued by the appellant that it was negligence to maintain the step at that place, and also negligence to direct the plaintiff to depart by a way other than the way by which she had entered. There is no merit in these contentions. It is no doubt the rule that an owner of a place of public entertainment is charged with the duty to maintain a reasonably safe place for his patrons. 38 Cyc. 268. The mere fact that a step up or one down, or a flight of steps up or down, is maintained at the entrance or exit is no evidence of negligence, especially if the step is in good repair and in plain view. There is no claim in this case that the step was in bad order, or not properly lighted, or was not in plain view of any person who might use it. In *Dunn v. Kemp*, 36 Wash. 183, 78 Pac. 782, we held that it was not negligence *per se* to maintain a stairway in a store or public place. It is not uncommon to find

a step up at the entrance of places where the public is invited, and it is certainly not negligence, as a matter of law, to construct floors above the level of the streets or sidewalks. It follows that it was not negligence to maintain a step down at the exit in question. It is apparent that it was the plain duty of the plaintiff to use her sense of sight and look where she was stepping. If it was not negligence to maintain the step, it was not negligence for the defendant to direct the plaintiff to retire by that exit.

There was no error, and the judgment is therefore affirmed.

Dunbar, Ch. J., and Parker, Fullerton, and Gose, JJ., concur.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

FIRST NATIONAL BANK OF PHILIPPI,  
Plff. in Err.,

v.

MARY D. KITTLE et al.

(69 W. Va. 171, 71 S. E. 109.)

Principal and surety — loss of collateral — release of surety.

A creditor is bound to use proper care and diligence in the management and collection of collateral securities; and a surety

Headnote by MILLER, J.

*Note. — Duty of creditor to surety with respect to management and collection of collateral.*

I. Introductory, 700.

II. Duty as dependent on nature of possession or lien, 701.

III. Is there a duty of active vigilance?

a. In general.

1. Contradictory opinions, 703.

2. Various judicial views, 703.

b. Particular inactivities.

1. Failure to sell or foreclose against the collateral, 707.

2. Failure to take possession of collateral covered by a mortgage or lien, 708.

3. Defaulting in suits, 710.

4. Failure to record papers, 710.

5. Miscellaneous omissions, 711.

c. Particular agreements, 711.

d. Under special statutes.

1. Georgia, 712.

2. Louisiana, 713.

3. Canada, 713.

e. Requests to realize on collateral, 714.

will be released to the extent of the loss actually sustained by the negligence of the creditor to the same extent as if such loss was due to some positive act of the creditor.

(April 18, 1911.)

**E**RROR to the Circuit Court for Barbour County to review a judgment reversing a judgment of a justice of the peace in plaintiff's favor in an action on a note. Affirmed.

The facts are stated in the opinion.

Messrs. Fred O. Blue and Arthur S. Dayton, for plaintiff in error:

Plaintiff was not guilty of such negligence as would release the sureties.

Womack v. Paxton, 84 Va. 9, 5 S. E. 550;

Knight v. Charter, 22 W. Va. 427; Renick v. Ludington, 14 W. Va. 387; First Nat.

Bank v. Parsons, 45 W. Va. 688, 32 S. E. 271; Coleman v. Stone, 85 Va. 386, 7 S. E. 241; Humphrey v. Hitt, 6 Gratt. 523, 52 Am. Dec. 133; Mackie v. Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482; Barksdale v. Fenwick, 4 Call. (Va.) 492; Bronaugh v. Scott, 5 Call. (Va.) 78.

Messrs. William T. George and John B. Dilworth for defendants in error.

Miller, J., delivered the opinion of the court:

In an action by plaintiff, before a justice, against V. W. and Mary D. Kittle and C. W. Brandon, defendants, on a note for \$200, plaintiff recovered a judgment against all defendants for the full amount of the note, interest and costs.

Defendants, Mary D. Kittle, wife of V. W.

IV. Sale merging security in the debt, 714.

V. Waiver and estoppel of surety, 715.

VI. Applying collateral to other debts, 715.

VII. Good faith and fraud, 716.

VIII. Miscellaneous, 716.

### I. Introductory.

"The surety," says Chancellor Kent, in *Hayes v. Ward*, 4 Johns. Ch. 123, "by his very character and relation of surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no wilful act, either to poison it in the first instance, or to destroy or cancel it afterwards. These are general principles, founded in equity. . . . This doctrine does not belong merely to the civil-law system. It is equally a settled principle in the English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another."

The authorities are agreed that if a creditor, without the consent of the surety, affirmatively releases collateral security, the surety is discharged; at least, to the extent of the value of the security lost. 32 Cyc. 216. But there is much difference of opinion where a loss is claimed to have occurred through the inactivity of the creditor.

The reader will find in the cases the assertion of two opposing theories: one, that the creditor owes no duty of active vig-

ilance in regard to the collateral security; the other, that his duties towards the collateral are those of any trustee. But it would seem that, upon the adjudicated cases, on the one hand, it is doubtful whether any court would hold that under no circumstances is the creditor bound to take any affirmative action, and, on the other hand, few of the cases asserting the view of trusteeship go far along that road in actual decision, unless, perhaps, in the cases holding that the creditor must not omit to record the papers which protect his lien. And while, as will be seen hereafter, some support can be found for the decision in *FIRST NAT. BANK v. KITTLE*, it should be noticed here that the court has not chosen well the cases it mentions in connection with its statement that, with respect to collateral securities in his hands, "the authorities all hold the creditor bound to use proper care and diligence in the management and collection of such collateral, and that a surety is released, to the extent of the loss actually sustained by the negligence of the creditor, to the same extent as if lost by the positive act of the creditor." The cases named by the court as sustaining this proposition are *Clow v. Derby Coal Co.*; *Phares v. Barbour*; *Hall v. Hoxsey*; *First Nat. Bank v. Parsons*; and (possibly) *Davenport v. State Bkg. Co.* 126 Ga. 136, 8 L.R.A. (N.S.) 944, 115 Am. St. Rep. 68, 54 S. E. 977, 7 Ann Cas. 1000. In the *Clow Case* the creditor satisfied the mortgage security; in *First Nat. Bank v. Parsons* the creditor consented to the setting aside of a decree which was a lien on the debtor's land; in the *Phares Case* the creditor sold the security at auction to his dummy for a trifling price, without notice to the surety; in *Hall v. Hoxsey*, it was held that the surety on a lease was not discharged because the landlord declined to distrain for rent on request and notice that the tenant was about to remove; (and in the *Davenport Case* the judgment was against the surety).

Perhaps the real situation may be stated thus: While in general the creditor owes

Kittle, and C. W. Brandon, though joint makers, were in fact sureties for V. W. Kittle, and they alone appealed, the judgment of the justice against V. W. Kittle, principal, remaining in full force, and unappealed from.

On the trial of the appeal in the circuit court, the court, on defendant's motion, struck out plaintiff's evidence, and directed a verdict in their favor, and from the judgment below, of *nil capiat*, and for costs, the plaintiff obtained this writ of error.

The defense of the sureties before the justice, and in the circuit court on appeal, was, that the bank, at the time of note sued on, had required of V. W. Kittle, principal, additional security, and who then, September 20, 1905, assigned to the bank, to use the language of the assignment, "\$200

of the amount due me by the county court of Barbour county for work done under contract with said court for court square paving, as collateral security for the payment of said note;" and that by the negligence of the bank in failing to give notice of said assignment, and to take such steps as was necessary to preserve its own rights and the rights of defendants as sureties, the same had been lost or surrendered, and the sureties thereby discharged.

For the bank it was replied that Mary D. Kittle was estopped from denying her liability, on the grounds, first, that after the trial and judgment by the justice, she had, on October 1, 1906, joined with her husband, V. W. Kittle, in a deed to one Golden for a house and lot belonging to her, by which deed the grantee, in part consideration, had

no duty of active vigilance, circumstances may arise under which he must act for the preservation of the security.

This note does not include cases between debtor and creditor as to collateral where there was no original surety, as where a debtor gives notes of third parties as collateral, or transfers a debt due him as conditional payment, or sells or assigns securities where there is recourse to him.

Cases where the security is the lien of a judgment or execution which has been lost by inaction or by having the execution returned unsatisfied are, also excluded.

It is not intended to include cases which simply sustain the rule that an active release of collaterals by the creditor, or permitting the debtor to take them out of his hands, is a breach of duty.

As to effect upon the surety or indorser of bank's failure to apply principal's deposit account upon note, see the note to *Davenport v. State Bkg. Co.* 8 L.R.A. (N.S.) 944.

For the release of the indorser of a note by failure to enforce liability of maker, see the note to *Rogers v. Detroit Sav. Bank*, 18 L.R.A. (N.S.) 530.

For the effect of failure to present claim against the estate of a deceased or bankrupt principal to release the surety, see the note to *Yerxa v. Ruthruff*, 25 L.R.A. (N.S.) 139.

The reader will remember that the creditor need not accept additional security when offered (see *Berlin Nat. Bank v. Guay*, 78 N. H. 216, 81 Atl. 475, as stating this rule), nor may the surety require the creditor to accept security (see *Rouss v. King*, 69 S. C. 168, 48 S. E. 220, and later appeal in the same case, 74 S. C. 251, 54 S. E. 615).

In distinguishing loss through action, from loss through inaction, the expression "negligence" is not to be applied to the latter unless the failure to perform a legal duty is intended; for if it be granted that loss has occurred through what is legal "negligence," there is, of course, a legal default.

37 L.R.A. (N.S.)

## II. Duty as dependent on nature of possession or lien.

The nature of the real or constructive control over the security which the creditor has in each particular case enters largely into the consideration by the courts of the extent of his duty towards the surety; but while it cannot be comprehensively treated as a separate question, some of the judicial views in regard to it are here collected.

It has been held that the property which the creditor is required to retain must be property on which he has a lien. Thus, where a company was the creditor of one of its stockholders for his subscription for stock, as evidenced by his note, on which the defendant was the indorser, and under the statute the company might prohibit the transfer of stocks or withhold the dividends until the stock had been paid for, but did not exert this privilege, it was held that the indorser was not discharged. *Perrine v. Fireman's Ins. Co.* 22 Ala. 575, where the court considered that there was no lien until the option was exercised, but thought it probable that the surety could have demanded that the lien be created. Compare *Fegley v. McDonald*, *infra*, III. a, 2.

In *Whitehouse v. American Surety Co.* 117 Iowa, 328, 90 N. W. 727, it was said: "The law, in the absence of special statute, annexes no condition requiring the creditor . . . to do any act, no matter what his opportunity to procure security. . . . He may remain entirely passive, and rely on the undertaking of the surety. . . . What shall be deemed a security, within the meaning of these rules, is a matter upon which there has been some contrariety of decision. But we are inclined to the view that it must be a mortgage, pledge, or lien,—some right to or interest in the property which the creditor can hold in trust for the surety, and to which the surety may be subrogated." And it was held that while a laborer on a public building had a privilege which, under the

covenanted to pay said judgment, then a lien on said lot; second, that subsequently, in a chancery suit of George against her, said debt had been reported, and decreed as a debt and lien on said house and lot; third, that subsequently in a suit by Howell against said Golden's administrator, and others, said judgment was reported and decreed as a personal debt against said Golden, and decreed to be paid out of his estate; and that if said debt or any part of it, should be paid out of that estate, Mary D. Kittle would be relieved *pro tanto* therefrom.

And as applicable to both defendants, it was said, that the bank was not bound to the utmost or even active diligence, while the sureties remained passive; and that in

as much as said assignment was only collateral, and that on October 13, 1905, before said note fell due, orders were issued and paid as follows: one to V. W. Kittle, for \$247.50; another for \$76.84; and another to V. W. Kittle, for the use of said Charles W. Brandon, for \$336.76; and that on April 10, 1906, three days after Kittle's assignment to the bank had been filed in the clerk's office of said court, said court, disregarding said assignment, had paid directly to V. W. Kittle \$112.50, for extra work on said court square, the defendants have not been prejudiced by any neglect or want of diligence on the part of plaintiff.

The fact of said collateral assignment is not denied, but fully established by the proof; and it is scarcely denied that the

statute, he might have enlarged into a lien upon a certain fund, he was not bound to do so, and his omission did not discharge the contractor's surety.

The first accommodation indorser is not discharged from liability to the second by the latter's failure to have an amount equal to the note retained, for purposes of set-off, from an indebtedness to the maker of the note, due from a firm of which he (the second indorser) was a member, and which indebtedness was incurred after the giving of the note, and was paid after the note had been taken up by the second indorser, since he was under no duty of active diligence to obtain the assent of his partners, necessary to a set-off. *Glazier v. Douglass*, 32 Conn. 393, 87 Am. Dec. 181. The court was apparently of the opinion that even if the indebtedness had been due from the second indorser individually, his failure to retain the amount of the note therefrom would not have discharged the first indorser. In this connection the court said: "The creditor shall apply in payment of the debt, or hold in trust, for the benefit of the surety, all securities which he may receive or procure for that purpose by contract or operation of law; so that, if compelled to discharge the debt, the surety may be subrogated to them. . . . In respect to what shall be deemed a security within the meaning of the condition, there has been some contrariety of decision. The better opinion is that it must be a mortgage, pledge, or lien,—some right to or interest in property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated; and the right to apply or hold must exist and be absolute."

In *Higdon v. Bailey*, 26 Ga. 426, where a man purchased certain property of his father's estate, giving notes on which the defendants were his sureties, and thereafter the administratrix delivered to him his share in the estate without retaining anything to cover the notes, it was held that she was not bound to retain funds to indemnify the sureties.

37 L.R.A. (N.S.)

Where the administrator of the surety upon a lease notified the landlord that the tenant was about to remove, and requested him to distrain for the rent then due, which he refused, and the tenant moved out of the state, it was held that the surety was not discharged. *Hall v. Hoxsey*, 84 Ill. 618.

So, where, long after the giving of a note with a surety, the debtor as tenant hired a farm from the creditor, and stipulated in the lease that the produce and profits of the farm were holden to the payment of the note, it was held that it was no defense to the surety that the landlord did not take and hold possession of the produce. The court said: "It was a mere executory agreement, authorizing the plaintiff to take possession of the produce when it should come into existence; and if he had exercised that power, and taken such possession, before the right of any creditor or purchaser had intervened, it might have given him a lien. *Bartlett v. Williams*, 1 Pick, 288. But until possession taken, he had no lien, and could not hold the produce against a bona fide purchaser or attaching creditor. *Jones v. Richardson*, 10 Met. 481. And we think he was not bound to active diligence in availing himself of the power to obtain a lien, any more than the holder of a note, with a surety, is bound to active diligence in securing his note by attachment of the property of the principal, when he has an opportunity to do so. 1 Story, Eq. § 325. It was a collateral security, not given at the time the note was made, but afterwards, and not taken with the knowledge or for the use and benefit of the surety. It was a means of obtaining a pledge, at the option of the plaintiff, of which he might have availed himself or not, but it did not constitute an actual security. The plaintiff's forbearing to act upon this executory agreement, and taking no measure to enforce it, was not such a voluntary relinquishment of any pledge or security as to bring the case within the principle relied on by the defendant." *Taft v. Gifford*, 13 Met. 187.

bank was negligent, grossly negligent, in failing to present said assignment, or give notice to the county court thereof, and demand payment. If it had done so, there is no reason to believe, and it is not shown or pretended, that the county court would not willingly and without objection have paid the bank the money which it did pay directly to Kittle. It is contended, however, that the county court was not bound to accept and pay a partial assignment of the amount due Kittle; but in equity, if not at law, it was. At all events, it is not shown that the county court decline to honor said assignment. The assignment was never presented, and the court given an opportunity to honor and pay, until it had actually paid out the

money actually assigned to Kittle and others. We must say, therefore, on the evidence, that the bank lost this security, by its negligence.

We see nothing in the suggestion of counsel, in argument, based on *Norfolk & W. R. Co. v. Pinnacle Coal Co.* 44 W. Va. 574, 41 L.R.A. 414, 30 S. E. 196, that the justice had no jurisdiction to try the rights of defendants as sureties, because equitable in nature. The fact that it might have been necessary for the bank or the sureties finally to enforce its or their rights by a suit in equity furnishes no excuse for the negligence of the bank. That loss by its negligence constituted a legal defense to the action against the sureties.

But was the bank bound to active dili-

Compare *Lichtenthaler v. Thompson*, infra, III. b, 2.

Where the seller of land took a title bond to convey within twelve months, and did not rely at all upon a lien on the land for the purchase money, but took the purchaser's note with a surety, and after the time mentioned in the title bond gave a deed to the purchaser, and took a mortgage from him which, at his request, she did not record, as he said if he was not able to sell the land, he would surrender and cancel his deed, but instead of that he mortgaged the land, it was held that these things did not release the surety, and that the power to withhold the deed could not be considered as a collateral security, which the creditor must retain at the hazard of releasing the surety. *Coombs v. Parker*, 17 Ohio, 289, 49 Am. Dec. 459.

### III. Is there a duty of active vigilance?

#### a. In general.

##### 1. Contradictory opinions.

As heretofore stated, two opposing views are asserted as to the nature of the creditor's duty to the surety with respect to the collateral security: one, that there is no duty of active vigilance; the other, that he holds the collateral as an active trustee.

The reasons given for the first view are (1) that the duty of activity is rather upon the surety than upon the creditor, and it is not for him to stand by and see the security lost, and then complain of the inactivity of the creditor; and (2) that at any time after default of his principal he may pay the debt and take the collateral.

The second view rests rather upon what the court considers reasonable under the circumstances than upon any specific reason. The loss of the right of subrogation is not, of course, a reason, as the question is how far the creditor is obliged to go to preserve the surety's right of subrogation.

The discussion in the cases is often of an

excursive character, and is apt to contain *obiter* views of various situations not supported by actual decisions. And here, as in every branch of the civil law where a legal distinction is made or attempted between positive and negative conduct, misfeasance and nonfeasance, commission and omission, difficulties arise in drawing the line between them. Thus, in *Clopton v. Spratt*, 52 Miss. 251, where the creditor, in enforcing his remedy against the collateral, which was land, omitted the most valuable part of the land, it was held that this was a positive act whereby the value of the collateral had been impaired; and that, if the creditor, in attempting to enforce the collateral, had failed to accomplish the result by reason of any negligence or want of skill on his part, the surety was *pro tanto* discharged; and that it was no answer to say that the omitted part of the land might still be looked to, as it was clear that the omission of the most valuable part had injured the sale.

##### 2. Various judicial views.

In *English v. Seibert*, 49 Mo. App. 563, where, after judgment against the principal and surety, the judgment creditor took a chattel mortgage on a crop of wheat from the principal debtor, who, however, declined to acknowledge it so that it could be recorded, and the creditor did not make any effort to prevent the disposal of the wheat by the debtor, it was held that this did not discharge the surety. The court said: "We know of no case where it is held that if, by his mere negligence or nonaction, the lien or security becomes fruitless, this releases the surety. It is indeed said by Judge Norton, in giving the opinion of the court in *Priest v. Watson*, 75 Mo. 315, 42 Am. Rep. 409, that, 'if the payee has a specific lien on the property of the debtor sufficient to satisfy the debt, and voluntarily surrenders the lien or loses it by his own neglect, the surety will be discharged.' But it is evident that in this dictum the learned judge was not using language with his usual care. He seems to have been misled into the expression by



gence? The authorities cited and relied on by plaintiff's counsel hold that a creditor is not bound to active diligence in pursuing his principal debtor, unless required by the sureties to do so. But this proposition, and the authority cited for it, we think inapplicable to the duty of a creditor respecting collateral securities in his hands. With respect to such securities the authorities all hold the creditor bound to use proper care and diligence in the management and collection of such collateral, and that a surety is released to the extent of the loss actually sustained by the negligence of the creditor, to the same extent as if lost by the positive act of the creditor. This proposition we think

fully sustained by the following: 1 Brandt, Suretyship, 3d ed. §§ 480, 481, 482 & 498; Clow v. Derby Coal Co. 98 Pa. 432; Phares v. Barbour, 49 Ill. 370; Hall v. Hoxsey, 84 Ill. 616; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. 554; 32 Cyc. 216, and many cases cited in notes; Davenport v. State Bkg. Co. 115 Am. St. Rep. 100, note page 100.

If the bank had given due notice to the county court, or filed said assignment in time to preserve its and the sureties' rights thereunder, the bank might not have been bound, in order to preserve its rights against defendants, to have pursued the county court by suit. It was, however, in the interest of the sureties, bound to preserve those rights by diligence. It is

following the language of the syllabus in *Ferguson v. Turner*, 7 Mo. 497. That syllabus does not correctly state the doctrine of the court." The court goes on to state that in the *Ferguson* Case the ground of the decision was not the omission by the creditor to record the deed of trust, but because of his affirmative act in causing the execution which had become a specific lien on the property to be returned unsatisfied. The court said further: "When it is said that, in such a case, the creditor, by taking additional security or acquiring a lien, constitutes himself a trustee for the surety in order to preserve for his benefit the advantage thus gained, it is not meant that he constitutes himself an active trustee in the sense of being obliged to go forward and take any other affirmative steps for the benefit of the surety. The meaning is that he can go forward as far as he wishes, but that having by going forward acquired any advantage, he cannot voluntarily go backward and surrender it."

In *Vance v. English*, 78 Ind. 80, where the surety alleged that she became such by reason of the fact that there was a mortgage securing the debt, and she alleged further that an older mortgage had been foreclosed, the creditor making default, and not notifying her of the foreclosure, and that it was now too late for her to redeem, it was held that this was no discharge of her contract. The court said: "It is also the duty of the creditor to use all reasonable care in the preservation of all collateral securities which he may have acquired for the security of his debt, and to which the surety has a right to become subrogated on payment of the debt, but it has never been held that the mere passiveness of the creditor in the collection of his debt, either of the principal debtor, or from collateral securities held by him, is sufficient ground for discharging the surety. As regards collateral securities, the creditor must be guilty of some wrongful act, such as by a release or fraudulent surrender of such securities, in order to discharge the surety. . . . If, when she indorsed the notes, she relied upon the

mortgage for her indemnity, she was much more interested in maintaining intact the lien of the mortgage than was the appellee, and it involved upon her to take whatever measures were necessary for the preservation of that lien in case she continued to rely upon it. It follows, from what we have said, that the appellee was under no legal obligation to notify the appellant of the institution of the suit by Fletcher to foreclose his mortgage."

In *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A.(N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435, where it was claimed that a surety of a note secured by mortgage was released by laches of the creditor in not proceeding to collect the indebtedness after it became due, the court said: "The conclusive answer to that is, as counsel for respondent suggests, the payee of an instrument having a principal obligor and surety owes no duty of active vigilance to the latter to enforce collection of the indebtedness. The way is open to the surety at any time after default of his principal to pay the debt and reimburse himself by enforcing the obligation of such principal and the cosureties, if there be such."

In *Schroeppell v. Shaw*, 3 N. Y. 446, where the creditor had not proceeded to foreclose a mortgage security as early as possible, Harris, J., said of the surety who was the plaintiff in the suit: "There was no time after the first instalment upon the bond and mortgage became due, when the plaintiff was not in default, and liable to be sued for such default. To allow him to take advantage of any want of diligence in the defendant in collecting the bond and mortgage, under such circumstances, seems very much like allowing a man to take advantage of his own wrong. If the defendant was guilty of negligence, the plaintiff was guilty of a positive omission of duty. The defendant was under no higher obligation to collect the bond and mortgage than the plaintiff was to pay the note, and take the bond and mortgage himself. . . . In reference to collateral securities, the rule is the same as in reference to the collection

shown in this case to have neglected that duty.

It is very clear, therefore, unless Mrs. Kittle is estopped by her acts, as claimed, from denying her liability, or she and her codefendant Brandon have not been prejudiced by the negligence of the plaintiff in the premises, that they have both presented complete defenses to the action.

We do not find any element of estoppel in the fact that in the deed to Golden, Golden covenanted to pay the bank the judgment recovered before the justice, then pending in the circuit court on appeal by Mrs. Kittle and Brandon; nor in the fact that in the subsequent decrees in the two chancery cases referred to, that judgment was allowed and decreed. Those decrees

were involuntary on her part. The plaintiff was in no way prejudiced by anything done or omitted by Mrs. Kittle. When she sold her property to Golden the lien of the judgment existed. Some provision had to be made to protect the purchaser. The parties chose to make such provision in the deed. The bank was no party to that agreement, did not rely thereon to its prejudice. For this reason plaintiff is not in a position to plead estoppel.

For a like reason it may be said with respect to the decrees in the chancery suits. The judgment of the bank had been recovered. It was a lien as it stood, though appealed from, certainly as to V. W. Kittle. Evidently nothing was ever realized by the bank in those suits, and we do not see any-

of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive. Until the surety moves in the matter, it is enough that the creditor holds himself in readiness to transfer to him, when he applies, all the securities he holds, that he may have the benefit of such securities in aid of his own responsibility. . . . In no single instance has it ever been held that the mere passiveness of the creditor in the collection of his debt, either of the principal debtor or from collateral securities held by him, is sufficient ground for discharging the surety from his liability. No rule is more uniformly recognized than that mere indulgence, at the will of the creditor, however long, or whatever may be the consequences, will not operate to discharge the surety. I think it may safely be added that this rule is equally applicable whether the indulgence is extended towards the principal debtor, or towards a third person, liable to the creditor upon a collateral security. The criterion by which to determine in any and every case, whether a creditor has done, or omitted to do, anything which will have the effect to exonerate the surety, is stated, as I think, with perfect accuracy by Judge Story, as follows: 'If a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him, if not at law, at all events, in equity.' " But in another part of the same opinion, Harris, J., considers that the passiveness of the creditor, outside of the failure to collect upon the security, might discharge the surety. He states that in *Capel v. Butler*, *infra*, "the plaintiff had become surety on the faith of the vessels being effectually assigned as a security for the annuity;" and continues: "For the defendant to omit an act necessary to render the assignment effectual was equivalent to a surrender of the security to the principal debtor. It was like the case of a creditor taking a mortgage upon personal property and omitting to file it, or the omission of the creditor to protest a note held by him as collateral security, so as to charge the indorser. In these and similar cases, a surety whose means of indemnity had been impaired by the neglect of the creditor to do what was necessary to protect the security might well insist upon his right to be discharged, to the extent of the loss sustained by reason of such neglect. If, for example, in the case under consideration, the mortgaged premises had been sold upon the foreclosure of the prior mortgage, the defendant would have been bound to take the necessary measures to secure the surplus moneys arising from the sale. . . . Such cases of negligence, however, differ very widely in principle from mere inactivity in the collection of a debt held as collateral security. It was well said by the court below, in noticing the case of *Capel v. Butler*, that 'the nature of the security required something to be done at once by the creditor to make it a valid security, and hence the law should, as it doubtless did, imply an agreement on his part to perform that act without which the security was invalid. An omission to do this would be gross neglect in an agent, bailee, or trustee, and would be a breach of good faith on the part of the creditor towards the surety.' It is this kind of negligence, undoubtedly, to which Justice Story refers when he says (*Story*, Eq. § 326) that 'if the creditor has any security from the debtor, and by his gross negligence it is lost, that will operate, at least, to the value of the security, to discharge the surety.' "

pal debtor. It was like the case of a creditor taking a mortgage upon personal property and omitting to file it, or the omission of the creditor to protest a note held by him as collateral security, so as to charge the indorser. In these and similar cases, a surety whose means of indemnity had been impaired by the neglect of the creditor to do what was necessary to protect the security might well insist upon his right to be discharged, to the extent of the loss sustained by reason of such neglect. If, for example, in the case under consideration, the mortgaged premises had been sold upon the foreclosure of the prior mortgage, the defendant would have been bound to take the necessary measures to secure the surplus moneys arising from the sale. . . . Such cases of negligence, however, differ very widely in principle from mere inactivity in the collection of a debt held as collateral security. It was well said by the court below, in noticing the case of *Capel v. Butler*, that 'the nature of the security required something to be done at once by the creditor to make it a valid security, and hence the law should, as it doubtless did, imply an agreement on his part to perform that act without which the security was invalid. An omission to do this would be gross neglect in an agent, bailee, or trustee, and would be a breach of good faith on the part of the creditor towards the surety.' It is this kind of negligence, undoubtedly, to which Justice Story refers when he says (*Story*, Eq. § 326) that 'if the creditor has any security from the debtor, and by his gross negligence it is lost, that will operate, at least, to the value of the security, to discharge the surety.' "

In *Clopton v. Spratt*, 52 Miss. 251, where it was conceded that no mere forbearance or nonaction on the part of the creditor toward the principal debtors would release the surety, but it was insisted that this applied only to forbearance or passiveness in the pursuit of property belonging to the principal persons, and that it did not apply to claims upon third persons which had been turned over by the principal debtor as collateral (being here land notes of a

thing in the record thereof, so far as presented, estopping Mrs. Kittle in this action.

But were defendants prejudiced by the negligence of the plaintiff? They were not, if, as intimated in the record and in argument, either got the money, or the benefit

thereof, paid out on orders of the county court to Kittle, subsequent to said assignment. That Mrs. Kittle is the wife of V. W. Kittle, without more, is not sufficient to show that she was benefited in such a way as to excuse the bank from loss due to its negligence. It is not prov-

third person), the court, in denying the point, said: "The surety is in all respects equally bound with the principal for the payment of the debt, so far as the creditor is concerned. He can therefore never claim to be released without showing that he has been in some manner damaged by the act of the latter. No mere laches on the part of the creditor, short of a bar of the statute of limitations, can have this effect, for several reasons. In the first place the surety—who, in the eyes of the law, so far as the creditor is concerned, is as much an original debtor as his principal—is himself always in default and guilty of laches, after the maturity of the debt, in not paying it off; secondly, he may at any time, by paying it off, become himself the owner of the original debt, as well as entitled to the control of all collaterals by which it is protected, or he may compel the creditor to sue and exhaust the principal, or he may, before the maturity of the debt, by bill *quia timet*, compel proceedings to collect the collaterals if he deems them likely to depreciate or be destroyed by lapse of time. With all these remedies in his hands, why should he be allowed to sit still and do nothing, and then be heard to complain because his creditor has done the same thing? The creditor, it is true, is his trustee of all securities placed in his hands for the protection of the debt; but surely he is no more bound to protect the surety than the latter, with the same facilities, is bound to protect himself. The creditor discharges his duty when he takes care that no affirmative act of his shall either diminish the value of the security, or tie up his own hands against the principal debtor, or release any claim he holds against the property of the latter."

In *Brick v. Freehold Nat. Bkg. Co.* 37 N. J. L. 307, where it was claimed that, owing to the neglect of the creditor to sell, the collateral had somewhat depreciated, the court, while not satisfied that there had been any material depreciation beyond wear and tear, said: "It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus make the principal his debtor. The same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt becomes due and owing discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact

37 L.R.A. (N.S.)

that the collaterals have depreciated between the time of the maturity of the debt for payment of which they were pledged, and the commencement of suit against the surety."

#### Theory of active vigilance.

Where the creditor and his assignee had, as collateral security, a mortgage on property which was already held by trustees upon prior trusts, and the creditor and the assignee both failed to notify such trustees of the existence of their mortgage, so that the trustees distributed the property without notice of the claim, it was held that the surety was discharged. *Strange v. Fooks*, 4 Giff. 408, where Stuart, V. C., said: "It is perfectly established in this court that if, through any neglect on the part of a creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged. . . . It seems to me that this case comes within the general doctrine of the court that a surety being entitled to the benefit of every security, where a security is lost through the negligence of the principal creditor by his not having had it perfected in the proper way, the surety is released to that extent."

In *Fegley v. McDonald*, 89 Pa. 128, where the debtor sent his creditor a check for the amount of the debt, not having funds in the bank that day, but deposited them the following day, and the creditor did not deposit or use the check for a week, on the last day of which the bank appropriated the money to a debt of the debtor to it, it was held that the surety was discharged. The court said: "The rule is well settled that when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged. It need not be actually in the hands of the creditor; if it be within his control, so that, by the exercise of reasonable diligence, he may have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged."

In *Mingus v. Daugherty*, 87 Iowa, 56, 43 Am. St. Rep. 354, 54 N. W. 66, it was held that when a creditor holds a landlord's lien for the debt due to him, it is a security; and if, through his act or neglect, that security is lost in whole or in part without the consent of a personal surety, it works a discharge of the personal surety to the extent of the security lost; but whether it was his duty to enforce his landlord's lien is a question for the jury.

en, or attempted to be, that Brandon did not have a bona fide debt against Kittle for the amount of the order of the county court to his use; or that he was in any way benefited by the orders issued in favor of Kittle individually; or that either Mrs. Kittle or Brandon knew, as a fact,

that the bank had not presented its assignment to the county court, and protected its own rights as creditor, and their rights as sureties.

For these considerations, we conclude that the judgment below was right, and should be affirmed.

The court said: "All that the law required of the appellant was the exercise of reasonable diligence in preserving his lien. What would be reasonable diligence depends upon the facts and circumstances. So long as he had no reason to anticipate loss by delay, he was not bound to proceed, nor was he bound to bring an action, if the amount of property covered by the lien did not justify it. . . . Whether it was the duty of the appellant to enforce his landlord's lien was a question that should have been submitted to the jury. It is not the law that the sureties are entitled to be exonerated merely because he did not enforce it. He must have been negligent in not doing so, and loss resulted from his negligence."

In *Galbraith v. Townsend*, 1 Tex. Civ. App. 447, 20 S. W. 943, where it appeared that losses had occurred, among other things, from failure to record a chattel mortgage and failure to prevent the shipping out of the state by the mortgagor of mortgaged sheep, the court, in denying that the creditor might remain inactive, said: "While it is true that, for the purpose of having an execution run against the property of the principal, generally, it does not require, for the protection of the surety, that the payee of a note shall institute suit at any particular time, unless requested in writing to do so by the surety, yet, when property is pledged to the creditor, by mortgage or otherwise, to secure a debt, and the latter has the right to control the property, he becomes trustee for the surety as well as the principal, and he rests under the same obligations that other trustees similarly situated do. The surety, by paying the debt, has the right of subrogation to all the security held by the creditor, and the law demands of the trustee—the creditor—the exercise of reasonable care and diligence for the preservation of the property, to the end that it may be devoted to the purpose for which the trust was created,—the payment of the debt."

In *Nelson v. Munch*, 28 Minn. 314, 9 N. W. 863, where the creditor permitted the proceeds of collateral realized by him to be absorbed by the debtor's firm, and also permitted them to absorb certain lumber transferred to him by bill of sale in trust, to be sold and the proceeds applied upon the debt, the court said, in crediting the sureties with the value of these items: "It is a well-settled rule of equity that any laches by the creditor in the care or management of collateral remedies or securities, if loss ensues, will discharge the surety *pro tanto*; that is, so far as he is ac-

tually damaged. This rule follows from the right of subrogation on the part of the surety. When a surety pays the debt of his principal, he is entitled to be subrogated to the rights of the creditor to all collaterals held by him for the payment of the debt. This right of subrogation implies an obligation on the part of the creditor to keep it unimpaired; and if this duty is violated, the loss must be borne by him who is in default. In short, the equity of a surety depends on the right of subrogation, and the consequent duty of the creditor to do no act by which the exercise of that right may be frustrated."

(The principle of the *Nelson* Case is approved in *Bandler v. Bradley*, 110 Minn. 66, 124 N. W. 644, where, however, the question was not decided.)

#### *b. Particular inactivities.*

##### *1. Failure to sell or foreclose against the collateral.*

The mere failure to sell or foreclose against the collateral will not discharge the surety. *Clopton v. Spratt*, 52 Miss. 251; *Brick v. Freehold Nat. Bkg. Co.* 37 N. J. L. 307; *Schroeppell v. Shaw*, 3 N. Y. 446; *Fanning v. Murphy*, 126 Wis. 538, 4 L.R.A. (N.S.) 666, 110 Am. St. Rep. 946, 105 N. W. 1056, 5 Ann. Cas. 435; *Gray v. Farmers' Nat. Bank*, *infra*; *Bank of Montreal v. Davy*, *infra*.

In *Lancaster v. Johnson*, 5 Ky. L. Rep. 244, it was held that the failure of a creditor to take personal judgment on lien notes held by him as collateral, the payor being insolvent, did not release the sureties in the note for the payment of which the lien notes were held as collateral.

So, in *Howe Mach. Co. v. Farrington*, 82 N. Y. 121, it was held that the mere failure of the creditor to enforce a security or secure the application of the property upon the debt did not release the surety, but here it did not appear that the security had become in any way impaired.

In *Cherry v. Miller*, 7 Lea, 305, where bonds had been deposited as collateral security for a note, and were not sold at the time of the maturity of the note, and at the time of their sale had depreciated, it was held that, in the absence of a request by the principal debtor or the surety to sell the bonds, the surety was not discharged, and that the creditor was not responsible for a depreciation in the collaterals, and that a mere omission to act or passive negligence of the creditor, the surety himself being inactive, would not discharge such surety.

But in *Bank of Gettysburg v. Thompson*, 3 Grant, Cas. 114, the court seemed to be of the opinion that a creditor who took the assignment of a note as collateral security must use due diligence to collect it; but it was held in that case that the sureties were estopped from claiming that they were discharged under the circumstances.

In *Murrell v. Scott*, 51 Tex. 520, where the debtor made a mortgage in trust to a third person to secure the debt, it was held, in an action against principal and surety, that the court properly charged the jury that the creditor was not legally bound to require the trustee to proceed to carry out the terms or conditions of the trust deed, and that any failure or default of the trustee fully to carry out the trust would not affect the legal right of the creditor to recover, unless it was further shown that such failure or default was procured by the fraudulent acts or procurements of the creditor, or expressly authorized by him.

The opinion is expressed in some of the cases that the surety would be discharged by the creditor's failure to proceed in time to avoid the statute of limitations, but the question does not seem to have been decided. In *Pfirsing v. Peterson*, 98 Ill. App. 70, where, in an action by a chattel mortgagor against the mortgagee, seeking to enjoin the foreclosure of the mortgage, a decree was entered for the defendant, permitting the foreclosure, and the defendant permitted the lien of the mortgage to expire, the court, while not deciding the question, was of the opinion that the surety in the appeal bond would be exonerated by such inaction. Compare *New York Nat. Exch. Bank v. Jones*, *infra*, III. b, 4, as to failure to refile a chattel mortgage; where, however, the court also found it unnecessary to decide the question.

#### Special agreements requiring activity.

In *Berman v. Elm Loan & Sav. Asso.* 114 Md. 191, 78 Atl. 1104, it was held that where there is a stipulation in the contract of suretyship as a condition of the surety's execution that the creditor will diligently enforce the payment of a mortgage held as collateral security to the principal debt, proof of the failure to perform such stipulation to the satisfaction of the jury will be a good defense to the surety.

Where the defendant gave his promissory note to the plaintiff as collateral security for a note and mortgage of a third party, and the understanding between them was that, as soon as the note of the third party became due, the plaintiff would proceed to collect it at once, and that the defendant should only be liable for the deficiency, and the plaintiff did not take any steps to collect the first note until some four years after it was due, it was held that the surety was discharged. *Bouche v. Louttit*, 104 Cal. 230, 37 Pac. 902.

In *Crim v. Fleming*, 101 Ind. 154, where certain fees due the debtor were assigned to the creditor, and the first paragraph of 57 L.R.A. (N.S.)

the complaint alleged a reassignment by the creditor, but the second paragraph did not allege such reassignment, the court said: "The second paragraph of the complaint is good, for the reason that it shows that the creditor undertook to collect the fees assigned to him, and that he negligently failed to do so. The complainant shows more than mere passiveness on the part of the creditor, for it shows that he permitted the principal debtor to collect the fees and appropriate them to his own use. It is quite clear that a creditor who receives from the principal debtor securities which he undertakes to collect and apply on the debt is guilty of positive negligence if he surrenders them to the principal debtor, and permits him to collect and appropriate the proceeds. Equity will not suffer the rights of the surety to be thus frittered away. There was here an express agreement to collect and apply the money to the payment of the debt, and it was a violation of this agreement to permit the principal debtor to regain possession of the securities and use them for his own benefit."

But where a note recited that certain certificates of stock were pledged as security, which stock the payee "may, after maturity of this note, sell for cash, or on time, as she may deem best, and apply the proceeds to the payment of the note, and any deficit remaining thereafter is to be made good by the sureties hereof," and there was no request to sell the security, the court said: "The holder of collateral securities, in the absence of an agreement upon his part to dispose of them at a certain time, is not liable for his failure to realize on the securities, unless he has been directed by the pledgor or surety to proceed to enforce their collection by a sale or otherwise, or he has such information as would put an ordinarily prudent business man on notice that action must be taken to prevent loss on the securities. To put it in another way, the pledgee is only held to the exercise of ordinary care and diligence, and is not responsible for loss unless it results from negligence or bad faith upon his part." *Cromwell v. Rankin*, 30 Ky. L. Rep. 123, 97 S. W. 415.

#### 2. Failure to take possession of collateral covered by a mortgage or lien.

In *Otis v. Von Storch*, 15 R. I. 41, 23 Atl. 39, it was held that it was necessary to show that the creditor had come into possession of personal property of the debtor mortgaged as collateral security, and afterwards relinquished it; and it was not sufficient to show that with a little more care he could have taken possession.

See also, in this connection, *Myers v. Farmers' State Bank*, *infra*, e.

In *English v. Seibert*, 49 Mo. App. 563, where, after judgment against the principal and surety, the judgment creditor took a chattel mortgage on a crop of wheat from the principal debtor, who, however, de-

clined to acknowledge it so that it could be recorded, and the creditor did not make any effort to prevent the disposal of the wheat by the debtor, it was held that this did not discharge the surety.

And in *Freaner v. Yingling*, 37 Md. 491, where a mortgage of personal property on a stock of goods in a store had been made after the loan, and not part of the original transaction, it was held that the creditor was not compelled to take the goods out of the debtor's hands, whereby they were lost, and that the surety was not discharged by this omission.

A surety who stands by and sees the principal debtor consume part of the crops mortgaged as collateral security for the debt cannot then set up the negligence of the creditor in regard to the crops so consumed. *Grisard v. Hinson*, 50 Ark. 229, 6 S. W. 906, where the court said: "The surety," says Lord Eldon (*Eyre v. Everett*, 2 Russ. Ch. 381), 'has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests on is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effective means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing.'"

But in *Galbraith v. Townsend* (supra, III. a, 2), where losses had occurred from failure to prevent the shipping out of the state of mortgaged sheep, the court held that the creditor rested under the same obligation as other trustees.

#### Landlord and tenant.

In *Ewing v. Williams*, 19 Ky. L. Rep. 319, 39 S. W. 843, supra, it was held that the failure of the landlord to enforce his lien upon the crops did not discharge the surety, although the surety asked him, at the time that the crops were being removed, to enforce such lien.

See also, in this connection, *Hall v. Hoxsey*, supra, II.

So, in *Taft v. Gifford*, 13 Met. 187, supra, where, long after the giving of a note with a surety, the debtor, as tenant, hired a farm from the creditor, and stipulated in the lease that the produce and profits of the farm were holden to the payment of the note, it was held that it was no defense to the surety that the landlord did not take and hold possession of the produce.

And see also, for cases under the Louisiana statute, *infra*, d, 2.

But where, by the agreement between a landlord and tenant and a surety, it was stated that the landlord would "retain a lien on the crops, to secure the payment of the above sum," and the landlord simply allowed the crops to be taken off the premises, it was held that the surety was discharged. *Hubbard v. Pace*, 34 Ark. 80, where the landlord was an administrator, and, as an individual, he was in partnership with the tenant, and this partnership 37 L.R.A. (N.S.)

sold the crops, and it was held that his position as administrator did not affect the question at issue.

See also *Taylor v. Scott*, *infra*, VI., and *Mingus v. Daugherty*, supra, III. a, 2.

And it was held in *Lichtenthaler v. Thompson*, 13 Serg. & R. 157, 15 Am. Dec. 581, where the surety of a tenant called upon the landlord to claim his lien from the officer who had seized the tenant's goods in execution, but he declined to do so, that the surety was discharged.

In *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891, where a landlord brought an action against the tenant by virtue of his landlord's lien, for the possession of cotton grown on the premises, and the same having been seized, was relinquished under claim and delivery proceedings in the suit on the giving of the usual undertaking, the principal and sureties in which were solvent, and the landlord afterwards submitted to a nonsuit, and thereafter brought an action on the bond given him by his tenant for rent, with a surety, it was held that the surety was discharged.

In *Kesler v. Linker*, 82 N. C. 456, where a judgment for the creditor was reversed for omitting to submit to the jury the question whether the creditor had agreed to active vigilance as to growing crops mortgaged as security, it was held that while without an express agreement to that effect there is no duty of active vigilance on the part of the principal creditor, "when there is such an agreement or understanding, the creditor is bound to active diligence; and if by his neglect the property is lost, or destroyed, or surrendered, the surety will be exonerated to the extent of the value of the property conveyed in the mortgage or other security, which might be secured by proper diligence; and the reason is because, by the understanding or agreement to look after the mortgage and see that the property conveyed therein shall be applied to the debt, it put to sleep the vigilance of the surety, and produces a false confidence, but for which he might have taken security for his own indemnification."

#### Where title of chattel sold is retained as security.

Where machines were sold, to remain the property of the sellers until paid for, and notes of the purchasers were taken, guaranteed by the seller's agent, it was held to be no defense to an action upon these guaranties that the sellers permitted the property to remain in the hands of the buyers, and neglected and refused to take it from them and sell it as the contract permitted. *Fuller v. Tomlinson Bros.* 58 Iowa, 111, 12 N. W. 127.

So, in *Massey-Harris Co. v. Graham*, 12 West. L. Rep. 593, it was held, where a chattel had been sold, the title to remain in the seller until payment was made, that the seller was not required to repossess

himself of the chattel, and to sell it in order to protect the surety.

In *Sheldon v. Williams*, 11 Neb. 272, 9 N. W. 86, the court seems to have held a similar opinion; but it is doubtful whether the case goes further than to hold that there was no evidence of negligence on the part of the creditor.

### 3. Defaulting in suits.

It was held in *Vance v. English*, 78 Ind. 80, where the creditor held mortgage security which was swept away by the foreclosure of an older mortgage, the creditor making default in the foreclosure, and not notifying the surety of it, that the surety could not complain.

So, in *Carver v. Steele*, 116 Cal. 116, 58 Am. St. Rep. 156, 47 Pac. 1007, where the principal debtor gave a note and a mortgage, and the sureties indorsed the note, and a prior mortgagee foreclosed his mortgage, and the principal creditor made default, so that his mortgage was extinguished, it was held that he had not lost his recourse against the sureties, even supposing that it was the law that his default would have prevented him from maintaining any personal action against the mortgagor.

Where a creditor having a mortgage, the mortgaged lands became delinquent in taxes, and were sold at a tax sale, and the purchaser brought an action to clear his title, in which the creditor did not appear, and so lost his lien, it was held that the surety was not discharged. *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

But compare where the omission to appear is the result of fraudulent collusion against the surety. *Clark v. State National Bank*, *infra*, VII.

And compare as to submission to non-suit, *Bell v. Howerton*, *supra*, III. b, 2.

### 4. Failure to record papers.

By the weight of authority, if the security is lost by the failure of the creditor to record mortgages, etc., the surety will be *pro tanto* discharged; but some of the courts hold the contrary.

Where a county treasurer lent some of the school fund upon the note of a debtor and a surety, and took also a mortgage, but failed to record it for over two months, and until after the recording of a subsequent mortgage to a third party, it was held that the surety was discharged. *Sullivan v. State*, 59 Ark. 47, 26 S. W. 194.

Where, during negotiations to procure a surety the creditor agreed to take a mortgage from the debtor and have it recorded for the surety's protection as well as his own, and the surety asked him to permit him to take the mortgage for record, but he refused, and delivered it to an agent, who recorded it in the wrong county, whereby the lien of it was lost, other mortgages having intervened before it was properly recorded, it was held that the surety was 37 L.R.A. (N.S.)

discharged. *Redlon v. Heath*, 59 Kan. 255, 52 Pac. 862.

So, where it appeared that the surety signed a note in reliance on the debtor that he would give a certain mortgage on personal property to the creditor, which was done, and the creditor failed to register the mortgage, whereby the mortgaged property, which was sufficient to have paid the debt, was lost, it was held that the surety was discharged. *Bennett v. Taylor*, 43 Tex. Civ. App. 30, 93 S. W. 704. See also to similar effect *Galbraith v. Townsend* (*supra*, III. a, 2).

Also where the creditor failed to register a mortgage of personal property, and failed to take possession of the property mortgaged, the debtor being in default for interest, and the creditor knowing that his bankruptcy was imminent, it was held that the surety was discharged to the extent of the value of the security lost by this neglect of the creditor. *Wulff v. Jay*, L. R. 7 Q. B. 756.

In *Capel v. Butler*, 2 Sim. & Stu. 457, 4 L. J. Ch. 69, where a man became surety on the faith of certain securities being given for the debt, among which were certain vessels, the transfer of which was not registered under the statute by the creditor, and being without this register they were sold by the debtor and lost as a security, it was held that they being lost by the neglect of the creditor, the surety was discharged so far as their value was concerned.

And in *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816, it was held that if a deed of trust was delivered to the creditor as collateral security for notes in which the surety was accommodation indorser, with a view of protecting the indorser, as well as affording additional security to the creditor, and if the omission to record the instrument was prejudicial to the surety, and not with his consent, he should be *pro tanto* exonerated. But a judgment against the surety was affirmed.

In *Burr v. Boyer*, 2 Neb. 265, the court, while recognizing and holding that where the creditor has received a chattel mortgage as collateral security, if, through his failure to record or file the mortgage, the property is lost to the surety, this is an exoneration of him *pro tanto*, holds nevertheless that where, nearly a year after the claim came due, the surety alleged that the property was lost, this did not show that it was lost at the time the surety ought to have paid the debt.

### No duty to record papers.

In *Hampton v. Levy*, 1 M'Cord, Eq. 107, it was held (in reversing the chancellor's decision) that the creditor's neglect to record a mortgage given to secure the debt would not discharge the surety on the debt, although the failure to record the mortgage resulted in the loss of the lien.

In *Lang v. Brevard*, 3 Strobb. L. 59, the

Hampton Case was approved and followed as to the failure to record the mortgage.

So, in *Jephson v. Maunsell*, 10 Ir. Eq. Rep. 132, affirming 10 Ir. Eq. Rep. 38, it was held that the surety on a lease was not discharged by the failure to enroll the tenant's recognizance whereby the priority of lien was lost.

And in *New York Nat. Exch. Bank v. Jones*, 9 Daly, 248, the court, while not considering it necessary to decide in the case, was of the opinion that the failure of the creditor to refile a chattel mortgage did not discharge the surety.

In *Pickens v. Finney*, 12 Smedes & M. 468, where the creditor obtained a judgment and an execution which was bonded with complainant as surety, and at that time the debtor had sufficient property, but the creditor failed to enroll the judgment so as to preserve the lien, and the property was taken by inferior judgments, it was held that the surety was not discharged. The court said: "Forbearance or mere passiveness on the part of the creditor will not release the surety; but he must do no positive act which would increase the hazard of the surety."

In *Philbrooks v. McEwen*, 29 Ind. 347, where the creditor neglected to have recorded a mortgage of the debtor and his wife covering ample personal property of the husband to have paid the debt, and also real property of the wife, and the debtor was thus enabled to sell the personal property, leaving the wife's real estate to bear the burden, it was held that, in the absence of a request by her to the creditor, he was not bound to record the mortgage, and the wife was not discharged. The court distinguished *Capel v. Butler*, supra, on the ground that in that case there was an express agreement that the surety became such on the faith of the vessels becoming effectually assigned as a security for the debt. The court said: "We know of no American case where loss of another security, in consequence of mere passiveness, in the absence of a request to act, has been held to discharge the surety."

##### 5. Miscellaneous omissions.

In *Gillespie v. Darwin*, 6 Heisk. 21, where the principal debtor died, and an order was made requiring claims to be presented in court, and the claim was presented, and enough of the estate sold to pay all the claims, and the creditor did not apply to have his claim paid from the money in court, it was held that the surety was discharged, and that the payment into court of the proceeds of the sale sufficient to pay all the claims was a discharge of the surety. The court stated that if the creditor who has had or ought to have had the securities "in his full possession or power loses them or permits them to get into the possession of the debtor, the surety will, to the extent of such security, be discharged."

So, where the money of a principal debtor

upon which the plaintiff's judgment was a lien was actually brought into court, and the plaintiff neglected to obtain it, it was held that the surety was discharged. *Ramsey v. Westmoreland Bank*, 2 Penr. & W. 203.

See also *Fegley v. McDonald*, III. a, 2, for failure to deposit a check.

In comparison with *Strange v. Fooks*, supra, III. a, 2, reference should be made to *Macdonald v. Bell*, 3 Moore, P. C. C. 315, which arose at the Cape of Good Hope, in which it was held that under the civil law, where a mortgage was lost through the neglect of the creditor to enforce it, the sureties were not discharged, there being no act done by the creditor, which was the Crown, and which omitted to claim its mortgage on the sale of the property. The case, however, is not very satisfactory, as it is stated that the conveyance, free from the mortgage, was "with the sanction of the government;" yet the court said: "If the title of the Crown, therefore, was lost, it was not by a positive act, but an omission."

##### c. Particular agreements.

(See also supra, III. b, 2.)

Where, in accordance with the understanding of the parties, personal property which, as collateral security, was covered by a lien, was annexed to real estate, and thus became subject to a mortgage on the real estate, so that the lien was lost, it was held that the surety was not discharged. *Evans v. Kister*, 35 C. C. A. 28, 92 Fed. 828.

In *Watts v. Shuttleworth*, 7 Hurlst. & N. 353, 7 Jur. N. S. 945, 5 L. T. N. S. 58, 15 Week. Rep. 132, where a contract was made to complete fittings, and provided that the owner "shall and may" insure, and deduct the amount of the premium from the amount of the contract, and the owner failed to insure, and there was a loss by fire, it was held that one guarantying the performance of the contract was entirely discharged.

So, where an agreement for the building of a church provided that "the owner, the church, shall protect by insurance to cover his interest when payments have been made to contractor," and the church was destroyed by fire before it was finished, and the insurance was only partial, it was held that the sureties on the building contract were exonerated. *Gallagher v. St. Patrick's Church*, 45 Neb. 535, 63 N. W. 864.

Where the creditor held two debts of his debtor, on one of which there was a surety, whom he promised that, on realizing from the security held for the other debt, he would also collect from it the debt for which the surety was holden, and thereafter he did not collect this debt from the proceeds of the security, but turned the property over to the debtor without notice to the surety, it was held that the creditor could not recover from the surety, who might have tried to get other security had



it not been for the promise. *Strong v. Wooster*, 6 Vt. 536.

Where part of sheep mortgaged as collateral security to a bank was, before any default, sold by the mortgagor upon six months' credit, with the assent of the mortgagee, which inquired into and approved the purchaser's credit, and which discounted the purchaser's note for the purchase money, indorsed by the mortgagor, and passed the proceeds to the latter's credit, and he drew out the amount, and the note was dishonored, it was held that the sureties who had bound themselves to reimburse and pay to the bank all moneys which the mortgagor should borrow from it, or which it should lend, pay, or advance to him up to a certain sum, were not discharged, although they had no notice of the sale, as it was held to have been within the contemplation of the parties that the mortgagor should manage the sheep, and from time to time make sales thereof, the court considering that it did not appear that the sale upon six months' credit was not in the usual course of business. *Taylor v. Bank of New South Wales*, L. R. 11 App. Cas. 596, 55 L. J. P. C. N. S. 47, 55 L. T. N. S. 444.

But compare *Lakenan v. North Missouri Trust Co.* 147 Mo. App. 48, 126 S. W. 547, where the principal debtor sold cattle which were security for the debt under a chattel mortgage, and deposited the money with the creditor, which was a trust company, and thereafter the creditor permitted him to draw a certain part of the money, it was held that if the creditor knew the source of the money, then the surety was *pro tanto* discharged, and inasmuch as the creditor had information sufficient to put it on inquiry as to the source of the money, this result must follow.

Where the principal creditor had first mortgages on cattle on which Scott, the surety, had a second mortgage, and it was agreed between all parties that one of the members of the partnership which was the principal creditor should buy the cattle at a certain price per head, the court said: "It cannot be doubted, if this testimony states the facts truly, that plaintiffs became charged with a duty to Scott, and that duty was to ascertain the cattle subject to the mortgages, and to at least use diligence to obtain possession of and apply them to the secured debts. Plaintiffs owned the principal mortgage, and had as good opportunity as Scott had to know the property covered by it; and when they assumed the management of the transaction and made the promises stated, their duty was not only to account for the value of the property delivered to them, but to use reasonable diligence to secure all that was called for by the mortgages; and for any loss sustained by Scott which such diligence on their part would have prevented, they were liable to him." *Scott v. Llano County Bank*, 99 Tex. 221, 89 S. W. 749.

In *Folk v. Cruikshanks*, 4 Rich. L. 243, it was held that it was no defense to a

surety on a bond, to allege that there had been a prior agreement between the debtor and the creditor to have also a mortgage as security, which the creditor did not get, as such agreement, having preceded that of the surety, was to be regarded as merged in it, and it was for the surety to secure himself if he so desired.

#### d. Under special statutes.

##### 1. Georgia.

In *Toomer v. Dickerson*, 37 Ga. 428, under the statute which provides that "any act of the creditor, either before or after judgment against the principal, which injures the surety, or increases his risk, or exposes him to greater liability, will discharge the security," where the debtor, to secure his bonds given with a surety, made a mortgage on slaves in South Carolina, and there recorded, and shortly afterwards took the slaves to his home in Georgia, and the creditor did not have the mortgage registered in Georgia, which was necessary to be done within a certain time in order to give the lien priority, it was held that the surety was discharged, although it did not appear that he had actually lost any security, as he had been "exposed to greater liability," within the terms of the statute.

So, where, by the contract of the surety, the debtor is to give a mortgage to the creditor, and does so, and the latter does not record it, and cancels it, taking another, although the mortgage if recorded would have been of no avail, owing to prior liens, the surety is nevertheless discharged, under the same statute. *Atlanta Nat. Bank v. Douglass*, 51 Ga. 205, 21 Am. Rep. 234.

*Toomer v. Dickerson*, supra, was followed in *Cloud v. Scarborough*, 3 Ga. App. 7, 59 S. E. 202, where it was held that a failure to record a mortgage of personal property released the surety, although no loss was shown. The *Scarborough Case* was followed in *Cordele Grocery Co. v. Thigpen*, 4 Ga. App. 643, 62 S. E. 97.

In *Trammell v. Swift Fertilizer Works*, 21 Ga. 778, 49 S. E. 739, the court charged the jury that if a lien on crops was intended to cover only the crops of the principal debtor, and not of the surety, the failure to record the instrument would release the surety; but a judgment against the surety was affirmed.

Although without the scope of this note, reference may be here made to *Williams v. Kennedy*, 134 Ga. 339, 67 S. E. 821, where it was held when a lien was lost by failure to put an execution on the special execution docket, that the surety was not discharged, under the statute providing that "any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him," as the same section also provides that "a mere failure by the creditor to sue

as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety." The court said that there was a difference in not recording an instrument given when the contract was made, and in not pursuing a remedy.

### 2. Louisiana.

In *Saulet v. Trepagnier*, 2 La. Ann. 427, where an appeal was taken from a judgment in favor of the creditor on a community debt, which was affirmed, but pending the appeal the debtor had died, and the creditor took no steps to bring in the widow, so as to make the judgment on the appeal binding on the community property, it was held that the surety on the appeal bond was discharged. The court said: "It would seem to be a necessary consequence of the principles of the law of suretyship, that the surety is entitled to the benefit of all the securities in the hands of the creditor; and, if any of them be lost by his wilful neglect or want of due diligence, the surety is, to that extent, discharged. . . . By article 3030 of the Code the surety is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety. Article 2037 of the Napoleon Code is to the same effect; and the court of cassation has more than once decided that the term 'act of the creditor' applied to omissions or neglects of the creditor, and consisted in *omittendo* as well as in *committendo*. . . . When the surety on the appeal bond in this case signed it, there was a judgment against Pierre Trepagnier, and the community existing between him and his wife was bound by it. The judgment rendered on the appeal, though it affirmed the judgment of the court, only bound those who were parties; to wit, the heirs of Pierre Trepagnier. There is to this day no judgment against the community. The creditor was bound to make the proper parties on the demise of the principal debtor, so as to maintain the judgment in its integrity. If, by his neglect, it has been impaired, so that a subrogation to the rights under the original judgment is impossible, his recourse against the surety, *pro tanto*, is lost."

Where a landlord did not proceed against her tenant until his effects were removed, the court said, in holding that the surety was not discharged: "The surety is not discharged by the mere omission of the creditor to enforce or preserve a privilege. To produce that effect, the creditor must do some act by which the subrogation can no longer be operated in favor of the surety. Civil Code, art. 3030." *Parker v. Alexander*, 2 La. Ann. 188.

In *Hill v. Bourcier*, 29 La. Ann. 841, an action for rent, brought against the tenant and the surety, it was held that the surety was not discharged because the landlord did not pray for judgment with privilege against the tenant's effects, under the stat-

ute providing that "the surety is discharged when, by the act of the creditor, the subrogation to his rights, mortgages, and privileges can no longer be operated in favor of the surety." The court said: "Jurisprudence has settled the law that the surety is not discharged by the mere omission of the creditor to sue the principal, or to enforce his privilege."

Where a company having a claim against its agent of about \$33,000, on which there were sureties to the extent of about \$10,000, received from the agent all his property, and administered it to its own benefit, appropriating it to its own use, it was held under the same statute that the sureties were entirely discharged. The court said: "The duty of the company was not to appropriate or dispose of the property, whether received before or after the sureties' liability had accrued by the defalcation of Randall, without the knowledge and consent of the sureties, but to hold it impartially for its own and the sureties' benefit. . . . This the company has not done. The plaintiff has placed the property beyond the reach of the sureties. They cannot demand subrogation to the creditors' rights against the principal, to which they are entitled under their contract of suretyship. When the creditor intends to look to the surety for payment, he is compelled to preserve, unimpaired, all his rights against the debtor. If the creditor, therefore, does any act without the surety's consent, which impairs his rights of subrogation or the means of enforcing his claim against the principal in case he should be called upon to pay the debt, the surety will be discharged." The court said, however, that the evidence left little doubt that the sureties could have done better with the assets than the company did. *New England Mut. L. Ins. Co. v. Randall*, 42 La. Ann. 260, 7 So. 679.

### 3. Canada.

Where, by agreement between the parties, it appeared that the creditor was to pay the premiums on a life insurance policy assigned as security, a special provision being made for securing the premiums paid by a general appointment of an agent to collect rents, it was held that while mere passiveness would not discharge the surety in this case, the failure to pay the premiums, whereby the policy was lost, would discharge him *pro tanto*. The court seemed to consider that the Canadian Code was substantially declaratory of the ordinary law in the following provisions: "The creditor is liable for the loss or deterioration of the thing pledged according to the rules established in the title of obligations. On the other hand, the debtor is pledged to repay to the creditor the necessary expenses incurred by him in the preservation of the thing. . . . The suretyship is at an end when, by the act of the creditor, the surety can no longer be subrogated in the rights, hypothecs, and privileges of such creditor.

*Trust & L. Co. v. Wurtele*, 35 Can. S. C. 663."

*e. Requests to realize on collateral.*

The law as to requests to realize on collateral would seem to follow the rule in the several jurisdictions as to requests to proceed against the principal, irrespective of collateral.

In *Ewing v. Williams*, 19 Ky. L. Rep. 319, 89 S. W. 843, it was held that the failure of the landlord to enforce his lien upon the crops did not discharge the surety, although the surety asked him at the time that the crops were being removed to enforce such lien.

See also, to similar effect, *Hall v. Hoxsey*, supra, II.

In *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518, where it was claimed that the surety urged upon the creditor that he should realize upon the security, and he agreed to do so, but delayed for a very considerable period, the court said: "Stat-ing the proof in its strongest aspect against the bank, its action amounted to no more than inaction or passive delay; and when that is the case, there is no impairment of the creditor's right to resort to the surety."

. . . If the surety desires to expedite payment, he may pay the debt, and by that means put himself in the place of the creditor, or he may call on the creditor, by the aid of a court of equity, to proceed against the debtor upon giving the proper indemnity against costs and delay."

In *Myers v. Farmers' State Bank*, 53 Neb. 824, 74 N. W. 252, it was held that "where the maker of a note secures its payment by a chattel mortgage, and the payee of the note indorses and delivers it to a third party, the failure of the indorsee to seize the mortgaged property for the purpose of satisfying the note, even though requested so to do by the sureties of the maker, will not discharge them."

In *Bank of Montreal v. Davy*, 21 U. C. C. P. 179, it was held that the creditor was not required, on the demand of the surety, to sell a vessel mortgaged as collateral security, under the power of sale in the mortgage.

On the other hand, in New York it has been held that the creditor may discharge the surety by failure to collect the collateral when requested. *Remsen v. Beekman*, 25 N. Y. 552, where the court said: "The principle was settled in this state more than forty years ago, and has since been steadily maintained, that if a surety request the creditor to collect the debt from the principal, and the creditor refuse or neglect to do so at a time when it is collectable, and from a subsequent change of circumstances it becomes uncollectable, the surety is, by such conduct of the creditor, exonerated from his liability. . . . It is not contended that it makes any difference in the rule, or in the application of the principles on which it is founded, that the principal to which the creditor re-

fuses or neglects to resort when he should is a fund or property primarily liable for the debt in exoneration of the surety, instead of being a person so primarily liable."

So it was held in Pennsylvania in *Lichtenthaler v. Thompson*, 13 Serg. & R. 157, 15 Am. Dec. 581, where the surety of a tenant called upon the landlord to claim his lien from the officer who had seized the tenant's goods in execution, but he declined to do so, that the surety was discharged.

Where a mortgagor conveyed the premises to a purchaser, who assumed the payment of the mortgage, and, upon the maturity of the bond and mortgage, the mortgagor requested the mortgagee to proceed immediately to foreclose and collect the debt, on the ground that the premises, which were then sufficient, might depreciate and become inadequate, and the plaintiff neglected to do so for a year, it was held that the original mortgagor was discharged. *Russell v. Weinberg*, 2 Abb. N. C. 422.

But in *Black River Bank v. Page*, 44 N. Y. 453, where the plaintiff, who was requested by one of the sureties to realize upon the securities, waited a considerable time before doing so, the court said: "This did not impose the absolute duty upon the plaintiff to proceed at once. It held these securities for two notes, upon one of which the defendants were not indorsers. It was to judge, acting in good faith, when it was best to convert them. If it delayed unreasonably, or was guilty of bad faith or gross negligence in the care and management of the property mortgaged to it, and the securities were thus damaged, they would undoubtedly, to the extent of such damage, have a defense to the note. . . . Here the court found that the plaintiff acted in good faith, and was not guilty of culpable neglect."

In *Mutual L. Ins. Co. v. Davies*, 56 How. Pr. 440, it was held that the request must be full and explicit.

In *Bingham v. Mears*, 4 N. D. 437, 27 L.R.A. 257, 61 N. W. 808, it was held that it is no defense to the surety that the creditor holds sufficient security to pay the debt, which he, on request, has failed to realize upon, in the absence of prejudice to the surety from such inaction.

#### IV. Sale merging security in the debt.

In *Johnson v. Young*, 20 W. Va. 614, it was held that where the owner of land which is subject to the lien of a judgment purchases the judgment, a surety for the debt covered by the judgment will be discharged to the extent of the value of the land.

So, in *Wright v. Knepper*, 1 Pa. St. 361, where, after a judgment became a lien upon the real property of the principal debtor, the latter sold the property to a third person, who afterwards bought the judgment, and the lot was worth the value of the

judgment, it was held that the purchaser could not recover upon the judgment against the surety.

In *Clow v. Derby Coal Co.* 98 Pa. 432, where the plaintiff having agreed to furnish the money to pay off a mortgage and other indebtedness of a company, and take a new mortgage, also became the owner of a judgment against the company, secured by a supersedeas bond which became absolute on dismissal of the writ of error, and consented that the old mortgage be satisfied, and sold the property under the new mortgage, and became the purchaser, apparently not supposing that the judgment was a lien, it was held that he could not recover from the sureties on the supersedeas bond.

#### *V. Waiver and estoppel of surety.*

The surety, of course, may waive the retention of the collateral or be estopped from objecting to its release.

This was shown in *Clark v. Smallwood*, 156 Fed. 409, where the vendor of property discounted purchase-money notes at a bank and assigned to it the mortgage securing them, and later repurchased the property, and in consideration assumed the payment of all the notes. Thereafter the original purchaser often requested the bank to foreclose, but it did not do so, and he continued to put his name on the renewal notes, and it was held that while he could have required the bank to foreclose, inasmuch as he continued to put his name on the renewal notes he must be deemed to have acquiesced, and that his remedy was to pay the debt and obtain subrogation to the mortgage, or sue in equity to be relieved from his liability on the notes, on account of the laches of the bank; and, that therefore he was not discharged as surety.

See also *Grisard v. Hinson*, supra, III. b, 2, for the view that a surety may be estopped by his own want of diligence.

In *Berlin Nat. Bank v. Guay*, 76 N. H. 216, 81 Atl. 475, it was held that where a litigation arises as to the application of property to various creditors, and the surety, being invited to join therein, refuses, he cannot complain of a reasonable settlement made by the creditors.

#### *VI. Applying collateral to other debts.*

The creditor cannot apply the security held for a particular debt to some other debt, at the expense of the surety. *Holliday v. Brown*, 33 Neb. 657, 50 N. W. 1042.

In *Hutchinson v. Woodwell*, 107 Pa. 509, where, under the contract between the debtor and the creditor, the creditor was to hold possession of personal property of the debtor for the fulfilment of the contract, and thereafter the creditor caused such personal property to be sold under an execution on a judgment he had in another matter against the debtor, it was held that the surety upon the contract was discharged.

In *Kuhns v. Westmoreland Bank*, 2 37 L.R.A. (N.S.)

*Watts*, 136, it was held that where, by statute, a bank had a lien upon the stock of a stockholder whose paper it had taken, that such lien must also be exercised for the benefit of the sureties; and that therefore the bank had no right to exercise this lien in favor of subsequent paper of such stockholder.

In *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613, which was an action upon notes given in renewal of an original note, the court approved an instruction to the following effect: If the jury believe from the evidence that Kendrick was in fact a surety for Farnham upon the original note, yet, if they further believe that before the renewal of the original note, Farnham placed in plaintiff's hands a quantity of wheat sufficient to pay said original note, and requested plaintiff to sell the same for that purpose, and apply it on said note, but that he failed to do so, and without Kendrick's consent applied the proceeds to other uses, and that Kendrick did not consent to such application to other uses, and did not know of Farnham's said request at the time he signed the renewal notes, they must find for the defendant; and quoted the general rule as codified in California, viz.: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety, at the time of entering into the contract of suretyship, or acquired by him afterward, whether the surety was aware of the security or not." (Civil Code, § 2849.) The "other uses" referred to in the instruction was the payment of another debt owed by the principal to the creditor.

So, where, in pursuance of an agreement between the creditor and the surety, made at the time of the suretyship, the creditor took a mortgage from the debtor, but failed to carry out his promise to appropriate the proceeds to the debt, but appropriated them to another debt, it was held that the surety was *pro tanto* discharged. *Montgomery v. Martin*, 94 Ga. 219, 21 S. E. 513.

The *Martin* Case was approved in *Barrett v. Bass Bros.* 105 Ga. 421, 31 S. E. 435, where it was held that if, at the time of executing the contract of suretyship, the creditor informed the surety that he had taken a mortgage on personal property of the debtor, and thereafter he applied the proceeds of such personal property to other debts, the surety would be discharged.

Where the debtor executed to the creditor notes containing a factor's crop lien, and such notes were also executed by sureties on the faith of the creditor's promise that he would apply the principal debtor's cotton crop to those particular notes, and the crop was sufficient for that purpose, but was not so applied except in a very small amount, it was held that the sureties were discharged. *Taylor v. Scott*, 62 Ga. 39, where most of the crops and proceeds were applied to other and later debts to the firm of which the principal creditor was a member.

But in *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 9 L.R.A. 282, 23 Am. St. Rep. 39, 20 Atl. 300, where a creditor on the same day brought several actions against the debtor on various claims, and attached his property, the action in which there was a surety being the first suit and attachment, and the creditor, having obtained judgments, applied the proceeds of the attached property to other claims, it was held that the surety had no cause of complaint.

### VII. Good faith and fraud.

The creditor is only responsible for the fair value of the security, and where he deals with it in a reasonably prudent way, the surety will not be discharged. *Denniston v. Hill*, 173 Pa. 633, 34 Atl. 452.

In *Miles v. Johnson*, 7 Ky. L. Rep. 229, it was held that sureties had no right to complain where the creditor exercised ordinary diligence and good faith in making collateral available, although they may have become bound upon the faith of the collaterals held by him.

See also *Berlin Nat. Bank v. Guay*, supra, V.

In *State Bank v. Smith*, 155 N. Y. 185, 49 N. E. 680, affirming 85 Hun, 200, 32 N. Y. Supp. 999, it was held that as the effect of release of collaterals is measured by the injury done to the surety, a substitution of one security for another, when made in good faith, and apparently for the benefit of all concerned, should be governed by the same rule. In this case, however, the security which was given up was probably of no value, and the securities taken in exchange were worth something.

In *Bailey v. Griffith*, 40 U. C. Q. B. 418, it seems to have been the opinion of the court that a surety is discharged to the extent of the loss suffered by substitution of securities.

Where a trustee holding securities for the benefit of the creditor and the surety sold the securities at a public sale, and they were bought by the creditor and the surety, and an opportunity arising to make sale of the securities, the creditor declined to accept the price offered, although asked to do so by the surety, so that the sale was lost, and the decision of a lawsuit shortly afterwards rendered the securities worthless, it was held that the surety was not discharged. *Kaufman v. Loomis*, 110 Ill. 617.

In *Coates v. Coates*, 33 Beav. 249, 33 L. J. Ch. N. S. 448, 10 Jur. N. S. 532, 9 L. T. N. S. 795, 12 Week. Rep. 634, where, after the principal debtor had become a bankrupt, the creditor surrendered an insurance policy on his life to the insurance company, obtaining certain amounts thereby, it was held that this did not discharge the surety on the debt, as it would have been a mere speculation to have continued to hold the policy, and the assured being a bankrupt, the probability was that he would not keep up the policy. 57 L.R.A. (N.S.)

On the other hand, in *Mutual Loan Assn. v. Sudlow*, 5 C. B. N. S. 449, 28 L. J. C. P. N. S. 108, 5 Jur. N. S. 338, where the creditor took the goods as security under a bill of sale, and sold them in a wasteful manner, it was held that the surety was rightly allowed to show that a proper sale would have realized enough to pay the debt, and a verdict in his favor was sustained.

So it was held in *Everly v. Rice*, 20 Pa. 297, that where a creditor, by fraud upon the surety, diminishes the amount of the proceeds from the security, the surety is *pro tanto* discharged.

So, where the creditor sold the security at auction to his dummy, for a triding price, without notice to the surety, it was held that the surety was discharged to the extent of the value of the property appropriated by the creditor. *Phares v. Barbour*, 49 Ill. 370.

In *Parks v. State Nat. Bank*, — Tex. Civ. App. —, 34 S. W. 1044, the court was of the opinion that "when a judgment creditor has, through such process, reached the assets of the principal debtor in the hands of a third party, and obtained judgment against the garnishee, and that when a garnishee seeks to enjoin such judgment, and the surety has requested the creditor, in order to protect himself, to be allowed to appear and contest the injunction, promising to pay the attorney's fees and all costs, and the request has been denied, and the creditor himself has promised the surety to appear, answer, and contest the injunction, it was his duty to make such contest, and not, through collusion with the principal debtor and garnishee, for the purpose of injuring and making the surety pay the debt, make no resistance, and, by default, let the injunction be perpetuated."

### VIII. Miscellaneous.

Where a bank had an arrangement with its debtor by which it would discount paper to the amount of \$9,000, receiving as security paper of his customers for the like amount, and, on the paying of any paper of the customers, it would lend back the money to the debtor, taking as security new paper of his customers, and later the bank declined to go on with this arrangement, but agreed to increase the amount of the discount to \$10,000 upon the defendant indorsing the debtor's note as surety, it was held that the surety was not discharged by a continuance of credit under which, upon collection of the collateral notes, the creditor reloaned the money, with new collateral notes as security. *First Nat. Bank v. Johnson*, 65 Vt. 382, 26 Atl. 634.

But where the surety made a mortgage to the principal creditor, a bank, to secure the debts of the debtor and to permit his credit to be enlarged, the mortgage providing that it should cover renewals and substitutions, etc., and, at the time, the paper in the bank being, to a large extent, paper of the debtor's customers, which had been rediscounted or placed in the bank as

collateral, the mortgage also provided that it should be a continuing security and that substitution of new credit might be made for the old, and the bank permitted a good deal of good paper to be taken up by apparent renewals which were forgeries, it was held that as to the amount of the forgeries, the surety was discharged. *Merchants' Bank v. McKay*, 15 Can. S. C. 672, affirming 12 Ont. Rep. 498.

In *Rainbow v. Juggins*, L. R. 5 Q. B. Div. 422, 49 L. J. Q. B. N. S. 718, 42 L. T. N. S. 346, 29 Week. Rep. 130, 44 J. P. 829, affirming L. R. 5 Q. B. Div. 138, 49 L. J. Q. B. N. S. 353, 28 Week. Rep. 428, the court was of the opinion that it must be deemed, in contemplation of the contract, that the creditor may, if he sees fit, in case the debtor becomes a bankrupt, sue for the whole amount of his claim, which will, as matter of law, cause him to lose his lien, and that this will not discharge the surety.

In *Jones v. Hawkins*, 60 Ga. 52, the court seems to have been of the opinion that if a judgment creditor, having a judgment against the principal and surety, proved his debt against the principal in the bankrupt court without reservation of his lien, and thus lost the judgment lien, the surety would be discharged; but the court reversed a judgment for the surety on the ground that it did not appear that he had been damaged.

Where the creditor released to assignees in bankruptcy of the debtor what legally he could not have withheld from them, it was held that the surety was not discharged. *Hardwick v. Wright*, 35 Beav. 133.

It was held in *Bixby v. Barklie*, 26 Hun, 275, where the holder of securities for the benefit of the creditor and surety gave up the security and later took an assignment of the debt, and thereafter assigned it, that his assignee could not recover against the surety.

In *City Bank v. Young*, 43 N. H. 457, the court approved an instruction to the jury to the effect that if the holders of a note secured by a mortgage of personalty made the principal debtor their agent to sell the mortgaged property, and if they were guilty of any want of ordinary care and prudence in the sale of the property, or in securing the proceeds of it, and if, in consequence of such want of ordinary care and prudence, there was a loss upon the security, the surety must be exonerated for the amount which was so lost.

So, where, owing to the carelessness of the creditor, it is put in the power of his messenger fraudulently to deliver the security to the debtor, and this is done, the surety is *pro tanto* discharged. *Sternbach v. Friedman*, 34 App. Div. 534, 54 N. Y. Supp. 608.

In *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601, where the judgment foreclosed a lien on the security, and required an order of sale to be issued to sell the property under the judgment in satisfaction of it, and the property by the principal judgment debtor was delivered to

the attorney of the creditor, to be sold in accord with the terms of the judgment, but the creditor kept the property for a time, and then sold it at private sale, the court said: "The property by the principal judgment debtor was delivered to the attorney of appellant to be sold in accord with the terms of the judgment. This judgment created a lien on the property as effectually as if an execution had been levied thereon; and in order to place appellant in a position to enforce this lien by a sale of the property, it was actually delivered to it. These facts made it incumbent upon appellant to use diligence in selling the property and applying the proceeds to the payment of the judgment, and if, from a failure to so do, the property depreciated in value or a loss occurred, it is attributable to its own negligence, the results of which it must bear." And the judgment in favor of the surety was affirmed.

An answer by the surety that the principal creditor has in his hands sufficient property of the principal debtor to pay the debt is not a good defense. *First Nat. Bank v. Wilbern*, 65 Neb. 247, 90 N. W. 1126, 93 N. W. 1002, 95 N. W. 12, where the court said: "If the answer had pleaded in issuable form that the principal was insolvent, and that his property was fraudulently encumbered or concealed by the plaintiff, so as to delay or embarrass the surety in obtaining indemnity, it would have stated a complete defense at law."

If the security is lost without the negligence of the creditor, the surety is not discharged. Thus, in *Gaar & Co. v. Taylor*, 128 Iowa, 636, 105 N. W. 125, where, by an erroneous judgment, a note was declared paid and a chattel mortgage discharged, and the debtor disposed of the property a good while afterwards, and still later the judgment was set aside as without jurisdiction, it was held that although the security of the mortgage was gone, the sureties were not discharged.

In *Wilbur v. Williams*, 16 R. I. 242, 14 Atl. 878, it was held that a transfer of a mortgage by the creditor to a third person does not discharge the surety, but transfers also the debt secured. B. B. B.

#### WISCONSIN SUPREME COURT.

#### METROPOLITAN CASUALTY INSURANCE COMPANY, Reapt.,

v.

FRED W. CLARK et al., Appts.

(145 Wis. 181, 129 N. W. 1065.)

#### Runaway horse — injury — liability of owner.

The owner of a team is not, in the absence of negligence on the part of himself or his driver, liable for their breaking a window in a building abutting on the highway, while running away because of fright, where,

at the time of their fright, they were being driven along the highway by an experienced driver.

(February 21, 1911.)

**A**PPEAL by defendants from a judgment of the Circuit Court for La Crosse County in plaintiff's favor in an action brought to recover damages for injury to the premises of plaintiff's assignor, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. J. E. Higbee, for appellants:

If horses, while being lawfully and carefully driven upon a public street, become unmanageable and escape from the control of the driver, against his will and without any

failure on his part to exercise proper care, and trespass upon real property adjacent to and abutting upon said street, the owner of the team is not bound to respond in damages to the property owner.

28 Am. & Eng. Enc. Law, 588; 6 Wait, Act. & Def. 44, § 2; Bullock v. Babcock, 3 Wend. 391; 2 Greenl. Ev. §§ 85-92; Wake-man v. Robinson, 1 Bing. 213, 8 J. B. Moore, 63, 2 Chitty, 639; Nitro Glycerine Case (Parrott v. Wells) 15 Wall. 524, 21 L. ed. 206; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; 1 Cyc. 652; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Case v. Hobart, 25 Wis. 654; Fidelity & C. Co. v. Cutts, 95 Me. 182, 49 Atl. 673; Nel-son v. Narragansett Electric Lighting Co. 26 R. I. 258, 67 L.R.A. 116, 106 Am. St. Rep.

**Note.**—*Liability, in absence of negli-gence, for damage by runaway horse.*

As to whether negligence may be inferred from the mere fact that a horse runs away, see the note to Collier v. Knox, 23 L.R.A. (N.S.) 171.

For the duty of the driver of horse that is running away, see the note to Kimble v. Stackpole, 35 L.R.A. (N.S.) 148.

For cases on negligence in leaving horse unhitched in highway, see the notes to Moulton v. Lewiston, B. & B. Street R. Co. 10 L.R.A. (N.S.) 845, and Corona Coal & Iron Co. v. White, 20 L.R.A. (N.S.) 958.

For cases on the liability for trespass on unfenced land by live stock being driven along the highway, see the note to Wood v. Snider, 12 L.R.A. (N.S.) 912.

No case has been found holding the owner or driver of a runaway horse liable for damage in the absence of negligence. Any such idea has been long since discarded.

The suggestion that the theory of the old law involved such an absolute responsibility seems by no means free from doubt, speaking generally of liability for injuries without negligence, while there are certain circumstances in which the inflicter of damage is held to the liability of an in-surer, it has been pointed out that some of the old cases, which hold that trespass is the form of action where an injury is direct, may have been misunderstood.

Thus, in Brown v. Kendall, 6 Cush. 292, Chief Justice Shaw, in holding that the defendant was not liable for hitting the plain-tiff accidentally with a stick which he was raising to strike fighting dogs, points out that he discussions which arose as to the form of action, as trespass or case, are not authority for holding that, in cases of this character, there could be a liability without negligence; and he says: "In the principal case cited, Leame v. Bray, 3 East, 593, the damage arose from the act of the defendant in driving on the wrong side of the road, in a dark night, which was clearly negligent, if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: 'There cer-

tainly are cases in the books where, the injury being direct and immediate, tres-pass had been holden to lie, though the injury was not intentional.' The term 'in-jury' implies something more than damage; but, independently of that consideration, the proposition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597): No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not.' But he immediately adds: 'Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road, when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? And, if so, it must be trespass; for every manslaughter includes trespass,' show-ing what he understood by a case not wil-ful."

The same view of the early cases was taken by Bramwell, B., in Holmes v. Mather, L. R. 10 Exch. 261, where he said, in hold-ing that judgment must be for the defend-ant, whose horses running away injured the plaintiff: "As to the cases cited, most of them are really decisions on the form of ac-tion, whether case or trespass. The result of them is this, and it is intelligible enough: If the act that does an injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

In view of these explanations, it may be doubted whether the court in Bennett v. Ford, 47 Ind. 264 (see also later in this note), correctly characterized the early cases on the general subject where it said: "Ac-cording to the early English cases, the fault or negligence of the defendant had no bearing upon the question of his liability,

711, 58 Atl. 802; *Nichols v. Marsland*, L. R. 10 Exch. 255, L. R. 2 Exch. Div. 1, 1 Eng. Rul. Cas. 262.

In the course of the affairs of life, accidents must happen, and if they are not attributable to the breach of some legal duty owing to the sufferer, he has no legal right to complain.

*Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310; *Moulton v. Lewiston*, B. & B. Street R. Co. 102 Me. 186, 10 L.R.A. (N.S.) 645, 66 Atl. 388; *Koonz v. New York Mail Co.* 72 N. J. L. 530, 63 Atl. 341, 5 Ann. Cas. 874; *Damonte v. Patton*, 118 La. 530, 8 L.R.A. (N.S.) 209, 118 Am. St. Rep. 384, 43 So. 153, 10 Ann. Cas. 862.

A person using due care in driving a domestic animal along the highway is not

but he was held liable for an injury which resulted from inevitable danger and unavoidable accident. The modern English decisions have, to some extent, relaxed the rigor of the old rule, but there is much conflict between the English and American rulings. In the very recent case of *Brown v. Collins*, in the supreme court of New Hampshire [53 N. H. 442, 16 Am. Rep. 372], reported in vol. 13 N. S., of the American Law Register, on page 384, the English and American authorities are reviewed with great ability and clearness, and the rule as laid down by Mr. Chief Justice Shaw in *Brown v. Kendall*, supra, is adopted as the rule in this country."

A more guarded but dissatisfied view is taken of the early cases in *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372 (see also later in this note), which is a direct authority for the decision in METROPOLITAN CASUALTY INS. CO. v. CLARK.

In *Gibbons v. Pepper*, 4 Mod. 404, 1 Ld. Raym. 38, where, in assault and battery, the defendant pleaded that he was riding on a horse in the highway, and that on a sudden fright the horse started and run upon the plaintiff, who continued in the way after he was called to go out, which was the same assault, the plaintiff demurred to the plea. And while the plaintiff had judgment on the demurrer, it was held *per curiam* that the defendant should have pleaded the general issue, for if the horse run away against his will, he would have been found not guilty, because in such case it cannot be said with any color of reason to be a battery in the rider. (Note that the report in 4 Mod. is somewhat obscure as to whether the court or counsel made the statement as to giving the justification under the general issue.)

That the theory of negligence in respect to injuries by horses was an early one is shown not only by *Gibbons v. Pepper*, supra, but by *Michael v. Alestree*, 2 Lev. 172, 1 Vent. 295, where the defendant was held liable in case, in that he brought into a frequented place a pair of ungovernable 37 L.R.A. (N.S.)

liable for the injury which it commits by escaping from his control and entering adjacent private grounds.

*Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Baldwin v. Greenwoods Turnp. Co.* 40 Conn. 238, 16 Am. Rep. 33; *Rightmire v. Shepard*, 36 N. Y. S. R. 788, 12 N. Y. Supp. 800; *Vincent v. Steinhour*, 7 Vt. 62, 29 Am. Dec. 145; 2 Cyc. 398; *Roche v. Milwaukee Gaslight Co.* 5 Wis. 55; *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237; *Case v. Hobart*, 25 Wis. 654; 1 Street, Foundations Legal Liability, 51, 84.

The question of negligence is the only true test of liability.

*Strup v. Edens*, 22 Wis. 432; *Sieber v.*

horses, to train them, and they ran upon the plaintiff and injured him.

So, also, in *Mason v. Keeling*, 1 Ld. Raym. 606 (a dog case), *Holt, Ch. J.*, and *Turton, J.*, stated that "if the owner puts a horse or an ox to grass in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise, if he had notice that they had done such a thing before."

So, the notion of liability without negligence is directly denied in *Wakeman v. Robinson*, 1 Bing. 213, although the charge of the trial court gives it countenance. In that case, there being several horses and carriages abreast in a road, one of the horses by plunging injured another horse, the action was brought in trespass, and the court instructed the jury that, it being an action of trespass, if the injury was occasioned by the immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable, nor was he requested to do so by the defendant's counsel. *Dallas, Ch. J.*, in sustaining a verdict for the plaintiff, said: "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie. . . . But, upon the facts of the case, if I had presided at the trial, I should have directed the jury that the plaintiff was entitled to a verdict, because the accident was clearly occasioned by the default of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do."

In *Goodman v. Taylor*, 5 Car. & P. 410, a pony and chaise belonging to the defendant injured the horse of the plaintiff, who sued in trespass. The defendant's witnesses testified that his wife stood by the head of the pony, holding it by the rein,



Amunson, 78 Wis. 679, 47 N. W. 1126; Roche v. Milwaukee Gaslight Co. 5 Wis. 55; Harrison v. Brown, 5 Wis. 31; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Vincent v. Steinhour, 29 Am. Dec. 149, note; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Tillett v. Ward, L. R. 10 Q. B. Div. 17, 52 L. J. Q. B. N. S. 61, 47 L. T. N. S. 546, 31 Week. Rep. 197, 47 J. P. 438.

Messrs. Bunge & Bosshard, for respondent:

The owner of an animal is liable for such animal's trespass on real estate, as for his own trespass.

when a "punch and judy" show coming by frightened the pony and he ran away, and the wife was unable to hold him. There was other evidence, however, that the pony was unattended. Denman, Ch. J., instructing the jury, said: "If the facts are true as suggested for the defense, I very much think you would be disposed to consider this as an inevitable accident, one which the defendant could not prevent." But the verdict was for the plaintiff.

In *Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676, 10 Week. Rep. 230, where it appeared that the defendant was trying a horse which he bought the day before and which became unmanageable and swerved from the roadway on the pavement, notwithstanding the defendant's efforts to restrain him, and killed a man on the pavement, it did not appear that the defendant had omitted to do anything he could have done to prevent the accident, but it was insisted that the mere fact of his having ridden in such a place a horse with whose temper he was wholly unacquainted was evidence of negligence. The trial court, being of opinion that there was no evidence of negligence, ordered a nonsuit, which on appeal was sustained.

The *Hammack* Case was approved in *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145, where the plaintiff was knocked down while walking on the sidewalk, by a runaway horse attached to a carriage, and it was held that the plaintiff was properly nonsuited. Denman, J., said: "It is impossible to say that horses do not sometimes bolt without any negligence or unskilfulness of those having the charge of them. Here the evidence was that the horse started off and became uncontrollable; and no question was put to either of the witnesses as to negligence on the part of the driver. We cannot therefore assume that there was negligence."

And the decision in *Holmes v. Mather*, supra, would seem to have ended the necessity of any further discussion on the subject in the English courts.

While without the scope of this note, reference should be made in this connection to *Tillett v. Ward*, L. R. 10 Q. B. Div. 17, where the court, in giving judgment for the defendant, whose ox, being driven down the

3 Bl. Com. p. 209; Jaggard, Torts, 662; 2 Am. & Eng. Enc. Law, 354; 2 Cyc. 376-392; Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567; Van Leuven v. Lyke, 1 N. Y. 517, 49 Am. Dec. 346; Bulpit v. Matthews, 145 Ill. 345, 22 L.R.A. 55, 34 N. E. 525; Cooley, Torts, 337; Harrison v. Brown, 5 Wis. 27; Morgan v. Hudnell, 52 Ohio St. 552, 27 L.R.A. 862, 49 Am. St. Rep. 741, 40 N. E. 716; Wood v. Snider, 187 N. Y. 28, 12 L.R.A. (N.S.) 914, 79 N. E. 858; Angus v. Radin, 5 N. J. L. 815, 8 Am. Dec. 626; Marsh v. Hand, 120 N. Y. 319, 24 N. E. 463; Noyes v. Colby, 30 N. H. 143; Petit

street, entered the plaintiff's shop and damaged its contents, no negligence being shown on the part of the defendant, said: "It is also tolerably clear that where both parties are upon the highway, where each of them has a right to be, and one of them is injured by the trespass of an animal belonging to the other, he must, in order to maintain his action, show that the trespass was owing to the negligence of the other or of his servant. . . . There is also the statement of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 265, 3 Hurlst. & C. 774, 3 H. L. Cas. 330, that persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk."

In *Bennett v. Ford*, heretofore quoted from in this note, it was held error to charge the jury: "If the owner of a team, driving it or stopping it on a street or highway, permits or suffers his team to run away and do injury to another person or his property, the owner of the team is liable to the person injured for the injury done; as between the owner of this team and the man who sustained the injury, the owner of the team must bear the loss."

In *Brown v. Collins*, supra, the plaintiff sought to recover the value of a lamp-bearing stone post standing in the front of his place of business, and broken by the defendant's horses. It was agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened by a locomotive on the railroad, and that they then became unmanageable and ran against and broke the post. The court, after reviewing the theories of law on the general subject, said: "Whatever may be the full legal definitions of necessity, inevitable danger, and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless everyone is liable for all damage done by superior force overpowering him and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understand

v. May, 34 Wis. 666; Hartford v. Brady, 114 Mass. 466, 19 Am. Rep. 377; Mairs v. Manhattan Real Estate Asso. 89 N. Y. 498; St. Peter v. Denison, 58 N. Y. 417, 17 Am. Rep. 258.

Timlin, J., delivered the opinion of the court:

The plaintiff corporation executed a policy of plate glass insurance on property abutting upon a highway. The plate glass was broken by defendants' team of horses, which, running away, dashed into the plate glass window. The plaintiff replaced the

plate glass at an expense of \$104, took an assignment of their right of action against the defendants from the owners of the plate glass window, and brought this action for damages, charging the defendants in two separate counts with trespass and with negligence.

The jury by its verdict acquitted the defendants of negligence. There was, however, uncontroverted proof that the defendants owned the horses, and that there was damage done to the amount of \$104. Allowing the verdict to stand, the circuit court rendered judgment for the plaintiff

them, the defendant is entitled to judgment."

In the similar case of *Goldschneider v. J. Rheinfrank Co.* 132 N. Y. Supp. 401, where a horse owned by the defendant and driven by one of his servants ran away, broke the plaintiff's show window, and damaged its contents, the court, in reversing a judgment for the plaintiff on the ground that there was no evidence that the owner had any reason to suppose that the horse had vicious tendencies, said: "There is no evidence that the driver was not competent. He had the reins in his hands, and no negligence on his part has been shown. He had never driven this particular horse before; but, unless the defendant had reason to believe that this horse had some vicious tendencies, it was not negligent on defendant's part to intrust the horse to this driver. . . . The horse was apparently frightened by a 'squeaky' whistle of an elevated train directly over his head. It was also shown that the horse was somewhat nervous and required a tight rein. These circumstances are perhaps sufficient to raise a question whether or not the horse had a dangerous character; but to sustain a recovery, the plaintiff must go further and show facts sufficient to allow the court to infer that the owner had knowledge of this character. I have searched the record, but find it bare of such facts. Certainly the mere fact that it was shown that it had a hard mouth and required a tight rein is insufficient. The defendant had owned this horse for six months, during which time it was kind and gentle and had never shied, run away, bitten, or kicked. The defendant had received no complaints about its behavior."

While the modern courts, in cases concerning runaway horses, often say that there is no responsibility upon the driver or owner without negligence, there are comparatively few cases which refer to any other theory of liability.

In *Caughlin v. Campbell-Sell Baking Co.* 39 Colo. 148, 8 L.R.A.(N.S.) 1001, 121 Am. St. Rep. 158, 89 Pac. 53, the court said, in affirming a judgment for the defendant, whose horses running away injured the plaintiff's bicycle: "Here the defendant was lawfully on the highway with its

team and wagon. While it is possible that an injury might be caused by leaving the team restrained as it was, we cannot say, either as a question of law or of fact, that it was the natural or probable result of such act that the team would break loose and cause mischief. All the cases upon this and analogous questions which we have been able to find, decided by the courts of this country, lay down the rule that the cause of action is based upon negligence, and negligence must be established by the plaintiff, or he cannot recover."

In *Stephenson v. Corder*, 71 Kan. 475, 69 L.R.A. 246, 114 Am. St. Rep. 500, 80 Pac. 938, the court, in holding that it was error to have declined to instruct the jury to find for the defendant, said: "Quite true, the accident would not have occurred had the horses been hitched to an unbreakable rack with an unbreakable chain; nor would it have occurred had not the defendant driven to the city on that day; but ordinary care does not require the use of such precautions. If it did, it would, in the language of this court in *Cleghorn v. Thompson*, 62 Kan. 733, 54 L.R.A. 402, 64 Pac. 605, 'paralyze human effort and action on all lines.'"

It seems that in Louisiana the statute places the burden of proof on the owner. Thus, in *Damonte v. Patton*, 118 La. 530, 8 L.R.A.(N.S.) 209, 118 Am. St. Rep. 384, 43 So. 153, 10 Ann. Cas. 862, where the defendant was held in fault for leaving his horse unattended while he was chasing his hat, the court said: "The law is 'that the owner of an animal is answerable for damage he has caused' (Civil Code, art. 2321); and the presumption is that the owner of the animal is in fault, and the burden is on him to show that he was without the slightest fault, and did all that was possible to prevent the injury. *Bentz v. Page*, 115 La. 560, 39 So. 599."

In *Groom v. Kavanagh*, 97 Mo. App. 362, 71 S. W. 362, the court, in affirming a judgment for the plaintiff, approved the following instruction: "That the defendant was not liable in every event for damage caused by his runaway team; but that his liability depended on whether or not he took ordinary care to prevent it from running away. . . . That the defendant

for this sum, on the ground that defendants, being the owners of the horses, were liable for the damage caused by such horses, without any negligence on the part of the owners, deducing this rule of liability from *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567; *Pettit v. May*, 34 Wis. 666; *Bul-pit v. Matthews*, 145 Ill. 345, 22 L.R.A. 55, 34 N. E. 525; *Wood v. Snider*, 187 N. Y. 28, 12 L.R.A. (N.S.) 912, 79 N. E. 858; *Hazleton v. Week*, 49 Wis. 661, 35 Am. Rep. 796, 6 N. W. 309; 2 Cyc. 376.

It appeared that the horses were in charge of an experienced driver, but took fright, became unmanageable and beyond the control of the driver, and ran away,—all in the highway,—and in their flight on the street they ran upon the sidewalk in front of the building in question and into the plate glass window.

The case is presented with commendable industry and ability. The appellants attack, and respondent defends, the ruling of the court below, each appealing to what he terms "common-law" rules in support of his position. That law being in a degree progressive, the term "common law" is somewhat ambiguous; for the common law of the seventeenth century is not in all details that of the nineteenth, nor the common law of England in all details that of

the United States, nor the common law of one state in all details that of another. This difference in detail is frequently all important and decisive of the particular case under consideration. The Constitution of this state (§ 13, art. 14) provides that such parts of the common law as are now (1848) in force in the territory of Wisconsin, not inconsistent with this Constitution, shall be and continue part of the law of this state, until altered or suspended by the legislature. Viewed objectively and at large as a system of deducing from litigated instances just, reasonable, and consistent rules of decision, suitable to the genius of the people and to their political, social, and economic conditions, the common law never changes; but, with reference to the rules so deduced, we may say, with Francis Bacon: "As waters do take tincture and taste from the soil through which they run, so do laws vary according to the region where they are planted, though they proceed from the same fountains."

A rule of the common law, which has come down to us practically unchanged, made it the duty of every man to keep his cattle (herbivorous domestic animals) within the limits of his own possessions. If he failed to so keep them, he failed in duty, and when they strayed upon the land of

is not liable to the plaintiff if the casualty was a pure accident, in no way due to the defendant's carelessness."

In *Unger v. Forty-second Street & G. Street Ferry R. Co.* 51 N. Y. 497, it was held that a person driving horses through a street is not bound absolutely to keep them under control. He is bound to exercise that reasonable degree of diligence and care which a man of ordinary prudence and capacity might be expected to exercise under the same circumstances. The court said: "It would be a very hard and unwise rule which would require of the owner of every vehicle driven in the streets of a city, that he use, in the construction of his carriage and in the harness of his horses, and all the means by which they are attached to the vehicle, the best methods which human skill and ingenuity have contrived and brought into use to prevent accidents to pedestrians in the streets. Such a rule has not and, probably, never will be adopted."

So in *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, the court said: "There is no rule of law which compels a person driving horses upon a highway absolutely to keep them under control. He is bound only to exercise that reasonable degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances."

In *Tooker v. Fowler, & S. Co.* 132 N. Y. Supp. 213, the court, in affirming a judgment of nonsuit, where the defendant's

horse had run away and injured the plaintiff's vehicle, said: "Such a conjunction of circumstances would not occur in the natural course of events once in ten thousand times, and to say that it was the duty of defendant's driver to anticipate this accident . . . is to make the defendant liable as an insurer, rather than as one charged with the duty of exercising reasonable care."

In *Kennedy v. Way*, *Brightly* (Pa.) 186, where, however, the defendant was held liable, the court said: "If a horse runs away without the fault of the driver, he is not answerable."

In *Vincent v. Stinehour*, 7 Vt. 62, 29, Am. Dec. 145, the court said: "It has been laid down that if a horse, upon a sudden surprise, run away with his rider, and runs against a man and hurts him, this is no battery. . . . In the case of *Gibbons v. Pepper*, 4 Mod. 405, it was distinctly decided that if a horse runs away with his rider, against his will, and he could not have avoided it, and runs against another, it is no battery in the rider, and he can defend under the general issue." In the Vermont case, where the judgment was for the defendant, and the horse in question was not running away, the court said further: "The result of our examination is that we think there must be some blame, or want of care and prudence, to make a man answerable in trespass; and that where a horse takes a sudden fright, and there is no imprudence in the rider, either

another, the owner was chargeable with a trespass. Nor did his liability for the mischief done by them depend in any degree upon his personal fault, since, if the cattle escaped from his custody, notwithstanding due care on his part, his responsibility for the injury committed by them was the same that it would have been had he voluntarily permitted them to roam at large. 2 Cooley, Torts, 3d ed. 684 (\*397); Bigelow on Torts, 8th ed. p. 459; 2 Jaggard, Torts, p. 662. This rule of the common law was recognized in Wisconsin in the early case of *Stone v. Donaldson*, 1 Pinney (Wis.) 393, and also in *Harrison v. Brown*, 5 Wis. 27. The liability still exists in this state, but subject to conditions imposed by statute. *Walls v. Cunningham*, 123 Wis. 346, 101 N. W. 696. A learned review of the common law on this subject, and the reasons upon which the rule was based, will be found in the opinion of Justice Doe, in *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372. The rule itself appears to have been founded on ancient analogies and on the known propensities of such animals to stray, crop the herbage, destroy trees, etc., and in part on the forms of action made imperative by the ancient common law. There grew up, however, not without some struggle, a supplementary rule of the com-

mon law limiting the liability of the owners for damages caused by such animals when, being lawfully driven upon the highway, without negligence on the part of the owner or his servant in charge, they escaped from control and trespassed upon property abutting on the highway. Cooley speaks of it as an exception to the common-law rule that every man, at his peril, must keep his beasts from the lands of others. "If one is driving his domestic animals along the public highway, he is bound to observe due care; and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time." 2 Cooley, Torts, 3d ed. 690 (\*401). "A person whose horses, frightened by a locomotive, became uncontrollable, ran away with him, went upon land of another, and broke a post there, is not liable for the damage, if it was not caused by any fault on his part." *Brown v. Collins*, supra. "An ox belonging to the defendant, and while being driven by his servants through the streets of a country town, entered the plaintiff's shop, which adjoined the street, through the open doorway, and damaged his goods. No negligence on the part of the persons in charge of the ox was proved. Held, that the de-

in managing the horse or in driving an unsafe horse, and the horse runs against another and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained."

In *Trow v. Thomas*, 70 Vt. 580, 41 Atl. 652, where the judgment was for the plaintiff, the court said: "In effect the charge was this, that if the horse became unmanageable without the fault of the defendant, he would not be liable; but if it became unmanageable through the fault of the defendant, he would be. This was correct."

In *Lynch v. Kineth*, 36 Wash. 368, 104 Am. St. Rep. 958, 78 Pac. 923, the court, in reversing a judgment for the defendant on the ground that the question of *scienter* was not submitted to the jury, said: "It is the contention of the respondents, in brief, as gathered from a citation from the case of *Cadwell v. Arnheim*, supra, that there is no rule of law which compels a person driving horses upon a highway to keep them absolutely under control; that he is bound to exercise only that degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances; that, in the course of the affairs of life, accidents must happen, and, if they are not attributable to the breach of some legal duty owing to the sufferer, he is without legal right to complain. This, no doubt, is a correct statement of the law."

It has been held also in Canada that, in 37 L.R.A. (N.S.)

order to permit a recovery, there must be negligence on the part of the proprietor of the horse. *Quebec v. Picard*, Rap. Jud. Quebec, 14 C. S. 94.

In *Patterson v. Fanning*, 2 Ont. L. Rep. 462, affirming 1 Ont. L. Rep. 412, where the defendant's horses escaped from the field in which they were pasturing, into the highway, through a defective fence, and on the highway they were startled by a boy, and, running away, went upon the sidewalk where the plaintiff was walking, and knocked her down, there was a by-law of the city making it unlawful for any person to allow his horses to run at large within the city. *Armour, C. J. O.*, said: "The effect of this by-law being in existence was, in my opinion, that the same liability was imposed upon the defendant in allowing his horses to run at large upon the public highway as would have been imposed upon him at the common law, had he allowed his horses to stray into the land of his neighbor without the default of his neighbor; that he was bound to take care that his horses did not run at large upon the public highway, and that he was answerable for the consequences of their doing so." *Osler, J. A.*, said it was conceded that the horses had no right to be unattended and at large upon the highway, but whether he grounds this opinion upon the by-law of the city or not is not clear.

B. B. B.

fendant was not liable." *Tillett v. Ward*, L. R. 10 Q. B. Div. 17. In the case last cited, Coleridge, Ch. J., says: "Persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. . . . The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town."

This exception to the common-law rule referred to, or supplementary rule of the modern common law, whichever it may be called, is recognized in Wisconsin. It is said in *Harrison v. Brown*, supra: "It is further conceded, that the alleged trespass was committed by the hogs escaping through the fence while running at large and depasturing in the highway, and not in consequence of breaking into the close while being driven along the same *in transitu*." The court seemed to think it was necessary to draw this distinction. See also *Van Roy v. Watermolen*, 125 Wis. 333, 104 N. W. 97. This is also supported by *Roche v. Milwaukee Gaslight Co.* 5 Wis. 55, and *Fahn v. Reichart*, 8 Wis. 255, 76 Am. Dec. 237. In the latter case it is said: "A possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and, if a loss is the consequence, it is *damnum absque injuria*." See also *Wood v. Snider*, 12 L.R.A. (N.S.) 912, and cases in note (187 N. Y. 28, 79 N. E. 858), 1 *Thomp. Neg.* §§ 1294, 1297; 18 *Am. & Eng. Enc. Law*, 2d ed. 588; *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295. The case of *Chunot v. Larson*, 43 Wis. 536, 28 *Am. Rep.* 567, chiefly relied upon in the court below to support the decision, is not in point. That case falls under a different rule of law.

Judgment reversed, and the cause remanded, with directions to enter judgment for defendants.

#### WISCONSIN SUPREME COURT.

JULIUS H. SURE, Appt.,  
v.

MILWAUKEE ELECTRIC RAILWAY &  
LIGHT COMPANY, Resp't.

(148 Wis. 1, 133 N. W. 1098.)

**Carrier — injury to passenger — act of fellow passenger.**

A street car company is not liable for injury to a passenger standing in the vestibule, by the act of a fellow passenger in releasing, without request from or notice to the company, a set brake, and letting the handle whirl around, where there is nothing to show that it ought to have anticipated

that passengers would meddle with its machinery.

(January 9, 1912.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

*Note. — Liability of carrier for injury resulting from negligent or meddlesome act of fellow passenger.*

Cases involving injuries to passengers resulting from crowded conditions on cars or at stations are excluded from this note, and notes covering such situations will be found appended to *Lynn v. Southern P. Co.* 24 L.R.A. 711; *Alton Light & Traction Co. v. Oller*, 4 L.R.A. (N.S.) 399; *Kuhlen v. Boston & M. Street R. Co.* 7 L.R.A. (N.S.) 729; and *Glennen v. Boston Elev. R. Co.* 32 L.R.A. (N.S.) 470.

The general rule underlying the cases in this note seems to be that a carrier will not be liable for injuries to passengers from negligent or meddlesome acts of other passengers, unless it has notice of such acts, or reason to anticipate them, and that injury will result from them.

This is also the general rule as to liability of a carrier for injuries resulting to a passenger from acts of a fellow passenger. 6 *Cyc.* 602.

#### Accidental discharge of firearms.

The general rule above stated is well illustrated by the cases under this head.

Thus, in *Northern Commercial Co. v. Nestor*, 70 C. C. A. 523, 138 *Fed.* 383, and *West Memphis Packet Co. v. White*, 99 *Tenn.* 256, 38 L.R.A. 427, 41 *S. W.* 583, the owners of steamboats who permitted shooting therefrom were held liable for injury to passengers from the accidental discharge of guns in the hands of other passengers.

And in *Nashville, C. & St. L. R. Co. v. Flake*, 114 *Tenn.* 671, 108 *Am. St. Rep.* 925, 88 *S. W.* 326, a carrier which failed to interfere with drunken passengers who were exploding dynamite caps in canes, and shooting pistols, was held liable for injury to a passenger from the accidental discharge of a pistol in the hands of one of such passengers.

On the other hand, in *Galveston, H. & S. A. R. Co. v. Long*, 13 *Tex. Civ. App.* 664, 36 *S. W.* 485, where a passenger who was somewhat intoxicated, but not boisterous, stumbled on some baggage as he was passing through the car, and a revolver fell from his pocket and was discharged, injuring plaintiff, it was held that the company had no reason to anticipate such a result from the passenger being permitted on the cars, and was therefore not liable.

And in *Flint v. Norwich & N. Y. Transp. Co.* 6 *Blatchf.* 168, 34 *Conn.* 554, *Fed. Cas.*

Statement by Winslow, Ch. J.:

Action for personal injuries. On the 27th day of February, 1908, plaintiff boarded one of defendant's cars standing at the east end of the North avenue line, and became a passenger thereon. The car was soon to start upon its return trip. The plaintiff was smoking and stood in the rear vestibule, as required by the rules of the company. The rear brake was set in order to hold the car in its position until it was ready to start, and the plaintiff stood very close to the handle thereof, which is a heavy brass handle such as is usual in city street cars. Just as the motorman started the car, or just after he had started it, a boy standing on the rear platform intentionally and without authority from the conductor, but with the idea of assisting

in the operation of the car, released the brake, and either accidentally or otherwise let go of the handle, and it swung around with considerable rapidity and force, striking the plaintiff a blow in the stomach of some severity, and for which this action is brought.

The brake and its mechanism are thus correctly described in respondent's brief: "The brake handle swings freely towards the left or anti-clockwise, but, when moved clockwise, the ratchet in the handle at the point where the handle is attached to the brake staff engages the brake staff and turns the entire staff so as to wind up a chain fastened at the lower end of the staff and under the platform of the car. When the chain is wound up to the desired point, a ratchet wheel, through which the

No. 4,873, where a passenger upon a steamboat which was carrying a large number of soldiers, among whom was some disorder, was injured by the accidental discharge of a gun dropped or thrown down by a soldier, it was left for the jury to determine whether or not defendant had exercised proper care for the protection of its passengers.

#### Articles negligently placed.

The specific question as to the liability of a carrier for injury to a passengers from baggage or parcels placed in the aisle of a car is treated in a note appended to Pitcher v. Old Colony Street R. Co. 13 L.R.A. (N.S.) 481, and such cases are therefore excluded from this note.

In *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678, 13 N. E. 455, where a wringer fell from the parcel rack and injured plaintiff, it was held that the carrier was liable only for failure to exercise ordinary care to prevent such accidents, and that such failure was not shown, inasmuch as the wringer was so wrapped as to conceal its identity and prevent the attracting of particular attention to it on the part of defendant's employees.

And this same degree of care was held to be all that was required in such cases, in *Whiting v. New York C. & H. R. R. Co.* 97 App. Div. 11, 89 N. Y. Supp. 584, and a judgment for plaintiff was reversed, it appearing that there was no evidence that the appearance of the grip which struck plaintiff was such as to indicate that it was insecurely placed in the rack, or was likely to fall.

And in *Adams v. Louisville & N. R. Co.* 134 Ky. 620, 135 Am. St. Rep. 425, 121 S. W. 419, 21 Ann. Cas. 321, where a woman wearing a heavy veil was injured by a suit case belonging to another passenger falling from the parcel rack, it was held to be for the jury to determine if the trainmen, by the exercise of ordinary care, should have apprehended danger from the suit case to a passenger sitting beneath it.

In *Luddy v. Old Colony Street R. Co.* 210 37 L.R.A. (N.S.)

*Mass.* 293, 96 N. E. 675, an action for injuries to a street car passenger struck as he was entering the car, by a tool left standing in the vestibule by another passenger, it was held that the lower court could not say, as matter of law, that the company was negligent, but that it was a question of fact.

And in *Farrier v. Colorado Springs Rapid Transit R. Co.* 42 Colo. 331, 126 Am. St. Rep. 158, 95 Pac. 294, where a hoe was carried by a passenger in such a way that it was caught by the forward car and a part of it thrown back against plaintiff, it was held to be for the jury to say whether the conductor was negligent in permitting the hoe to be carried in that position.

#### Fires.

In *Sullivan v. Jefferson Ave. R. Co.* 133 Mo. 1, 32 L.R.A. 167, 34 S. W. 566, a street car company was held not liable for injuries received by a passenger when a fellow passenger negligently threw a lighted match which ignited her dress, where its employees did all they could to extinguish the fire when it was discovered. And in *Fanizzi v. New York & F. C. R. Co.* 113 App. Div. 440, 99 N. Y. Supp. 281, where a lady's dress was ignited in the same manner, the *Sullivan* Case was approved, and recovery was denied to a passenger injured in the panic which ensued, the court holding, furthermore, that the fact that the passenger who threw the match was allowed to smoke in the front seat, contrary to the rules, was not sufficient to charge defendant with negligence, as such act could not be regarded as the proximate cause of the injury.

In *Gulf, C. & S. F. R. Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. 709, 29 S. W. 652, where a drunken passenger boarded the train, carrying a sack in which was a jug of alcohol, which he dropped, breaking the jug and spilling the alcohol, which was almost immediately ignited by another passenger, burning plaintiff, it was held that the company was not liable.

brake staff passes, and which is keyed firmly to the staff, is engaged by a dog being pressed against the ratchet by the foot of the operator, and the staff is thus held until the brake handle is forcibly moved clockwise far enough to disengage the dog from the ratchet, or until the dog is by some other method forcibly removed from the ratchet. At all times, except when the dog is engaged, the brake handle moves freely anti-clockwise." It was the conductor's duty to loosen this brake at about the time the car started, and the conductor testified that just as or just after he gave the motorman the signal to start, he was coming out of the back door of the car to release the brake, and it was released by the boy.

The jury returned the following verdict:

"Question 1: Did the witness Harold Krebs release the brake at the time of the accident? Answer. Yes.

"Question 2: If you answer question No. 1 'yes,' then answer: Was such release of the brake by Harold Krebs the proximate cause of the injury to the plaintiff? Answer: Yes.

"Question 3: Ought the defendant, in the exercise of ordinary care, to have antici-

pated that the brake, if left in a set position, might be released by a jar or jolt caused by the operation of the car? Answer: No.

"Question 4: Ought the defendant, in the exercise of ordinary care, to have anticipated that the brake, if left in a set position, might be released by a person upon the car not an employee? Answer: Yes.

"Question 5: Was the failure of the defendant to exercise the care described in the third and fourth questions, or either of them, the proximate cause of the injury to the plaintiff? Answer: Yes.

"Question 6: Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? Answer: No.

"Question 7: What sum will reasonably compensate the plaintiff for the injury which he sustained? Answer: \$1,000."

On motion the court changed the answers to the fourth and fifth questions from "Yes" to "No," and rendered judgment for the defendant on the verdict, from which the plaintiff appeals.

#### Couplings and air brakes.

In *Texas & P. R. Co. v. Storey*, 37 Tex. Civ. App. 156, 83 S. W. 852, it is held that as long as an air brake was sufficient while the train remained intact, the company was not liable for injury to a passenger caused by collision of two parts of the train after it had been uncoupled by a drunken passenger, as this act, not the failure of the air brake to stop the detached car before the forward part of the train stopped, was the proximate cause of the injury.

In *McDonnell v. New York C. & H. R. R. Co.* 35 App. Div. 147, 54 N. Y. Supp. 747, appeal dismissed in 159 N. Y. 524, 53 N. E. 1127, it is held that the carrier was not liable to a passenger injured by the parting of the train caused by a passenger in the rear coach inadvertently setting the air brake.

#### 'Announcements and signals.

In *Columbus & I. C. R. Co. v. Farrell*, 31 Ind. 408, the court said that an instruction that the railroad company was legally responsible for the actions of persons not its servants, in falsely announcing the station, whereby plaintiff was injured in alighting in the dark, was clearly erroneous, but harmless, inasmuch as the jury found that the announcement was in fact made by defendant's servants.

In *Cohen v. Philadelphia Rapid Transit Co.* 228 Pa. 243, 77 Atl. 500, it is held that a carrier is not liable to a passenger injured while boarding a car, by the premature starting of the car by an unauthorized fellow passenger.

37 L.R.A. (N.S.)

In *Ferry v. Manhattan R. Co.* 118 N. Y. 497, 23 N. E. 822, affirming 22 Jones & S. 325, it was held that the carrier was not liable for injuries received by a passenger because of the premature starting of the train, if the starting signal was given by another passenger who, according to some of the evidence, grabbed the bell rope to steady himself.

And in *Mississippi & T. R. Co. v. Harrison*, 66 Miss. 419, 14 Am. St. Rep. 573, 6 So. 319, where plaintiff knew that the giving of the signal for the train to move was the unauthorized act of a fellow passenger, but nevertheless attempted to alight as it was starting, it was held that she was not entitled to recover for injuries received in doing so.

In *Nichols v. Lynn & B. R. Co.* 168 Mass. 528, 47 N. E. 427, where a passenger was injured while alighting from a street car which started prematurely on signal given by another passenger, it was held that the company was liable, it appearing that the same passenger had given the stopping signal, and that, to the knowledge of the conductor, passengers sometimes took it upon themselves to give signals.

In *Blair v. Brooklyn, Q. C. & S. R. Co.* 141 App. Div. 843, 126 N. Y. Supp. 466, it was held that the street car company was liable to a passenger injured while alighting, by the premature starting of the car on signal of another passenger, it appearing that the conductor, though on the platform was counting transfers and paying attention to nothing else, and that the passenger had given the signal before on that trip.

And in *Leavenworth Electric R. Co. v.*

Mr. H. B. Walmsley, with Mr. W. B. Rubin, for appellant:

The company, as persons of ordinary care and prudence, ought reasonably to have anticipated that some injury to someone might naturally and probably result somehow from the situation in which the brake was left before the boy touched it.

Bates v. Chicago, M. & St. P. R. Co. 140 Wis. 242, 133 Am. St. Rep. 1069, 122 N. W. 745; Coolidge v. Hallauer, 126 Wis. 250, 105 N. W. 568; Meyer v. Milwaukee Electric R. & Light Co. 116 Wis. 340, 93 N. W. 6; Vollmer v. Fairbanks, 146 Wis. 630, 132 N. W. 544; Mauch v. Hartford, 112 Wis. 60, 87 N. W. 816; Van de Bogart v. Marinette & M. Paper Co. 127 Wis. 110, 106 N. W. 805; Winchel v. Goodyear, 126 Wis. 271, 105 N. W. 824; Zabawa v. Oberbeck Bros. Mfg. Co. 146 Wis. 621, 131 N. W. 826; Wilbert v. Sheboygan Light, Power & R. Co. 129 Wis. 1, 116 Am. St. Rep. 931, 106 N. W. 1058; 5 Am. & Eng. Enc. Law, 553, 556; Connell v. Chesapeake & O. R. Co. 93 Va. 44, 32 L.R.A. 792, 57 Am. St. Rep. 786, 24 S. E. 467; Simmons v. New Bedford, V. & N. S. B. Co. 97 Mass. 361, 93 Am. Dec. 99; Kline v. Milwaukee Elec-

tric R. & Light Co. 146 Wis. 134, 131 N. W. 427; North Chicago Street R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Koutsky v. Forster-Whitman Lumber Co. 146 Wis. 425, 131 N. W. 1001.

Messrs. Van Dyke, Rosecrantz, Shaw, & Van Dyke, for respondent:

Defendant could not reasonably have anticipated that the boy would release the brake and let it spin, in time to have taken steps to prevent injury to the plaintiff.

Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 84 Am. Dec. 457; Dahlke v. Illinois Steel Co. 100 Wis. 435, 76 N. W. 362; Fredericks v. Northern C. R. Co. 157 Pa. 103, 22 L.R.A. 306, 27 Atl. 689; Mars v. Delaware & H. Canal Co. 54 Hun, 625, 8 N. Y. Supp. 107; McDonnell v. New York C. & H. R. R. Co. 35 App. Div. 147, 54 N. Y. Supp. 747; McDonough v. Third Ave. R. Co. 95 App. Div. 311, 88 N. Y. Supp. 609; Moore v. Woonsocket Street R. Co. 27 R. I. 450, 114 Am. St. Rep. 59, 63 Atl. 313; Krone v. Southwest Missouri Electric R. Co. 97 Mo. App. 609, 71 S. W. 713; Western R. Co. v. Walker, 113 Ala. 267, 22 So. 182; Ferry v. Manhattan R. Co. 118 N. Y. 497, 23 N. E. 822; Bevard v. Lincoln Traction Co. 74

Cusick, 60 Kan. 590, 72 Am. St. Rep. 374, 57 Pac. 519, where the conductor left a fellow conductor at the time off duty, to stop the car for a passenger at a certain street, who, after stopping the car, left it himself, and it was started by a passenger, it was held that the company was liable to one injured by the premature starting of the car.

Other cases involving the liability of a street car company for injury to alighting passengers by the starting of a car on signal of a fellow passenger will be found in a note appended to Cary v. Los Angeles R. Co. 27 L.R.A. (N.S.) 764.

#### Miscellaneous cases.

In Simmons v. New Bedford, V. & N. S. B. Co. 97 Mass. 361, 93 Am. Dec. 99, where a passenger on a steamboat was injured by the falling of a small boat suspended above the deck, because of other passengers getting into it, the court said: "They were not indeed responsible for the negligent or wrongful acts of the passengers to the same extent as for those of their own officers and crew. But they had the power to make reasonable regulations as to the places which passengers might occupy, and as to their conduct while on board. And they were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers."

In Craft v. Boston Elev. R. Co. — Mass. —, — L.R.A. (N.S.) —, 97 N. E. 610, where 37 L.R.A. (N.S.)

plaintiff was injured by the street car door being closed upon her as she was entering the car, it was held that the closing of the door was evidence of negligence, and made a prima facie case, even if some passenger intentionally started the machinery by which it was closed, as the mechanism was under defendant's control, and it was its duty to see that no stranger started it.

In Montgomery Traction Co. v. Whatley, 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538, where a passenger was injured by a drunken fellow passenger falling against her, a judgment for plaintiff was sustained, it appearing that the passenger, though so drunk he could not stand, was permitted to pass up and down the car instead of being required to remain seated or leave the car.

It is as much the duty of a carrier to see that its passengers are safely landed as it is to see that they are safely carried, and in Missouri, K. & T. R. Co. v. Russell, 8 Tex. Civ. App. 578, 28 S. W. 1042, the company was held liable for injuries to a passenger received while alighting, by being jostled by other passengers scuffling on the platform of the car, which it could have prevented had it had an employee in attendance upon alighting passengers.

In Dumas v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 43 S. W. 908, the railway company was held not liable for an injury received by a woman passenger by the falling of a window which a fellow passenger had raised for her, but which he failed to raise far enough to catch.

R. L. S.



Neb. 802, 3 L.R.A. (N.S.) 318, 105 N. W. 635; LaFond v. Detroit Citizens' Street R. Co. 131 Mich. 586, 92 N. W. 99; Jakobski v. Grand Rapids & I. R. Co. 106 Mich. 440, 64 N. W. 461; Fewings v. Mendenhall, 83 Minn. 237, 55 L.R.A. 718, 86 N. W. 96; Thompson v. St. Louis & Suburban R. Co. 111 Mo. App. 465, 86 S. W. 465; Graeff v. Philadelphia & R. R. Co. 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107; Ellinger v. Philadelphia, W. & B. R. Co. 153 Pa. 215, 34 Am. St. Rep. 697, 25 Atl. 1132; George v. Los Angeles R. Co. 126 Cal. 357, 46 L.R.A. 829, 77 Am. St. Rep. 184, 58 Pac. 819; Kaumeier v. City Electric R. Co. 116 Mich. 306, 40 L.R.A. 385, 72 Am. St. Rep. 525, 74 N. W. 481; Sullivan v. Jefferson Ave. R. Co. 133 Mo. 1, 32 L.R.A. 167, 34 S. W. 566; Columbus & I. C. R. Co. v. Farrell, 31 Ind. 408; Glensky v. Kimberly & C. Co. 140 Wis. 57, 121 N. W. 893.

Winslow, Ch. J., delivered the opinion of the court:

The brake in question and all the machinery connected with it seem to have been of approved pattern, in excellent condition, and were absolutely essential machinery for the proper operation of the car. So far as appears in the case, it would not be possible to have a brake covered or so firmly fastened in position that a passenger could not release it if he deliberately endeavored to do so, and yet have it capable of instant release by an employee when the necessities of the service required. There are numerous appliances of this nature connected with the transportation of passengers by steam and by electricity as well.

The general principle often decided is that a carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train; that the meddler becomes thereby a trespasser, and, if injury results to another passenger by his act, the carrier will not be liable, in the absence of any other ground of negligence. Carriers are rightly held to a high degree of diligence, but they are not held responsible for the lawless acts of third persons not under their control, which they could not reasonably anticipate. McDonnell v. New York C. & H. R. R. Co. 35 App. Div. 147, 54 N. Y. Supp. 747; McDonough v. Third Ave. R. Co. 95 App. Div. 311, 88 N. Y. Supp. 609; Moore v. Woonsocket R. Co. 27 R. I. 450, 114 Am. St. Rep. 59, 63 Atl. 313; Krone v. Southwest Missouri Electric R. Co. 97 Mo. App. 609, 71 S. W. 712. While there is some evidence in the case to the effect that passengers sometimes played with the brake, or leaned against it, or touched the dog

with their feet, there is absolutely nothing in the evidence to show that a passenger was ever known to deliberately loosen it when properly set as in this case. Had the brake here been released by accident, by reason of a passenger striking the dog with the foot and releasing it, or in some other purely accidental way, the question presented would be of a different character.

On the undisputed facts presented, a verdict for the defendant should have been directed, on the ground that no negligence was shown.

Judgment affirmed.

#### KENTUCKY COURT OF APPEALS.

EDDIE A. REDMAN, Impleaded, etc.,  
Appt.,  
v.

JACOB HUBBARD et al.

(140 Ky. 71, 130 S. W. 955.)

#### Will—vested remainder.

1. Under a will directing that an estate be held for the use of testator's son and his family for life, and that after his death the property so set apart shall pass and

*Note.—Character of remainder given by will as affected by a direction that children, etc., of a deceased remainderman, shall take their parent's share.*

In solving the question which forms the subject of the present inquiry, when presented in any given case, the courts are obliged, more or less consciously, to dispose of one or more of the following questions:

First, during what period does the contingency implied by the provision operate, the lifetime of the testator, or the continuance of the precedent estate? If the former, obviously the remainder will vest absolutely upon testator's decease; if the latter, it thereupon becomes necessary to consider,

Second, whether the element of contingency is incorporated into the description of or into the gift to the remainderman, in which case the remainder is contingent; or whether it is merely annexed to the gift in the character of a condition subsequent, in which case the remainder is vested subject to be divested by the operation of the contingency. This question sometimes appears clothed in a different phraseology, its variant form being whether the gift to the children, descendants, issue, etc., of a deceased remainderman, was intended to be original or substitutional. If the gift is original, the children, etc., take under the original gift as members of the class to whom the remainder is limited. If it is substitutional, they take by executory devise or bequest upon the contingency by

go to his children, the descendants of any child to take the share which its parent would have taken if alive at the time, the interest of the children is vested, and the father will inherit from any child who dies in his lifetime without issue.

**Levy — estate of life tenant — rental.**

2. A judgment creditor of a life tenant may have the estate rented out, and the income applied in satisfaction of his claim, until the debt is paid or the estate terminates.

**Judgment — res judicata — construction of will.**

3. A judgment in an action to enjoin the sale of real estate as the property of a judgment debtor, to the effect that he did not inherit any part of it from his child, is

without effect, where a prior unmodified judgment in a suit to settle the accounts of the trustee, to which the interested persons were parties, determined that he did so inherit.

(September 28, 1910.)

**A** PPEAL by defendant Redman from a judgment of the Circuit Court for Larue County in plaintiffs' favor in a suit to subject the rents and income of a life estate in certain lands to the payment of a judgment against the owner thereof. Affirmed.

The facts are stated in the opinion.

which the remainder given to their parent is divested.

And before a case involving the question under consideration may be finally disposed of, it may become necessary to determine whether the contingency implied from the provision that children of a deceased remainderman shall take their parent's share, upon which a vested remainder may be divested, is one of dying simply (with a substitutional gift to descendants if any), or of dying leaving descendants. If the former, the remainder is divested by death alone; if the latter, it is divested only in case of death leaving issue.

There are, then, accordingly as the context evinces the testator's intention, four possible conclusions to be reached in the class of cases under discussion: 1, That the remainder is contingent; 2, that the remainder is vested (no necessity existing for determining whether or not it is likely to be divested); 3, that the remainder is vested subject to be divested; and 4, that it is vested absolutely. Now in certain situations, *e. g.*, where a remainderman has died during the continuance of the life estate leaving issue, and without having attempted to alien or encumber his interest, it is obviously immaterial, for most practical purposes, whether the court calls the remainder one contingent on surviving the life tenant with an original gift to issue, or one vested subject to be divested upon the contingency which has occurred, with a substitutional gift to issue by way of executory devise. But suppose him to have died without issue, it manifestly becomes a question of importance whether the remainder was contingent or vested subject to be divested, unless, indeed, the contingency itself is interpreted as meaning death during the continuance of the preceding estate, either with or without issue. And even in the situation first supposed, that of a remainderman dying with issue, it may still be important to determine whether the remainder is contingent or vested subject to be divested, as in one case the contingency of survival may also apply to the gift to the deceased remainderman's children, whereas in the other case the divesting clause would operate only on

the deceased remainderman's estate. Again, in certain situations, it may be that a case may be disposed of by simply holding that a remainder is vested, without proceeding to consider whether or not it is subject to become divested. Clearly cases of this sort cannot be considered as authority for regarding remainders created by similar testamentary provisions as absolutely vested.

These instances are adduced to show the necessity of reading each decision in the light of the situation occasioning the litigation. An attempt has therefore been made in setting out the decisions contained in this note to indicate, whenever it seemed advisable, or was possible to do so, the situation of the parties and the ultimate question before the court for decision.

The reader's attention is also directed to the fact that decisions in New York and other states having statutory definitions of vested and contingent remainders, upon the question whether a remainder is vested or not, are to be received with some caution, owing to the fact that by virtue of such definitions remainders are sometimes held to be vested which at common law would have been regarded as contingent; although this is not apt to be the case, in the more recent decisions at least unless some question as to the unlawful suspension of the power of alienation is involved. This complication is explained in detail in a note to *Robertson v. Guenther*, 25 L.R.A. (N.S.) 889.

This note includes both those cases in which the effect of a provision that the children of a deceased remainderman shall take their parent's share has been directly considered, and those in which such a provision existed, although not expressly referred to. It does not, however, assume to present cases in which the question is as to the character of a remainder created by a gift either to individuals or a class and their heirs, children, descendants, etc., or by a gift to them or their heirs, children, descendants, etc., without the superadded provision as to the issue taking the parent's share, as in such case the element of contingency is not so clearly created, and the decision is apt to go off upon the question whether there is a substitutional gift or

Mr. John S. Kelley, with Mr. L. A. Faurest, for appellant:

M. M. Hubbard inherited no part of the remainder from his deceased daughters.

Dohn v. Dohn, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352; Mercantile Bank v. Ballard, 83 Ky. 481, 4 Am. St. Rep. 160.

That M. M. Hubbard took no interest in the remainder by inheritance from his daughters is *res judicata*.

23 Cyc. 1288, 1302; Owingsville & Mt. S. Turnp. Road Co. v. Hamilton, 21 Ky. L. Rep. 815, 53 S. W. 5; Newport v. Newport & C. Bridge Co. 90 Ky. 193, 8 L.R.A. 484, 13 S. W. 720; Mills v. Hopkinsville, 11 Ky. L. Rep. 164, 11 S. W. 776; Stevenson v. Flournoy, 89 Ky. 561, 13 S. W. 210.

whether the words are merely words of limitation. Nor does it assume to include cases in which the question as to whether the remainder is contingent or vested turns on the time at which the class is to be ascertained, although there may be a provision that descendants of a deceased member of a class shall take the parent's share, *e. g.*, where the remainder is given to "surviving children" or to members of a class "whom shall be living at that time," etc. Most, if not all, of these, may be found in the note in 25 L.R.A.(N.S.) 888, on "Character of remainder created by grant or devise to one for life, with remainder to his children who may survive him."

So far as it is possible to make any general statement in regard to the cases upon the question under consideration, it is that a direction that the children or descendants of a deceased remainderman shall take their parent's share is not of itself sufficient to warrant the inference of an intention on the part of a testator that the remainder shall be contingent, at least where no period of time beyond the testator's death is indicated for its operation; or, to put it in another way, such a direction is not sufficient to prevent a remainder from being held to be vested.

In Gibbens v. Gibbens, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, the court said: "Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills when, strictly speaking, they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised."

In some cases such a provision is regarded as having been inserted to protect the issue of a remainderman from the supposed consequence of their parent's death in the lifetime of testator. See *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101, 18 Atl. 100; *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 34 L.R.A.(N.S.) 1150, 94 N. E. 980; *Heilman v. Heilman*, 129 Ind. 59, 28 77 L.R.A.(N.S.)

*Messrs. D. H. Smith and Williams & Handley*, for appellees:

The will of John S. Hubbard gave to M. M. Hubbard's children a vested remainder in the property devised in trust for M. M. Hubbard for life.

6 Lawson, Rights, Rem. & Pr. § 2741; *Walters v. Crutcher*, 15 B. Mon. 2; *Kean v. Tilford*, 81 Ky. 605; *Grigsby v. Breckenridge*, 12 B. Mon. 633; *Gilman v. Stone*, 123 Ky. 137, 94 S. W. 28.

*Carroll, J.*, delivered the opinion of the court:

This action was instituted by the appellee Jacob Hubbard, a judgment creditor of M. M. Hubbard, to subject the rent and income of certain lands in which M. M. Hub-

*N. E. 310; Moores v. Hare*, 144 Ind. 573, 43 N. E. 870; *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Re Tienken*, 131 N. Y. 391, 30 N. E. 109; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008; *Johnson v. Washington Loan & T. Co.* 224 U. S. 224, 56 L. ed. —, 32 Sup. Ct. Rep. 421.

In other cases it is regarded as denoting merely the inheritable quality of the estate. See *Knight v. Pottgieser*, 176 Ill. 368, 54 N. E. 934; *Middleton v. Middleton*, 19 Ky. L. Rep. 1232, 43 S. W. 677; *Redman v. Hubbard*; *Trowbridge v. Coss*, 126 App. Div. 679, 110 N. Y. Supp. 1108, affirmed without opinion in 195 N. Y. 596, 89 N. E. 1114.

Such a provision does not operate in any way to abridge the estate given the remaindermen, even though it is regarded as creating a substitutional or alternative gift. See *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980; *Engel v. State*, 65 Md. 539, 5 Atl. 249; *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923; *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, 79 Atl. 616; *Goerlitz v. Malawista*, 56 Hun. 120, 8 N. Y. Supp. 832, affirmed without opinion in 130 N. Y. 688, 30 N. E. 68; *Fishburne v. Sigwald*, 79 S. C. 551, 60 S. E. 1105.

It is referred to in *Hudgens v. Wilkins*, 77 Ga. 555, as casting some doubt upon the character of the remainder, although not sufficient to prevent it from being regarded as vested; and in *Thompson v. Thompson*, 28 Barb. 432, as being consistent with vesting, for the reason that the statute of distribution would place the issue in the same position.

According to the court in *Re Tienken*, 131 N. Y. 391, 30 N. E. 109, however, it is an argument of some force that such a clause is needless except upon a construction which postpones vesting until the termination of the life estate; and in one instance (*Schaeffer v. Schaeffer*, 54 W. Va. 681, 46 S. E. 150) the fact that the

bard had a life estate under the will of John S. Hubbard. The appellant, Eddie A. Redman, a daughter of M. M. Hubbard, and who owns the remainder of the estate in which M. M. Hubbard has a life estate, resisted the effort to subject the income and rent, upon the ground that M. M. Hubbard had wasted or taken possession and disposed of a large part of the principal of the estate, and therefore was not entitled to receive, nor could his creditor subject, any portion of the income or rent until the principal used by him had been restored. In answer to this, and in avoidance of the claim of the remainderman, it is insisted for Jacob Hubbard that, although M. M. Hubbard took only a life estate under the will, he subsequently inherited under the

law of descent and distribution two thirds of the remainder, from two of his daughters who died intestate, and that the only part of the principal estate used by him was that portion received by inheritance from his deceased daughters. They further set up that in a suit in the Jefferson circuit court it was adjudged that the trustee under the will of John S. Hubbard had properly paid him the amounts received by them, and therefore the question of whether he was entitled to said amounts was *res judicata*.

The lower court held that M. M. Hubbard took no interest in the estate by descent from his deceased daughters, but decided that the settlement of the accounts of M. M. Hubbard as trustee in the suit of Stratton v. Hubbard in the Jefferson chan-

statute will prevent a lapse in such a case has been held to render it proper to consider such words as importing a contingency.

In some instances, in each of which a reference to some point of time formed a part of the provision, it has been regarded as supporting an inference of an intention to give a contingent remainder. See *People v. Byrd*, 253 Ill. 223, 97 N. E. 293; *Clark v. Cammann*, 160 N. Y. 316, 53 N. E. 769; *Rosengarten v. Ashton*, 228 Pa. 389, 77 Atl. 562; *Fulkerson v. Bullard*, 3 Sneed, 260.

In some cases inferences of an intention that the remainder shall be contingent will be found to have drawn from the phraseology of the provision that the children of the deceased remainderman shall take; as where the gift to the children is of the share which the parent "would have taken if living" (see *People v. Byrd*, 253 Ill. 223, 97 N. E. 293; *Rosengarten v. Ashton*, 228 Pa. 389, 11 Atl. 562), or where the provision is that they shall take the share "which would have vested in their parents" (see *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264).

The conclusion reached in many of the following cases is often considerably influenced by the form of the gift, since the fact that a gift is not direct, but takes the form of a direction to divide and distribute, although not controlling, gives rise to a strong inference of an intention to postpone vesting.

Where the remainder is given to persons named or otherwise definitely designated, and there is no clause of survivorship, the fact that a construction of the will which will render the remainder contingent may produce an intestacy as to the share of any of such persons who may die without leaving children surviving, during the continuance of the precedent estate, is a consideration which will influence the courts to regard the remainder as a vested one. See *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 34 L.R.A.(N.S.) 1150, 94 N. E. 980; *Roberts v. Roberts*, 102 Md. 131, 137 L.R.A.(N.S.)

L.R.A.(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 Ann. Cas. 805.

This objection is, of course, overruled by the fact that there is an alternative limitation over in the case of the remainderman's death without issue. As to the time to which the contingency of death of the legatee or devisee without children or issue, upon which a gift is conditioned, is referable, see note to *Smith v. Smith*, 25 L.R.A.(N.S.) 1045, especially the discussion, at page 1100, of the doctrine that where a gift in absolute terms is followed by limitations over, both in the event of death leaving issue and in the event of death without issue, the contingencies are to be restricted to the period before the primary gift takes effect.

While the circumstances that persons to whom a remainder is limited are not children of a testator or relatives of blood or marriage is of no affirmative weight to show that the remainder in question is contingent, there is in such case an absence of one consideration, which, if present, would have tended strongly to indicate that a vested remainder was created. *Crapo v. Price*, 190 Mass. 317, 76 N. E. 1043.

It seeming that the convenience of the user of this note will be best subserved by such an arrangement, the decisions which follow are grouped primarily with reference to the results reached therein, and secondly (so far as possible) with regard to the similarity of the testamentary provisions under construction, rather than to the considerations inducing the adoption of the conclusions therein.

Instances in which remainder is held contingent.

In *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611, testator devised his real estate to his three children equally for life, "and after the death of either of them, their share to be equally divided amongst their children or their descendants, giving to the descendants of each child one share." In a subsequent portion of the will he expressed his intention to give his daughters an estate

every court, and the orders of that court relative thereto, were conclusive of the question that M. M. Hubbard was entitled to the fund alleged to be a part of the principal estate that was paid to him by the trustee, and accordingly decreed that the land should be rented out to pay the debt due by M. M. Hubbard to Jacob Hubbard.

So much of the will of John S. Hubbard as it is necessary to consider in disposing of this case reads as follows: "I direct that my estate shall be divided in two equal parts whenever my executor shall deem it proper to do so. The one equal half to be held by said executor for the use of the family of my son, M. M. Hubbard, including himself, during his life, to be used for the support of himself and family residing

with him and his wife, so long as the children are under age and remain with their parents. But after the death of my said son, the share of my estate set apart for the use of his family is to pass to and go to his children or descendants, the descendants of any child to take the share which its parent would have taken if alive at the time. The income from this portion of my estate may be by my executor paid to my son if, in the judgment of said executor, said son is leading a sober and temperate life; but if not, then the same is to be from time to time paid to the wife of my said son, and her receipt shall be an acquittance to said executor for the same. Only the rents, profits, and issues are to be paid over by said executor. . . ." At the

for life "and the remainder to their children and descendants." The question having arisen as to whether a child of a daughter dying in her lifetime without issue took an heritable interest, it was held that, even without taking into account the use of the disjunctive "or," which might be regarded as having the effect to create an alternative devise to the descendants of a daughter other than her children, and to import a condition which could not be determined until the period of distribution had arrived,—as, at the time of making the will, and when the devisee of the life estate took effect by the death of the testator, a daughter was unmarried, and there was no person in existence to take the remainder under the will; as the division of each daughter's share was to take place "after the death of either of them," and as the designation of "descendants," in the phrase "children and descendants," as persons entitled to participate in the division, would be unmeaning and useless, should the remainder be regarded as vesting in the children of a daughter at their birth, it was testator's intention that the remainder should not so vest, but should be contingent upon their surviving a period when the estate was to vest in possession.

In *Dohn v. Dohn*, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352 (which is distinguished in *REDMAN v. HUBBARD*), testator, after creating a trust for the benefit of his wife during her lifetime and his children until the youngest should attain twenty-five years of age, provided: "After the death of my wife, and when my youngest child is twenty-five years of age, my entire estate, real and personal, of every nature and description, shall be divided in equal parts among my children or their heirs. The issue of the child or children dying shall inherit the share of its parent." The question having arisen as to whether a son who died without issue took an heritable interest, it was held that no intention that the remainder should vest in the children who survived the testator could be drawn from the provision that the issue of the child or children dying should "inherit" the share

of its parent, as, if the death of the child be referred to the period before the testator's death, the issue would not inherit at all, either from its parent or from the testator, but would take under the will, so that it is probable that the word "inherit" was loosely used in lieu of "take;" but as the devise in the clause under consideration is coupled with and following a provision for the time of distribution, and as neither the words nor context tend to show that the payment directed was postponed for the convenience of the estate, or to let in some other interest, the interests taken by testator's children were conditioned upon their surviving the time for distribution.

In *Ross v. Ware*, 131 Ky. 828, 116 S. W. 241, where a testator bequeathed all his real estate to his wife, to have the use and control thereof until all his children, who were to have the privilege of living with the wife and were to be supported and maintained by her, should become twenty-one years of age, when the property was to be sold and the proceeds divided,  $\frac{1}{3}$  to the wife, "and the balance to be equally divided between my children or their descendants, the descendants getting the portion the parent would have gotten," and the question arose as to who was entitled to participate in the distribution, two of the children having died without issue, it was held that, viewing the will as a whole, it was but reasonable to assume that it was the intention of the testator to defer the vesting in his children of the title of the estate devised them, until the period fixed by the will for its distribution and delivery to them should arrive.

In *Schaeffer v. Schaeffer*, 54 W. Va. 681, 46 S. E. 150, a testator gave his wife for life all his property, with power to sell some and use its proceeds, and then provided: "At the death of my wife what real and personal property may be left shall be sold and divided equally among my children, or their children, or their representatives." Two of his sons having died leaving children, in the lifetime of the widow, the question arose as to whether deeds of trust given by them on their interest in their father's estate constituted a valid

death of the testator, M. M. Hubbard had a wife and three children. Two of these children died in infancy prior to 1900, neither having married; and the wife of M. M. Hubbard died several years before this suit was brought,—the only remaining child being the appellant, Mrs. Eddie A. Redman, who is some thirty-five years of age. The estate received by M. M. Hubbard and his family under the will consisted of real property worth some \$12,000. This property was sold by a trustee under a power given in the will, and about one half of the proceeds was paid to M. M. Hubbard by the trustee, and the remainder invested by the trustee in the land, the rent of which it is sought to subject in this action. If, therefore, M. M. Hubbard inherited two thirds of the es-

tate from his deceased daughters, he has not received any part of the principal estate to which his daughter, Mrs. Redman, is or was entitled, and so her defense must fail. It is therefore apparent that the first question to be disposed of is: Did M. M. Hubbard inherit from his deceased daughters?

It is insisted by counsel for Mrs. Redman that the children of M. M. Hubbard took not a vested estate in the land devised by the will, but only a contingent remainder or defeasible fee, depending upon their survivorship of their father, M. M. Hubbard, and so he did not take by inheritance from his deceased daughters. In other words, the argument is made that no estate vested in the children until the death of M. M. Hubbard, and that at his death Mrs. Redman,

lien thereon, as against the claims of their children. It was held that the words "or their children" could not be regarded as having been used to prevent lapse from the death of a child in testator's life, because likely those very words by their force would prevent a lapse, and also because the statute would prevent it; but that they import a condition that the testator's children shall survive the life tenant, on which the vesting of any estate depends, rendering the remainder to testator's sons contingent.

In *Re Ehle*, 109 Fed. 625, it was held that under a will by which testator created a trust for the benefit of his children and grandchildren, naming them, directing its division among the grandchildren at the termination of the trust, "or their lawful children, for their own use and in their own right forever," and further providing that if any of them should not be living and should have no lawful children when the trust fund was to be divided, it should be given to the surviving grandchildren, a grandchild took no vested interest which would pass to his trustee in bankruptcy.

In *Crapo v. Price*, 190 Mass. 317, 76 N. E. 1043, a testatrix directed a sum of money to be held in trust for a friend during her life, and after her decease, to pay, distribute, and divide the principal fund to and among the friend's children "and the issue of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." It was held, in view of the fact that the remainder was not given to children of testatrix or to her relatives by blood or marriage; the fact that there were no words of present gift to the children of the life tenant, the gift being made by a direction to the trustees to distribute; and the fact that the natural import of the words used by the testatrix excludes those children who should die during the life estate without leaving issue, so that some of the legatees in the remainder cannot be ascertained until after the termination of the life estate, while the intention of the testatrix seems to have been that the whole fund should be divided among the beneficiaries whom she

identifies by description,—that the persons entitled to take the gift in remainder were those who at the time of the death of the life tenant were her children and the issue of any deceased child by right of representation, and that a child of hers who died in her lifetime leaving no issue had no vested interest which would pass to the executor of his or her will.

In *Brownback v. Keister*, 220 Ill. 544, 77 N. E. 75, where testator, after creating a trust for the benefit of certain persons, provided that after the death of some of them, and when all the rest of them should have reached the age of twenty-one years, "the trust hereby created shall terminate, and said lands in the item described shall vest in fee simple absolutely in the said now living children of my said son, Julius, and his present wife, Matilda, and their descendants, share and share alike, the descendants of any of said above-named children taking the share of their parents," the question arose as to the title acquired by a purchaser of the interests of some of the grandchildren, and it was held that, as it could not be ascertained until the termination of the particular estate what persons would come within the description of remainderman as contained in the will, the remainder was a contingent one.

In *Denison v. Denison*, 96 App. Div. 418, 89 N. Y. Supp. 126, affirmed without opinion in 183 N. Y. 505, 76 N. E. 1093, testator devised certain realty in trust during the joint lives of his two daughters and the life of the survivor of them, to apply the net income for the use of one of them during her life, and in the event of her decease leaving the other daughter her surviving, to apply such income to the use of her children and the issue of such as might then be deceased, share and share alike, *per stirpes*, and not *per capita*. He further provided: "Upon the death of the survivor of my two said daughters, Pauline and Adele, then I devise one third of said two stores in fee to the children of my said daughter Pauline and the issue of such as may be then deceased, share and share alike, *per stirpes*, and not *per capita*." It was

his only child, if living, or, if dead, her children, if any survive her, would be entitled to take the whole of the principal of the estate left by the will. In support of this construction, the case of *Dohn v. Dohn*, 110 Ky. 884, 62 S. W. 1033, 64 S. W. 352, is strongly relied on. In that case the estate was to be held in trust for the purposes designated in the will. In item 6 it provided that "after the death of my wife, and when my youngest child is twenty-five years of age, my entire estate, real and personal, of every nature and description, shall be divided in equal parts among my children or their heirs. The issue of the child or children dying shall inherit the share of its parent." It was held that the estate devised in item 6 was conditional

upon the survival of the beneficiaries until the time fixed for the distribution; and, upon the death of one of them prior to that time, his interest, not having vested, did not pass to his heirs and distributees. But this construction of the will was rested upon the conclusion that the children did not take any present interest in the estate under the will. This is apparent from the language of the will, and we quote the following extract from the opinion as pertinent to the principle announced. "If the testator has annexed futurity to the substance of his bounty, and it is of the essence of the gift, then its vesting is suspended; but, if it merely relate to the enjoyment or payment of it, then it vests *in presenti*, unless this be made to depend up-

held that the interest taken by Pauline's issue was contingent upon their surviving the termination of the trust estate, and hence was not devisable.

In *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750, it was held that under a gift of a trust estate on the determination of an estate given to testator's widow, to the children of testator's brother, and the issue of any of them who might then have deceased, in equal shares, the descendants taking the share his or her parent would have taken if then living, the remainders were contingent, the gift being to them and the descendants of any of them who may then have deceased, etc., since it could not be known until the determination of the widow's estate who of the children would survive that event, and thereby become entitled to the benefit of the gift.

In *Rosengarten v. Ashton*, 228 Pa. 389, 77 Atl. 562, a testator gave a moiety of his residuary estate to his executors and trustees in trust to pay over the net income for and during the lives of his children, equally to and among all of his children and the issue of such as might be dead, such issue to take the share of the said income of said trust estate the parent would have taken if living, and on the death of the last of his children, then to pay over and distribute said trust estate equally to and among all his grandchildren and the issue of such as might be dead, such issue to take the share the parent would have taken if living at the time of the death of his last surviving child. It was held that, as there was no direct or express gift to the grandchildren, whatever interest a grandchild took in the corpus of the estate passing under the direction for distribution, the intention of testator clearly appeared to make the interest taken by any grandchild to be contingent upon its surviving the termination of the particular estate, the court saying: "The testator directs what is to be done with what remains of his estate upon the death of his last child. He directs who shall take directly from him, and, while he does not expressly say that they are to be

grandchildren then living and the issue of those dead, no other intention is to be gathered from his words, unless we deny them their ordinary meaning, in which sense the law presumes the testator used them. No share is given to the estate of a deceased grandchild. The condition of participation in the distribution is life at the time it is to be made. Living grandchildren and living issue of deceased grandchildren are to be the distributees. They constitute the exclusive class to which the testator declares his estate shall go. The issue of a deceased grandchild shall take 'the share the parent would have taken if living' at the time of distribution. Could words more clearly indicate the intention of the testator that a grandchild shall take only if living at the time of the death of his last child? And if a living grandchild will take only at that time, by the express words of the testator, it cannot take before."

In *Paget v. Melcher*, 156 N. Y. 399, 51 N. E. 24, it was held that under a will by which testator gave his wife the use of certain personal property during her natural life, and then provided: "Upon the decease of my said wife, the property by this and the preceding clause devised shall belong to my children, the descendants of any deceased child to take the share their parent would have taken if living; and if no descendants of mine survive my said wife, then said property shall belong and be delivered over by my executors to the same persons named as residuary legatees in case of such failure of descendants in the next clause of this will, and in the same proportion," the testator's children took no vested interests upon his decease, the concluding clause, that if no descendants of his should survive his wife, the property should belong and be delivered over by his executors to the persons named by him, showing that he did not intend that his children should have such a vested interest in the property during the lifetime of his wife as to make it pass under their wills or go to their next of kin.

The same testamentary provision came before the supreme court of Rhode Island in

on an event which may never happen. The legacy is to be regarded as vested or contingent, according to the time when it is to take is annexed to the enjoyment of the gift or the gift itself. If there be no substantive gift, and it is only implied from a direction to pay, then the devise is contingent, unless a contrary intention may be collected from the words or context, or the payment be postponed for the convenience of the property or estate, or to let in some other interest.' In the case at bar we do not think a contrary intention may be collected from the words or context, or that the payment directed was postponed for the convenience of the estate, or to let in some other interest." In the case at bar the estate was to be held by the executor for the

use of the family, including M. M. Hubbard, during his life, and the profits used for the support of himself and family. The devise was in effect to M. M. Hubbard, his wife, and children. The children took a present vested interest in the estate, only the enjoyment of their individual interest being postponed until his death. The interest they took was not postponed. It was only the enjoyment or use of it. The testator only intended that his estate should be kept together for the use and benefit of his son and family until the children were able to take care of themselves. When his son died, his children then living were to come into the use and possession of that part of the estate undisposed of by them to which they were entitled. If any of them died, not hav-

Re Melcher, 24 R. I. 575, 54 Atl. 379, where a like conclusion was reached.

In Straus v. Rost, 67 Md. 465, 10 Atl. 74, where a testator devised all his property to his wife during widowhood, and provided that in the event of her marriage the whole of the estate was to be divided as though he had died intestate, that is to say one-third of the personalty absolutely to the wife, and one-third of the realty for life, the balance or remainder to be divided equally among the children of the testator, "share and share alike, the issue or descendants of any deceased child or children to take *per stirpes*, and not *per capita*, the share such child or children would have respectively taken had such child or children survived," it was held that the survivorship mentioned in the will was referable to the second marriage of the widow, and therefore that the remainder did not vest until that time, so that the interest taken by a surviving child of a son dying during the continuance of the precedent estate was unaffected by any conveyance, assignment, or encumbrance placed upon the property by his father.

In Bowen v. Hackney, 136 N. C. 187, 67 L.R.A. 440, 48 S. E. 633, it was held that under a will giving real estate to testator's widow for life, and providing that at the expiration of the life estate, "that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors," a child dying before the widow had no interest which would pass by its will, whether the remainder was contingent or vested subject to be devested by its death before that of her life tenant.

In Richey v. Johnson, 30 Ohio St. 288, where testator, after devising to his wife the use of a farm for life, continued: "I devise that my executors or the survivors of them, after the decease of my said wife, shall sell said last-mentioned farm, either at public or private sale, and that the proceeds thereof be divided equally between my brothers and sisters and their heirs,—the children of any that may be dead to have 37 L.R.A. (N.S.)

the shares of their deceased parents," it was held that, as the gift was of a fund which could not be raised until the death of the widow, and which was to be divided among brothers and sisters then living, the interest of the legatees remained contingent until the time fixed for distribution.

In Clark v. Cammann, 160 N. Y. 315, 54 N. E. 709, a testator directed a sum of money to be held in trust for the use of a niece for and during her natural life, "and from and immediately after her decease upon trust to pay over and divide the said principal sum of \$10,000 unto and among all her children, share and share alike, and to their lawful representatives forever as tenants in common *per capita*, the issue of any such child who may then be dead to take his or her deceased parent's share." The niece's children having died without issue in the lifetime of their mother, the question arose as to the disposition of the remainder interest; and it was held, although the result of the construction was to produce an intestacy as to the fund, the remainder would not be held vested, the provision that "the issue of any such child who may then be dead to take his or her deceased parent's share" negating the claim that the estate vested in the sons; the fact that the gift was found only in a direction to the trustees to pay over to the sons on the death of their mother being also invoked in support of this conclusion. The court said: "The view that we entertain of this will is that the testator intended the estate to go to the issue of the sons of Mrs. Gillespie in case of the death of either during the existence of the life estate. No issue of these sons were in being at the death of the testator, and it was uncertain as to whether they would ever have issue. The remainder was therefore contingent, and not vested, for the reason that the persons to whom, or the event upon which, the estate was limited to take effect, remained uncertain until the termination of the life estate. Futurity was annexed to the substance of the gift, and the vesting was suspended."

In Lese v. Miller, 71 App. Div. 195, 75 N. Y. Supp. 673, a will by which testator gave



ing disposed of their interest, and leaving descendants or children, then, at the death of the son, these descendants or children were to take what their parents would have taken if alive. There is no expression in the will indicating a purpose upon the part of the testator to postpone the vesting of the estate in the children until the death of their father. On the contrary, we think it plain that the direction that the executor was to hold the estate for the use of the family of M. M. Hubbard vested in his children the estate, subject to the enjoyment of it by M. M. Hubbard as long as he lived. These children took under the will an estate that they might at any time dispose of subject to the rights of their father, and an estate that would pass by inheritance in

the event of the death of any of the children. The essential difference between this case and the Dohn Case is that in the Dohn Case the children did not, as held in the opinion, take under the will any present interest in the estate. Here they did. It follows from this construction of the will that M. M. Hubbard inherited two thirds of the estate from his deceased daughters, and therefore no part of the principal of the estate to which Mrs. Redman was or is entitled was paid to him. He has a life interest in the estate that can be subjected to the payment of the debt, and this is all that the court did in a judgment directing that the land should be rented out until the debt was paid or the death of M. M. Hubbard,

his residuary estate in trust to pay over the net income to his wife for life, and after her decease then to convey, assign, transfer, and set over unto his children "in equal proportions, share and share alike (the issue of any of such children who may have died before the death of my said wife taking *per stirpes* the share that their deceased parent would have taken if living)," was held to manifest an intention to limit the gift over to the children who should be living at the death of the wife, and to the issue of any child then dead who should survive her decease.

In *Dougherty v. Thompson*, 167 N. Y. 472, 60 N. E. 760, a testator created a trust for the benefit of a nephew and his family, directing an annual sum to be paid to the nephew for life and the residue of the net income to be divided among the nephew's wife and children. Upon the death of the nephew and his wife, the trust was to cease and the trust property transferred over to their children, and if any of said children should have died leaving issue, such issue should take their parent's share. One of the nephew's children having died without widow or issue surviving him, during the continuance of the trust, the question arose as to whether his share passed under his will. It was held that, the gift being found in a direction to pay or distribute at a future time; and there being no indication that the estate was to be benefited by postponement of distribution, or its convenience further promoted by it than to facilitate the immediate partition and application of the income; and the inference of an intention to postpone vesting drawn from the form of the gift being strengthened by testator's general scheme; and the grandnephew's share of the income during the continuance of the term being less than the income of his ultimate share in the corpus, the grandnephew took nothing which passed under his will; the court finding it unnecessary to explicitly decide whether his interest was contingent or one vested subject to be devested by his death during the continuance of the trust.

In *Re Gardner*, 106 Fed. 670, it was held 37 L.R.A. (N.S.)

that under a will by which testator provided that upon the death of the survivor of his two daughters, to whom he had given a life estate, "all the real estate so devised shall be sold and the proceeds divided equally among my grandchildren, share and share alike, and if any of my grandchildren shall die leaving issue then surviving, such issue shall take the portion their parents would have been entitled to had they been living," a grandchild took no present gift which would pass to his trustee in bankruptcy, but only a contingent future gift; the real intent of the testator being that those who should neither survive the daughters nor leave issue surviving them should take nothing; but that the whole proceeds should be divided among those grandchildren or their issue who did so survive.

In *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264, where testatrix, after giving her husband a life estate in certain realty, devised it after his death to three persons named, further providing that in case of the death of either of the three "(prior to the death of my husband or prior to my decease) leaving a child or children, then in that case such child or children, or the descendants of such child or children, shall inherit the share of the real estate which would have vested in their parents under the sixth and last provision above made," it was held that although the gift of the remainder was by words of present devise, and not conditioned upon the remaindermen surviving the life tenant, the expression "which would have vested in their parents" was significant to show that it was the purpose of the testatrix that the remainder was not to vest in the parent unless the parent survived the life tenant; and therefore the land was not subject to partition until the death of the life tenant. The court in this case stated it to be immaterial whether the remainder is to be regarded as contingent, or as vested subject contingent to be devested.

In *People v. Byrd*, 253 Ill. 223, 97 N. E. 293, where testator gave his wife, should she survive him, his residuary estate, both real and personal, during life, and upon

if this event took place before the debt was paid.

It is said, however, that by a judgment of the Larue circuit court in the case of M. M. Hubbard and Mrs. Redman v. Jacob Hubbard, the appellee herein, and others, from which no appeal was prosecuted and which stands unmodified, it was finally adjudicated that M. M. Hubbard did not inherit any estate from his deceased daughters. The chief purpose of the action in the Larue circuit court was to enjoin the sheriff from selling under an execution in favor of Jacob Hubbard an undivided two thirds interest in the land in Larue county. The land was sought to be subjected upon the theory that M. M. Hubbard inherited two thirds of it from his deceased daughters. The lower

court enjoined the sale of the land under the execution, and also adjudged that M. M. Hubbard did not take any part of the principal estate by inheritance from his deceased daughters. The judgment in so far as it enjoined the sale of the land was manifestly correct, because in virtually all this land M. M. Hubbard only had a life estate with a vested remainder in his daughter, Mrs. Redman, he having received from the trustee practically all of the estate inherited from his deceased daughters. But so much of the judgment as held that M. M. Hubbard did not take any estate by inheritance from his deceased daughters cannot in any event be *res judicata* of the question here presented, for the reason that many years before this action was brought

her death to his children, naming them, "share and share alike; and if either of my said children, Anne, Lucy, William, or Francis, die leaving issue either before me or before my said wife, then the issue of the child so dying shall take the share which his, her, or their parent would have taken if living at the death," it was held that the language of the clause above set forth clearly evidenced an intention that the remainder given to the children should be contingent upon their surviving the life tenant, the court saying that if the clause had ended with the words "share and share alike," there would be much force in the contention that the remainder was vested, and that the words "upon her death" merely referred to the time when the devisees were to come into the enjoyment of the estate, but that the latter part of the clause clearly indicates that a child, in order to take under the will, must be living at the death of the life tenant. And it was further held that such conclusion was supported by the fact that by the succeeding clause of the will testator provided that if his wife should not survive him, he gave all the rest, residue, and remainder of his estate to his children, naming them, share and share alike, and if either of them should die before testator leaving issue, then the issue of the child so dying should take the share which its parent would have taken if living at testator's death,—showing that the words "if living at her death" in the preceding clause were used advisedly. The ultimate question in this case was as to whether the remainder was subject to an inheritance tax. Had the remainder vested in the children living at testator's death, the amount taken by each would have been exempt; whereas, the devise being construed as one to the children surviving the widow and the issue of such as might predecease her, such was not the case.

In Acken v. Osborn, 45 N. J. Eq. 377, 17 Atl. 767, where a testator directed that the income of his residuary estate should be paid to his daughter during her life, and that after her decease the principal "shall be equally divided among such children of 37 L.R.A. (N.S.)

my said daughter as she may then have, provided always that if any child of my said daughter shall die before its mother leaving children or a child, such child or children shall take the share of such deceased parent," it was held that the remainder taken by the daughter's children was contingent upon their surviving her.

In Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295, a testator, after a limitation to his wife for life, provided as follows: "At the death of my said wife the said plantation with all its rights and interests, I bequeath and devise to our seven sons [naming them], or such of them as may be living at their mother's death, and to their heirs, share and share alike; and if any one or more of our said sons should be dead leaving lawful issue, such issue shall take the deceased father's share in each and every such case." It was held that the limitation to each of the sons was not of a remainder vesting at testator's decease, but a remainder upon a contingency with a double aspect, vesting on the mother's death.

In Re Albiston, 117 Wis. 272, 94 N. W. 169, a testator gave all his property to his wife for life, and after her death gave, devised, and bequeathed one half thereof to her brothers and sisters, share and share alike, adding: "If any of her said brothers or sisters have died or shall die before my said wife, the share which would have gone to him or her shall be equally divided between his or her children, share and share alike." It was held that the fact that there are no words of present devise or bequest, and the expression "the share which would have gone to him or her," clearly indicated that the testator's idea was that the time when the bequest was to go or become effective was at the death of his wife, and not before, and therefore that the beneficiaries were to be determined as of that time.

In Darnell v. Barton, 75 Ga. 377, where testator, after giving all his property to his wife for life, directed that after her death "all the remainder of my said property be sold by my executors, and be equally divided among my children; and in the

in the Larue circuit court, an action was brought in the Jefferson chancery court to settle the accounts of the trustee under the will, to which action Mrs. Redman was a party. In this action, the question was raised as to whether or not M. M. Hubbard inherited the estate of his deceased daughters, and it was held by both Chancellors Edwards and Miller that he did; and, in accordance with their decision, the settlement

of the trustee, in which it appeared that M. M. Hubbard had been paid a large part of the estate that came to him by inheritance from his deceased daughters, was confirmed. We are therefore of the opinion that the judgment of the Larue circuit court in so far as it conflicted with the judgment of the Jefferson chancery court previously rendered, and which has never been modified, was a nullity. The judgment

event that any of my children should die prior to the death of their said mother, leaving a child or children living, then I desire said child or children so left should stand in the place of its or their deceased parent, and heir a child's part; that is, the part that the deceased parent would have taken if living,"—it was held that as it was only the remainder or residue of the estate not consumed by the wife of testator which was to be sold and divided, and, as the mention of grandchildren as taking if their parent should be dead showed an intention to exclude the widow of a deceased son, who would otherwise share with her child had the son taken a vested remainder, the remainder was contingent upon surviving the life tenant.

In *Re Crane*, 184 N. Y. 79, 58 N. E. 47, where a testator created a trust the term of which was measured by the life of his wife, providing: "Upon the decease of my said wife, I order and direct that my estate be divided as follows: namely, equally between my brothers and sisters and my niece; and after directing the shares of some of them to be held in trust, provided further: "That if any of my said brothers and sisters and niece shall depart this life before my said wife, leaving lawful issue him or her surviving, then the share of the one so dying shall be paid over to their issue in equal shares. Should they leave no lawful issue him or her surviving, then the share is to be divided among the survivors and the lawful issue of any one or more of them who shall have died leaving lawful issue him or her surviving, each one of the said survivors taking one equal share thereof, and the lawful issue of anyone deceased to take the share of the parents." The testator's seven brothers and sisters and his niece survived him, but all died during the lifetime of the widow, four leaving issue who survived the widow, and four without issue. It was held that there being no direct gift of the principal of the trust estate, but instead a direction to divide it on the death of testator's widow, and the gift being of money and the direction to convert the estate absolute, and no contrary intention being manifested by the will, the remainder was a contingent one, and not one vested subject to be divested as to any of the parties by their death prior to the decease of testator's widow, and in case of the death of a party leaving issue, then on such death vesting the share of the parent in the issue.

In *Blaney v. Sin Clair*, 216 Pa. 258, 65 37 L.R.A. (N.S.)

Atl. 662, where a testator devised his real estate to his widow for life, and directed his executors at her death to sell it and divide the proceeds among his children, naming them, in certain proportions, and further provided: "In case either of my above said children shall die before the division of my estate as hereinbefore directed, having lawful issue, such issue shall receive the deceased parent's share; but if there be no such issue, then such share shall fall into the general fund to be divided among the survivors in the manner hereinbefore provided," it was held that this provision made the interests of the children clearly contingent.

In *Oliver's Estate*, 199 Pa. 509, 49 Atl. 215, the will of a decedent gave his estate to his wife during widowhood, and at her death or remarriage, "then the same shall be divided as follows; to wit: To my son Robert Oliver, one half of all my real estate, household furniture of whatsoever kind. And the other half to be equally divided, share and share alike, among Joseph Oliver, Martha Burchill, Sarah Ann Lenhard. I further direct that in case any of the said persons named shall die before the division of my estate, leaving lawful issue, such issue shall receive the parent's legacy; but, if without such issue, the legacy to him or her therein given shall revert to and become part of my general estate, and be divided equally among the other children then living, share and share alike." It was held that the remainder was not vested, but that Robert Oliver having died during the life of the widow without leaving children, his share was to be divided between the others.

In *Magill v. McMillan*, 23 Hun, 193, a testator gave his estate in trust to apply and pay over the net income to his five children in equal proportions, until one, or, in case of such one's death before then, another, should attain the age of twenty-one years, at which time he directed that his estate should be converted into money and divided between his said children equally, share and share alike, adding: "Should any of my children die before such distribution, leaving issue her surviving, such issue shall take the share his or her or their parents would have been entitled to if living, and in same manner, that is, in equal shares." It was held that there being no immediate gift to the children, but all the estate being given to the executors to be divided at the termination of the trust, the right to share in the distribution was contingent upon

of the Jefferson chancery court was and is binding upon the parties to this action, and, as it was there correctly determined that M. M. Hubbard inherited two thirds of the estate from his deceased daughters, it is manifest that the Larue circuit court had no power in a subsequent action to modify or annul the judgment of the Jefferson chancery court. It may be well to add that we do not determine on this appeal whether

or not M. M. Hubbard is entitled as heir of his deceased daughters to any part of the land in Larue county. He may or not have an interest as such heir in a part of this land, this depending upon how much of the principal he received from the estate devised.

Wherefore the judgment appealed from is affirmed.

the duration of life of the beneficiary until that time.

In *Fulkerson v. Buillard*, 3 Sneed, 260, where a testator directed that his negroes should be hired out for the benefit of his estate for five years, and at the expiration of such time divided equally amongst all my children; "and in case any of my children should die before the time aforesaid, leaving lawful children, said last-mentioned children shall take the share of their parents in said negroes," it was held that the bequest to the children was not vested, but that the clause quoted showed a contrary intention; and therefore that the bequest was to a class answering the description at the end of the designated time.

In *Spengler v. Kuhn*, 212 Ill. 186, 72 N. E. 214, testator created a trust for the benefit of his wife during widowhood, providing that upon her death or remarriage, the trust estate should be divided equally between his children, share and share alike, "and if in the meanwhile any or some of my children shall have died leaving a descendant or descendants, such deceased child's share shall go to his or her issue, descendant, or descendants." It was held that as the testator plainly manifested an intention that those to take should be determined at the time of the expiration of the trust, the estate did not vest in the children of the testator at his death, for the reason that it could not then be known that any child of his would survive the termination of the trust and become entitled to it, and therefore did not pass to their trustee in bankruptcy.

#### Instances in which remainder is held vested.

In *Hatfield v. Sohler*, 114 Mass. 48, where a testatrix devised certain realty to a daughter to her sole and separate use, "and to the children or child of the said Louisa, or the issue of any deceased child, in equal proportions," it was held that, construing the devise as one of a life estate to the daughter, and a remainder to her children, upon established rules of law the remainder vested in the children at the death of testatrix, opening to let in after-born children: so that upon the death of an after-born child his estate passed by inheritance to his mother.

In *West v. Smith*, — S. C. —, 72 S. E. 395, a testator bequeathed property in trust for his married daughter for life, providing that on her death the property

should pass to his daughter's "child or children and to the issue of any deceased child or children; the child or children of such deceased child or children representing and taking the share or shares to which his, her, or their deceased parent or parents would have been entitled had they survived the said" daughter. It was held that the devise in remainder not being to the child or children of the daughter who might survive her, but to her child or children generally, it created a vested remainder; so that upon the death of the grandchildren in the lifetime of their mother, without children, their shares passed by inheritance.

In *Pike v. Stephenson*, 99 Mass. 188, in which the question before the court was whether a remainderman dying without children during the continuance of the life estate had an heritable interest, it was held that in the provisions of the will, by which testator, after giving his daughter a life estate in certain realty, provided: "In the event of her decease, I do then give, devise, and bequeath the same in equal shares to the children of said [life tenant], and the children of any deceased child of said [life tenant], who shall take the parent's share by representation, to hold to them and their heirs and assigns forever," there was nothing to control the presumption that all devises and bequests vest upon the death of the testator, the devise over not being restricted to such of the daughter's children or grandchildren only as might survive her, but being to all her children and the children of any deceased child.

In *Thyng v. Lane*, 69 N. H. 403, 43 Atl. 616, a bequest of a sum of money to testator's son for life, and after the death of the son "to the children of the said William and the legal representatives of such as may be dead, to be equally divided between them, giving to the legal representatives of any deceased child the same share to which such deceased child, if living, would be entitled," was held to give the grandchildren an interest vesting upon the death of testator, the words looking to the future apparently relating to the time when possession of the property was to be taken, instead of the time when the right to the property was to arise and therefore the interest of a grandchild dying during the continuance of the life estate descended to its mother.

In *Re Heinze*, 20 Misc. 371, 46 N. Y. Supp. 247, it was held that under a testamentary provision by which testator gave the corpus of a trust fund created for the

benefit of his wife during her life, to his children "and the issue of any deceased child or children, to be equally divided between them, such issue, however, to take by representation the share which the parent would have taken if living," the remainder in the trust fund became vested in testator's children at the time of his decease.

In *McComb v. McComb*, 96 Va. 779, 32 S. E. 453, where testator, after giving one sixth of his residuary estate to each of his four daughters, provided that, at their respective deaths, what each should receive under such provision "shall pass and belong absolutely to their respective children and to the descendants or descendant of any that may have died leaving issue, such to take what its deceased parent would have taken if alive," it was held that there was nothing in the language of the clause, when read alone or in connection with other provisions of the will, to show any special intention that the remainder given should vest at the death of the life tenant; but that the fact that in prior clauses of the will testator, after giving certain property for life, gave the remainder at the death of life tenants to their "children then living and to descendants or descendant of any that may have died leaving issue, such to take what its parent would have taken if alive," thus manifesting his intention that the remainder should not vest until the death of the life tenant, showed that in the clause under construction a different intention was manifest.

In *Little v. Brown*, 126 N. C. 752, 36 S. E. 175, it was held that a testamentary provision as follows: "At my wife's death it is my will and desire that all the property and estate, real and personal, that I have left to her for life, shall be equally divided among my children, and the issue of any deceased child or children," when read with the concluding clause of the same item: "It being my intention that all my children shall receive an equal share in valuation of all my estate, real and personal, left to my wife for life," clearly manifested an intention to give the children a vested remainder.

In *Kean v. Tilford*, 81 Ky. 600, it was held that the interest created by a testamentary provision that after the death of the testator's wife, his property should be divided between his children, the children of any who might be dead receiving the share of the parent, was a vested interest. The question before the court was whether the interest was so vested that the property might be partitioned.

In *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, testator provided that at the decease of his wife all his estate, real and personal, "shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." One of the children having died in the lifetime of the mother, without issue, the question arose as to whether her share passed under her will; 37 L.R.A. (N.S.)

and it was held that while the meaning of the testator is open to some doubt, yet (there being no words of contingency as to the children who shall take, but the devise being generally to the testator's children, not merely to those surviving at the termination of the precedent estate, the issue of a deceased child standing in the place of the parent), the case falls within the general rule that a vested remainder will be held to have been intended in the case of a devise to testator's children, unless there is something sufficient to show the contrary. The court said: "An argument in favor of contingency is drawn from the use of the words, 'the issue of a deceased child standing in the place of the parent.' It is urged that such issue, if there were any, would take at all events; that the parent could not have disposed of his or her share, to their exclusion; and that therefore the interest of the parent was not an absolute vested one. It is contended, on the other hand, that the interest of Harriet was a vested remainder, subject only to be divested by her death in the lifetime of her mother, leaving issue. . . . But in the present case we do not find it necessary to consider whether Harriet's interest was liable to be divested by the birth and survivorship of issue or not. It is quite as natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse, in the case of the death of one of his children, leaving issue. Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills when, strictly speaking, they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised."

In *Ackerman v. Ackerman*, 63 App. Div. 370, 71 N. Y. Supp. 780, a testator gave a power of sale to his executors and a life estate in all property to his widow, further providing: "Upon the death of my said wife, or in case she does not survive me, I give, devise, and bequeath to my three children [naming them] all my estate, real and personal, to be divided between them, share and share alike, the share of such of my children as may be deceased to be divided equally among his or her heirs, if any there be, the share of such child or children to be held in trust and placed at interest on good security until said heir or heirs have attained their majority; but in case there should be no such heir or heirs, or such heirs should be deceased before they have attained their majority, then and in that case the share of such heir or heirs shall be equally divided among my surviving children." It was held that, as the possible event of the death of the devisees was clearly shown by the expression "upon the death of my said wife, or in case she does not survive me, I give," etc., to refer to the time of

testator's own death, and not to that of his wife, the remainder vested at the time of testator's death.

In *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980, testator, after giving his wife a life estate in his realty, provided and "at the decease of my said wife I desire that said lands be owned equally and jointly by my children [naming them], or in case of the decease of any of said children, his or her share to descend to the heirs of their bodies, if any, and if not, to those surviving." One of testator's children having died, apparently without issue, a proceeding was instituted by his administrator to subject his interest in said lands to the payment of debts and the widow's statutory allowance. The court based its conclusion, that the children of the testator took a vested remainder at his death, upon the argument that words of survivorship in a will are to be construed as referring to the death of the testator in all cases where the words of the instrument are not such as clearly to show that they refer to a subsequent date, which rule of interpretation was stated to find justification in the fact that, in most wills wherein language is used which upon superficial consideration might seem to lead to the conclusion that it was the design of the testator to postpone the vesting of the estate beyond his own death, an adequate explanation is found in the general tendency of testators to look forward to the time when the devisee will enjoy the estate in possession, and to overlook the proposition that it is necessary that, at or prior to the time of entering upon the possession, the right to the property should vest; holding that the language of the testator was not persuasive of a purpose upon his part to postpone the vesting of the remainder. With reference to the expression used by the testator which brings this case within the scope of the present discussion, the court said: "We have not failed to observe that in the latter part of the language quoted the will provides that in case of the decease of a child his share shall descend to the heirs of his body. This does not prevent the view that the class was to be ascertained at the death of the testator. The children were *in esse*, and it is evident that, if the words 'heirs of their bodies' were not used as words of limitation, the gift to such heirs was substitutional, and, as said in *Williams*, Real Prop. 17th ed. 287: 'The heirs are no objects of the testator's bounty, further than as connected with their ancestor.' It is to be recollected that the testator was providing for the disposition of his estate by will, and, even if the bequest were to operate as an executory devise (a construction not favored), it would still follow that the case was one wherein the testator was by will giving direction concerning his property; and therefore we would not be doing violence to the testator's intention, as manifested by his language, to hold that the word 'descend' was used in the sense

of 'go to.' A construction which has often been adopted in will cases."

In *Meyer v. Eisler*, 29 Md. 28, a testator gave his residuary estate to be held in trust until the end of twenty years from and after his death, or until his youngest child should arrive at the age of twenty years, when the whole was to be divided and paid over, one third to the wife, if living, "and the other two third parts to all my children, share and share alike, as well the children by my first wife as the child or children by my present wife, Ann Meyer; and in the event of the death of either of my said children leaving lawful issue, such issue to have and receive the share or proportion that the deceased would have been entitled to if living." One of testator's daughters having died without issue before the termination of the precedent estate, the question arose as to the rights of her surviving husband; and it was held that, there being nothing on the face of the will to indicate the intention of testator to postpone the vesting of the estate till the happening of the event named, the daughter had at his death a vested estate, in which her husband was entitled to assert his statutory rights.

In *Livingston v. Greene*, 52 N. Y. 118, a testator, after giving a life estate in all his realty to his wife, provided as follows: "From and after the decease and death of my beloved wife, . . . I give and bequeath all my real estate then being . . . to all my children, and to their heirs and assigns forever, to be equally divided, share and share alike, and should any of my children die and leave lawful heirs, such heirs to receive the portion that their parent would have been entitled to had such parent lived; namely, after the death of my beloved wife, I give to my son John A. Livingston one equal share," and so on, naming all his children. It was held that the language used in the provision quoted referred to a death in the lifetime of the testator, and therefore that the children took a vested remainder at his death; but that even if the death of any of his children had referred to their death after the testator's and before his widow's, it was a death leaving children, so that their estates were not divested by their dying without children.

In *Embury v. Sheldon*, 68 N. Y. 227, testator gave his residuary estate in trust for the benefit of his wife and children during the lifetime of his wife and of one of his sons, and devised the remainder of the estate, after the termination of the trust, to his four children, with the direction: "In the case of the death of Anna, Daniel, or Philip, leaving lawful issue surviving them, I direct that such issue shall take of income as well as principal, the share which the parent would have been entitled to if living; and should no lawful issue survive them, the share of the one so dying shall go to the survivors of the last above-named persons, and the children of my son, James

benefit of his wife during her life, to his children "and the issue of any deceased child or children, to be equally divided between them, such issue, however, to take by representation the share which the parent would have taken if living," the remainder in the trust fund became vested in testator's children at the time of his decease.

In *McComb v. McComb*, 96 Va. 779, 32 S. E. 453, where testator, after giving one sixth of his residuary estate to each of his four daughters, provided that, at their respective deaths, what each should receive under such provision "shall pass and belong absolutely to their respective children and to the descendants or descendant of any that may have died leaving issue, such to take what its deceased parent would have taken if alive," it was held that there was nothing in the language of the clause, when read alone or in connection with other provisions of the will, to show any special intention that the remainder given should vest at the death of the life tenant; but that the fact that in prior clauses of the will testator, after giving certain property for life, gave the remainder at the death of life tenants to their "children then living and to descendants or descendant of any that may have died leaving issue, such to take what its parent would have taken if alive," thus manifesting his intention that the remainder should not vest until the death of the life tenant, showed that in the clause under construction a different intention was manifest.

In *Little v. Brown*, 126 N. C. 752, 36 S. E. 175, it was held that a testamentary provision as follows: "At my wife's death it is my will and desire that all the property and estate, real and personal, that I have left to her for life, shall be equally divided among my children, and the issue of any deceased child or children," when read with the concluding clause of the same item: "It being my intention that all my children shall receive an equal share in valuation of all my estate, real and personal, left to my wife for life," clearly manifested an intention to give the children a vested remainder.

In *Kean v. Tilford*, 81 Ky. 600, it was held that the interest created by a testamentary provision that after the death of the testator's wife, his property should be divided between his children, the children of any who might be dead receiving the share of the parent, was a vested interest. The question before the court was whether the interest was so vested that the property might be partitioned.

In *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, testator provided that at the decease of his wife all his estate, real and personal, "shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." One of the children having died in the lifetime of the mother, without issue, the question arose as to whether her share passed under her will; 37 L.R.A. (N.S.)

and it was held that while the meaning of the testator is open to some doubt, yet (there being no words of contingency as to the children who shall take, but the devise being generally to the testator's children, not merely to those surviving at the termination of the precedent estate, the issue of a deceased child standing in the place of the parent), the case falls within the general rule that a vested remainder will be held to have been intended in the case of a devise to testator's children, unless there is something sufficient to show the contrary. The court said: "An argument in favor of contingency is drawn from the use of the words, 'the issue of a deceased child standing in the place of the parent.' It is urged that such issue, if there were any, would take at all events; that the parent could not have disposed of his or her share, to their exclusion; and that therefore the interest of the parent was not an absolute vested one. It is contended, on the other hand, that the interest of Harriet was a vested remainder, subject only to be divested by her death in the lifetime of her mother, leaving issue. . . . But in the present case we do not find it necessary to consider whether Harriet's interest was liable to be divested by the birth and survivorship of issue or not. It is quite as natural and probable to infer that the words above quoted were used for the purpose of showing clearly that the testator did not intend the devise to lapse, in the case of the death of one of his children, leaving issue. Words to the effect that the issue of deceased children shall take by right of representation are not uncommon in wills when, strictly speaking, they are entirely unnecessary; and the use of so familiar and common an expression does not carry with it a strong inference that the testator thereby designed to express some peculiar intention with reference to the vesting or contingency of the interest devised."

In *Ackerman v. Ackerman*, 83 App. Div. 370, 71 N. Y. Supp. 780, a testator gave a power of sale to his executors and a life estate in all property to his widow, further providing: "Upon the death of my said wife, or in case she does not survive me, I give, devise, and bequeath to my three children [naming them] all my estate, real and personal, to be divided between them, share and share alike, the share of such of my children as may be deceased to be divided equally among his or her heirs, if any there be, the share of such child or children to be held in trust and placed at interest on good security until said heir or heirs have attained their majority; but in case there should be no such heir or heirs, or such heirs should be deceased before they have attained their majority, then and in that case the share of such heir or heirs shall be equally divided among my surviving children." It was held that, as the possible event of the death of the devisees was clearly shown by the expression "upon the death of my said wife, or in case she does not survive me, I give," etc., to refer to the time of

testator's own death, and not to that of his wife, the remainder vested at the time of testator's death.

In *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980, testator, after giving his wife a life estate in his realty, provided and "at the decease of my said wife I desire that said lands be owned equally and jointly by my children [naming them], or in case of the decease of any of said children, his or her share to descend to the heirs of their bodies, if any, and if not, to those surviving." One of testator's children having died, apparently without issue, a proceeding was instituted by his administrator to subject his interest in said lands to the payment of debts and the widow's statutory allowance. The court based its conclusion, that the children of the testator took a vested remainder at his death, upon the argument that words of survivorship in a will are to be construed as referring to the death of the testator in all cases where the words of the instrument are not such as clearly to show that they refer to a subsequent date, which rule of interpretation was stated to find justification in the fact that, in most wills wherein language is used which upon superficial consideration might seem to lead to the conclusion that it was the design of the testator to postpone the vesting of the estate beyond his own death, an adequate explanation is found in the general tendency of testators to look forward to the time when the devisee will enjoy the estate in possession, and to overlook the proposition that it is necessary that, at or prior to the time of entering upon the possession, the right to the property should vest; holding that the language of the testator was not persuasive of a purpose upon his part to postpone the vesting of the remainder. With reference to the expression used by the testator which brings this case within the scope of the present discussion, the court said: "We have not failed to observe that in the latter part of the language quoted the will provides that in case of the decease of a child his share shall descend to the heirs of his body. This does not prevent the view that the class was to be ascertained at the death of the testator. The children were *in esse*, and it is evident that, if the words 'heirs of their bodies' were not used as words of limitation, the gift to such heirs was substitutional, and, as said in *Williams*, Real Prop. 17th ed. 287: 'The heirs are no objects of the testator's bounty, further than as connected with their ancestor.' It is to be recollected that the testator was providing for the disposition of his estate by will, and, even if the bequest were to operate as an executory devise (a construction not favored), it would still follow that the case was one wherein the testator was by will giving direction concerning his property; and therefore we would not be doing violence to the testator's intention, as manifested by his language, to hold that the word 'descend' was used in the sense

of 'go to.' A construction which has often been adopted in will cases."

In *Meyer v. Eisler*, 29 Md. 28, a testator gave his residuary estate to be held in trust until the end of twenty years from and after his death, or until his youngest child should arrive at the age of twenty years, when the whole was to be divided and paid over, one third to the wife, if living, "and the other two third parts to all my children, share and share alike, as well the children by my first wife as the child or children by my present wife, Ann Meyer; and in the event of the death of either of my said children leaving lawful issue, such issue to have and receive the share or proportion that the deceased would have been entitled to if living." One of testator's daughters having died without issue before the termination of the precedent estate, the question arose as to the rights of her surviving husband; and it was held that, there being nothing on the face of the will to indicate the intention of testator to postpone the vesting of the estate till the happening of the event named, the daughter had at his death a vested estate, in which her husband was entitled to assert his statutory rights.

In *Livingston v. Greene*, 52 N. Y. 118, a testator, after giving a life estate in all his realty to his wife, provided as follows: "From and after the decease and death of my beloved wife, . . . I give and bequeath all my real estate then being . . . to all my children, and to their heirs and assigns forever, to be equally divided, share and share alike, and should any of my children die and leave lawful heirs, such heirs to receive the portion that their parent would have been entitled to had such parent lived; namely, after the death of my beloved wife, I give to my son John A. Livingston one equal share," and so on, naming all his children. It was held that the language used in the provision quoted referred to a death in the lifetime of the testator, and therefore that the children took a vested remainder at his death; but that even if the death of any of his children had referred to their death after the testator's and before his widow's, it was a death leaving children, so that their estates were not divested by their dying without children.

In *Embury v. Sheldon*, 68 N. Y. 227, testator gave his residuary estate in trust for the benefit of his wife and children during the lifetime of his wife and of one of his sons, and devised the remainder of the estate, after the termination of the trust, to his four children, with the direction: "In the case of the death of Anna, Daniel, or Philip, leaving lawful issue surviving them, I direct that such issue shall take of income as well as principal, the share which the parent would have been entitled to if living; and should no lawful issue survive them, the share of the one so dying shall go to the survivors of the last above-named persons, and the children of my son, James



W., in equal proportions, *per stirpes*, and not *per capita*." The language of the clause quoted was held, in the absence of any other controlling provision showing a contrary intention, to refer to a death in the lifetime of testator; so that the share in remainder of a son became vested upon the death of his father, and upon his decease during the continuance of the precedent estate, passed under his will.

In *Heberton v. McClain*, 135 Fed. 226, it was held that under a will by which testatrix gave her residuary estate to her husband for life, and upon his death equally to and between her daughters, adding: "Should either of them die leaving issue, such issue is to take and receive the share of its parent," the interest taken by the two daughters in the residuary estate was vested.

In *Re Jennings*, 28 N. Y. Week. Dig. 807, 15 N. Y. S. R. 807, 1 N. Y. Supp. 565, where a testator gave among certain legacies, one to a grandson, and directed the residue to be invested for the benefit of his widow during her life, after whose demise the whole estate to be equally divided into five parts, one of which was to be paid to the grandson, and in case of his death to his children, it was held that, as the legacy payable immediately to the grandson was free from contingencies, and the time of payment of the other legacy was postponed for the convenience of the estate, to let in and subserve the interests of the widow, both legacies to the grandson vested in him at the death of the testator.

In *Reed's Appeal*, 118 Pa. 215, 4 Am. St. Rep. 588, 11 Atl. 787, testator directed certain realty to be sold, and, after reciting the fact that he had nine grandchildren, directed that the net proceeds should be divided into nine equal parts, and that his executors should, for the period of twelve years from his death, keep such proceeds invested and pay over to each of his grandchildren named in the will one ninth of the interest thereof annually, "or if any of them have died leaving heirs, then pay the same to said heirs, and at the full expiration of twelve years from the time of my decease, shall in like manner pay over the principal. But neither interest or principal shall be liable to attachment." It was held that, although the gift was not a direct one in terms, yet, as the remaindermen were to enjoy the interest during the continuance of the precedent estate, it was nevertheless a substantive one; and that the provision that neither principal nor interest should be liable to attachment, coupled with the trust, was insufficient to prevent the vesting of the legacies at the time of testator's decease.

In *Richardson's Appeal*, 3 Sadler (Pa.) 217, 19 W. N. C. 175, 6 Atl. 204, where testator gave his residuary estate to his wife for life, and upon her decease directed that it be sold by his executor and the moneys arising therefrom divided between his children, naming them, share and share alike, and if any of such children should be de-

ceased leaving issue, then the share the parent would have been entitled to if living should go to such issue, it was held that the interest of the children was a vested one during the life of the widow.

In *Kinkead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730, it was held that under a will by which testator gave his estate to his wife for life, and after her death to his children, share and share alike, and to their heirs and assigns forever, with the further provision: "If any of my said children should die before my said wife, then it is my will that upon my wife's death the share of my said estate which would have gone to such deceased child if living shall go to the heirs of such deceased child," a son took a vested remainder, which was capable of being sold under execution in the lifetime of his mother.

In *Byrnes v. Stilwell*, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. 241, a testator devised to his daughter certain realty during her natural life, and after her decease "unto the lawful child or children of my said daughter, his, her, or their heirs forever, if more than one, share and share alike, as tenants in common; and in case any or either of the children of my said daughter Maria at the time of her death be dead, leaving a lawful child or children him or her surviving, such child or children shall take the share or portion which his, her, or their parent would have been entitled to if living; to have and hold to him, her, or them, and their heirs forever." Some of the daughter's children who were living at the death of testator having died during the lifetime of their mother, without leaving issue, the question arose as to whether they took such a vested estate in the lands as was alienable or devisable by them or descendible from them. It was held that no words of survivorship being found in the will to indicate an intention of testator that the surviving brothers and sisters were to take in the event of the death of any of his daughter's children without issue, the remainder taken by the children vested at testator's decease, subject only to open and let in children born thereafter.

In *Swerer v. Ohio Wesleyan University*, 27 Ohio C. C. 144, 6 Ohio C. C. N. S. 185, a will contained the following provision: "I give, devise, and bequeath to my grandson Bert L. Rees and to my grandson Walter B. Huffman, share and share alike [certain realty], in the following manner, to wit, my executor hereinafter named is to have and to hold the same in trust for the term of ten years; to collect the rents arising therefrom, . . . and to pay the net balance of such income equally to my two grandsons aforesaid, or the lawful children of such grandchildren in case of the death of either or both of said grandsons before the expiration of said ten years; and at the expiration of said ten years after my decease, my executor shall turn over to my said grandsons, or in case of the decease of either of said grandsons before said term of ten years shall have lapsed, without law-

ful issue of said decedent, then the share of such grandson to go to the surviving grandson and to his heirs and assigns forever," the said real estate. It was held that, as the will showed that no other persons except these grandsons were in the mind of the testatrix as beneficiaries, and that, as the devise was not to the trustee, but direct to the grandsons, the testatrix intended to give the grandsons an immediate vested interest therein.

In *Darling v. Blanchard*, 109 Mass. 176, where a testator devised a fifth part of his estate in trust for a daughter, and at and upon her decease "to convey the said fifth part to her children, share and share alike, and if any of them at that time be dead and leave issue, the issue shall be entitled to have the parent's share only," it was held that there was nothing in the will to show an intention of testator to postpone the vesting of the estates in the daughter's children until the death of their mother, the devise over being to all of them, and not to such as might be living at her death; and therefore, the children having died in the lifetime of their mother, unmarried and without issue, that the property descended to her.

In *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923, a vested, and not a contingent, interest, which was therefore assignable during the continuance of the life estate, was held to be created by the following testamentary provision: "I give and bequeath to the children of my brother, Welcome A. Greene, to be divided equally among them, all the residue and remainder of my estate after the decease of my said wife, to them, their heirs and assigns forever; it being my intention if any of these should die leaving issue before the reception of this bequest, said issue shall be entitled to one share thereof by right of representation," the court saying: "Upon this point, the case of *Gibbens v. Gibbens*, 140 Mass. 102, 54 Am. Rep. 453, 3 N. E. 1, is decisive. The testator, Thomas A. Greene, does indeed provide that, if any of his nephews should die leaving issue before the reception of the bequest, such issue should be entitled to one share by right of representation. There may be a vested interest determinable upon the happening of a contingency. If the interest of Welcome and his brothers was subject to be divested by the contingency of the death of either, leaving issue, during the lifetime of the tenant for life, it was not the less on that account vested."

In *Cook v. McDowell*, 52 N. J. Eq. 351, 30 Atl. 24, it was held that under a will by which testator gave a sum of money for the use of his wife during her life, and after her death to be divided in the same manner as the residuum of the estate, which residuum he then proceeded to devise and bequeath to his six children, "to be divided equally among them, share and share alike, to them, their heirs and assigns forever; in case any of my said children die before receiving their share leav-

ing issue, then I give, devise, and bequeath to such issue the share the parent would have taken if living," a son took a vested estate, which was not divested by his death without issue.

In *Boykin v. Boykin*, 21 S. C. 513, testator directed that the residue of his real estate should be kept undivided until the death of his wife, to be worked under the control and management of his executors, adding: "And from and immediately after her death, I devise the said real estate in this section referred to, to my sons, equally to be divided among them, share and share alike, to them and their heirs forever; . . . and should any of my sons die before the time herein appointed for the division of my real estate, and should leave issue living at that time, then I direct that such issue shall take among them share and share alike, the same portion of the real estate to which their parent would have been entitled if he had survived my said wife, to them and their heirs forever. And if any of my sons shall arrive at the age of twenty-one years before the death of my said wife, I direct that such son or sons shall be permitted to cultivate each for himself such a part of real estate as shall be allotted to him for that purpose by my wife and executors, until the final division when he or they shall receive his or their own share." Two of his sons having died unmarried and without issue, during the life of the widow, the question arose whether they took vested interests in the undivided lands, which were transmitted to their respective heirs, or whether the lands passed under the will to their only surviving brother; and it was held that as the three sons were *in esse* at the testator's death, the devise created vested interests in them.

In *Thompson v. Thompson*, 28 Barb. 432, testator directed that a share in his estate be held in trust for each of his sons for their support and education during minority, and upon each arriving at the age of twenty-one years to pay over to him, to be thenceforth had and holden by him and his respective heirs, executors, and administrators forever. He further declared that the principal sums bequeathed and devised to his children should vest in them respectively when and as they respectively should arrive at the age of twenty-one years, and not before, providing that if any of his children should die before attaining the age of twenty-one leaving lawful issue, such issue should stand in the place his or their parent would have been entitled to, had the parent attained the age of twenty-one years; and in case of the extinction of all the lineal descendants of testator at any time before any or all of his estate so devised and bequeathed should have vested in interest, then upon a limitation over, which was void for remoteness. It was held that the share bequeathed to a son vested in him in interest on the death of testator, and, having so vested, on his death without issue,

passed to his heirs; and that the declaration that in case any of testator's children should die before arriving at the age of twenty-one years, leaving issue, such issue should stand in the place of the deceased parent, was consistent with such vesting, for the statute for the distribution of estates of intestates would place such issue in the same position.

Instances in which remainder is held vested subject to be divested.

In *Goerlitz v. Malawista*, 56 Hun, 120, 8 N. Y. Supp. 832, affirmed without opinion in 130 N. Y. 688, 30 N. E. 68, a testator gave his wife all his estate for life, if she should so long continue and remain his widow, adding: "And upon her decease or second marriage, the same to revert to my son Anderson or his issues, and such other children as I shall leave or their issues, share and share alike, provided that the issues of any deceased child of mine be entitled to and receive only such portion as their parent would have received if living. Fifth. In case my wife deceases or marries again, leaving no children of mine or their issues living, then I bequeath all my estate, both real and personal, to my surviving brothers and sisters, share and share alike." It was held that the devise to the issue of any deceased child was clearly meant to be in the alternative and substitutionary, and that the contingency referred to was the death of the life tenant, since it cannot be referred to the time of testator's own death, as he hardly could have contemplated the second marriage of his wife, which was one of the events from which the remainder was limited, to take place in his own lifetime; and therefore that the son took a remainder vested in right, but not in possession or enjoyment, and subject to be divested by his own death with or without issue during the lifetime of the widow.

In *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163, in which the ultimate question was whether a son had an interest which might be subjected to the claims of his creditors, a testator by codicil to his will gave his wife a life estate in certain property, and provided that after that "after her death the property shall be equally divided among the several legatees who are to receive the residue of my property as provided and directed in the 21st clause of the will to which this is a codicil." By the clause above referred to, it was provided that when the youngest of testator's children should arrive at legal age or marry, his residuary estate should be equally divided among all his children and the children of any one of the latter who, before the period specified, might die, such grandchild to receive only the deceased parent's share. By another codicil he devised other realty to his wife for life, "and at her death to be equally divided among all my children then living and the children of any one or more of my children who may previously

die, the latter to take *per stirpes*, and not *per capita*." It was held that both the person to take and the event being certain, testator's sons took a vested remainder in the property bequeathed to his widow for life, which vested in them when the will took effect at the death of testator. With reference to the direction that the children of any deceased child should take the parent's share, the court quoted with approval the statement made in *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, with reference to a similar provision, that such direction was evidently intended to provide for children of a deceased child, and not to define the nature, as vested or contingent, of the previous general gift, its only effect upon that gift being to divest the share of any child dying leaving issue, and to vest that share in such issue.

In *Hudgens v. Wilkins*, 77 Ga. 555, the nature of the remainder created by the following clause was in question: "I lend unto my beloved wife, Mary R. Wilkins, all the lands which I may die possessed of in Elbert county, during her natural life, for her to support herself and my children which may remain with her on the land, and after the death of my wife, this land to be equally divided between all my sons or their children; that is, if either of my sons should die before my wife does, leaving a child or children, their child or children to draw their father's part of said land; this land I give to my sons above, over and above their distributive share of my estate as hereafter bequeathed to them." It was held that, having regard to the phraseology of the provision above set forth, and the fact that testator in the subsequent portions of his will excepted the property in question from the other property divided generally among his children, and referred to it as land "which I have willed to my sons in the first item of this will," the sons living at testator's death took a vested remainder, subject to be divested in the event of the son's dying leaving a child, before the termination of the life estate. The provision that should one of the sons die before the time of enjoyment of the estate in actual possession and leave a child, his child shall have his part of the land, is referred to as casting doubt upon the vesting of the title, but it was evidently regarded as insufficient to prevent the remainder from being regarded as vested, the property being fixed, and the persons to take, and the event upon which they were to take, being certain. The ultimate decision was that the estate of a son dying without children, before the termination of the life estate, passed to his heir or devisee.

In *Re Miles*, 61 L. T. N. S. 359, the will was as follows: "The entire residue of my property I leave to my two sons [naming them] in trust for the benefit of my dear wife during her lifetime, at her death to be equally divided among our children, Thomas, James, and Mary Hamilton [who

were children of a deceased daughter], to take what would have been their mother's share, and any other of my grandchildren to represent their parents in similar circumstances." It was held that this was a substitutionary gift to testator's grandchildren, and that the children of testator who died after his death, and before the death of his widow, did not take vested or indefeasible interests in his estate, but that the interests of the children so dying were devised and bequeathed to their children by the clause above set forth.

In *Mercantile Bank v. Ballard*, 83 Ky. 481, 4 Am. St. Rep. 160, where testator, after devising property to a daughter for life continued: "After her death, or if she die before me, the fee simple of said property shall be conveyed to her children and their descendants, in the same proportion as if it had descended from her; but if she leave no child, nor descendant of a child, then to be held in trust for" the son, it was held that the remainder vested in the children of the daughter living at the death of the testator, but subject to be divested in the event of their dying before the life tenant.

In *Ranhofer v. A. C. & H. M. Hall Realty Co.* 143 App. Div. 237, 128 N. Y. Supp. 230, testator gave his wife an estate during widowhood, further providing: "After the decease of my said beloved wife, or in the case of her remarriage, . . . I do from and upon the date of her said decease or remarriage, give, devise, and bequeath all the rest, residue, and remainder of my said estate, real and personal, then undisposed of, to my beloved children, and to the descendants of any of them then deceased, in the proportion of the share of each child to his or her descendants, share and share alike, for the sole use and benefit of my said children, respectively, and their descendants; and to the survivors of my said children in the cases of the decease of either of them without such descendants." It was held that, as the will very clearly indicates an intention on the part of the testator that the persons to take at the death or remarriage of the widow were to be determined at that time, testator's children each took a vested remainder in his real estate, subject to be divested by death before the decease or remarriage of the widow, and therefore that they could not convey said realty by a good and marketable title.

In *Dodd v. Winship*, 144 Mass. 461, 11 N. E. 588, it was held that under a devise in trust for testator's widow for life, and at her death "to pay, convey, and assign the trust property to and among my children, their heirs, personal representatives, and assigns, in equal proportions, the issue of any deceased child to stand in their parent's stead, and to receive their parent's share," the children of the testator took interests which vested at his death, liable to be divested by death in the lifetime of their mother leaving issue; and 37 L.R.A. (N.S.)

therefore that the trustees were accountable to a son's children for a part of the principal which they had allowed the son to appropriate in his lifetime.

In *Miller v. Worrall*, 59 N. J. Eq. 134, 44 Atl. 890, which is affirmed on this point, although reversed on another, in 62 N. J. Eq. 776, 90 Am. St. Rep. 480, 48 Atl. 586, a testator gave all his property in trust for his wife for life, directing his executors upon her death to "divide the entire amount thereof equally between my children, share and share alike, to whom I do hereby give, devise, and bequeath the same to their heirs and assigns forever, the children of any deceased child to have the share of his, her, or their parent." One of the children having died without leaving issue, in the lifetime of testator's widow, the question arose as to whether her executors were entitled to her share. It was held that the will disclosed no intention that those children only should take who might survive the period of distribution, and that the direction to divide lapsed legacies might be appropriately referred to the case of a child dying without leaving issue in the lifetime of the testator; and therefore that the daughter took a vested interest subject to be divested only by her death in the lifetime of her mother, leaving issue her surviving.

In *Camp v. Cronkright*, 59 Hun, 488, 13 N. Y. Supp. 307, it was held that under a devise to testator's wife for life, and upon her death "unto my children share and share alike, absolutely and forever, the child or children of any deceased child of mine to take the share which his or her or their parent would have taken if living," a son took an interest subject to be divested by his death in the lifetime of his mother, the life tenant, the language of the will showing that the devise over depends upon a death occurring during the lifetime of the life tenant.

In *Rutledge v. Fishburne*, 66 S. C. 155, 97 Am. St. Rep. 757, 44 S. E. 564, it was held that under a will by which testatrix devised property to her daughter for life, "with remainder to her children share and share alike, the child or children of deceased child to represent and take the parent's share," a child of the daughter who was *in esse* at the death of testatrix took a vested transmissible interest in the remainder, which upon her death leaving no children would descend to her heirs generally; but that if she should die leaving children at the time of her death, they would take, by substitution or executory devise, the interest which she would otherwise have taken.

In *Fishburne v. Sigwald*, 79 S. C. 551, 60 S. E. 1105, where a testatrix devised property to her daughter for life, and after her death to be equally divided between another daughter and a son, to them and their heirs, share and share alike, the child or children of a deceased child to represent and take the parent's share, it was held that the last part of the above pro-

vision was simply to provide for the devolution of the estate in case either of the children died during the life of the life tenant, and was not intended in any way to abridge the estate given them, except, by way of substitutional or alternative fee, the children of a child dying in the lifetime of the life tenant should take the share of the child so dying.

In *Re Gilbert*, 54 L. T. N. S. 752, where testator created a trust for a sister, and after her death gave all the residue of his estate unto and between all and every the children of his brothers and sisters, share and share alike, "the issue of any deceased child to take the parent's share," it was held that the substitutional gift took effect in the case of any child of a brother or sister of testator who died in the lifetime of the tenant for life. The inference from this decision is that the interests in remainder taken by the brothers and sisters were vested subject to be divested.

In *Engel v. State*, 65 Md. 539, 5 Atl. 249, where testator directed that at the termination of his wife's life estate, his farm should be sold and the proceeds divided amongst all his children, share and share alike, naming them, "or their share to the children of them that may have died," it was held that, it being unmistakably clear that testator intended to substitute the child or children of the legatee who might die in the place of the parent, and the words in question not confining the happening of the death of the legatee to the lifetime of testator, the gift to the children vested upon the death of testator, subject to be divested by death in the lifetime of the widow.

In *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, where a testator provided that after the death of his wife all the property devised to her for life, with the exception of some specifically disposed of, "shall be sold if necessary for equal partition, or if the same can be accomplished without a sale, shall be divided amongst my children, share and share alike, the child or children of any deceased child to take the portion which the parent, if living, would have been entitled" to, it was held that a share of the property vested in each of the children of testator who survived him; but if any such child should leave children at his death, his share would be divested in favor of his child; and that it was not divested by the death of a child in the lifetime of the tenant for life without leaving children.

In *Joseph v. Utitz*, 34 N. J. Eq. 1, testator gave one fourth of his estate to each of his three daughters, and the other fourth in trust for his son for life, and at the son's death to divide the principal among the daughters "or their heirs" in equal parts or shares, and further provided: "In the case of the death of any of my said daughters before my decease, or before the death of my son, Phineas, or before receiving her bequest, leaving lawful issue, such issue is to take the bequest or share 37 L.R.A.(N.S.)

to which his, her, or their mother would be entitled if living." One of testator's daughters having died leaving a husband and children before the distribution of the estate, the question arose whether her share was payable to her children or to her executors, and, in deciding that question, the court said in passing that testator must be presumed to have intended that his daughters' shares in the one quarter given in trust should go to their issue if they should predecease their brother, but that he did not intend that their title to the shares given to them directly and vesting in them on his death should be defeasible by their death in the lifetime of their brother.

In *Genunge v. Murphy*, 59 Misc. 381, 112 N. Y. Supp. 310, where testator gave his wife the use of his residuary estate during widowhood, adding: "On her death or when she marries again, I give and bequeath said residue of my estate unto my children in equal parts or shares; the child or children of any child of mine who at that time may be deceased shall take the part in such division which his, her, or their parent would have taken if then living," it was held that, there being persons in being who would have an immediate right to the possession of the property at the determination of the particular estate, the remainder was vested; that it could not be regarded as contingent because it was subject to defeasance by the death of the remaindermen prior to the determination of the particular estate.

In *Carstensen's Estate*, 196 Pa. 325, 46 Atl. 495, a testatrix devised and bequeathed her entire estate to her executor in trust to convert the same into money, and to pay the interest and income thereof to her husband during his life, further providing: "And from and after the decease of my said husband I give, devise, and bequeath the whole estate then remaining to my brothers and sisters; the child or children of any of my said brothers or sisters who may then be dead to take and receive the share that his or their parent would have taken if living." It was held that as the bequest was absolute and immediate, and the brothers of the testatrix were *in esse* at the date of her death, and as it was evident that the only object of testatrix in the postponement of distribution of the estate among her brothers and sisters was her desire to give her husband a life interest, the interest of the brothers and sisters was not contingent upon their surviving the life tenant, but vested at the death of testatrix, subject to be divested only upon the contingency of death during the continuance of the particular estate, leaving a child or children.

In *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, 79 Atl. 616, a testator gave his estate to his wife for life, directing that after her decease his executors should sell the realty and divide the proceeds between testator's children and the children of a deceased daughter, further providing: "Should either of my above-named chil-

dren die leaving issue, it is my will that the portion herein devised or bequeathed to such child or children shall be equally divided between their issue." The question having arisen upon a bill for the construction of the will, as to the disposition of the share of a child who had died leaving daughters and granddaughters, it was held that while the interests of the several children might properly be regarded as vested interests at the death of testator, they were, by the terms of the will, to be divested in favor of their issue in the event of death with issue before the death of the life tenant, and therefore that the daughters and granddaughters took the share of their ancestor.

In *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325, testator directed that upon the termination of a certain trust, "the principal fund of the whole of said trust estate shall be divided up and distributed as follows, to wit: . . . I give, devise, and bequeath to Lawrence Mitchell and his children, in equal portions, two fifths of all my estate after the closing of the trust, to have and to hold unto them and their heirs forever. But if one or more of the said four children of Lawrence Mitchell shall have died leaving issue of his or her body, said issue shall receive the same portion that his or her parent would be entitled to if living." It was held that no such contrary intent appeared in the will as to preclude the vesting of the two fifths devised and bequeathed to Lawrence Mitchell and his children at the death of testator; and therefore, by the death of Lawrence before the closing of the trust, the portion bequeathed to him did not become intestate estate; and that the issue of a deceased child were entitled to a share.

In *Flanagan v. Staples*, 28 App. Div. 319, 51 N. Y. Supp. 10, a testator provided as follows: "Upon the death of my said wife, I give, bequeath, and devise all my said estate and property unto my children in equal shares or portions, share and share alike, absolutely and forever. In the event of the death of any of my children leaving issue him or her surviving, such issue shall take the share or portion of my said estate and property which the parent would have taken if living." It was held that a son took a vested remainder in his father's estate, which was subject to be divested by the contingency which occurred, of his dying in the lifetime of the life tenant, leaving issue; and therefore that he took no interest which he could dispose of by his will.

In *Schwartz v. Rehfuß*, 129 App. Div. 630, 114 N. Y. Supp. 92, affirmed without opinion in 198 N. Y. 585, 92 N. E. 1101, the testator, after devising his residuary estate to his wife for life, provided: "At the death of my said wife, Sophia Dale, I give, devise, and bequeath all my property, real and personal, and wheresoever situated, to my children [naming them], share and share alike, to have and to hold the same to them and their heirs and assigns  
; L.R.A.(N.S.)

forever, and in case any of my said children shall have died leaving issue, the share of the child so dying shall descend to and vest in his or her issue, and in case of the death of any child without leaving issue, his or her share shall descend to and vest in his or her surviving brothers and sisters." It was held that upon testator's death the real estate in question vested in the children, subject to be divested by their not surviving the life tenant.

In *Ive v. King*, 16 Beav. 46, 21 L. J. Ch. N. S. 560, 16 Jur. 489, where a testator gave certain real and personal property to his wife for life, and after her death to others in trust to convert into money and pay a share thereof to certain persons named, and in the case of the death of any or either of them, then their respective shares to their children, if any, and if not, then to the survivors of them, it was held that the children of legatees who would have taken if they had survived the tenant for life were entitled to their parent's share.

In *Smiley v. Bailey*, 59 Barb. 80, it was held that, under a will by which testator gave his son Elmore a life estate in certain realty, with the provision: "And at and after his decease I direct that such real estate be equally divided between all my grandchildren, share and share alike; and in case of the decease of any of my grandchildren before the death of the said Elmore, leaving issue, then said issue to take the share that the parent would be entitled to if living; and I hereby bequeath such real estate accordingly," a grandson took a conditional fee which vested at testator's death, liable to be divested on the birth of issue; and therefore that, the grandson having died without issue after the death of the testator, his father succeeded to the estate as heir at law.

In *Rudd v. Travelers' Ins. Co.* 24 Ky. L. Rep. 2141, 73 S. W. 759, it was held that, under a will giving to a son certain realty for life, and at his death "to go, belong, and become the property equally of his children. In the event, however, at his death, any of his children have died leaving a lawful child or children, then such to take the part of their parent," the son's children took a vested remainder, and their children a contingent remainder depending upon their parents dying before their grandparents.

In *Post v. Horning*, 6 N. Y. S. R. 716, it was held that, under a devise to testator's wife for life, or until her remarriage, and upon her death or remarriage to the testator's children, with the proviso that if either of the children should die leaving issue, at the death of such child before the life estate fell in, such child's share should be given to the issue of such deceased child, the remainder vested in the children, subject to be divested by a death leaving issue during the continuance of the life estate.

In *Wright v. Dugan*, 15 Abb. N. C. 107, where testator devised his residuary es-

tate in trust for his wife during her life, and after her decease to pay the principal to his two sisters, adding: "And in case either or both my said sisters shall have died before the decease of my said wife, then and in such case the child or children of the one so dying to take and be entitled to the share and portion his, her, or their mother would have been entitled to had such mother survived my said wife," it was held that the sisters took a vested estate in remainder, and upon the death of one of them in the lifetime of the life tenant, the estate so vested in her became vested in her surviving children and in the children of a deceased son.

In *Wicker v. Wicker*, 70 S. C. 33, 49 S. E. 10, testator gave all the property to his wife for life, and directed that after her death all his personal estate remaining unconsumed by use or natural decay "be divided equally among my children then surviving, and the child or children of any child or children of mine that shall die before me or before my said wife, so that the children or child of any deceased child shall have the share of such property to which his, her, or their parent would have been entitled under this will, had such parent survived me. And I will that the lands hereinafter devised to my children in remainder shall be governed by the same rule of transmission, that is to say, that if any child of mine shall die before me or before my said wife, his or her child or children shall have in remainder, after the termination of the wife's estate for life, the share of land which the deceased parent of such child or children would have taken under this will, had such parent survived me and my wife." In the succeeding clause testator directed that after the death of his wife, all of his real estate should be divided among his children in parcels described by him, and in a codicil he referred to certain property as "the tract of land devised to my son." It was held that as the devises of land to the children were specific, and not to his children as a class, the remainder vested subject to be divested by death before the life tenant, and leaving children; and therefore that upon a son's death without issue, the property devised to him passed to his heirs.

In *Webster v. Ellsworth*, 147 Mass. 602, 18 N. E. 569, a testatrix, after creating a trust for the benefit of her husband during his life, gave, bequeathed, and devised the trust property to certain legatees, with the proviso: "If at the time of my said husband's decease, or at my decease, if he shall not survive me, any of the legatees named in this seventh clause shall have deceased leaving issue surviving at that time, such issue shall have the parent's share by representation. The shares of such as shall at that time have deceased leaving no issue shall be distributed among the other legatees above named, and the issue then living of any deceased legatee by right of representation, according to  
J. L.R.A. (N.S.)

their several proportions above set forth." It was held that, assuming without deciding that the remainder given to one of the legatees was a vested remainder in fee, it was nevertheless subject to be divested, and was divested, by her death before the life tenant, leaving no issue living at that time.

In *Churchman's Appeal*, 9 Sadler (Pa.) 428, 22 W. N. C. 131, 12 Atl. 600, testator gave the residue of his estate to his wife for life, and at her death certain legacies to nephews and nieces, further providing: "It is my will, and I so direct, that if any of the legatees die before her without leaving lawful issue, him or her surviving, living at my said wife's decease, then the legacy of the one so dying shall lapse for the benefit of the final residue of my estate; but if such legatee leaves such lawful issue him or her surviving, who shall be living at the decease of my wife, then I direct that such issue shall receive the legacy which was bequeathed to his or her or their deceased parent." It was held that the gift to a nephew was a present vested gift, the payment of which was subject to the contingency of his dying without issue before the life tenant, and therefore that it passed to his assignee for the benefit of creditors.

In *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652, a testator devised property in trust until the decease of all his children, and until his youngest grandchild who might live to be twenty-one years of age should arrive at that age, when the land should be "inherited and equally divided between my grandchildren *per capita*" in fee; and directed that in like manner the personal property should at the same time be equally divided among said grandchildren, share and share alike, *per capita*, further providing that if any grandchild should have died before the final division, leaving children, they should take and receive *per stirpes* the share which their parent would have been entitled to have and receive if then living; that any assignment, mortgage, or pledge by any grandchild of his share should be void, and the executors in the final division and distribution should convey and pay to the persons entitled under the will. It was held that the grandchildren took equitable vested remainders, subject to be divested only as to any grandchild who died before the expiration of the particular estate leaving issue, by an executory devise over to such issue. The court said: "The direction that if any grandchild shall have died before the final division, leaving children, they shall take and receive *per stirpes* the share of the estate, both real and personal, which their parent would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild, and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren; and its only effect upon that gift is to divest the

share of any grandchild deceased leaving issue, and to vest that share in such issue."

In *Jennings v. Barry*, 5 Dem. 531, testator gave his residuary estate upon trust for his wife during her natural life, directing that after her demise, it, together with the proceeds of certain realty given to her for life, should be equally divided, and one portion thereof given to certain children and a grandson; and further provided that in case of the death of any or either of them "before having received the portion above devised to them, and leaving issue him, her, or them surviving, I order and direct that the same be divided among the children of the deceased equally, share and share alike. In the event of any or either of my said children or my grandson thus dying without leaving issue them surviving, I order and direct that the portion to which he or she would have been entitled be divided equally among the survivors of them, share and share alike." It was held that as the postponement of payment appears to have reference to the situation or convenience of the estate, and the gift being of the residuary estate, the legacies would be considered as having vested at the death of testator, subject to be divested on the death of any legatee without issue before the period fixed for division.

In *Barker's Estate*, 159 Pa. 518, 28 Atl. 365, 368, a testatrix appointed her husband as executor with full power to dispose of the estate, both real and personal, in his discretion, dividing it equally among their children, with the proviso: "And if any or either of them die before such division, such portion as would have appertained to the deceased to be divided among his, her, or their children, share and share alike. Such distribution not to take place until the death of my said husband," until which time the income was to be devoted to the support of the family. She further provided that at any time during the life of her husband, after the coming to the age of twenty-one years of any of their children, the husband might bestow on such child such portion of the estate as it would inherit at his death. It was held that the children took vested interests, which were subject to be divested by their death under twenty-one.

In *Jacobs v. Whitney*, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576, where testator, after devising property in trust for the benefit of a brother during his life, and after his death one third of the income to the brother's wife if she survived him, and the remaining two thirds to the brother's children in certain proportions, directed that immediately after the decease of the brother and his wife, the realty should be vested in the children of the said brother "in the same proportions as above mentioned as to the income thereof; if any of the said children be then deceased, under lawful age, and without issue, the surviving children of my said brother to take the share of

said decedent in the same proportions; but if either of the said children be then deceased leaving lawful issue him or her surviving, such issue shall take, and if more than one divide equally among them the part or share his, her, or their deceased parent would have taken if then living." It was held that there being nothing uncertain or contingent about those who are to take, or what they are to take, or when they are to take, the brother's children took an interest vesting at the moment of testator's death, subject only to the contingency of dying under age and without issue before the period when they are to come into possession arrives; and therefore that a child who attained full age, although dying in the lifetime of his parents, without issue, had an interest which passed to his assignee in insolvency.

Instances in which remainder is held vested not subject to be divested.

In *Johnson v. Washington Loan & T. Co.* 224 U. S. 224, 56 L. ed. —, 32 Sup. Ct. Rep. 421, a testator devised his homestead to his daughters for a home so long as they should remain single and unmarried, directing that after the death or marriage of the last of them, it should be sold and the proceeds thereof "be distributed by my said executors among my daughters living at my death, and their children and descendants (*per stirpes*)." It was held that the words "living at my death" were conclusive that the daughters took a vested remainder in fee; and that such remainder was not defeasible, as to the interest of any of them, by her death leaving descendants before the expiration of the preceding estate, inasmuch as, if the provision for the children and descendants of the daughters *per stirpes* should be regarded as importing a condition subsequent, providing for a divesting of the interest of the daughters who survived him, and a substitution of their children and descendants, it would necessarily follow that the children and descendants of the daughters who died before him would be excluded from participation.

In *Re Dawes*, L. R. 4 Ch. Div. 210, where testator gave a sum in trust for a certain person for life, and from and after his decease gave and bequeathed the principal sum "to be equally divided amongst the children of my late daughter, Jane Maria Boddy, or their descendants, but should there be none of them surviving, then my mind and will is that said sum shall be equally divided amongst such other grandchildren as I may then have living, or in default thereof to my legal representative." it was held that the children of the daughter, who survived the testator, were entitled under the bequest, although all but one of them failed to survive the tenant for life, two dying without and one leaving issue. The conclusion reached in this case, although perhaps supported by the context of the will, is sometimes criticized.



In *Knight v. Pottgieser*, 178 Ill. 368, 52 N. E. 934, where a testator devised certain realty to his wife for life, adding: "And upon and at her death the same to go to and be divided amongst my children and their descendants in equal shares, the descendant or descendants of a deceased child to take the parent's share in equal proportions," it was held that, although the gift was one to a class, and arose out of a direction to distribute, yet as the postponement of the right to possession was for the purpose of giving the wife a life interest, the remainder should be deemed to have vested at the death of the testator; and, further, that there was nothing in the will to indicate testator meant that the interest which vested at his death should be a base or determinable fee subject to be divested as to any devisee by the death of such devisee during the continuance of the life estate without leaving descendants to take after the death of the widow. With reference to the bearing of the allusion to "descendants" upon the question whether the remainder vested at testator's death, the court said: "The will provides that upon the termination of the life estate the premises shall 'go to and be divided among' the children of the testator and their descendants. It is urged the word 'descendants' means only those persons who have proceeded in some degree from the body of a child of the testator, and that the selection and use of that word unmistakably indicate that it was the intention and purpose of the testator to exclude from the devise those who, though heirs at law of any deceased child, were not the direct or remote issue of such child. If this be conceded, we do not perceive it discloses that it was the purpose of the testator that those whom he intended to receive his bounty should not be determined during the lifetime of the widow. It is but his declaration as to the class of persons who should take,—not as to the time when the investiture should occur. His desire thereby indicated is well fulfilled by our construction of the will, i. e., that his children, at and upon his death, became seised of the estate in remainder in fee."

In *Middleton v. Middleton*, 19 Ky. L. Rep. 1232, 43 S. W. 677, a will by which testator gave a daughter his estate to be used and enjoyed by her during her life, adding, "and at her death the same shall go and descend in equal shares to her children and to the descendants of such of her children as may be dead," was held to give the children a vested remainder, the court remarking: "The clause 'and to the descendants of such of her children as may be dead' means nothing more than if, at the time of distribution of the estate,—when the time comes for its enjoyment in possession,—one or more of such children be dead, their issue should take. This, it is true, would result anyway, but it is a common form of expression, denoting merely the inheritable quality of the estate." 57 L.R.A.(N.S.)

In *White v. Curtis*, 12 Gray, 54, where testator, after creating a trust for the benefit of his sons during their lives, directed: "At the decease of both my sons, the remainder of my estate shall be equally divided amongst my grandchildren and the legal descendants of any that may be deceased (if any there be) for their use and behoof forever; it is to be understood that each grandchild shall receive one share of said estate and all the descendants of a deceased grandchild (if any there be) shall receive one share to be equally divided amongst them," it was held that a grandchild living at testator's decease took a vested interest, which accordingly passed by inheritance to an illegitimate child.

In *Trowbridge v. Coss*, 128 App. Div. 679, 110 N. Y. Supp. 1108, affirmed without opinion in 195 N. Y. 596, 89 N. E. 1114, a testator gave his residuary estate in trust to divide the income among his intended wife and children during the lives of his daughter Mary and his intended wife, directing and declaring that the child or children of any deceased child should take the share of the parent deceased. He further provided: "On the death of the survivor of my said intended wife and my said daughter Mary, I give, devise, and bequeath my said property, real and personal, to my children, including the issue of my said intended marriage, share and share alike, the child of any deceased child to take the share of the deceased parent." Testator's son survived him, but died intestate and unmarried in the lifetime of the widow. A daughter who survived him died intestate leaving an infant child, who also died in the lifetime of the widow. The question having arisen as to whether the remainder vested in testator's children so as to pass to their heirs, or was contingent so as to pass to the only grandchild of testator who survived the termination of the trust estate, it was held that, the gift being made direct to testator's children, and the persons to take being certain, their interests would not depend upon their surviving the termination of the trust estate; that the use of the words "on the death of the survivor of my said intended wife and my said daughter Mary" did not show a contrary intent; and that the provision that the child or children of any deceased child should take the share of the parent merely emphasized his intention that the children living at the time of his death should take a vested, and not a contingent, estate.

In *Womrath v. McCormick*, 51 Pa. 504, a testator gave his wife the net income of all his estate for life, further providing that upon her decease all his real and personal estate should be valued and divided into as many parts, to be equal in value, as he should then have children living, the issue of any deceased child to represent their respective parent or parents, and each of such issue, if any, to be considered in the division as one part only, "and I give, devise, and bequeath to each of my said

surviving children, and the issue of any deceased children, such issue to stand respectively in the place of their parent and to take together only the share their respective parent, if living, would have taken, one equal share or part of my said estate." A question having arisen as to whether the widow and children could give a good title, it was held that the reference to issue regarded the succession of the law, and created no contingency to prevent the estate devised to the children from being a vested remainder.

In *Cowan v. Epes*, 2 Patton & H. (Va.) 520, a testator gave his wife the use of one third of his estate during her natural life, desiring that at her death it be equally divided "among my children that I now have or may hereafter have, and the children of such of them as may die leaving children, giving to my grandchildren the portion intended for their deceased mother or father." It was held that, although the clause standing alone might lead to a contrary conclusion, the will as a whole, and notably the following recital in the residuary clause, "meaning and intending that in all clauses of this will all the children that I now have or may hereafter have share equally," manifested an intention on the part of the decedent that the remainder should vest at his death in his children surviving him and in the issue of those deceased.

In *Brown v. Dinwiddie*, 24 Ky. L. Rep. 209, 68 S. W. 421, a will by which testator gave shares of his estate in trust for his sisters for life, with the provision: "At the death of each of said three sisters who survive me, the share of my estate so held in trust for her shall be divided among my brothers and sisters having children, the children of any who may be dead taking the share of their parent," was held to give the brothers and sisters a vested remainder interest, enabling each of them, to give perfect title.

In *Roberts v. Roberts*, 102 Md. 131, 1 L.R.A.(N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 Ann. Cas. 805, a testator gave his estate to his wife during life in trust for the use of herself and her children, with power to sell the property, and invest the proceeds, and lease the real estate and use whatever should be necessary for the support and education of the children, and to make advancements to them, devising and bequeathing all his property remaining at the death of the wife "to my children by my said wife, share and share alike, absolutely in fee simple; the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living." The question having been raised as to whether one of the children, who died during the continuance of the life estate leaving issue, who died a few days later, took an heritable interest, it was held that, as the wife having power to make advancements to any of the

children, equality of distribution did not in any way depend upon whether the remainders were contingent or vested and as in doubtful cases an interest should be deemed vested in the first instance, rather than contingent, wherever such construction is possible, and as if the remainder must be regarded as contingent, there would be a possibility of intestacy in the event of all the children dying without issue in the wife's lifetime, the remainders were vested. The court said: "The provision that 'the child or children of a deceased child shall stand in its or their parent's place and stead, and receive and have the share and interest its and their parent would have been entitled to if living,' is not of controlling effect on this question by reason of the use of the words 'receive and have.' That was speaking of the period of distribution, and, whether vested or contingent, the remaindermen were not entitled to 'receive and have' their shares until that time arrived."

In *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008, reversing 61 Hun, 528, 16 N. Y. Supp. 395, where a testator devised to his two daughters certain realty for and during the term of their natural lives, and from and after their decease to the two children of a son, "to be divided equally between them and their heirs, share and share alike, the child or children of a deceased child taking the share which her or their parent would have taken if living," it was held that the two children of the son, who survived the testator, took, upon his death, a vested remainder in fee in the premises in question, and that the provision for their issue was by way of substitution in case of the death of the parent during the life of testator; and therefore that, by joining with the surviving tenant for life, they could convey a good title.

In *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. 586, a testator, after giving his wife the use of his entire estate during her widowhood, with the provision that should she marry, from and after such marriage she should have and control only "one third in value of the realty, and one third of the personal property then remaining, absolute," and should she survive all testator's children "(they having died without issue)," the entire estate was given to her absolutely, added: "But in case of the death of my wife leaving any of my children surviving, I will, devise, and bequeath to them all of my estate, in equal proportions, share and share alike, the heirs of any of my said children taking their deceased parent's share." It was held that as the devise of the reversion in two thirds of the realty in the event of the subsequent marriage of the widow would take effect immediately upon such marriage, there being nothing in the language of the will to warrant the conclusion that the title devised was intended to be vested at different times, although the enjoyment of the one third of the estate was postponed until

after the death of the widow, the title was intended to vest immediately upon the death of testator, and so necessarily he must have intended children or children's children in being at his death, and the deaths contemplated were necessarily deaths in the lifetime of testator. The ultimate question in this case was whether the share of a child dying in infancy, and before the subsequent marriage of the widow, passed to its heirs at law.

In *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101, 18 Atl. 100, a testator directed that, upon the death of his wife, property bequeathed for her benefit should be turned into money and divided into four equal parts, one part to be paid to each of his children, further providing: "In case of the death of any of my said children I order and direct that the part of him or her so dying be paid to his or her lawful issue, and in case he or they shall die without leaving any lawful issue, to pay and divide the part of him or her so dying to and among my surviving children and the lawful descendants of any of my said children [naming them] who may have deceased, such descendants of children to receive *per stirpes*, and not *per capita*." The question having arisen as to whether the issue of a son dying during the continuance of the precedent estate, or the son's legatee, was entitled, it was held that the death of the devisee referred to in the provision quoted being an absolutely certain event, it would be referred to the time of testator's own death, and the presumptions from the frame of the will being that the testator preferred children to grandchildren, and the vesting of his estate in his children at his death, rather than upon an event of uncertain time thereafter, the son took an interest which was not divested by his death.

In *Moore v. Hare*, 144 Ind. 573, 43 N. E. 870, a will by which testator, after giving his daughter a life estate in certain realty, provided: "At the death of her, said Maria F. Ritzinger, all the said real estate so devised to her for life shall go to her children in fee simple. If any child of hers shall have died leaving a child or children, then the portion of said real estate that would have gone to the parent shall go to such child," was held, in view of the rule that words of survivorship in a will, unless there is a manifest intent to the contrary, always relate to the death of the testator, to vest the remainder in the daughter's children at testator's death, the latter part of the clause quoted being regarded as having reference to death during testator's lifetime. This was an action by a purchaser of the interests of the life tenant and her children, to quiet title as against the grandchildren.

In *Hopkins v. Hopkins*, 1 Hun, 352, 3 Thomp. & C. 527, a testatrix gave to her two daughters the use and income of all her estate during their natural lives, provided they should remain unmarried, and in the event of their death or marriage, 37 L.R.A. (N.S.)

the remainder to her children, naming them, or to the survivor or survivors of them, with the proviso: "In case any of my children die having issue, then I will and direct that the child or children of such son or daughter of mine shall receive the same as the parent of such child would have received if living,—that is, the portion that would have belonged to the parent, if living." It was held that, although the clause quoted raised a question not entirely free from embarrassment, it should be taken to provide for the disposition of the share or shares of such child or children as might not be living at the time of testatrix's decease, as otherwise the portion of any who might die in the lifetime of testatrix with issue would go to the survivor or survivors to the exclusion of such issue, thus precluding an equal distribution among her descendants, and therefore that the remainder was a vested one.

In *Kessler v. Friede*, 29 Misc. 187, 60 N. Y. Supp. 891, a will by which testator devised certain realty in trust for the care, maintenance, and education of the children of a deceased son, until the oldest should have arrived at the age of thirty years, when the trust fund was to be divided into as many shares or parts as his said son had children living at the time of testator's decease, and to pay one part to each child who may have arrived at the age of thirty years, further providing: "It is my will, and I hereby direct, that in case any of the children of my deceased son, Robert, shall depart this life leaving issue surviving, then such issue shall be entitled to and become vested with the share, interest, or portion of, in, and to the trust estate and my residuary estate his or their parent would be entitled to or would have received if such parent had lived," disclosed an intention to vest the interests of the distributees from the date of testator's death, the provision quoted plainly referring to a death before that of testator.

In *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310, testator, after making certain specific gifts to his children, gave all the rest of his property to his wife during widowhood, with the further provision: "After the death of my dear wife all my estate, excepting the bequests herein made, shall be divided in equal shares among all my children, and should any of my children be dead, and have left children, then they shall be entitled to the distributive share of their parents." It was held in an action by a purchaser from a son to quiet title as against the son's children, that, although the gift took the form of a direction to divide and distribute after the death of the wife, yet, in view of the leaning of the courts toward a construction which will give a vested estate wherever possible, and the rule that survivorship, made a condition, turning point, or controlling event in the disposition of the property by a will generally, in the absence of an expressed or implied intention

to the contrary, will be construed to refer to the time of the death of the testator, the children of the testator took a vested interest in the residue of his estate at the time of his death. The court said: "The reference to the grandchildren is one usually inserted in wills, intended originally to prevent the lapsing of legacies, but since the enactment of our statute, §§ 2567 and 2571, Rev. Stat. 1881, seldom necessary. We do not regard the insertion of this provision as of controlling effect in the construction of the instrument."

In *Re Tienken*, 131 N. Y. 391, 30 N. E. 109, a testator gave certain realty to his wife for life, and gave all the rest of his realty in trust during the life of his wife to pay to her a certain sum and apply the balance of the net income between his children, share and share alike, for their use, benefit, and maintenance, further directing that after the expiration of the life estate, the remaining land should be sold and the proceeds divided amongst the children. By the eighth clause of the will he provided: "Whereas in this will is mentioned and described gifts, devises, and bequests to my children, if any of them shall be dead leaving issue surviving them I do direct that the issue of any of my children deceased shall take the same share their parent would have received had such parent remained living, and to be divided among them, the said issue, share and share alike." A son of testator having died in the lifetime of the widow leaving no children, the question arose as to whether he had such an interest in his father's estate as would pass under his will. It was held that, having regard to the intention of testator as manifested by the language and the general scheme of the will, the son's estate vested at the time of his father's death, the court holding that the eighth clause above set forth had reference to the death of a child during testator's lifetime, and that its true meaning and office was to put in the place and stead of a child who had died before the testator, but left issue surviving, such surviving issue, as recipients of the parent's share, standing collectively in his or her place as one of the children to whom property is given, notwithstanding, in view of the protection afforded by the statute relating to lapsed legacies, that the provision was needless, and that such clause, instead of dictating the interpretation to be placed upon the will, must receive interpretation from the other indications of testator's intention. The court admitted, however, that it was an argument of some force that the clause itself was needless, except upon a construction which postponed vesting until the death of the widow, but stated that the force of such argument was more than balanced by other inferences founded upon the language of the clause itself. It may also be noted with regard to this case that the fact that the gift was in the form of a direction to divide and distribute was held not to give rise to an inference that tes-

tator meant the interest taken by his children to be contingent upon their surviving, a contrary intention being indicated by the fact that distribution was not directed to be made among "surviving children" or "among those who should be then living," or "among those and the issue of such as shall have previously died," but simply to "my children,"—a phrase used by testator throughout the will, as well in gifts taking effect immediately as in those in which enjoyment was postponed.

In *Hill v. Bacon*, 106 Mass. 578, it was held, without discussion of the question, that by a devise to testatrix's husband for life, and at his decease the remainder to her children in fee in equal proportions, "and if either shall at the time of their father's death have deceased leaving issue, such issue shall take their parent's portion of such estate," the children took vested remainders in fee absolutely, and could give good title thereto.

In *Kimball v. Tilton*, 118 Mass. 311, a testator created a trust for the benefit of his wife and children during the lives of his wife and daughter, directing that after the decease of said wife and daughter, the trustees should divide the trust funds into three equal parts and convey one part to each of his two sons and one to the lawful issue of the daughter. He further provided that if either of the sons should have deceased before the death of the daughter, leaving lawful issue then living, such issue should take the parent's share, and for want of such issue on the part of either, his share should go to his heirs at law. It was contended that as one of the sons had died in the lifetime of the daughter, leaving a son, his share never vested, or if it vested, was divested by the happening of the contingency; but it was held, following *Hill v. Bacon*, supra, that the son took a vested remainder in fee absolutely, which was capable of alienation.

In *Callison v. Morris*, 123 Iowa, 297, 98 N. W. 780, in which the ultimate question was whether testator's widow and son could convey a perfect title, it was held that the remainder devised to testator's son by a will also containing the following provision: "Should my son . . . decease leaving issue, prior to the distribution of my said property as herein provided, then it is my will, and I hereby direct, that the issue of such deceased son shall receive the share of his father; should my son . . . decease prior to such distribution leaving no issue, then it is my will that the interests of such deceased son shall descend to his heirs as the law may provide," was vested, the person being ascertained and the event certain, and there being nothing in the language of the will itself manifesting an intention to postpone the gift, the proviso quoted being practically the same as a devise to the son and his heirs.

In *Northern Trust Co. v. Wheaton*, 249 Ill. 606, 34 L.R.A. (N.S.) 1150, 94 N. E. 980, a testator, after creating a trust estate during the life of his wife and sister

and the survivor of them, directed that at its termination the trust estate then in the hands of the trustee "shall go, belong, and be immediately divided in absolute ownership to the following persons, share and share alike . . . [naming them]. In the event of the death of any of the ten persons above named as beneficiaries, before the interest in my estate shall vest in them, leaving a child or children surviving at the time said estate shall vest, then said child or children of such deceased person shall take their parent's share." One of the remaindermen died without leaving children surviving, during the continuance of the life estate. It was held that as it is an established rule that estates devised will vest at the death of the testator, unless some later time for their vesting is clearly expressed by the words of the will, or is necessarily implied therefrom; and as, at the time of the death of the testator, the ten beneficiaries named were in being, so that there was no uncertainty as to who would take the fee; as the postponement of the enjoyment of the estate was merely for the purpose of letting in the life interests of testator's wife and sister; and as, there being no clause of survivorship, the effect of holding the remainders to be contingent would be to produce an intestacy as to the share of any person dying during the continuance of the precedent estate without leaving children,—the remainder would be held to have vested at the death of testator. Referring to the indication of a contrary intention in the provision that a child or children of a deceased beneficiary should take the parent's share, the court said: "This clause may as well refer to the death of the beneficiaries before the death of the testator as afterwards. It is not inconsistent with the other provisions of the will to construe this language as referring to the death of the beneficiary before the death of the testator, and as indicating an intention on his part that if any of the beneficiaries died before the testator, leaving issue, such issue would be substituted for such deceased beneficiary. This construction seems to be consistent with the general testamentary scheme of the testator. By the death of a beneficiary after the death of the testator, the estate, being vested, would, of course, pass to the legal heirs of such beneficiary, and thus prevent intestacy as to such shares." E. S. O.

#### KENTUCKY COURT OF APPEALS.

DAVID W. KETTERER, Appt.,

v.

WILL NELSON et al.

(146 Ky. 7, 141 S. W. 409.)

**Curtesy — mortgaged property — joiner by husband.**

1. A man who joins in a mortgage of his wife's property is entitled to compute 37 L.R.A. (N.S.)

his curtesy interest only on the surplus after satisfying the mortgage and tax liens, not on the entire value of the property, under a statute giving him one third of all the real estate of which she was seized in fee simple during coverture, unless the right shall have been barred or relinquished.

**Same — medical and funeral expenses — reimbursement.**

2. A man is not entitled to be reimbursed out of his wife's estate the amount which he paid for her physician's and nurse's bills and funeral expenses.

**Same — improvement of real estate — reimbursement.**

3. A man is not entitled to reimbursement from his wife's estate of money expended by him in the improvement of her real estate.

(December 15, 1911.)

**Note. — Liability of separate estate of wife for her funeral expenses.**

The question of the liability of the wife's separate estate for her funeral expenses is covered in the note to *Schneider v. Breier*, 6 L.R.A. (N.S.) 917, and this note is merely supplementary thereto.

It may be stolid as an elementary proposition, the husband is liable for the reasonable funeral expenses of his wife, whether or not she may have had property of her own, and that he cannot, upon paying such expenses, charge the same to her separate estate (21 Cyc. 1233). From this it will be seen that in order to render the wife's separate estate liable, an exception must be made to that rule.

In *Re Sea*, 11 B. C. 324, it was held that the husband was liable for the wife's funeral expenses, and was not entitled to be indemnified from her separate estate. The court said: "The husband's duty to bury his dead wife at his own charge is neither based upon nor incidental to his marital proprietary right. It is founded in the marriage relation itself. Its true correlative is his right to nominate the place of his wife's burial and to prescribe the manner of her obsequies. The married woman's property acts do not expressly or by necessary implication deal with this obligation; nor do they affect the marriage status. I am therefore unable to agree with the view tentatively advanced by Mr. Lush in his book on 'Husband and Wife' (which is also the view held by so distinguished a jurist as Mr. Justice Holmes respecting the effect of the parallel legislation of the state of Massachusetts), that the reduction of the *jus mariti* effected by these acts involves the relief of the husband from the burden of this last act of piety and charity. Such an interpretation would, in my judgment, be legislative in its character. With respect to the weighty authority of Mr. Justice Holmes's opinion—one may observe that eminent American judges, in the application of legislative enactments, do permit themselves a latitude of interpretation which a Canadian court would not feel it-

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Boyd County distributing the property of plaintiff's deceased wife in an action brought to settle her estate. Affirmed.

The facts are stated in the opinion.

Mr. J. F. Stewart, for appellant:

Appellant has a right to be reimbursed for amounts paid for street improvement after his wife's death.

Nineteenth & J. Street Presby. Church v. Fithian, 16 Ky. L. Rep. 581, 29 S. W. 143; Hackworth v. Louisville Artificial Stone Co. 106 Ky. 234, 50 S. W. 33.

self free to exercise. It is equally clear that there is no right of indemnity out of the wife's estate. Of course, where the wife's property, being under settlement, is in course of administration in a court of equity, for the benefit of her creditors, a creditor resorting to that court to enforce his demand may be put upon terms to act fairly; and this, doubtless, is the explanation of the decision in *Re M'Myn*, L. R. 33 Ch. Div. 575, 55 L. J. Ch. N. S. 845, 55 L. T. N. S. 834, 35 Week. Rep. 179."

While the husband is bound to pay his wife's funeral expenses, yet if he fails to do so her estate is liable therefor, and her heirs can compel the husband to reimburse them for such expenses. *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 666.

In *Gregory v. Lockyer*, 6 Madd. 90, 22 Revised Rep. 246, where the husband had paid his wife's funeral expenses, and claimed before the master to have the amount repaid, and a decree was entered directing the wife's separate estate to be applied to the payment of these expenses, the vice chancellor said that he considered himself bound by the decree, but expressed a doubt whether generally the husband had a right to throw the wife's funeral expenses upon her separate estate.

A married woman may, however, make a testamentary disposition of so much of her estate as is necessary for the payment of her funeral expenses. *Hoopes's Estate*, 2 Chester, Co. Rep. 67.

And the payment of such expenses by the husband in the first instance will not prevent his recovery from her estate, where she has made such a provision. *Ibid*.

In *Re M'Myn*, L. R. 33 Ch. Div. 575, a husband who was executor of his wife's will, made under a testamentary power of appointment, was held entitled to retain out of her estate the amount paid by him for her funeral expenses, although the estate was insufficient to pay her creditors, and she had made no charge of debts or funeral expenses. The court said: "In *Willeter v. Dobie*, 2 Kay & J. 647, 4 Week. Rep. 669, it is true that there was a charge by the wife of her funeral expenses. It is also true that the law casts upon a husband the duty of burying his wife; but the law does not on that account cast upon the

And for payments made on liens against the property after his wife's death.

*Treadway v. Pfaris*, 13 Ky. L. Rep. 787, 18 S. W. 225; *Kelley v. Ball*, 14 Ky. L. Rep. 132, 19 S. W. 581; *State Nat. Bank v. Vicroy*, 24 Ky. L. Rep. 892, 70 S. W. 183; *Connor v. Home & Sav. Fund Co. Bldg. Asso.* 26 Ky. L. Rep. 109, 80 S. W. 797; *Cumberland University v. Roberson*, 30 Ky. L. Rep. 947, 99 S. W. 1152; *Ft. Jefferson Improv. Co. v. Dupoyster*, 112 Ky. 792, 2 L.R.A.(N.S.) 263, 66 S. W. 1048; *Pom. Eq. Jur.* § 799.

Mr. George B. Martin, for appellees:

Plaintiff is not entitled to be paid out of

husband the burden of burying his wife at his own cost always. In most cases the husband takes all his wife's personal property by reducing it into possession during his lifetime. To call upon him to bury her out of his own money in a case like the present, where the wife exercised her power of appointment, and made the fund general assets for her creditors, but has omitted to mention her funeral expenses, would be too hard. I think, therefore, that the husband is entitled to retain the sums expended on her funeral."

Where a statute provides that when an executor or administrator has sufficient means over and above the expenses of administration, "he shall pay off the charges of the last sickness and funeral expenses of the deceased," a primary liability is created, and although it is still the husband's duty to see that his wife is properly buried, he is entitled to be reimbursed from her estate; and where she predeceases her husband, her estate is liable to his estate for such expenses. *Skillman v. Wilson*, 146 Iowa, 601, 140 Am. St. Rep. 295, 125 N. W. 343. The court said: "The legislative design in enacting the statute quoted was to assure to every person care in his last sickness and appropriate burial by declaring the charges therefor preferred claims, and exacting their payment as soon as funds enough to satisfy them come into the possession of his personal representative. It is mandatory in form. It contains no discrimination as between creditors to whom such charges may be owing, and the duty to pay is declared independently of any obligation which may exist on the part of others. Its language obviates the inference otherwise to be drawn, that it was intended merely to declare a preference as between claims against the estate. As seen, it may be deemed the basis for the allowance of such expenses, and we are of the opinion that the legislative intent was to impose on the estate of every deceased person a primary liability for the charges of the last sickness and funeral. If so, the obligation of either husband or wife therefor is secondary thereto in character, and, in event of payment by either, such charges may be established as claims against the estate of the deceased." J. T. W.

the surplus a curtesy valuation based upon the entire value of the property.

Harrison v. Griffith, 4 Bush, 146.

He is not entitled to reimbursement for physician's and nurse's bills and funeral expenses.

Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666; Towery v. McGaw, 22 Ky. L. Rep. 155, 56 S. W. 727, 982; Brand v. Brand, 109 Ky. 721, 60 S. W. 704; Long v. Beard, 20 Ky. L. Rep. 1036, 48 S. W. 158.

Nor for any amount expended by him in improvement of the property.

Nall v. Miller, 95 Ky. 448; Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666.

Settle, J., delivered the opinion of the court:

This case presents a controversy between the appellant and the brothers and sisters of his deceased wife over the distribution of the proceeds of her real estate, she having died childless and intestate. There seems to have been no administration of the decedent's estate, and this action was brought by the husband to settle the estate.

The decedent owned at the time of her death a lot in the city of Ashland upon which was situated a combined residence and business house. She owed no debts except a note of \$1,000 to Mrs. Casebolt, a note of \$850 to Mrs. Gartrell, both secured by mortgage liens upon her real estate, and to the city of Ashland \$275.73 for street improvement, for which it had and asserted a statutory lien upon the property in question. The circuit court adjudged that the creditors named had liens upon the real estate left by the decedent to secure their respective debts, directed its sale to pay them, and that a sufficiency of the residue of its proceeds be applied to the payment of appellant's curtesy or dower right in the real estate, and the remainder to the decedent's two brothers and sister, who are her only heirs at law.

The appellant complains of the judgment, and insists it should have directed that he be paid his curtesy or dower upon the basis of the entire price realized by the sale of the decedent's real estate, instead of out of the surplus after payment of the liens thereon, as was adjudged. He also contends that, before the distribution of any part of the proceeds of the real estate among the decedent's heirs at law, the judgment should have directed that he be reimbursed out of same for certain sums he paid for the burial of his wife, in satisfaction of physician's and nurse's bills incurred during her last illness, and for improvements upon her real estate, made before her 37 L.R.A. (N.S.)

death. These several contentions we will now consider in the order named.

The surviving husband's interest in the deceased wife's real estate is declared by § 2132, Kentucky Statutes (§ 4637, Russell's Stat.), which provides: "After the death of either the husband or wife, the survivor shall have an estate for his or her life, in one third of all the real estate of which he or she, or anyone for his or her use, was seised of an estate in fee simple during the coverture, unless the right to such dower or interest shall have been barred, forfeited, or relinquished; and the survivor shall have an absolute estate in one half of the surplus personalty left by such decedent." It will be observed that by the language of the statute appellant's curtesy or dower only extended to such of the wife's real estate, or interest therein, as had not been barred, forfeited, or relinquished. By his act in joining in the mortgages which the wife gave upon the property, appellant relinquished his curtesy or dower therein to such part thereof as might be required to pay the mortgage liens, and the lien debt due the city of Ashland for the street improvement, being in the nature of a tax lien upon the property, was also superior to his curtesy or dower. In view of these facts, he was not entitled to be paid out of the surplus proceeds of the real estate a curtesy or dower valuation based upon the entire value of the property. In Harrison v. Griffith, 4 Bush, 146, we held that a widow is entitled to dower in what remains of the proceeds of the sale of the house and lot to which her husband held an equitable title at his death, after satisfying a vendor's lien, and also satisfying an execution lien in favor of the commonwealth, to pay which he had surrendered the house and lot in writing. We think this case conclusive of the one at bar as to the question of appellant's curtesy or dower. Therefore the judgment of the lower court on that point was not error.

Appellant's claim to be reimbursed out of the proceeds of the property for the wife's physician's and nurse's bills and burial expenses cannot be sustained, these items being demands in the nature of necessities for the wife for which he was primarily liable. We do not think the case of Carpenter v. Hazelrigg, 103 Ky. 538, 45 S. W. 666, relied on by appellant, militates against this conclusion. It is true the wife's physician's bill and funeral expenses were in that case ordered to be paid out of the proceeds of her land, but it was because the husband had failed to pay them. In the opinion it is said: "Whilst the husband is bound in law to pay the necessary physician's bill for his wife and her funeral

expenses, yet, if the husband fails to pay them, her estate is liable therefor. The husband seems to have failed to pay them, and it was not error for the court to order the land sold subject to the husband's homestead right to pay these expenses. If the land is sold to pay them, the husband can be compelled by appropriate proceedings to reimburse those to whom her estate descends."

Appellant also relies upon the case of *Towery v. McGraw*, 22 Ky. L. Rep. 155, 56 S. W. 727, 982, in which it was held that the wife's personalty should first be subjected to the payment of funeral expenses, but also held that medical services and the care of the wife were necessities within the meaning of the statute providing that the husband shall be liable for necessities furnished the wife. The holding that the wife's personalty should be subjected to the payment of funeral expenses seems to have been based upon the ground that the bills for medical services and care of the wife had not in fact been paid by the husband; the claims therefor being asserted by the creditors directly against the wife's estate. These facts seem to distinguish *Towery v. McGraw* from *Carpenter v. Hazelrigg*, supra, with which it is apparently in conflict, and also distinguishes it from the case at bar. In *Long v. Beard*, 20 Ky. L. Rep. 1036, 48 S. W. 158, it was held that the husband is bound in law for the physician's bill and burial expenses of his deceased wife, as these are obligations for which he is primarily liable. In *Brand v. Brand*, 116 Ky. 785, 63 L.R.A. 206, 76 S. W. 868, it was held that the share of the husband in the wife's estate may be charged with the funeral expenses and physicians' bills of the wife, as he is primarily liable for debts contracted by her, for necessities, after marriage. The opinion in *Brand v. Brand* is the last decision of this court on the question under consideration, and we adhere to the conclusion therein expressed.

We are also of opinion that the circuit court did not err in rejecting appellant's claim for the amount expended by him in improving the wife's real estate. In *Nall v. Miller*, 95 Ky. 448, 25 S. W. 1106, it was held that "equity . . . will not imply a promise by her [the wife] to pay him [the husband] for improvements or repairs on her land while possessed, used, and enjoyed in virtue of his marital rights, nor even for money advanced by him to remove an encumbrance from it. On the contrary, a presumption arises in all such cases the consideration and motive of the husband was that he would be reimbursed by use and enjoyment of the land." The same prin-

ciple was announced in *Carpenter v. Hazelrigg*, supra, it being there held that the husband was not entitled to enforce a claim against his wife's land for improvements erected thereon by him, whether with her money or his own.

We do not question that the wife's estate, at the suit or upon the claim of the creditors, could have been made to pay the claims for which appellant demanded reimbursement, but as they seem to have been voluntarily paid by him before the wife's death, and were demands for which he could have been made primarily liable, he is now estopped to insist upon their payment out of the proceeds of the wife's realty. Especially is this true in view of the fact that appellant has neither alleged nor proved any express promise on the part of the wife to repay him the sums expended by him for her.

Judgment affirmed.

Petition for rehearing denied.

#### OREGON SUPREME COURT.

GEORGE JACKSON, by Guardian *ad Litem*, Resp.,

v.

PACIFIC COAST CONDENSED MILK COMPANY, Appt.

(— Or. —, 120 Pac. 1.)

Master — hospital fund — liability.

1. An employer who, under his contract

*Note. — Liability of master for medical attendance engaged by employee who, by the contract of employment, was entitled to such attendance.*

As to implied power of employee to employ physician to attend injured employee, see note to *Atlantic Ref. Co. v. Leffingwell*, 34 L.R.A.(N.S.) 351.

As to liability of master for services of physician whom he summons to care for employee, see note to *Norton v. Rourke*, 18 L.R.A.(N.S.) 174.

As to liability for negligence of attendants furnished by relief department toward which employees contribute, see notes to *Phillips v. St. Louis & S. F. R. Co.* 17 L.R.A.(N.S.) 1167, and *Texas C. R. Co. v. Zimwalt*, 30 L.R.A.(N.S.) 1207.

On the general question as to master's duty to provide medical assistance for his servant, see note to *The Kenilworth*, 4 L.R.A.(N.S.) 49.

As to the rights of the parties under specific agreements to provide medical assistance, see the cases collected on pages 55 and 56 of the note in 4 L.R.A.(N.S.).

Independent of contract, a physician cannot recover from an employer for services



with an employee, retains a portion of his wages for a hospital fund, the contract making him a member of the hospital association, membership in which entitles him to medical attention when injured, is liable for the expense of such attention when the employee is injured in his service.

**Same — private physician — employer's liability.**

2. An employee who, under his contract of employment, is entitled to medical attention from his employer in case of injury, may employ a physician at his employer's expense if the employer has no hospital service, and does nothing towards furnishing needed attention after receiving notice that the employee has been injured and needs treatment.

(January 23, 1912.)

rendered by an employee. 26 Cyc. 1050.

A contract of employment whereby the master agreed to furnish medical attendance in case of injury does not inure to the benefit of a physician employed by the servant, so as to entitle the physician to recover from the master for professional services rendered to the injured servant, even though the master knew and approved of the employment. *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218. It is intimated, however, that the injured servant might be entitled to recover the amount paid for medical attendance. The court said: "Moreover, the contract here was 'to furnish medical attendance,' not to pay the wages or for the services of a physician whom Brown might employ. According to the express terms of the contract, the company did not surrender to Brown the right to bind it by a contract he might make with a physician, or constitute him its agent to employ a physician, and hence the company is not bound, according to the written contract, for the services of a physician whom Brown employed. But the court found 'that this employment of plaintiff as physician was known to defendant company, and by it, through its officers, fully approved.' This might be sufficient, in a suit brought by Brown against the company, to recover of it the sum which he had paid his physician, to estop the company from denying that it had waived its right to furnish its own physician, provided the company knew that the physician was called by Brown in reliance upon his contract for it 'to furnish him medical attendance.' But this finding cannot avail appellee, for he is suing upon an express written contract, which, as we have seen, was not for his benefit."

A dissenting opinion in the above case took the view that the contract of employment, which recited that the employer was insured against accidents resulting in bodily injury or death of the employees, and that he would pay certain sums in case of bodily injury, and furnish medical attendance, was a contract to create a fund for the benefit of a third person, in considera-

**A** PPEAL by defendant from a judgment of the Circuit Court for Washington County in plaintiff's favor in an action brought to recover the expense of medical attention made necessary by an injury received while in defendant's employ. Affirmed.

Statement by Eakin, Ch. J.:

Plaintiff in June, 1908, was in the employ of defendant at its factory as a laborer, at the agreed wage of 15 cents per hour, and it was agreed that defendant was to retain 50 cents per month as hospital fees from such wages. While performing the duties of his employment on June 28, 1908, his left leg was broken, but the injury was of such a nature that he did not realize that

tion of services to be performed by him in the future; and that the servant was not the beneficiary contemplated, for he was one of the original parties who had engaged to raise the fund, and was in fact the only contributor to that fund, and that therefore the physician who rendered the medical assistance was the beneficiary, and should be entitled to recover from the employer for services rendered in caring for the injured servant.

The mere retention by the employer of a part of the servant's wages for the support of a hospital for the use of the employees does not impose upon the employer the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not, as the only liability assumed in collecting the fund was to expend it for the purpose for which it was given. *MacRae v. Small*, 48 Or. 139, 85 Pac. 503.

Accordingly, where the employer has used ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, he is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another, whereby an injured employee was compelled to engage another surgeon to perform a necessary operation. *Miller v. Beaver Hill Coal Co.* 48 Or. 136, 85 Pac. 502.

An arrangement whereby the employer retains a certain portion of the wages, with the understanding that the employee, when sick or injured, shall be entitled to hospital benefits at the employer's expense, implies, in the absence of an understanding to the contrary, the continuance of the benefits while the sickness or injury require it; and the employee is not bound by a rule, subsequently adopted, of which he had no notice, to the effect that treatment shall continue as long as the attendant or chief surgeon deems it necessary, and that benefits will not be given for injuries received in a fight. *Scanlon v. Galveston, H. & S. A. R. Co.* — Tex. Civ. App. —, 86 S. W. 930 (action for damages). A. L. R.

there was a fracture, although it caused him great suffering. He continued at his work for several days, during which time he complained of the injury to his boss at different times, and also reported his inability to work. He consulted a physician, Dr. Ward, whom he understood was the company's physician, and was given some liniment for external application. He reported to the bookkeeper that he had consulted Dr. Ward, and was told it was all right. Plaintiff's condition continued to grow worse, and in August, 1908, being unable to work, he consulted another physician, Dr. Leonard, who pronounced the injury a fracture, and he set it in splints. There was not much improvement until May, 1909, when plaintiff consulted Dr. Wilson, who operated upon the bone to induce it to unite. So far as the record shows, the defendant does not maintain a hospital, but simply uses the hospital funds to defray the expenses for medical treatment of the members of the Hospital Fund Association, who are entitled to aid therefrom. On November 27, 1908, defendant paid all bills incurred by plaintiff for medical treatment prior to that date, but bills subsequently incurred by him it refused to pay, being the items for surgical treatment and attention and the expense of X-ray photos, amounting to the sum of \$218.95. Plaintiff brought this action to recover that sum. On the trial, at the close of plaintiff's evidence, defendant moved for judgment of nonsuit, which was denied, and verdict and judgment were rendered for plaintiff, from which defendant appeals.

Messrs. Williams, Wood, & Linthicum and Isaac D. Hunt, for appellant:

The deduction from the wages of an employee, by an employer, of a certain sum per month for the maintenance of a hospital fund, is a subscription to charity by the employee, and does not constitute a contract whereby the employer agrees to indemnify the employee for all sums of money spent for medical and surgical services.

Miller v. Beaver Hill Coal Co. 48 Or. 136, 85 Pac. 502; Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Richardson v. Carbon Hill Coal Co. 10 Wash. 648, 39 Pac. 95; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553.

Messrs. Bagley & Hare, for respondent:

The record discloses a contract whereby the defendant agreed to indemnify the plaintiff for all sums of money spent for medical and surgical services, and the case at bar is not within the purview of Miller 37 L.R.A. (N.S.)

v. Beaver Hill Coal Co. 48 Or. 136, 85 Pac. 502.

Eakin, Ch. J., delivered the opinion of the court:

The only question involved on the appeal is the alleged error in the denial of the motion for judgment of nonsuit, which involves two questions: Whether plaintiff has established a contract on the part of defendant to pay such expense; and, if so, whether the injury and expense incurred in the treatment of it are within the contemplation of the contract.

Plaintiff's contract of employment is evidenced by the following:

**Forest Grove Factory.**

George Jackson, No. 54, enters the employ of the Pacific Coast Condensed Milk Co. as gen'l help, to be rated at 15 cents per hour from June 9, 1908; 50 cents per month to be deducted for hospital fund. Payment for each month's labor to be made on the 12th day of following month. I agree to the above.

George Jackson.  
H. H. Steward, Supt.

The by-laws of the Hospital Fund Association of defendant are stated, in substance, in the answer of defendant, as follows: "On or about the 1st day of March, 1903, the defendant herein . . . created what is known as the hospital fund, said fund being for the benefit of its employees. By the rules and by-laws of said hospital fund it was provided that all persons employed by the Pacific Coast Condensed Milk Company at its factory located at Forest Grove, Oregon, should be considered members of the Hospital Fund Association, and, if a member in good standing and otherwise properly entitled thereto under the rules and by-laws of the said association, should receive the benefits of the Hospital Fund Association. It was further provided that the initiation fee to said association should be \$.50 and that monthly dues of the said association should be \$.50. It was further provided that the membership of any employee in the Hospital Fund Association and his right to the benefits thereof should be terminated by the discharge of any such employee by the defendant herein, or by the discontinuance of work by any of the employees. It was further provided that the benefits to be derived by the injured or sick members of the Hospital Fund Association . . . were that medical attention and drugs should be furnished to such member without expense to said member." It is admitted by defendant that the hospital fund is not a separate fund or

organization, but is in the hands of the defendant company, and that there are sufficient hospital funds to satisfy any judgment rendered in this case. The employment card signed by plaintiff and the company constituted the plaintiff a member of the Hospital Fund Association, and entitles him to any benefits authorized thereby, and the dues which the defendant retained out of his wages were the consideration therefor. The employment of plaintiff and the payment from his wages of 50 cents per month, together with the stipulations of the by-laws, make a complete contract whereby defendant undertook to furnish to plaintiff medical attendance and drugs without expense to plaintiff in case of sickness or injury. We also find that the injury was received by plaintiff while in the employ of defendant, and therefore he was within the provisions of the by-laws.

It is contended by defendant that plaintiff chose his own physician, and that it should not be held liable, as plaintiff did not apply to defendant for treatment. It appears that defendant knew of the injury at the time it was received, and of the daily increasing suffering it caused, and the disability resulting therefrom. Plaintiff does not say he gave defendant formal notice of the injury or asked for a physician, but it does appear that his superiors knew of the injury at the time it was received, and that it was serious, on account of which he was unable to perform regular work, and that he was receiving medical treatment. The company had no hospital, and did nothing toward furnishing him needed attention, and he was justified in seeking proper medical aid, the expense of which should have been paid out of the hospital fund. The defendant recognized this fact in paying the first bills, namely, the bill of Dr. Leonard, for medical service and the expense of three X-ray photos of the fracture, thus approving plaintiff's act in choosing his own physician.

The case of *Miller v. Beaver Hill Coal Co.* 48 Or. 136, 85 Pac. 502, upon which defendant rests his case, is not at all in point here. In that case no contract was proved. But a hospital which was at the service of defendant was maintained by the company, with a competent surgeon in charge, and the company was under obligation to do nothing more. Neither was it shown that there were hospital funds available, which was the limit of the company's liability. In the case at bar we have a contract and sufficient money available in the hospital fund, but no hospital nor medical attendant offered or available; and 37 L.R.A. (N.S.)

plaintiff was justified in seeking the necessary medical attention.

The motion for nonsuit was properly denied.

# WASHINGTON SUPREME COURT. (Department No. 1.)

STATE OF WASHINGTON, Resp't.,

v.

JOHN RACKICH, Appt.

(66 Wash. 390, 119 Pac. 843.)

## Witness — competency — nationality of parents.

1. Upon a prosecution for selling liquor to a person of Indian blood, the latter is competent to testify as to the nationality of his parents.

## Evidence — best — parentage.

2. Evidence of one whose parents are accessible, as to their nationality, is not inadmissible on the theory that it is not the best evidence of the fact.

## Continuance — to secure better evidence.

3. A continuance to secure the presence of witnesses to testify to their nationality should not be granted because their child is offered as a witness to prove that fact, where there is nothing to show that their testimony would differ from that of the child, or that diligence has been used in attempting to secure their testimony sooner.

## Trial — evidence — credibility — question for jury.

4. The credibility of a witness employed by the government to secure evidence against persons selling liquor to Indians is for the jury.

## Pleading — variance — difference in quantity.

5. There is no fatal variance in a prosecution for selling liquor to Indians in the fact that the information charges sale of a quart, while the evidence shows sale of a pint.

(December 27, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for King County convicting him of selling intoxicating liquors to a half-blood Indian. Affirmed.

The facts are stated in the opinion.

## Note. — Competency to testify as to one's nationality.

In *Daniel v. Guy*, 19 Ark. 121, it was held that persons skilled in the national history of the races of men are competent to testify to the distinguishing marks of the different races, to aid the jury, who have observed the person whose nationality is in issue, in coming to a correct conclu-

Mr. John H. Allen, for appellant:

The evidence of Brown concerning his parentage was inadmissible.

Brown v. Lazarus, 5 Tex. Civ. App. 81, 25 S. W. 72; Gilbert, Ev. 2d ed. 1760; Re Heaton, 135 Cal. 385, 67 Pac. 321; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Malone v. Adams, 113 Ga. 791, 84 Am. St. Rep. 259, 39 N. E. 507; Greene v. Almand, 111 Ga. 735, 36 S. E. 957; Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207; Re Robb, 37 S. C. 33, 16 S. E. 241; Fulkerson v. Holmes, 117 U. S. 389-397, 29 L. ed. 915, 918, 6 Sup. Ct. Rep. 780; Flora v. Anderson, 75 Fed. 217; Northrop v. Hale, 76 Me. 306, 49 Am. Rep. 615; Jackson v. Jackson, 80 Md. 176, 30 Atl. 752; Emerson v. White, 29 N. H. 482;

Young v. Shulenberg, 165 N. Y. 385, 80 Am. St. Rep. 730, 59 N. E. 135; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; Thompson v. Woolf, 8 Or. 454.

Messrs. John F. Murphy and Alfred H. Lundin, for respondent:

There is no difference in principle between a person testifying as to his nationality or to his age. It has been repeatedly held that one may testify as to his age.

McCollum v. State, 119 Ga. 308, 100 Am. St. Rep. 171, 46 S. E. 413; Curry v. State, 50 Tex. Crim. Rep. 158, 94 S. W. 1058; State v. Miller, 71 Kan. 200, 80 Pac. 51, 6 Ann. Cas. 58; Loose v. State, 120 Wis. 115, 97 N. W. 526; Reed v. State, 16 Ark. 499; Underhill, Crim. Ev. 2d ed. § 53; United States v. Hung Chang, 67 C. C. A.

sion as to whether he belonged to the one race or the other.

And in *White v. Clements*, 39 Ga. 232, it was held that a physician who has studied the science of ethnology is competent to testify as an expert that a certain person had negro blood.

In *Almshouse Comrs. v. Whistelo*, 3 Wheeler, C. C. 194, physicians were permitted to testify as experts on the question whether a black or white man was the father of a particular child.

So, an owner and manager of negro slaves who had studied and observed the effects of the intermixture of the races is competent to testify as an expert on the question as to the presence of African blood in a person. *State v. Jacobs*, 51 N. C. (6 Jones, L.) 284.

And a government Chinese inspector whose business is closely to observe Chinamen, and who has made a practical study of the racial characteristics of the Chinese, is a competent witness to give his opinion as to the nationality of a person in deportation proceedings under the Chinese exclusion acts, though he has only had three months' experience as government inspector, and had no theoretical knowledge of the science of ethnology. *United States v. Hung Chang*, 67 C. C. A. 93, 134 Fed. 19, reversing 126 Fed. 400.

Likewise, a Chinese interpreter who was born in China and lived about fifteen years in that country, and who devoted his time to the identification and examination of Chinese persons, and had conversed with the accused in the Chinese language, is competent to testify as an expert that accused was a Chinese person, though he admitted on cross-examination that if a Chinaman had his queue eliminated and did not speak the Chinese language, he might be mistaken for a Korean or a Japanese. *Ibid.*

In *Hare v. Board of Education*, 113 N. C. 9, 18 S. E. 55, it was said that while in doubtful cases only an expert would be qualified to testify from the appearance of a person as to the extent to which white and negro blood are commingled in his veins, it does not require any peculiar 37 L.R.A. (N.S.)

scientific knowledge to be able to detect the presence of African blood by the color or other physical qualities of a person.

Accordingly, it was competent to show by one not an expert, who had observed the appearance, the color, and other physical qualities of a person, that such person's parent was a full-blood negro. *Ibid.*

And in *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1, it was held that a witness who knew the person, and had had opportunities of observation, was competent to give his opinion in evidence that such person was of mixed African and white blood. The court said that it was not necessary that the witness should be an expert to testify to a matter which is simply one of common observation, and cited the cases in which it was held that one not an expert can give his opinion as to the sanity or insanity of a person he has had opportunities of observing.

In *State v. Patrick*, 51 N. C. (6 Jones, L.) 308, a witness who knew defendant was permitted to testify that he had the appearance of and looked like a negro. To the same effect is *Moore v. State*, 7 Tex. App. 608, though no objection appears to have been raised.

In *Kansas P. R. C. v. Miller*, 2 Colo. 442, one who had traveled several days in a car with eight or ten passengers was permitted to testify that, in his opinion, formed from observing the dress, general appearance, and conversation, certain passengers were of German nationality; though the witness professed himself not well acquainted with the German language.

It has been held that the race of a person may be shown by persons who are familiar with his reputation among those who knew him. *White v. Clements*, 39 Ga. 232 (part negro); *Nave v. Williams*, 22 Ind. 368 (part negro); *Chancellor v. Milly*, 9 Dana, 24, 33 Am. Dec. 521 (negro).

A diligent search of the authorities corroborates the statement by the court in *STATE v. RACKICH*, as to the lack of authorities on the question whether one is competent to testify to his own nationality or that of his parents. A. L. R.

93, 134 Fed. 19; Greely v. Newcomb, 21 Wash. 357, 58 Pac. 216; State v. Littooy, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292.

There was nothing wrong in the method employed by United States agent Miller in this case.

State v. Lucas, 92 Mo. App. 117, 67 S. W. 971.

The substance of an allegation is all that the state is required to prove.

State v. Smith, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686.

Fullerton, J., delivered the opinion of the court:

The appellant was convicted of the crime of selling spirituous liquor to one Brown, an Indian of the half blood.

On the trial Brown was permitted to testify, over the objection of the appellant, as to his parentage, stating that his mother was a full-blooded Indian and that his father was a Portuguese. The appellant argues in this court that this evidence was inadmissible, being but hearsay, and consequently not the best evidence. But we think a person, competent otherwise to be a witness, may testify as to his parentage. While no case has been cited us holding directly that a witness may so testify, analogous cases are numerous. For example, it was held in State v. Miller, 71 Kan. 200, 80 Pac. 51, 6 Ann. Cas. 58, that the prosecuting witness was competent to testify as to her own age, notwithstanding both of her parents were present and testifying to the same fact, and this is a case where the question of her exact age at a particular time was a material question at issue. To the same effect are the following cases: State v. McClain, 49 Kan. 730, 31 Pac. 790; Hill v. Eldridge, 126 Mass. 234; State v. Cain, 9 W. Va. 559; State v. Best, 108 N. C. 747, 12 S. E. 907; Loose v. State, 120 Wis. 115, 97 N. W. 526; 2 Jones, Ev. § 303.

So, also, a witness may testify as to the ages of other members of his family. 2 Jones, Ev. § 303. The principle that permits a person to testify to his own age, or as to the ages of the different members of his family, will also permit him to testify as to his parentage. He acquires the knowledge of the one fact in the same manner that he does the other facts, and, while such evidence partakes somewhat of the character of hearsay evidence, it is admissible on grounds of public policy.

The appellant argues further that since it was shown that the parents of the prosecuting witness were still living, they were the only persons competent to testify to the prosecuting witness's parentage, and that in consequence the evidence admitted was not the best evidence of which the case in its 37 L.R.A. (N.S.)

nature was susceptible. But the rule that permits a person to testify as to his parentage is not founded on the principle that it is substitutory in its nature. On the contrary, it is of itself original evidence. It may be weaker than would be that of the parents themselves; but to permit the one to testify when the others are within call is not a substitution of evidence. It is no more than the selection of the weaker competent evidence instead of the stronger. To do this violates no rule of evidence. 1 Greenl. Ev. § 82.

At the trial, and after the prosecuting witness had testified that his parents were still living, the appellant moved orally for a continuance until such time as the parents could be brought into court. The court denied the motion, and the appellant excepted. It is thought that the court abused its discretion in denying the motion, but we think otherwise. There was no showing that the testimony of the parents would have differed from that of the prosecuting witness, nor was there any showing of diligence in attempting to procure their testimony. The court's business must proceed orderly and with despatch, and interruption in the proceedings such as was here sought is not to be tolerated, unless for the gravest reasons.

It appears that the prosecuting witness to whom the liquor was sold was in the employ of a government agent engaged in the detection and prosecution of persons selling liquor to Indians, and it is thought that this fact rendered his testimony concerning the alleged sale unworthy of belief. But this was for the jury. There is nothing inherently wrong in this method of detecting wrongdoers; in fact, the method resorted to is sometimes indispensable if violators of the liquor statutes are to be brought to justice.

The charge in the information is that the appellant sold to the prosecuting witness one quart of spirituous liquor, while the proof was that one pint of such liquor was so sold. It is thought that this was such a variance as to amount to a failure of proof, but the rule is otherwise. The crime consists in the selling of spirituous liquors, not in the selling of any particular quantity thereof. Hence the substance of the issue was proven, which is all that is required.

The other assignments touched upon in the appellant's brief seem to have no support in the record. For that reason it is unnecessary that we consider them.

The judgment is affirmed.

Dunbar, Ch. J., and Gore and Mount, JJ., concur.

## ARKANSAS SUPREME COURT.

W. A. RUTHERFORD, Appt.,

v.

MRS. ANGIE WILSON.

(95 Ark. 246, 129 S. W. 534.)

**Life estate — cutting timber — waste.**

A jury may find absence of waste on the part of a life tenant in cutting and selling one hundred dollars worth of timber from 20 or 25 acres of a 230-acre tract, 150 acres of which are already in cultivation, where it is done not to secure the profits from the timber, but to put the land into cultivation, the effect of which will be a benefit to the freehold.

(May 30, 1910.)

**Note. — Timber rights of life tenant.**

- I. In general, 763.
- II. Necessities of life tenant, 764.
- III. Customary estovers.
  - a. Fuel, 764.
  - b. Repairs; fences; buildings, 765.
- IV. Payment of taxes and other charges, 767.
- V. Fallen or decaying timber, 767.
- VI. Thinning trees, 768.
- VII. Cutting timber for sale.
  - a. In general, 768.
  - b. Custom of estate, 768.
- VIII. Clearing land.
  - a. Relaxation of strict rules, 770.
  - b. The rule and its application in this country.
    - (1) In general, 771.
    - (2) Proceeds of timber, 772.
- IX. Tenant for life not impeachable for waste; ornamental trees, 772.
- X. Miscellaneous, 773.

This note is confined to tenants for life, to the exclusion of tenants for years. It is concerned only with questions of substantive law, and does not deal with the subject of remedies. Upon the analogous subject of the right of the life tenant as to minerals, generally, see note to Deffenbaugh v. Hess, 36 L.R.A.(N.S.) 1099; and as to oil and gas, see note to Ohio Oil Co. v. Daughette, 36 L.R.A.(N.S.) 1108.

**I. In general.**

Since the extension by the statute of Marlbridge (52 Hen. III. chap. 23) to conventional estates for life, of the common-law doctrine of waste, which originally only applied to life estates created by law, the life tenant, whether his estate is of conventional or legal origin, has, in England, been narrowly restricted in respect of the right to the use of timber, unless the instrument creating the estate declares him not to be impeachable for waste. In that country estovers of fuel and repairs comprise substantially the entire right, with the single exception of timber lands which have, by the custom of the estate, been cultivated for 37 L.R.A.(N.S.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Independence County in defendant's favor in an action brought to recover from a life tenant the market value of certain timber sold from the estate under circumstances constituting it waste. **Affirmed.**

The facts are stated in the opinion.

Mr. Samuel M. Casey, for appellant:

The cutting and selling of timber by a life tenant is waste, for which the reversioner may sue.

Learned v. Ogden, 80 Miss. 769, 92 Am. St. Rep. 621, 32 So. 278; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Tiedeman, Real Prop. §§ 69-74; McLeod v. Dial, 63 Ark. 15, 37 S. W. 306.

the produce of salable timber; otherwise the cutting of timber for the purpose of selling it or using it off the premises is entirely forbidden to the life tenant. So, in England, the life tenant may not cut timber even for the purpose of clearing wooded land and rendering it fit for cultivation. While the purpose and object underlying these rules is the preservation of the inheritance without permanent injury, the rules themselves, in England, at least, are very rigid, and, with the exception just noted, admit of little variation or relaxation by reason of the circumstances of the individual case. So fixed is the idea that the cutting of growing timber is an injury to the fee under the conditions which exist in England that the rules on the subject admit of no inquiry as to the actual effect in the particular case, except where certain trees are removed for the benefit of those remaining. The courts in this country have frequently declared in general terms that the strict rules of the common law on this subject do not obtain in this country, owing to the substantially different conditions here and the great amount of woodland as compared with arable land. As a matter of fact, however, the common-law rules on the subject have not been greatly relaxed in this country, except so far as they forbid the cutting of timber for the purpose of converting the wooded into arable land and fitting it for cultivation. In England, as has been said, such clearing of the land is not permitted at all, while in this country, as subsequently shown in detail, such clearing is permitted, due regard being had to the proportion of arable to wooded land. As conditions in this country approach more closely to those which obtain in England, and the proportion of wooded land to arable land decreases, a tendency on the part of the courts to revert to the strict rules of the common law in this respect may be anticipated. That tendency, however, is not very apparent in the American cases cited in the note; doubtless for the reason that the majority of them dealt with conditions which existed years ago; or, if modern cases, arose in localities where the conditions have not materially changed.

Messrs. **Oldfield & Cole**, for appellee:

In America, a life tenant may cut and remove timber for the purpose of putting the land in cultivation, and may sell same.

*McLeod v. Dial*, 63 Ark. 15 37 S. W. 306; *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467; *Lunn v. Oslin*, 96 Tenn. 281, 33 S. W. 561; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527; *Ward v. Sheppard*, 3 N. C. (2 Hayw.) 283, 2 Am. Dec. 625; *Jackson ex dem. Church v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *Lynn's Appeal*, 31 Pa. 44, 72 Am. Dec. 721, 15 Mor. Min. Rep. 126; 1 *Tiffany*, Real Prop. 564; 15 Cyc. 627; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308; *Glass v. Glass*, 6 Pa. Co. Ct. 408; *St. Louis, I. M. & S. R. Co. v. Osborn*, 67 Ark. 399, 55 S. W. 142; *St. Louis Southwestern*

*R. Co. v. Byrne*, 73 Ark. 377, 84 S. W. 469; *McClintock v. Frohlich*, 75 Ark. 111, 86 S. W. 1001; *Roberts & S. Co. v. Jones*, 82 Ark. 188, 101 S. W. 165; *Western Coal & Min. Co. v. Burns*, 84 Ark. 74, 104 S. W. 535; *Scott v. Moore*, 89 Ark. 321, 116 S. W. 660.

**McCulloch**, Ch. J., delivered the opinion of the court:

A tract of land in Independence county, containing 229.32 acres, was assigned to the defendant, Mrs. Angie Wilson, as dower out of the estate of her deceased husband; about 150 acres of this tract being cleared and in cultivation, and the remainder being woodland. Plaintiff, W. A. Rutherford, is the owner of the reversion. In the year 1907 defendant sold and allowed to be re-

## II. *Necessities of life tenant.*

In *Lunn v. Oslin*, 96 Tenn. 28, 33 S. W. 561, the court said: "From the nature and character of the estates of dower and homestead there must necessarily arise a difference between them and life estates created by deed or will, in which the extent to which timber may be used can be fixed by the terms of the deed or will. But dower and homestead estates are given to widows to furnish them a support and maintenance; and the law is zealous to guard their rights to a greater extent than other life tenants or those entitled in remainder; and this is especially so in homestead estates, where the lands are held for the benefit of minor children as well as of the widow. In both cases a liberal construction and application will be made, and such use will be sanctioned as will best afford that support and maintenance which is the primary object of the laws."

But while the courts may to some extent be influenced by the nature of the estate for life and the necessities of the particular tenant, neither consideration may properly be regarded as controlling the application of the rules on the subject. Ordinarily the results in individual cases are referred to rules or exceptions applicable generally to tenants impeachable for waste, without reference to the character of the life estate whether an estate of dower, by the curtesy, or otherwise. Thus, a tenant for life may not cut and remove valuable growing timber, to the irreparable injury of the fee, nor is the question affected by the necessities of such tenant for life. *Robertson v. Meadors*, 73 Ind. 43. That the cutting of timber is necessary to the profitable enjoyment of the land by the life tenant does not necessarily justify it, since there may be waste when there is such a profitable enjoyment. *Proffitt v. Henderson*, 29 Mo. 325. So the question is not whether the doweress cut the timber as a necessary means of support, but whether she materially injured the estate. *Owens v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467.

But where property is devised in trust

for the maintenance, support, and benefit of the testator's son during his life, the life tenant may cut and remove timber from time to time, as he may need for his reasonable maintenance and for repairs to the freehold necessary for his comfort, where that was the practice of the testator. *Beam v. Woolridge*, 3 Pa. Co. Ct. 17.

## III. *Customary estovers.*

### a. *Fuel.*

As to the rights of tenants generally to cut wood for fuel, see note in 68 L.R.A. 641.

A tenant for life may take a reasonable amount of firewood for necessary fuel. *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306; *Brugh v. Denman*, 38 Ind. App. 486, 78 N. E. 349; *Zimmerman v. Shreeve*, 59 Md. 357; *White v. Cutler*, 17 Pick. 248; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Rutherford v. Aiken*, 2 Thomp. & C. 281; *Livingston v. Reynolds*, 26 Wend. 115; *Van Deusen v. Young*, 29 N. Y. 9; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

The right of a grantor in a deed of a farm, who reserved a life estate, to use the fuel from the land, is not affected by the fact that, prior to the deed, he was in the habit of taking part of his fuel from another tract, not included in the deed. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

The right, however, must be exercised in a prudent and proper manner. *Smith v. Jewett*, 40 N. H. 530.

And the fuel must be actually used and consumed upon the premises, or at least for a purpose connected with the proper use, occupation, and enjoyment thereof. *Armstrong v. Wilson*, 60 Ill. 226; *Zimmerman v. Shreeve*, 59 Md. 357; *White v. Cutler*, 17 Pick. 248.

To entitle a tenant in dower to take firewood, there must be a house upon the land when the dower is assigned to her; and she can take wood only to use in such a house; and should she take it herself, or permit any other person to take it, to be used in any other place, it is waste. *Fuller v. Wason*, 7 N. H. 341.

moved the timber on 20 or 25 acres of the woodland, for which she received the sum of \$104.77, its market value; and in February, 1909, plaintiff instituted this action against her to recover said sum so received, alleging that she committed waste by removing the standing timber, and that the freehold was damaged to that extent. A trial before a jury resulted in a verdict for defendant, and plaintiff appealed.

The evidence shows that the land from which the timber was removed is tillable, but that it had not been put in cultivation at the time of the trial, except a small part,—something less than an acre. It will be ready for the plow as soon as the brush and undergrowth is burned, defendant testified that she sold and allowed the timber

to be cut so that she could put the land in cultivation as soon as practicable, and that she is proceeding to put it in cultivation.

This court, in the case of McLeod v. Dial, 63 Ark. 10, 37 S. W. 306, laid down the following rule as to the rights of a life tenant: "He had no right to cut trees growing on this portion of the land, or allow them to be cut, except so far as was necessary to the proper and reasonable enjoyment of his life estate in conformity with good husbandry. For the purpose of using it as farming land, he had the right to clear a part of it, provided such part and that already prepared for cultivation, as compared with the remainder of the tract, did not exceed the proportion of cleared to wooded land usually maintained in good

It has been held that a life tenant may not use firewood off the premises, although he used none on the premises. *Ibid.* And that a widow who does not live upon the dower estate has no right to cut wood for sale. *Noyes v. Stone*, 163 Mass. 490, 40 N. E. 856. Nor is a widow entitled to take firewood from a farm assigned to her in dower, for use on village property, constituting an entirely separate tract, also assigned to her in dower. *Cook v. Cook*, 11 Gray, 123.

In *Gardiner v. Derringer*, 1 Paige, 573, however, it is stated that it is not absolutely necessary that the wood be burned on the premises, provided it is taken in good faith, for the use of the tenant and her servants, and in reasonable quantity. This, however, seems to be *obiter*, as the tenant house for which the wood was taken in this case was upon the farm.

A tenant for life may cut only such wood and timber as he may need for immediate use, and not in anticipation; and he must cut such timber as is fit for the use for which he is allowed to take it. *Zimmerman v. Shreeve*, 59 Md. 357. He must not cut rail timber for firewood when there is other wood that may be used for that purpose. *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351. But he is not bound to select timber the conversion of which would exceed its worth as fuel. *Rutherford v. Aiken*, 2 Thomp. & C. 281. Nor it it waste to cut oak trees for firewood in a community where they are in common use for fuel. *Padelford v. Padelford*, 7 Pick. 152.

A tenant for life has the right to take from the premises reasonable firewood for the use not only of the house which she herself occupies, but also sufficient to supply a house on the premises occupied by one who works the farm for her. *Gardiner v. Derringer* 1 Paige, 573. And it makes no difference in this respect whether the servants are paid by fixed wages or by a share of the crops as tenants at the halves. *Smith v. Jewett*, 40 N. H. 513. But it has been held that a tenant for life of a farm of 165 acres is not entitled to firebote for the dwelling of a farmer or laborer, in addition to firebote for the principal dwelling house or 37 L.R.A. (N.S.)

mansion; and that a custom to that effect would be unreasonable and invalid. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

So strict is the rule that the fuel must be consumed on the premises that it has been declared that a life tenant may not cut timber on land, to be exchanged for fuel. *Padelford v. Padelford*, 7 Pick. 152 (dower). (But see *infra* as to exchange of timber growing on the land for other timber suitable for repairs.)

So, a tenant for life may not set off, as against the value of timber wrongfully removed by her, the amount expended in supplying her fires upon the premises from other sources, though she might have taken wood for that purpose from the premises. *Phillips v. Allen*, 7 Allen, 115. Nor may a tenant for life sell a portion of the trees to pay the expense of cutting and conveying to her door wood which she has a right to take for fuel. *Johnson v. Johnson*, 18 N. H. 594.

#### **b. Repairs; fences; buildings.**

As to right of tenants generally to cut timber for fences, see note in 68 L.R.A. 641.

A tenant for life may take timber for necessary repairs of buildings and fences on the premises. *Chapman v. W. F. Epperson* Circled Heading Co. 101 Ill. App. 161; *Brugh v. Denman*, 38 Ind. App. 486, 78 N. E. 349; *Calvert v. Rice*, 11 Ky. L. Rep. 1001, 12 Ky. L. Rep. 252; *Zimmerman v. Shreeve*, 59 Md. 357; *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270; *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362; *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Van Deusen v. Young*, 29 N. Y. 9; *Morris v. Knight*, 14 Pa. Super. Ct. 324; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

The scarcity of timber does not prevent its use by the life tenant in repairing the buildings and fencing on the premises. It only requires him to be the more careful in its use, and only cut so much as would be used by a prudent man when in possession and the owner of the fee. *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351.

As shown *infra*, VIII. a, the courts have



husbandry; and provided, further, that he did not materially lessen the value of the inheritance. He also had the right to cut and use so much of the timber standing on the one half which belonged to his wife as was necessary for fuel, and for making and repairing fences and buildings on the same. But the timber could only be cut or used for the proper enjoyment of the estate for life, and not merely for sale,"—citing *Davis v. Clark*, 40 Mo. App. 515; *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467; *Jackson ex dem. Church v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Balentine v. Poyner*, 3 N. C. (2 Hayw.) 110; 1 Washb. Real. Prop. pp. 146, 148. The same rule has been stated by this court in

subsequent cases. *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S. W. 758, 20 Ann. Cas. 968; *Cherokee Constr. Co. v. Harris*, 92 Ark. 260, 135 Am. St. Rep. 177, 122 S. W. 485.

Now, measured by the law thus announced, it was a question for the jury to determine whether or not the removal of the timber amounted to waste and constituted an injury to the inheritance. What is "good husbandry" is not always easily determined, as that depends on the peculiar facts and circumstances of each case. The whole tract contained 229.32 acres, with about 150 acres already in cultivation. With 20 or 25 acres more in cultivation, there would be left 55 or 60 acres of woodland. This may be sufficient to afford fire-

frequently remarked that the strict rules of the common law as to waste do not apply in this country; but this has usually been said in connection with the question as to the right of the life tenant to clear wooded land for purposes of cultivation. In *Cannon v. Barry*, 59 Miss. 289, however, it was said that a life tenant of land on which there is a superabundance of timber is not guilty of waste in cutting and using the timber in rebuilding fences, and building tenants' cabins, even though he would have been guilty of waste under the English authorities; since the conditions in this country and in England are wholly dissimilar, and that which would be a safe test there is altogether inapplicable here. The court added that, speaking generally, it may be said that nothing should be held to constitute waste which is dictated by good husbandry, and promotes, rather than diminishes, the permanent value of the property as an estate of inheritance.

In general, however, it will be observed that the courts of this country have applied the rule as to repairs with considerable strictness.

Thus, a tenant for life has no right to cut and use for fencing purposes young and growing timber that would not make more than four or five rails to the cut. *Calvert v. Rice*, supra.

In *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362, the rule is stated in the guarded form that a tenant for life may take from the land wood necessary for the repairing of fences and buildings which are on the premises at the commencement of the tenancy. And it is said in *Fuller v. Wason*, 7 N. H. 341, that a tenant in dower may not take timber from land for the purpose of building a new house, nor may she take timber from the land for the purpose of repairing a house so built; and, upon the authority of *Co. Litt. 53, b*, that a tenant in dower may not take timber to build new fences where there were none before.

So, a tenant for life, not being bound to replace a barn destroyed by an act of God, is not entitled to cut and sell timber for such purpose. *Miller v. Shields*, 55 Ind. 71. 37 L.R.A. (N.S.)

And a tenant by the curtesy has no right to cut timber for the purpose of repairs on a house upon an adjoining tract which belongs to him in his own right, though there was no house on the premises subject to the curtesy. *Armstrong v. Wilson*, 60 Ill. 226.

But it is not waste for a tenant in dower to cut timber on a woodland lot for repairs on buildings on the homestead farm, 2 miles distant therefrom, although the reversion of the two parcels is in different persons. *Padelford v. Padelford*, 7 Pick. 152.

A life tenant having cut timber, not for the purpose of repair, but for the purposes of sale, is not entitled to be credited with the amount laid out in timber for repairs. *Whitfield v. Bewit*, 2 P. Wms. 240.

The destruction or sale of timber, not for the immediate purpose of reparation, is always waste, and repairs done at another time cannot be recouped against it. *Morehouse v. Cotheal*, 22 N. J. L. 521.

Improvements made by the life tenant may not be offset against waste by the cutting and sale of timber; especially where the improvements are to the fertility of the soil, which may be exhausted during the life estate. *Van Syckel v. Emery*, 18 N. J. Eq. 387.

In *Elliott v. Smith*, 2 N. H. 430, it is said to be well settled that the tenant for life cannot justify cutting trees for firewood or fencing unless he uses the trees for those purposes on the land; and that he may not sell wood not suitable for fencing, for the purpose of purchasing timber suitable for that purpose. And in *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362, it is declared that the right of the tenant for life does not extend beyond the proper use of wood and timber upon the premises themselves; and that they cannot be sold for any purpose, even for the purpose of paying for repairs for which the life tenant might have used the wood or timber itself. But, upon the other hand, it has been held that it is not waste for a life tenant to cut and sell timber and make improvements with the proceeds, enough timber being left for the necessary purposes of the farm. *Morrow v. Morrow*, 3 Ky. L. Rep. 620. And in *Loomis*

wood and materials for repairs, such as fence posts, rails, boards, or even lumber with which to build houses. That, of course, depends on the amount and kind of timber. We cannot say that the jury were unwarranted in finding that it would be good husbandry to put the additional quantity of land in cultivation.

Another element of the inquiry is the relative value of the land and the timber. There is nothing to show that this land is chiefly valuable for timber. On the other hand, there is testimony to the effect that the land is not injured by removing the timber and putting it in cultivation, and that it will be a benefit to the freehold, in point of value, and remove the timber and put the land in cultivation. All of the

land is tillable, so the witnesses say, and the value of the timber on the 20 or 25 acres was only \$104.77.

The jury were also warranted in finding that the defendant sold the timber, not for profit, but for the purpose of immediately putting the land in cultivation. She did not do that at once, but it is not essential that it be done within any given time. There may be more or less delay in getting land ready for the plow, even after the timber was removed. It may not be poor husbandry to wait for the roots to decay and for the land to dry out to some extent after the timber is removed, before commencing to cultivate. Defendant testified that a considerable part of the land would be ready for the plow as soon as the brush

v. Wilber, 5 Mason, 13, Fed. Cas. No. 8,498, it is held that the cutting down of timber, and the sale thereof, and use of the proceeds in purchasing material for necessary repairs on the premises, if done pursuant to an original intention to that effect, is not waste. The court, however, remarked that if the cutting of the timber was without any intention of repairs, but for sale generally, the act would doubtless be waste; and if so, it would not be purged or its character changed by a subsequent application of the proceeds to repairs.

To entitle a tenant for life to sell timber from the land and exchange the same for material with which to make needed repairs on the buildings, it must appear that that course was the most economical. *Miller v. Shields*, 55 Ind. 71.

In *Flener v. Flener*, 24 Ky. L. Rep. 725, 69 S. W. 954, the court granted an injunction against the sale of timber by the life tenant, but directed the master commissioner to make the necessary improvements on the house and fences, and to sell the timber that might be necessary for that purpose, it appearing that such improvements could not be made out of the rent accruing to the life tenant.

Whether trees were cut down for the purpose of repairing buildings, and were in course of application for that purpose, was held in *Doe ex dem. Foley v. Wilson*, 11 East, 56, to be a question for the jury.

A widow to whom dower is assigned in separate parcels is not bound to use each parcel separately, nor is she confined to the timber or wood on each parcel for use on that parcel, but may use the timber and wood on one parcel for necessary repairs of buildings and fences on another. *Childs v. Smith*, 1 Md. Ch. 483.

So, a widow in general has the right to take wood for fuel and timber for repairs from whatever part of the land in which her dower has been assigned that she pleases, notwithstanding that the reversion has been divided in severalty among the heirs. It seems, however, that in an extreme case, where the widow acts out of mere caprice and partiality, with a view to 37 L.R.A.(N.S.)

favor one at the expense of the other, a court of equity may be induced to interfere, although there is technically no waste. *Dalton v. Dalton*, 42 N. C. (7 Ired. Eq.) 197.

#### IV. *Payment of taxes and other charges.*

In a number of cases it has been held that a life tenant may sell timber for the purpose of raising money to pay the taxes upon the property. *Cannon v. Barry*, 59 Miss. 289; *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 So. 278; *Crockett v. Crockett*, 2 Ohio St. 180; *Kent v. Bentley*, 3 Ohio Dec. 173.

And where the dower assigned consists of a wholly unimproved and unproductive town lot and a tract of woodland, the tenant in dower may sell timber to pay taxes on the town lot as well as on the land. *Crockett v. Crockett*, 2 Ohio St. 180.

So, the compensation of an agent employed by the widow to make sales of timber cut from wild land assigned to her as dower, collecting the proceeds, paying the taxes, overseeing the property, and protecting it against trespassers and other injuries, may be paid out of the sales of timber from the land, without imputation of waste to the life tenant. *Ibid.*

#### V. *Fallen or decaying timber.*

In *Perrot v. Perrot*, 3 Atk. 94, the Lord Chancellor remarked that he knew no distinction between cutting down young timber trees that have not come to their full growth, and decayed timber, either in law or equity.

But it has been held in this country that a tenant for life may sell fallen or decaying timber. *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Kent v. Bentley*, 3 Ohio Dec. 173; *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308.

In *Houghton v. Cooper*, 6 B. Mon. 281, where the owner of two thirds of the estate in remainder sought to enjoin the life tenant from selling fallen timber, the injunction was denied upon the ground that the

was burned off; and at the time of the trial her tenant was going ahead with the clearing. Under all the facts and circumstances of the case, we think it was peculiarly a question for the jury to decide whether or not waste had been committed. There being evidence to sustain the verdict, we are not concerned with its weight, for that was within the province of the jury.

The instructions of the court were, we think, within the principles of law herein announced, and we find no error in the pro-

ceedings. It devolved on the plaintiff to show that waste had been committed to his injury, and the amount of damage, if any, to the freehold. This includes the burden of proving that the alleged act of the life tenant was not rightfully done, for the presumption is in favor of the latter until the contrary appears from the evidence. 30 Am. & Eng. Enc. Law, 304; Lynn's Appeal, 31 Pa. 44, 72 Am. Dec. 721, 15 Mor. Min. Rep. 126.

Judgment affirmed.

fallen trees impaired the use of the land as a woodland pasture. The denial, however, was upon the condition that the life tenant account to the complaining remaindermen for two thirds of the proceeds of the sale of the timber which was not needed on the property itself.

The fund arising from the damages paid by a railroad company for injury to timber and from a sale of the injured timber should be invested and the income therefrom paid to the tenant during her life, even though she had no right to cut off and sell any of the timber. *Keniston v. Gorrell*, 74 N. H. 53, 64 Atl. 1101.

But the proceeds of the sale of firewood obtained from timber that had been blown down, assuming that nothing was used for firewood which was valuable as timber, belong to the life tenant. *Stonebraker v. Zollickoffer*, 52 Md. 154, 36 Am. Rep. 364.

Where timber is cut by order of the court, for the benefit of the estate, the funds arising from the sale should be invested for the benefit of the estate, and the income therefrom paid to the tenant for life, and the corpus to the remainderman. And this principle has been extended to cases where the timber has been severed by tempest, accident, or trespass, the tenant for life being without fault. *Ibid*.

#### VI. Thinning trees.

The proper and regular trimming of a wood for the purpose of improving the rest of the trees within certain limits does not amount to waste. *Pidgeley v. Rawling*, 2 Colly. Ch. Cas. 275; *Bagot v. Bagot*, 32 Beav. 509, 9 Jur. N. S. 1022, 2 New Reports, 297, 33 L. J. Ch. N. S. 116, 9 L. T. N. S. 217, 12 Week. Rep. 35, 15 Mor. Min. Rep. 130.

The produce from trees which are properly cut for the benefit of other trees, however, is corpus, and not income. *Cowley v. Wellesley*, 35 Beav. 635, L. R. 1 Eq. 656, 14 L. T. N. S. 425, 14 Week. Rep. 528.

#### VII. Cutting timber for sale.

##### a. In general.

As to the right to the proceeds of timber cut not for the primary purpose of sale, but for the purpose of clearing the land, see *infra*, VIII. b. (2).

With the exception noted in the next subdivision, a tenant for life, impeachable 37 L.R.A. (N.S.)

for waste, may not cut timber to sell for profit, nor authorize another to do so. *Honywood v. Honywood*, L. R. 18 Eq. 306, 43 L. J. Ch. N. S. 652, 30 L. T. N. S. 671, 22 Week. Rep. 749; *Garnett Smelting & Development Co. v. Watts*, 140 Ala. 449, 37 So. 201 (dower); *C. W. Zimmerman Mfg. Co. v. Wilson*, 147 Ala. 275, 40 So. 515 (dower); *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306; *Nashville Lumber Co. v. Barefield*, 93 Ark. 353, 124 S. W. 758, 20 Ann. Cas. 968; *RUTHERFORD v. WILSON*; *Chapman v. W. F. Epperson* *Circled Heading Co.* 101 Ill. App. 161; *Modlin v. Kennedy*, 53 Ind. 267; *Bergen & M. Co. v. Sears*, 24 Ky. L. Rep. 80, 67 S. W. 1002; *Kentucky Stave Co. v. Page*, — Ky. —, 125 S. W. 170 (curtesy); *Zimmerman v. Shreeve*, 59 Md. 357; *White v. Cutler*, 17 Pick. 248; *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. Rep. 621, 32 So. 278 (curtesy); *Davis v. Clark*, 40 Mo. App. 515; *McCartney v. Titsworth*, 119 App. Div. 547, 104 N. Y. Supp. 45; *McCartney v. Titsworth*, 142 App. Div. 292, 126 N. Y. Supp. 905; *Davis v. Gilliam*, 40 N. C. (5 Ired. Eq.) 308; *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Lester v. Young*, 14 R. I. 579; *McKee v. Dail*, 1 Tenn. Ch. App. 689; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554.

In *Van Deusen v. Young*, 29 N. Y. 9, it was said that when a tenant cuts and carries away standing timber required for the use of the farm, the question whether it is or is not good husbandry, or whether the farm is worth more or less by reason of it, should not be submitted to the jury, since the law forbids the act to be done, and the reversioner has the right to damages if it is done, unless such right is waived.

It was said in *Cannon v. Barry*, 59 Miss. 289, however, that a tenant for life may cut down timber in such quantities and at such places as do not seriously impair the value of the inheritance, even for the purposes of his own profit.

##### b. Custom of estate.

In *Honywood v. Honywood*, L. R. 18 Eq. 306, Sir. G. Jessel, Master of the Rolls, declared that the rule that a tenant for life, impeachable for waste, may not cut timber, was subject to a "single exception which has been established principally by modern authorities in favor of the owners of timber estates; that is, estates which are cul-

tivated merely for the produce of salable timber, and where the timber is cut periodically. The reason of the distinction is this: that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land; and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate; and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and therefore goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all."

The exception thus declared was applied by the English court of appeal (Kay, L. J., dissenting), by holding that a life tenant was not guilty of waste in cutting and selling timber trees in pursuance of a local custom of clearing out the trees and selling the timber cut which had been observed on the estate in question for generations, and had been a source of great profit to the former holders of the estate. *Daashwood v. Magniac* [1891] 3 Ch. 306, 60 L. J. Ch. N. S. 809, 65 L. T. N. S. 811.

And the entire produce from the cutting of underwood of ten or twelve years' growth, following the custom of the testator in that respect, belongs to the life tenant. *Cowley v. Wellealey*, 35 Beav. 635, L. R. 1 Eq. 656, 14 L. T. N. S. 425, 14 Week. Rep. 528.

So, where land was bought as timber land, and that was its chief value, and the owner was engaged in cutting and rafting timber from it at the time of his death and the descent of the life estate, the life tenant is not guilty of waste in continuing the timbering for profit. *Williard v. Williard*, 56 Pa. 119. The court said in effect that it was difficult to draw a distinction in this respect between profits actually drawn by the owner from timber where it is the source of profit, and profits drawn from open mines. (As to open mines, see notes in 36 L.R.A.(N.S.) 1099 and 36 L.R.A.(N.S.) 1108.)

A wife endowed of swamp lands incapable of cultivation, and productive or valuable only by working the timber for profit, may cut down the timber *ad libitum* and make all the profit she can, provided she does not thereby prevent the reversioner from making a like profit; and especially where the tract had been worked in this manner for timber by the husband during his lifetime. *Macaulay v. Dismal Swamp Land Co.* 2 Rob. (Va.) 507. The court said that the extent of the tract, the quantity of timber, the period of reproduction, the demands of the market, the expenses of the employment, were all elements of inquiry, and that these should lead to a just and convenient rule of uniform application, which would be presumably that the tenant's use of the timber should be so restricted as to

leave the successive tenants and owners and equally extensive use of it, at least.

An unnecessary cutting down and disposing of timber, or destruction thereof upon woodlands where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to use for fuel, fences, plantation utensils, and the like, is waste; but if it respects juniper, swamp, and other lands similarly circumstanced, where the timber, made into staves and shingles, is the only use to be made of the lands, then the devisee or widow shall not be liable to waste for using such timber according to the ordinary use made of the same in that part of the country. *Ballentine v. Poyner*, 3 N. C. (2 Hayw.) 110.

A widow has not the right to make turpentine upon land which, in the lifetime of her husband, had not been used for that purpose. But she may rightfully use, in the ordinary mode of making turpentine, trees that have been boxed or intended for turpentine in the lifetime of her husband. *Carr v. Carr*, 20 N. C. 317 (4 Dev. & B. L. 179). And she may box new trees as those already boxed for turpentine become unfit for use, but not so as to enlarge the crop beyond the extent which it had when the dower was assigned. *Ibid.*

The exception stated at the beginning of the subdivision is impliedly recognized in *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 821, declaring that cutting hoop poles, i. e., timber trees in the early stages of their growth, is waste unless it is the ordinary mode of managing the farm; and in *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554, declaring that a tenant for life is not entitled to cut and sell merchantable timber growing upon land of which there was no evidence to show that it was used for other than agricultural purposes, or that the owner had ever leased or used it as timber land, or derived revenue from the sale of timber thereon prior to the creation of the life estate.

In *Findlay v. Smith*, 6 Munf. 134, 13 Mor. Min. Rep. 182, it was held that a devise of the testator's salt works to certain persons during the lifetime of the widow carried with it the right to the unlimited use of fuel for carrying on the works from the woodlands which belonged to the testator and which were used by him for that purpose. So, a tenant for life of land upon which there was an opened mine may use timber on the land in the mining operations. *Neel v. Neel*, 19 Pa. 323, 14 Mor. Min. Rep. 363.

But it was held in *White v. Cutler*, 17 Pick. 248, that a widow was not to be endowed of a lot of growing wood and timber, although kept purposely to raise wool and timber as objects of profit, provided that it was not assigned to her as part of her dower in connection with buildings or cultivated land, though when woodland is so connected and used, it may be included in the assignment of dower to be used and

enjoyed by the widow or those holding under her.

### VIII. Clearing land.

#### a. Relaxation of strict rules.

By the strict rule of the common law as applied in England, it was, under all circumstances, waste for a life tenant to cut timber for the purpose of clearing woodland and converting it into arable land. Though the reason for the rule was that the destruction of timber is an injury to the inheritance, the presumption of injury, if such it may be deemed, is there regarded as a conclusive one; and the rule is applied as an absolute rule, admitting of no inquiry as to whether, under the facts and circumstances of the case, the clearing and conversion would in fact be injurious to the inheritance, or otherwise.

As might be expected, in view of the early conditions in this country, and the large proportion of wooded as compared with arable land in most sections, the strictness of the English rule on this point has been much relaxed in this country.

Thus, while in its essential element waste is the same in this country and in England, being a spoil or destruction in houses, trees, and the like, to the permanent injury of the inheritance, yet, in respect to acts which constitute waste, the rule that governs in a new and opening land, covered with primeval growth, must be very different. Where the proportions of arable and wooded land are adjusted to give the greatest value to the farm in its present condition, the conversion of one kind into another may be in itself a waste committed; while here, the clearing of the forest growth and fitting the virgin soil, which it covers, for cultivation, is ordinarily an improvement, most valuable to the property, and is not, nor can it be, injurious to the succeeding estate in fee. *King v. Miller*, 99 N. C. 583, 6 S. E. 660.

Many things that constitute waste in England, and may hereafter do so in this country, because prejudicial to the inheritance, ought not to be so held here at present, because they do not prejudice but rather improve the inheritance; hence, turning woodland into arable, though the timber felled be sold, is not absolutely waste in our law; for cutting the timber on land fit for cultivation, or that may be made so, and reducing it to that state, may, in the condition of our country, be a benefit rather than an injury to the reversioner. *Davis v. Gilliam*, 40 N. C. (5 Ired. Eq.) 308.

The doctrine of the common law in relation to waste has been greatly relaxed in favor of the life tenant. But to prevent waste, the jurisdiction of courts of equity by means of injunction is still freely exercised in order to protect the reversioner against waste by the tenant in possession when the threatened acts amount to a manifest injury to the inheritance and a wanton abuse of the reversioner's rights. *Disher v. Dishar*, 45 Neb. 100, 63 N. W. 398, 87 L.R.A. (N.S.).

The doctrine of waste of the common law is not, in its strictness, applicable to the conditions of things in this country. What in England might be injurious to the inheritance, and therefore waste, would probably, in most parts of this country, be the very reverse of injury, and would be the actual improvement of the estate. But the law remains with us, as in England, that such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of specific leave or license to cut such trees or timber, is waste, for which an action will lie in equity for the prevention of such injury by injunction before it is committed, or at law, for the recovery of damages by the remainderman, after the injury is done. *McCay v. Wait*, 51 Barb. 225.

The common law of England was very strict in regard to waste. Its rigor has been much relaxed here, especially in the matter of timber. This was to be expected in the new country, where land was far more valuable without timber than with it. *Sayers v. Hoskinson*, 110 Pa. 473, 1 Atl. 308.

The doctrine of the English courts, which prohibits the life tenant to cut wood or timber, except for firewood, fencing, and such uses as come under the denomination of estovers, has been subject to important modifications in this country, growing out of the different condition existing in England, where the land has been cleared, the due proportion between woodland and cleared land fixed by long experience, and where the diminution of the proportion of woodland to arable land might be deemed an injury to the heir or remainderman, and a comparatively new and undeveloped country, such as ours, where increasing the area of cleared land, so far from being a wrong to the heir or remainderman, is often a benefit to him. Therefore the law of waste, as administered in England, is subject to many changes and modifications with us, to adapt it to the wholly different circumstances and conditions by which we are surrounded. *Bond v. Godsey*, 99 Va. 564, 39 S. E. 216.

In *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 487, it is said: "In respect to the privilege of a tenant for life in the destruction of timber, the law must necessarily be varied in this country from the English doctrine. There, we could not well conceive of the destruction of timber without attaching to it the idea of an injury to the estate; as timber is scarce, and forest trees are planted and raised for fuel and for timber, it is of too much value to permit its unnecessary destruction. That not being the state of things here, but, on the contrary, as a benefit often results to the estate by clearing away the timber, it would be absurd to apply the rigid principles of the English law to a state of things wholly variant from theirs."

What constitutes waste and what is permissible use of timber are largely dependent upon the locality of the property and

the extent and value of the timber. Lunn v. Oslin, 96 Tenn. 28, 33 S. W. 561.

**b. The rule and its application in this country.**

**(1) In general.**

The rule established by the weight of authority in this country permits the tenant for life to cut timber for the purpose of clearing the land, provided the part cleared, with that already prepared for cultivation, as compared to the remainder of the tract, does not exceed the proportion of cleared to wooded land usually maintained in good husbandry; and provided, further, that he does not materially lessen the value of the inheritance. *Alexander v. Fisher*, 7 Ala. 514; *McLeod v. Dial*, 63 Ark. 10, 37 S. W. 306; *RUTHERFORD v. WILSON*; *Woodward v. Gates*, 38 Ga. 205; *Proffitt v. Henderson*, 29 Mo. 325; *Davis v. Clark*, 40 Mo. App. 515; *Hill v. Ground*, 114 Mo. App. 80, 89 S. W. 343; *Shine v. Wilcox*, 21 N. C. (1 Dev. & B. Eq.) 631; *Parkins v. Cox*, 3 N. C. (2 Hayw.) 339; *Davis v. Gilliam*, 40 N. C. (5 Ired. Eq.) 311; *Lambeth v. Warner*, 55 N. C. (2 Jones, Eq.) 165 (dower); *Joyner v. Speed*, 68 N. C. 236 (dower); *King v. Miller*, 99 N. C. 583, 6 S. E. 660 (dower); *Dorsey v. Moore*, 100 N. C. 41, 6 S. E. 270; *VanDeusen v. Young*, 29 N. Y. 9; 4 Kent, Com. 76; *Hastings v. Crunkleton*, 3 Yeates, 261; *Morris v. Knight*, 14 Pa. Super. Ct. 324; *Keeler v. Eastman*, 11 Vt. 293; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

The rule has also been applied in Canada. *Drake v. Wigle*, 24 U. C. C. P. 405, and *Saunders v. Breakie*, 5 Ont. Rep. 603.

In *Bond v. Godsey*, 99 Va. 564, 39 S. E. 216, the court held that the value of coal underlying land should be deducted in determining the present value of a life tenant's estate, but the value of the timber on the land should not be deducted, it not appearing from the record what was the relative value of the timber, and the surrounding circumstances and conditions not being sufficiently disclosed to enable the court to say that the value of the estate would not be increased by the clearing of the land.

A tenant in dower in clearing land is not bound to take notice of any division which may have been made out of the reversionary interest amongst the heirs; she takes the dower estate as it was assigned to her, with the rights and liabilities which attach to that as a whole; and although she may have destroyed all the timber which was on that part of one of the lots included in her dower, yet, if the dower estate was not injured, but benefited thereby, she would not be guilty of waste. *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467.

But in *Clark v. Holden*, 7 Gray, 8, 66 Am. Dec. 450, opinion by Shaw, Ch. J., it was held that a tenant for life was guilty of waste in cutting timber, not with the intention of using it on the estate, but for

the purpose of restoring it to the condition of pasture land which obtained when the estate for life commenced, the timber having grown up during the pendency of that estate, even on the assumption that the removal of the timber would be good husbandry in the owner of the fee.

And in *Conner v. Shepherd*, 15 Mass. 164, it was held that a widow is not dowerable of land in a wild and uncultivated estate covered with wood and timber, and wholly distinct and separate from any improved or cultivated estate, for the reason that there could be no benefit to the widow from such land, since she would be impeachable for waste and the estate subject to forfeiture if she were to cut down any of the trees valuable as timber, or were to change the property from wilderness to arable or pasture land by cutting down the wood and clearing up the land. (But see *contra* as to right of dower in wild lands, *Crockett v. Crockett*, 2 Ohio St. 180; and *Allen v. McCoy*, 8 Ohio, 464. And it is apparent that the cases previously cited in this subdivision, asserting the right of the life tenant to clear land for cultivation, are opposed to the premise upon which the conclusion in *Conner v. Shepherd* rests.)

In *Smith v. Poyas*, 2 De Sauss. Eq. 65, the court, without saying anything about proportion of arable to wooded land, enjoined the life tenant from clearing oak land or felling trees except for necessary fuel, fencing, or other plantation uses.

To cut down all the timber on a tract of land and sell it would be waste, because it would be detrimental to the inheritance. *Proffitt v. Henderson*, 29 Mo. 325.

The standard by which the conduct of the life tenant is to be gauged, or the test as to whether waste has been committed or not, is the rule of a prudent husbandman and what he would do under the circumstances if the owner of the fee. The value of timbered and of cleared land may be considered by the jury in determining whether the clearing of the land by the life tenant had or had not been done in a prudent manner; but the fact that the land with the timber standing upon it would be more valuable than the land would be when cleared is not in itself decisive of the question as to waste by the life tenant. *Norris v. Laws*, 150 N. C. 599, 64 S. E. 499.

The great criterion by which to determine whether waste has been committed is whether or not the estate is injured. It is clear that the cutting timber and clearing land, instead of being waste, would often greatly enhance the value of the inheritance. In this country, where so large a proportion of the lands are wild and yet in forests, it is often of great advantage to the estate to destroy the timber and reduce the land to a state of cultivation. *Owen v. Hyde*, 6 Yerg. 334, 27 Am. Dec. 467.

The question is not where the doweress cut the timber as a necessary means of support, but whether she thereby materially injured the dower estate; if so, she would be liable to an action for waste; but if not,

although the clearing was not necessary for her support, and although she may have done it for the purpose of profit, she is not liable. If the cleared land on the dower estate was old and worn, and if the proportion of woodland was such as that a prudent farmer would have considered it best to reduce a portion of it to cultivation, whereby to relieve the old land from excessive culture, and thus enhance the value of the whole dower estate, such clearing would not be waste, provided "sufficient timber for the permanent use of the dower estate" were left. *Ibid.*

This doctrine that it is not waste to clear land for cultivation was approved in *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368, but was held inapplicable to the facts in the case, it appearing that the cutting of the timber was a manifest injury to the inheritance and a wanton abuse of the reversioner's rights.

The right of a life tenant to clear land in order to enjoy the life estate is recognized in *Johnson v. Johnson*, 2 Hill, Eq. 277, 29 Am. Dec. 72; but it was held that a life tenant would be guilty of waste in clearing 60 acres of woodland in the center of a tract, not leaving timber enough upon the whole land to repair the plantation, if there was a cleared plantation sufficient for the enjoyment of his estate.

Where wild and uncultivated land, wholly covered with wood and timber, is leased to lessees for life, with covenant to pay rent, the lessees may sell part of the wood and timber so as to fit the land for cultivation, without being liable for waste; but they cannot cut down all the wood and timber so as permanently to injure the inheritance. And to what extent the wood and timber on such land may be cut down without waste is a question of fact for a jury to decide, under the direction of the court. *Jackson ex dem. Church v. Brownson*, 7 Johns. 227, 5 Am. Dec. 258.

In *Robertson v. Meadors*, 73 Ind. 43, the court sustained a demurrer to the answer of the life tenant, alleging that only 6 acres of the tract of 31 had been reduced to cultivation, and that, for the purpose of obtaining proper and reasonable support for herself, she caused 5 acres of the land to be cleared and reduced to cultivation; that she fenced the land so cleared, and repaired other fences upon land, and used and consumed, for necessary fuel, the timber which grew upon such lands, save ten logs. In this case, however, there was no denial of the allegation of the complaint that the removal of the timber worked an irreparable injury to the fee.

That the life tenant does not put land cleared by her immediately into cultivation does not necessarily convict her of waste in cutting the timber and selling the same, but the question is for the jury, under the circumstances of the case. *RUTHERFORD v. WILSON.*

#### (2) *Proceeds of timber.*

Subject to the limitations affecting the 37 L.R.A. (N.S.)

right to clear the land, the life tenant is entitled to the timber or the proceeds thereof, which he, in good faith, cuts for the purpose of clearing the land and fitting it for cultivation. *Warren County v. Gans*, 80 Miss. 76, 31 So. 539; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Davis v. Gilliam*, 40 N. C. (5 Ired. Eq.) 311; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

But in *Saunders v. Breakie*, 5 Ont. Rep. 603, the court, while characterizing it as a strange conclusion, was of the opinion that, under the authorities, a life tenant may not sell timber which he cuts in clearing the land, even though he would not be impeachable for waste if he destroyed it as an incident to clearing the land.

It is to be observed, however, that the rule which awards to the life tenant the proceeds of timber cut by him only applies to timber cut for the primary purposes of clearing land, and does not conflict with the rule of subdivision VII. a, that a tenant for life may not cut timber for sale.

In *Ward v. Sheppard*, 3 N. C. (2 Hayw.) 283, 2 Am. Dec. 625, the court said that if the jury should find that the trees were cut down by the dower for purposes of sale, she was guilty of waste; but if they should find that they were cut down with a view to clearing the land, she was not guilty of waste.

#### *IX. Tenant for life not impeachable for waste; ornamental trees.*

A lease of property "to have and to hold, to use and control as he thinks proper, for his benefit, during his natural life," imports a leasing without impeachment of waste, and the life tenant has a right to do all those acts which a tenant without impeachment of waste may exercise. *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205.

But a grantor in a deed reserving to himself the use and control of the lands during his natural life is impeachable for waste in cutting and taking timber trees thereon for sale, and if timber trees be thus cut, they become the personal property of the reversioner, who may maintain replevin therefor. *Richardson v. York*, 14 Me. 216.

Nor does a reservation in a deed of all the right, title, and interest to the land and premises during the lifetime of the grantor extend the right of the grantor in respect to the removal of timber beyond those of an ordinary tenant for life. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705.

A tenant for life without impeachment of waste may cut wood which would otherwise, at the common law, amount to waste. *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205.

So, a tenant for life without impeachment of waste may cut timber of natural growth and remove it, and in fact do all things consistent with the preservation of the estate. He may not burn down necessary buildings or destroy productive or

chards, for such acts will be wanton and malicious. But he may do any act with reference to woodland that the owner of the fee might do, being restrained only from the commission of wilful and malicious waste. He may thin out the timber of a wood's pasturage, or cut off all the timber, and cultivate it as a field. If the cutting is not wanton or malicious, and does not amount to equitable waste, it cannot be restrained by the owner of the fee, even if he sells the timber. *Chapman v. W. F. Epperson* Circled Heading Co. 101 Ill. App. 161.

But a tenant for life without impeachment of waste may cut timber from land which, by the will, is directed to be sold and the proceeds used in the purchase of other land, since to permit him to remove the timber from the land sold would be to permit him to commit double waste. *Plymouth v. Archer*, 1 Bro. Ch. Cas. 159.

And it is not a good exercise of the power conferred upon testamentary trustees to sell the estate at the request of a life tenant without impeachment of waste, for the trustees to sell the land without the timber, and then for the tenant for life to sell the timber. *Cockerell v. Cholmeley*, 10 Barn. & C. 564, 1 Russ. & M. 424, 1 Clark & F. 61.

Even a tenant for life without impeachment of waste may not cut down trees left or planted for ornament or shelter. *Strathmore v. Bowes*, 2 Bro. Ch. Cas. 88; *Packington's Case*, 3 Atk. 215; *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205; *Clement v. Wheeler*, 25 N. H. 361.

A life tenant without impeachment of waste save only the cutting and felling of ornamental timber may be enjoined from cutting timber of that description, the question whether the particular timber does answer that description being one of fact. *Marker v. Marker*, 9 Hare, 1, 20 L. J. Ch. N. S. 246, 15 Jur. 663.

In *Aston v. Aston*, 1 Ves. Sr. 264, the lord chancellor, while conceding that a tenant for life under a settlement without impeachment of waste might be restrained from taking down trees for ornament and shelter, refused to extend the principle to the cutting of timber not full grown or proper for building, in the absence of special circumstances. In the instant case, however, such relief was granted upon the ground that, under the terms of the settlement, it was plain that the intention was that the provision making the tenant for life not impeachable for waste was to prevent trouble in little matters, and was not intended to leave her at liberty to cut down and strip the estate of the timber.

In *Peirs v. Peirs*, 1 Ves. Sr. 521, an injunction was denied to prevent a tenant for life without impeachment of waste from removing from one part of the estate to another certain young oaks that he had planted.

37 L.R.A. (N.S.)

*A fortiori*, a tenant impeachable for waste may not cut ornamental trees. *Alexander v. Fisher*, 7 Ala. 514; *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351.

#### X. Miscellaneous.

The grantee from the husband alone of an estate held by the entireties has no right to cut timber on the land. *Bynum v. Wicker*, 141 N. C. 95, 115 Am. St. Rep. 675, 53 S. E. 478.

One to whom an estate in dower is conveyed has the same right with respect to the use of wood thereon as had the tenant in dower. *Fuller v. Wason*, 7 N. H. 341.

The same rights and privileges with respect to the use of wood and timber that belong to the life tenant are incidental to the rights of a tenant under the life tenant. *Miles v. Miles*, 32 N. H. 147, 64 Am. Dec. 362.

In *Phillips v. Allen*, 7 Allen, 115, it was held that the fact that new growth on land from which the life tenant removed the timber was as valuable as the increased growth of the trees which were cut would have been did not affect the remainderman's right to interest on the value of the wood and timber wrongfully cut by the life tenant.

Where a lessee for life, by turning the water of a creek (an act of good husbandry) kills some of the growing timber, he is not liable for waste, especially where the landlord had stood by for twenty years, during which time new trees had grown up, of more value than the old, so that there was no permanent injury to the inheritance. *Jackson ex dem. Van Renselaer v. Andrew*, 18 Johns, 431.

Under the Rhode Island statute, a widow shall be endowed in a special and certain manner as of a third part of the growth in woodlands; and in *Brayton v. Jordan*, 24 R. I. 6, 51 Atl. 1047, it was held that the widow was entitled to one third of the growth of the wood on a lot assigned to her by metes and bounds, since equity regards that as done which should have been done.

It is not waste to permit exhausted cleared land to grow up to a second growth of trees, where that is in accordance with the custom of husbandry. *Shine v. Wilcox*, 21 N. C. (2 Dev. & B. Eq.) 631.

A dowress is entitled to one third of the yearly income from the sale of timber made by her pursuant to the direction of the court, as the receiver of the rent and profits of the estate. *Dicken v. Hamer*, 1 Drew & S. 284, 29 L. J. Ch. N. S. 778. In this case the widow was denied any right whatever in the proceeds of mines which were leased pursuant to the direction of the court, but this was upon the ground that the lease was entirely for the benefit of the remaindermen. Apparently there were no circumstances indicating that the direction to sell the timber was for the exclusive benefit of the remaindermen. G. H. P.



## ARKANSAS SUPREME COURT.

STATE OF ARKANSAS EX REL. HAL L.  
NORWOOD, Attorney General,  
v.

W. H. BYLES.

EX PARTE W. H. BYLES

(93 Ark. 612, 126 S. W. 94.)

**License — peddler — unjust discrimination.**

1. A statute imposing a license tax of \$200 per year upon peddlers of lightning rods, steel stove ranges, clocks, pumps, and vehicles, is not void for making an arbitrary and unjust classification, although other articles may be peddled without license.

**Habeas corpus — statute violating interstate commerce law.**

2. Whether or not a statute imposing a license tax on peddlers of certain articles interferes with interstate commerce cannot be determined in a habeas corpus proceeding to secure release from custody to which one is committed for violation of the statute.

(February 21, 1910.)

**P**ETITION for a writ of certiorari to the Chancery Court for Pulaski County to review a judgment discharging respondent from custody to which he had been committed for violation of the statute imposing a license tax on peddlers. Reversed.

The facts are stated in the opinion.

Mr. Hal L. Norwood, Attorney General, for petitioner:

The act does not interfere with or attempt to burden commerce among the states.

Western U. Teleg. Co. v. State, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82.

The act does not conflict with § 5, article 16, Const. Appellee was a peddler, pure and simple.

Grafty v. Rushville, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L.R.A. 273,

**Note.**—The question in the above case, as to the right to discriminate between harmless articles in legislation regulating peddlers, was discussed in the notes to State v. Wright, 21 L.R.A.(N.S.) 349, and State ex rel. Moskowitz v. Jenkins, 35 L.R.A.(N.S.) 1079.

As to the validity of a license tax on peddlers so high as to be prohibitory in effect, see the note to People use of State Bd. of Health v. Wilson, 35 L.R.A.(N.S.) 1074.

As to the right to grade license taxes according to volume of business or the amount of capital employed, see the note to Salt Lake City v. Christensen Co. 17 L.R.A.(N.S.) 898.

37 L.R.A.(N.S.)

3 Inters. Com. Rep. 146, 11 S. E. 233; Duncan v. State, 105 Ga. 457, 30 S. E. 755; American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365. Messrs. Arthur C. Lyon and Samuel M. Casey, for respondent:

States cannot burden commerce among the states by legislative acts. They are void.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The act is prohibitive of competition, and void.

Spaulding v. Evenson, 149 Fed. 913; La Junta v. Heath, 38 Colo. 372, 88 Pac. 459; State v. Bayer, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129; Smith v. Farr, 46 Colo. 364, 104 Pac. 401; Stamps v. Burk, 83 Ark. 351, 104 S. W. 153.

Messrs. Moore, Smith, & Moore, amici curiæ:

Respondent was not a peddler within the meaning of the act.

Com. v. Ober, 12 Cush. 493; Com. v. Farnum, 114 Mass. 267; State v. Moorehead, 42 S. C. 211, 26 L.R.A. 585, 46 Am. St. Rep. 719, 20 S. E. 544; Alexander Bros. v. Greenville County, 49 S. C. 527, 27 S. E. 469; Re Houston, 14 L.R.A. 719, 47 Fed. 539; Kansas v. Collins, 34 Kan. 434, 8 Pac. 865; Davenport v. Rice, 75 Iowa, 74, 9 Am. St. Rep. 454, 39 N. W. 191; Spencer v. Whiting, 68 Iowa, 678, 28 N. W. 13; Ballou v. State, 87 Ala. 144, 6 So. 393; Emmons v. Louisville, 132 Ill. 380, 8 L.R.A. 328, 22 Am. St. Rep. 540, 24 N. E. 58; Hewson v. Englewood Twp. 55 N. J. L. 522, 21 L.R.A. 736, 27 Atl. 904; State v. Wells, 69 N. H. 424, 48 L.R.A. 99, 45 Atl. 143; Peques v. Ray, 50 La. Ann. 574, 23 So. 904; Potts v. State, 45 Tex. Crim. Rep. 45, 74 S. W. 31, 2 Ann. Cas. 827.

If the act of 1909 be construed as applying to respondent, then it is in conflict with article 1, § 8, of the Constitution of the United States, and in so far as it does so apply is void.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Asher v. Texas, 128 U. S.

129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; *Rearick v. Pennsylvania*, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

The shipping of vehicles into this state, and storing them in the original package, and the taking of orders for their delivery subsequent to their arrival in this state, constitute interstate commerce, and the act of 1909 as applied to the soliciting of orders under such circumstances is unconstitutional and void.

*Wrought Iron Range Co. v. Campen*, 135 N. C. 506, 47 S. E. 658; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Rhodes v. Iowa*, 170 U. S. 413, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

McCulloch, Ch. J., delivered the opinion of the court:

The respondent, W. H. Byles, was arrested in Independence county on the criminal charge of violating the provisions of an act of the general assembly approved April 1, 1909 (Laws 1909, p. 292), entitled "An Act to Regulate the Sale of Lightning Rods, Steel Stove Ranges, Clocks, Pumps, Buggies, Carriages, and Vehicles in the Several Counties of this State," and on a trial before a justice of the peace of that county, he was convicted of the alleged offense, and a fine was assessed against him. The proceedings before the justice of the peace were in regular form, and the information which was the basis of the prosecution properly charged a violation of the statute referred to above. Respondent refused to pay the fine assessed against him, and presented to the chancellor of the Pulaski chancery court his petition for habeas corpus, asking that he be discharged from custody. On the return of the writ the chancellor decided that the statute in question is void, and ordered respondent's discharge. The attorney general

brings the proceedings here by certiorari for review, and seeks to quash the judgment of the chancellor.

The only question before us now is as to the validity of the statute; for, if the statute is valid, the question of respondent's guilt of a violation of its provisions cannot be tested in any other manner than by direct appeal from the judgment of conviction. *State ex rel. Arkansas Industrial Co. v. Neel*, 48 Ark. 283, 3 S. W. 631; *Ex parte Foote*, 70 Ark. 12, 91 Am. St. Rep. 63, 65 S. W. 706.

The statute, the validity of which is attacked, reads as follows:

"Section 1. That hereafter before any person, either as owner, manufacturer, or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage, or other vehicle, or either of said articles, he shall procure a license as hereinafter provided, from the county clerk of such county, authorizing such person to conduct such business.

"Sec. 2. That before any person shall travel over or through any county and peddle or sell any of the articles mentioned above, he shall pay into the county treasurer of such county the sum of two hundred (\$200) dollars, taking the receipt of the treasurer therefor, which receipt shall state for what purpose the money was paid. The county clerk of such county, upon the presentation of such receipt, shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such county and sell such articles or article for a period of one year from the first day of January preceeding the date of such license.

"Sec. 3. Any person who shall travel over or through any county in this state and peddle or sell, or offer to peddle or sell, any of the above enumerated articles, without first procuring the license herein provided for, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than two hundred (\$200) dollars nor more than five hundred (\$500) dollars.

"Sec. 4. That any person who shall travel over or through any county in this state and peddle or sell any of the articles mentioned above shall be deemed and held to be a peddler, under the provisions of this act."

This statute taxes the privilege of peddling the several articles enumerated, and defines a peddler within the meaning of the statute to be "any person who shall travel over or through any county in this state and peddle or sell any of the articles mentioned above." The Constitution of this state (article 16, § 5) provides that "the general assembly shall have power from time to time

to tax hawkers, peddlers, ferries, exhibitions, and privileges in such manner as may be deemed proper." But, aside from any express constitutional sanction, as said by Judge Cooley, "everything to which the legislative power extends may be the subject of taxation, whether it be person or property or possession, franchise, or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes." 1 Cooley, Tax. 3d ed. p. 9.

We need not stop, therefore, to consider whether the statute in question imposes a tax for revenue purposes, or is merely a police regulation, for the legislature can exercise either power, and its effect is to impose a license tax on certain privileges. If the statute be found free from objection on the charge of unjust classification, it can be justified either as a police regulation or as a privilege tax imposed for the purpose of raising revenue. *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *State v. Webber*, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; *Coldwater v. Russell*, 49 Mich. 617, 43 Am. Rep. 478, 14 N. W. 568. It does not, however, impose a tax on property, and is therefore not within the constitutional mandate requiring that all property shall be taxed according to its value, and that all taxation shall be equal and uniform. *Ft. Smith v. Scruggs*, 70 Ark. 549, 58 L.R.A. 921, 91 Am. St. Rep. 100, 69 S. W. 679. In the case of *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030, we declared to be invalid a similar statute, except that it contained a proviso exempting from its operation resident merchants of the county. The general assembly of 1909 re-enacted the statute without the exemption, thus freeing it from the objectionable feature condemned in the *Deeds* Case. That decision was placed on the ground that the statute unjustly exempted from its operation a certain class of merchants, and it has no bearing on the present case. The statute is attacked on the ground that it arbitrarily classifies certain articles of trade, and taxes the business of selling the same, and that this operates as an unjust discrimination against those engaged in the business of selling those articles.

Before entering into a discussion of this question, it is well to notice a general principle which guides the courts in determining the validity or constitutionality of legislative enactments. It is that the duty of a court in testing the validity of a statute is to resolve all doubts in favor of the legislative action, and to uphold it unless clearly an abuse of legislative power. *State v.* 37 L.R.A. (N.S.)

*Moore*, 76 Ark. 197, 70 L.R.A. 671, 88 S. W. 881; *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289. Chief Justice Marshall said that, before a court should feel justified in annulling a statute, "the opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162. Judge Cooley announces the same principle as follows: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." Cooley, Const. Lim. 7th ed. 236.

This principle is especially applicable when it comes to a question of the propriety of a classification made by the legislature for the purpose of taxation of privileges and occupations or for police regulation. Unless the classification be clearly unreasonable and arbitrary, and without just distinction as a foundation, the legislature being primarily the judge of that, it is the duty of courts to respect and uphold the legislative determination. *Williams v. State*, 85 Ark. 464, 26 L.R.A. (N.S.) 482, 122 Am. St. Rep. 47, 108 S. W. 838; *Missouri & N. A. R. Co. v. State*, 92 Ark. 1, 31 L.R.A. (N.S.) 861, 135 Am. St. Rep. 164, 121 S. W. 930; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Kehrner v. Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89. The mere fact that the privilege of selling other articles escapes taxation affords no ground for invalidating the taxation or regulation

of those mentioned; for, as we have already said, the constitutional provision that all taxation should be equal and uniform does not reach to the taxation of privileges. The Supreme Court of the United States very aptly said: "A tax may be imposed only upon certain callings and trades, for, when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a state could not tax any property or calling unless at the same time it taxed all property or all callings." *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

So, treating this statute as one imposing a tax on privileges or occupation, it is valid, as the legislature has the power to select certain occupations and tax them without taxing others, and to classify the peddling of certain articles as an occupation and tax it. But whether we treat it as a tax or a mere police regulation, we fail to discover any reason for declaring the statute void on account of its being an arbitrary and unwarranted classification. To do so would be to disregard entirely the legislative determination as to the propriety of the classification. We can see some reason for selecting the articles enumerated in this statute and putting them into a class to themselves for the purpose of taxing the privilege of peddling them over the state, or of regulating the peddling of them. They are articles of merchandise, the sale of which bears larger profits than some others, and the sales amount to more. Therefore the privilege of peddling them should be taxed higher. It might not do to tax the tinware peddler, or the peddler with a pack of small wares on his back, the same as one who peddles lightning rods, steel stove ranges, clocks, pumps, buggies, or carriages, whose sales and profits in a day amount to more, perhaps, than those of the former in a month, for they do not belong in the same class. Moreover, the legislature doubtless made investigation and found that lightning rods, steel stove ranges, clocks, pumps, buggies, and carriages are the articles which constitute the stock of peddlers of this day in the state, and the present legislation was designed to meet the conditions which were found to exist. This it was proper and right for the legislature to do, and the fact that the precise conditions are found not to be met will not invalidate what the legislature has done. This is the idea expressed by this court in *Williams v. State*, supra, and by the Supreme Court of the United States in the case of *Ozan Lumber Co. v. Union County Nat. Bank*, supra. Mr. Justice Peckham, speaking for the Su-

preme Court of the United States in the latter case, said: "It is almost impossible in some matters to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact conclusion or inclusion of persons and things."

Our conclusion in upholding the validity of the statute in question is fully sustained by the following cases: *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *State v. Webber*, 214 Mo. 272, 113 S. W. 1054, 15 Ann. Cas. 983; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L.R.A. 497, 25 S. E. 249; *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *Hays v. Com.* 107 Ky. 655, 55 S. W. 425; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *State v. Stevenson*, 109 N. C. 730, 26 Am. St. Rep. 595, 14 S. E. 385; *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675. A review of the opinions in the several cases cited above would unduly lengthen this opinion, and that shall not be attempted, but an examination will disclose that they are based upon statutes similar to the one now under consideration, or sufficiently so to call for the application of the same principle.

It is insisted that this particular question was not raised nor decided in the Supreme Court of the United States in the cases cited above; but in the case of *Emert v. Missouri*, supra, though the particular question discussed is as to whether or not the statute violated the interstate commerce clause of the Constitution, the opinion contains, we think, a distinct recognition of the validity of the Missouri statute imposing a tax on the privilege of peddling certain articles and exempting others.

Learned counsel for respondent cite us to the following cases, which sustain their contentions that the statute in question is an improper and unjust classification: *State v. Wright*, 53 Or. 344, 21 L.R.A.(N.S.) 349, 100 Pac. 296; *State v. Bayer*, 34 Utah, 257, 19 L.R.A.(N.S.) 297, 97 Pac. 129; *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401. We cannot, however, reconcile our views with the conclusions reached in those cases, and we

are of the opinion that the views we here announce are in accord both with sound reason and the weight of authority.

Counsel insist that the statute selects a few articles not manufactured in this state, and imposes a prohibitive tax on the sale thereof, thus excluding foreign manufactured articles and preventing nonresident merchants from selling them here. Such is not, however, the effect of the statute, nor does that appear to be its design. We are not advised that none of these articles are manufactured in the state; but, even if there are none, this does not affect the validity of the statute. It bears alike on all persons peddling these articles, wherever manufactured, and does not, either in letter or in spirit, discriminate against any. *Armour Packing Co. v. Lacy*, supra. Neither can we say that the tax or license fee of \$200 per annum is prohibitive.

It is unnecessary to pass on the question argued whether or not the business transacted by the respondent constituted interstate commerce. We cannot go into that question, as the case is presented here; for, as already stated, if the statute is found to be valid and the proceedings against respondent were regular, the question of his guilt or innocence of violating the statute must be tested in a direct appeal from the judgment of conviction. If the statute should be found to burden interstate commerce, and be held to that extent void, that part could be eliminated and disregarded, and leave it valid and enforceable as to transactions not within the realm of interstate commerce. It has become the settled rule of construction in this court to separate statutes valid in part and void in part, on account of excess of the legislative power, so as to disregard the part which was beyond the power of the legislature to enact, and preserve the part which was within the legislative power. *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; *Wells, F. & Co.'s Express v. Crawford County*, 83 Ark. 576, 37 L.R.A. 371, 40 S. W. 710; *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42; *Western U. Teleg. Co. v. State*, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82; *Oliver v. Chicago, R. I. & P. R. Co.* 89 Ark. 466, 117 S. W. 238; *Parkview Land Co. v. Road Improv. Dist. No. 1*, 92 Ark. 93, 122 S. W. 241.

The judgment of the Chancellor discharging the respondent is therefore reversed and quashed.

Dismissed by the Supreme Court of the United States, April 18, 1912, 225 U. S. —, 56 L. ed. —, 32 Sup. Ct. Rep. —. 37 L.R.A. (N.S.)

## ILLINOIS SUPREME COURT.

### PEOPLE OF STATE OF ILLINOIS

v.

HARTFORD LIFE INSURANCE COMPANY, Plff. in Err.

(252 Ill. 398, 96 N. E. 1049.)

**Insurance — police power — maintaining rates — stifling competition.**

1. The police power extends to compelling life insurance companies to maintain uniform rates among the same classes of applicants, although the effect is to stifle competition between different companies for business.

**Same — penalty — forbidding prosecution of business.**

2. A statute depriving a life insurance agent of the right to prosecute that business if he gives special rates to applicants is not invalid as imposing too severe a penalty.

**Pleading — characterization of discrimination.**

3. A claim against an insurance company for penalty for making a discrimination between applicants in rates need not allege that it was unjust, if all the facts are stated, and the statute fixes the character of discrimination prohibited and characterizes such discrimination as unjust.

**Insurance — rebating — penalty — violation of rule.**

4. A rule of an insurance company forbidding rebating of premiums cannot effect a reduction of statutory penalty for granting rebates, if the rule was violated by a manager having charge of an agency.

**Evidence — insurance — commission — rebate.**

5. Evidence as to the commission for securing a life insurance policy is immaterial in an action to recover a statutory penalty for rebating, where the rebate was given not to an agent, but to an applicant.

**Penalty — right to share — inducing statutory breach.**

6. One does not lose the right to share in a penalty imposed for the rebating of life insurance premiums, by the fact that he furnished the money to pay the premium and directed an applicant to secure a rebate if possible.

**Trial — penalty — amount — jury.**

7. Where an action for penalty for breach of a statute is a civil one in debt, the jury should fix the amount of the recovery.

(December 21, 1911.)

**Note. — Power of legislature to regulate life insurance rates.**

The police power of a state extends to the protection of all property within the state; and the mere fact that a law necessary for the welfare of society regulates trade or

**E**RROR to the Municipal Court of Chicago to review a judgment in plaintiff's favor in an action brought to recover the statutory penalty for the rebating of life insurance premiums. Affirmed.

The facts are stated in the opinion.

Mr. Harvey Strickler, for plaintiff in error:

The exercise of the police power by the legislature is limited to such measures as are designed to promote the public health, morals, safety, or welfare, and when it has no such tendency the court will declare it invalid.

People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A. (N.S.) 1074, 94 N. E. 141; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 83 N. E. 236; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453.

The penalty is not proportioned to the nature of the offense.

People v. Jones, 241 Ill. 482, 89 N. E. 752, 16 Ann. Cas. 332; Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Cummings v. Missouri, 4 Wall. 277, 320, 18 L. ed. 356, 362.

In an action of debt on a penal statute, where the penalty is not definitely fixed, upon a verdict of guilty the court must fix the penalty, and it is not the province of the jury to assess damages.

Armstrong v. People, 37 Ill. 459; United States v. Allen, 4 Day, 474, Fed. Cas. No. 14,431; Chesley v. Brown, 11 Me. 143; Com. v. Stevens, 15 Mass. 195; Scott v. Missouri P. R. Co. 38 Mo. App. 523; United States v. Boston & A. R. Co. 15 Fed. 209; 16 Enc. Pl. & Pr. 297; Wiggins v. Chicago, 68 Ill. 372; Berkowitz v. Lester, 121 Ill. 99, 11 N. E. 860.

An informer cannot reap a benefit from his own wrongful conduct in inducing violation of the statute complained of.

Jolley v. Chicago, M. & St. P. R. Co. 110 Iowa, 491, 93 N. W. 555; Parks v. Nashville, C. & St. L. R. Co. 13 Lea, 1, 49 Am. Rep. 655; Love v. People, 160 Ill. 501; Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; Kizer v. Walden, 198 Ill. 282, 65 N. E. 116.

The discrimination act is unconstitutional.

People v. Steele, 231 Ill. 340, 14 L.R.A. (N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Massie v. Cessna, 239 Ill. 352, 28 L.R.A. (N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152; Josma v. Western Steel Car & Foundry Co. 249 Ill. 508, 94 N. E. 945; Mathews v. People, 202 Ill. 405, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Connolly v. Union Sewer Pipe Co. 184 U. S. 541, 46 L. ed. 682, 22 Sup. Ct. Rep. 431; People ex rel. Akin v. Butler Street Foundry & Iron Co. 201, Ill. 236, 60 N. E. 349.

business, or to some degree operates as a restraint thereon, does not make it unconstitutional. 8 Cyc. 864.

PEOPLE v. HARTFORD L. INS. CO. seems to be in accord with the unanimous opinion of the courts that a state may, in the proper exercise of its police power, regulate the rates to be charged by life insurance companies, to prevent discrimination between insureds of the same class and equal expectation in life.

The legislature of a state has authority to fix as a condition of a foreign insurance company's doing business in the state, that it shall not make or permit any distinction or discrimination between insureds of the same class, nor pay or allow, nor offer to pay or allow, to any person insured any special rebate or premium. New York L. Ins. Co. v. People, 95 Ill. App. 136, affirmed in 195 Ill. 430, 63 N. E. 264; Equitable Life Assur. Soc. v. Com. 121 Ky. 543, 89 S. W. 537.

An act to prevent unjust discrimination in life insurance rates is valid, though fraternal beneficiary societies are excluded from its operation. People v. Commercial L. Ins. Co. 247 Ill. 92, 93 N. E. 90.

And in State v. Fraternal K. & L. 35 Wash. 338, 77 Pac. 500, it was held competent for the legislature to fix the rate to be charged by beneficial societies, and to 37 L.R.A. (N.S.)

determine such rate by adopting a table designated as "Fraternal Congress Mortality Table," and incorporating it into the law.

An act to prevent unjust discriminations between insureds of the same class and equal expectation of life is a valid enactment, and binding upon insurance companies doing business in the state, and not expressly excepted by the provisions thereof. Western Mut. Life Assn. v. People, 73 Ill. App. 496.

In People v. Formosa, 131 N. Y. 478, 27 Am. St. Rep. 612, 30 N. E. 492, affirming 61 Hun, 272, 16 N. Y. Supp. 753, in holding constitutional a provision of an act which prohibited life insurance companies or their agents from paying or allowing any rebates or premium as an inducement to any person to insure, the court said: "Life insurance companies perform very important functions in modern society. They operate in all parts of the state, and a very large number of people are interested in them. They are resorted to for the purpose of making provisions for families and dependents after the death of the insured, and for that purpose many persons invest in them the accumulations of their labor and their thrift. The nature of insurance contracts is such that each person effecting insurance cannot thoroughly pro-

Messrs. John E. W. Wayman and David K. Cochrane, for defendant in error:

The act is not unconstitutional. It is not in contravention of either the state or Federal Constitutions.

People v. Commercial L. Ins. Co. 247 Ill. 92, 93 N. E. 90; W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 27 L.R.A.(N.S.) 994, 91 N. E. 695, overruling Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Consolidated Coal Co. v. People, 186 Ill. 134, 56 L.R.A. 266, 57 N. E. 880, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Chicago, W. & V. Coal Co. v. People, 181 Ill. 270, 48 L.R.A. 554, 54 N. E. 961; Laaher v. People, 183 Ill. 226, 47 L.R.A. 802, 75 Am. St. Rep. 103, 55 N. E. 663, 15 Am. Crim. Rep. 108; Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; Chicago v. Schmidinger, 243 Ill. 167, — L.R.A.(N.S.) —, 90 N. E. 369, 17 Ann. Cas. 614; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; Massie v. Cessna, 239 Ill. 352, 28 L.R.A.(N.S.) 1108, 130 Am. St. Rep. 234, 88 N. E. 152; Noel v. People, 187 Ill. 857, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Dunne v. People, 94 Ill. 120, 34 Am. Rep. 213; Cole v. Hall, 103

Ill. 30; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; Lowe v. Kansas, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Jones v. Brim, 165 U. S. 180, 184, 41 L. ed. 677, 679, 17 Sup. Ct. Rep. 282; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Powell v. Pennsylvania, 127 U. S. 687, 32 L. ed. 257, 8 Sup. Ct. Rep. 992, 1257; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 27, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; Kruse v. Kennett, 181 Ill. 199, 54 N. E. 965; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Franklin L. Ins. Co. v. People, 200 Ill. 594, 66 N. E. 378; Franklin L. Ins. Co. v. People, 200 Ill. 619, 66 N. E. 379; Metropolitan L. Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643; Ward v. Farrell, 97 Ill. 593; Chicago L. Ins. Co. v. Auditor, 101 Ill. 82.

It is proper for the jury to assess damages against the defendant in its verdict.

Zito v. People, 140 Ill. App. 612; Chicago & A. R. Co. v. People, 82 Ill. App. 679; 30 Cyc. 1359; McDaniel v. Gates City Gaslight Co. 79 Ga. 58, 3 S. E. 693; Hines v. Darling,

tect himself. He is not competent to investigate the condition and solvency of the company in which he insures, and his contracts may run through many years, and mature only, as a rule, at his death. Under such circumstances, it is competent for the legislature, in the interest of the people and to promote the general welfare, to regulate insurance companies and the management of their affairs, and to provide by law for that protection to policy holders which they could not secure for themselves. Under such conditions there should be a wide range of legislative power to promote the public welfare in the exercise of the police power, and the true boundaries of that power it would be difficult in such a case to prescribe."

In *Com. v. Morningstar*, 144 Pa. 103, 22 Atl. 867, in holding a similar act constitutional, the court said that the scope and purpose of the act is clearly within the police powers of the state, and its terms are not in conflict with any rights guaranteed by the fundamental law.

And, also, in *Equitable Life Assur. Soc. v. Com.* 113 Ky. 126, 67 S. W. 388, it was said: "The legislature must be credited with the design, in the enactment of the statute under consideration, to benefit the public. Wise and prudent business men not only regard that there is an obligation

on them to support and care for their families during their lives, but that it is provident and wise to protect them against want by life insurance. Of course, life is of uncertain duration. Policies of life insurance may run for forty or fifty years, or more, and those who buy them are deeply interested in having their policies issued in a solvent company. Every one who takes out a life insurance policy is interested in the solvency of the company. It is important that the business of the company should be successfully conducted, and that it should, at the end of a long period, be able, by collecting sufficient premiums, to meet the demands of the beneficiaries in the policies."

And in *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643, the court said: "The nature of the insurance business and the interest of the public in it are such as to subject it to regulation under the police power, and the statute which prohibits discrimination in favor of individuals, between insurants of the same class and with equal expectation of life, is a valid exercise of that power."

For note as to kinds of business affected with a public interest subjecting them to regulation and control in respect to rates or prices, see 6 L.R.A.(N.S.) 834.

J. H. B.

99 Mich. 47, 57 N. W. 1081; Kennedy v. Wright, 34 Me. 351; State v. Leaver, 62 Wis. 395, 22 N. W. 576; Lammond v. Volans, 14 Hun, 263.

There was no evidence of any entrapment of the agents to violate the law, and hence it was not proper to instruct the jury on that point.

People v. Whalen, 151 Ill. App. 16; Chicago v. Bartels, 146 Ill. App. 180; Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; Grimm v. United States, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; Price v. United States, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Curtis, 95 Mich. 212, 54 N. W. 767; Willey v. Dake, 118 Ill. App. 47; Connor v. People, 18 Colo. 373, 25 L.R.A. 342, 36 Am. St. Rep. 295, 33 Pac. 159; Toluca, M. & N. R. Co. v. Haws, 194 Ill. 94, 62 N. E. 312; Wilmette v. Brachle, 110 Ill. App. 356.

Cartwright, J., delivered the opinion of the court:

The municipal court of Chicago entered a judgment on the verdict of a jury against the Hartford Life Insurance Company for a penalty of \$750 in a suit of the fifth class brought by the people of the state of Illinois for a violation of the act prohibiting discrimination between life insureds of the same class and equal expectation of life (Hurd's Rev. Stat. 1909, chap. 73, §§ 27-30), by issuing a policy to Alfred Bellstrom for less than the fixed annual premium. The defendant moved the court to strike the amended statement of claim from the files, and one of the reasons assigned was that the act violated constitutional restrictions upon the legislative power, and was therefore void. The motion was overruled, and, the validity of the act being involved, the record has been brought to this court by writ of error.

We decided in Metropolitan L. Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643, that the nature of the life insurance business and the interest of the public in it are such as to subject it to regulation and that the act prohibiting discrimination in favor of individuals between insureds of the same class and with equal expectation of life is a valid exercise of the power of regulation. Subsequently, in People v. Commercial L. Ins. Co. 247 Ill. 92, 93 N. E. 90, it was contended that the act was void as a police regulation, because it excluded fraternal associations furnishing life insurance, thereby discriminating arbitrarily between companies in the same class. This question was considered, and it was held that there is such a fundamental difference between life insurance companies and fraternal associa-

tions that they are not substantially in the same class or situation, and there was therefore no arbitrary discrimination against life insurance companies.

It is not now contended that insurance companies are not subject to police regulation, nor that there is no difference in character or situation between life insurance companies and fraternal associations, but the argument is that the real purpose of the act is to stifle competition between life insurance companies, and compel them to have only one price for their policies, and make everybody pay that price, which cannot be deemed for the public welfare; that there is no difference, in principle, between selling contracts for life insurance and fire insurance, and the sale of other contractual obligations, such as bonds, notes, or mortgages, or the selling of any other property. There are material differences between life insurance contracts and those of fire insurance companies, as well as the sale of bonds, notes, mortgages, or other property. The purchaser of property or securities takes title to the same and pays the price agreed upon, and, when one takes a fire insurance policy, he makes the contract for his own benefit for a short period of time, and does not need the aid of a statute designed to secure the solvency of the company at a distant period of time. The policies of life insurance companies run for comparatively long periods of time, and are mainly for the benefit of a class of dependents entitled to protection against the insolvency which might follow reckless and ruinous competition. The right to contract is a property right, but, like all other rights, its exercise is subject to the police power, and may be limited and restricted for the preservation of the public health, morals, safety, or welfare, or to prevent a well-known evil and wrong. *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509, 27 L.R.A. (N.S.) 994, 91 N. E. 695. A regulation designed to secure equality between those contributing to the funds and resources of life insurance companies, and to secure financial ability to meet obligations which may mature in the distant future, and adapted to that end, does not violate any prohibition of the Constitution. Similar acts are in force in a large number of the states (*Joyce, Ins. § 1091, note; Richards, Ins. Law, 703*); and have been regarded as valid.

The act provides for a forfeiture of the agent's license, and counsel insists that it is void because that penalty is not proportionate to the offense. Other acts provide for the revoking of licenses to practise professions requiring great skill and learning, where the holder has violated the law, and they are considered valid. The occupation



of an insurance agent does not call for learning or a previous course of study, but only for persuasive powers; and, if he violates the law, he may be lawfully deprived of the right to prosecute that business.

It is also argued that the statement of claim was insufficient, because it did not allege that the discrimination was unjust, although it stated with particularity all of the facts showing a violation of the act. The 1st section of the act fixes the character of discrimination prohibited, and the 2d section declares that any company making any unjust discrimination, as enumerated in § 1, shall be deemed guilty of having violated the act. It was not necessary, after stating the facts in the claim, to denounce the discrimination as unjust.

August C. Wegner, who was the informer and entitled to one half of the penalty, was an agent of the New York Life Insurance Company, and he gave to John F. Goggin \$44 to pay as premiums on policies which he would get from other insurance companies, and he was to get rebates if he could. In pursuance of the plan, Wegner wrote a letter June 29, 1910, to which he signed the name of Goggin, directed to Harry B. Johnston, manager of the defendant at Chicago, saying that he had received a proposition for insurance in that company, and had a few other offers, but concluded to accept Johnston's offer. He requested Johnston to call July 7th at his residence. Goggin had received no proposition for insurance, and the statement was false. Goggin saw the letter when Wegner was at his house, and he mailed it to Johnston. Johnston employed subagents on commission, and sent Louis P. Hazen to Goggin's home as requested, and Hazen took an application for a policy for \$1,000, which was afterward delivered. The regular annual premium was \$22.08, and Wegner gave Goggin \$16.56, with which Goggin paid for the policy. Wegner had told Goggin that he would furnish the money for the premium, and all the discount or rebate Goggin could get would be his. In pursuance of that arrangement, Wegner paid Goggin the amount of the rebate, which was the difference between \$16.56 and \$22.08. On July 18, 1910, Johnston wrote Goggin inclosing the policy, saying that the balance due was \$16.56, which was to be sent to the office, and adding: "I hope you will be able to secure more business for us on the same basis." Wegner wrote a letter in reply, saying that Johnston had offered to extend the terms granted to Goggin to others; that he had a friend, Alfred Bellstrom, whom he had told about his premium, and if Johnston could see Bellstrom on August 2d at 8 P. M., he believed he could secure an application. Goggin signed the letter, and gave

37 L.R.A. (N.S.)

it back to Wegner. Another letter was written to Johnston, saying that Ida Waters wanted to take out some insurance, and Goggin would send her to the office with a letter, if he could persuade her to go. Johnston wrote to Goggin, saying that he had recommended two prospects for insurance, and, in case the policies were issued and paid for, 25 per cent of the premium would be paid Goggin. Johnston sent Hazen to see Bellstrom and took his application for a policy for \$1,000, which was issued, and the annual premium was \$29.25. The defendant gave Bellstrom a receipt for that amount, but Bellstrom paid only \$21.94 in a check of J. H. Fetterhoff, furnished him by Wegner. This was the act of discrimination alleged in the statement of claim, which did not include the transaction with Goggin or Ida Waters. On September 9th Goggin wrote to Johnston, claiming a commission of 25 per cent on the Bellstrom and Waters policies, which had been deducted by the defendant, and Johnston answered on September 12th, saying that the other parties were informed by Goggin that the 25 per cent was to be credited to them, as had been done in Goggin's case, and he understood it was to be given to the other parties. On September 22d Goggin wrote to Johnston that he had inquired of his friends, and found that they had got the commission instead of himself, and that they would call the matter square.

It is objected that the court admitted evidence of transactions not pertaining to the case, and leaving the jury to believe that the defendant had been guilty of other offenses. The letter to Goggin about securing other business was brought into the case on the cross-examination of Bellstrom, and was admitted in evidence without objection. It was the theory of the defendant that there was an arrangement with Goggin for 25 per cent commissions, and this was presented as the sole defense. The letters about the Waters policy were offered in evidence by the defendant, so that there is no ground for the complaint.

The court did not err in refusing to permit proof of a rule prohibiting rebating. It is said that it would tend to mitigate the amount of the penalty, but it could not have that effect where the manager having charge of the agency knew that the rule was being violated. If the defendant was guilty and subject to a penalty, the existence of a rule which was not enforced, but was violated by the defendant's manager, would have no tendency to reduce the penalty.

It is next argued that the trial court failed properly to control the conduct of plaintiff's counsel in asking improper questions and in making improper statements at the trial. Bellstrom had testified, and later

in the trial was recalled and asked if he had seen the attorney for the defendant at the state's attorney's office, if he went there at the request of the attorney, and what occurred there. He persisted in asking the questions, and in reply to objections of defendant's attorney and interrogations of the court, simply said that the evidence would tend to show the facts of the case, and that it would straighten out the testimony so that the jury would get it right, and that he wanted to show what those people falsely represented at Bellstrom's house. The conduct of the attorney was grossly improper, and had no object except to create prejudice or raise an unfavorable inference against defendant's attorney. The court finally sustained the objection, and, in view of all the evidence, we are not inclined to reverse the judgment because of the conduct of the attorney.

The defendant offered to prove that the commission on Bellstrom's policy was 60 per cent of the face of the premium, in connection with the evidence that he paid 25 per cent less than the amount of the premium, but was not permitted to make the proof. The object was to prove that the agent had divided the commission with Goggin for services rendered in securing the insureds. It is not claimed that the agent had a right to dispose of his commission as he saw fit, or to rebate a part of it to the insured where the insurance company received the entire amount to which it was entitled, but it is assumed here, as it was in *Metropolitan L. Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643, that doing so would be a violation of the terms of the act. That question therefore is not considered, and we do not think the jury could have believed that the allowance to Bellstrom was made as a commission to Goggin. It is true that Goggin directed the attention of Johnston to Bellstrom, but the conduct of the parties indicates pretty clearly that the proposition for commissions was a mere device, since the deduction of 25 per cent was made to Bellstrom directly, without any inquiry to Goggin. Proof that the commission was 60 per cent of the premium would not have aided the defendant on that question.

The court refused to instruct the jury that the law does not permit an informer to reap a benefit from his own wrongful conduct in inducing a violation of a statute. One cannot arrange for a crime to be committed against himself or his property, and aid, encourage, or solicit the commission of the crime (*Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710), but if he does not induce or advise the commission of the crime, and merely creates the condition under which an offense against the public

may be committed, the rule does not apply (*People v. Smith*, 251 Ill. 185, 95 N. E. 1041). It is not a violation of the law to find out whether offenses are being committed, although it is done by artifice or deceit, such as the use of decoy letters, writing letters under assumed names, or furnishing money to secure evidence. We see no substantial distinction between the act of an informer and that of one who secures evidence of criminal acts for a reward, and undoubtedly a prosecution could not be defeated because the evidence is so obtained.

Counsel contends that it was error for the jury to fix the amount of the penalty. There seems to be no uniformity of practice in the courts of different states with respect to the proper functions of the court and jury in such cases. In this state the action for a penalty is a civil action in debt (*Metropolitan L. Ins. Co. v. People*, supra), and we see no reason why it should not be governed by the same rule that obtains in other civil cases where the jury fixes the amount. That has heretofore been the unquestioned practice. The case of *Armstrong v. People*, 37 Ill. 459, does not apply, because that was a criminal prosecution for an offense punishable by imprisonment in the penitentiary and a fine, while this is a civil action to recover a penalty as a debt.

We cannot say that the judgment was wrong, and accordingly it is affirmed.

#### NEW YORK COURT OF APPEALS.

ESTHER F. BLANCHARD, Admr., etc., of  
Flint Blanchard, Deceased, Resp.,  
v.

AMOS F. BLANCHARD, Appt.

(201 N. Y. 134, 94 N. E. 630.)

**Note — implied contract to reimburse accommodation indorser — enforcement after note is barred.**

The law implies a contract by the maker

**Note. — Right of accommodation party who is obliged to pay bill or note, to recover from the accommodated party.**

The rule that one who has accommodated another by loaning him his credit has, upon being required to pay the debt to a bona fide holder, a right of action against the accommodated party for reimbursement, seems to have the unanimous approval of the courts.

#### Accommodation indorser.

An accommodation indorser who is obliged to pay a note at its maturity is entitled to reimbursement from the accommodated party. *Adler v. Teller*, 3 Legal

of a note to reimburse the accommodation indorser the amount which he is compelled to pay thereon, and therefore, if the note is barred in favor of the maker when its amount is collected from the indorser's estate, the time having been extended as to it by the administration proceedings, the estate has a right of action against the maker upon the implied contract for reimbursement.

(February 28, 1911.)

**A**PPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of the Supreme Court for Chautauqua County in plaintiff's favor in an action brought to recover from the maker

the amount paid by an accommodation indorser on a promissory note. Affirmed.

The facts are stated in the opinion.

Mr. V. E. Peckham, with Mr. John G. Wicks, for appellant:

The payee and first indorser of a promissory note, to recover of the maker for moneys paid as such indorser, must take up the note and bring his action on it against the maker; and he cannot recover from the maker for moneys paid for the maker's benefit and impliedly at his request.

Woodruff v. Moore, 8 Barb. 171; Converse v. Cook, 25 Hun, 44, 31 Hun, 417; Crampton v. Foster, 29 App. Div. 215, 51 N. Y. Supp. 883; Stephens v. Monongahela Nat. Bank, 88 Pa. 158, 32 Am. Rep. 438;

Gaz. 236; Foster v. Balch, 79 Conn. 449, 65 Atl. 574.

So an accommodation indorser who pays notes may recover the amount from the estate of the accommodated party. Bliss v. Plummer, 103 Mich. 181, 61 N. W. 263.

In Brown v. American Wheel Co. 46 Fed. 733, where an accommodated party sold out, the successors agreed to pay certain debts of which it was notified accommodation paper was part; the successors requested the indorser to continue for them, and upon the indorser's having to take up the notes, it was held he could recover, though the debt was not a part of the amount assumed, and the successors had paid other debts equal to such amount assumed.

In Lyon v. Robertson, 50 Ala. 74, it was held that the liability of an accommodated party to reimburse an accommodation party was good consideration for a note given for the purpose of reimbursement.

One who indorsed a note signed by two makers, at the request of one only of the makers, may, upon being required to pay the note, recover the amount from the other maker who had not requested the indorsement. Hoffman v. Butler, 105 Ind. 371, 4 N. E. 681.

And an accommodation indorser who pays the note after its maturity, upon the maker's default, can recover from the maker, as such an indorser is not a purchaser after maturity. Van Brunt v. Potter, 2 Pa. Super. Ct. 591.

In Havens v. Huntington, 1 Cow. 387, where the accommodation indorsement was by a firm, in the firm name, it was held that the note could be assigned to one member, and action maintained against the accommodated party, in his own name alone as indorser.

The fact that judgment was obtained against a sheriff for not returning execution against the maker did not discharge the indorser from liability on judgment against him, and therefore payment by such indorser was not in his own wrong, so as to defeat recovery of the amount paid from the accommodated party. Baker v. Martin, 3 Barb. 634.

37 L.R.A. (N.S.)

—indorsement for firm.

In Annis v. Lowes, 5 U. C. Q. B. O. S. 198, one who, at the request of two partners, indorsed for their accommodation a note signed by one partner only, but which was represented by both as drawn on account of the firm, was held entitled to recover from the nonsigning partner, where the other partner absconded before the maturity of the note, which was taken up by the indorser.

So, one who renewed his accommodation indorsement of firm paper after a change in the personnel of the firm, of which he was not aware, without any intention of releasing anyone liable on the original paper, may recover the amount paid by him against all the members of the original firm. Miller v. Miller, 8 W. Va. 542.

—effect of fraud.

An accommodation indorser who was a party to the fraud on a corporation, by which an officer executed the note in its name, may not recover from the corporation, even if he has paid the note to a bona fide holder thereof, who was not affected by the fraud. Erie Boot & Shoe Co. v. Eichenlaub, 127 Pa. 164, 17 Atl. 889.

But where partnership notes made by one partner after dissolution, in renewal of prior notes made before dissolution, were indorsed in good faith for the accommodation of the partnership, it was held in an action by the accommodation indorser, who had been obliged to pay the notes, that the fraudulent use of such notes for individual purposes of another partner, to which fraud the accommodation indorser was not a party, would be no defense. Meyran v. Abel, 189 Pa. 215, 69 Am. St. Rep. 806, 42 Atl. 122.

—effect of usury.

The payee of a promissory note who indorses the same for accommodation of the maker, and who is compelled to take up the note at its maturity, may maintain an action thereon against the maker, though such note was discounted at a usurious rate

Graham v. Roberson, 79 Ga. 72, 3 S. E. 611; Perry v. Barret, 18 Mo. 140; 4 Am. & Eng. Enc. Law, 478; Bird v. Kay, 40 App. Div. 533, 58 N. Y. Supp. 170.

Mr. A. Frank Jenks, for respondent:

Where one person becomes a mere surety for another, whether by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor.

Hunt v. Amidon, 4 Hill, 348 40 Am. Dec. 283.

Even if respondent's intestate had not waived notice of protest and guaranteed the payment of the note, he might, upon demand, after presentment, protest, and no-

of interest, if he was in ignorance of such fact. Cassebeer v. Kalbfleisch, 11 Hun, 119.

—necessity for demand and protest.

An accommodation indorser for the maker of a promissory note, who pays the note upon the maker's default, may recover the amount so paid from the maker, though the note was not protested. McGowan v. Hover, 45 Misc. 138, 91 N. Y. Supp. 892; Pinney v. McGregory, 102 Mass. 186.

And so the fact that an accommodation indorser who has paid the note did not receive such notice of default as was necessary to fix his liability on note will not defeat his right of recovery from the maker. Stanley v. McElrath, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16.

And one who indorses a note for the accommodation of prior indorsers, and who had to pay the note at maturity, may recover such amount from such indorsers on account for money paid, though unable to prove any demand of the maker. Rodman v. Denison, 21 Conn. 406.

#### Accommodation maker.

An accommodation maker who is compelled to pay a note at maturity to a bona fide holder may recover the amount paid with interest from the accommodated parties. Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410.

In Kern's Estate, 171 Pa. 55, 33 Atl. 129, a note was made for the accommodation of the payee, who deposited the same with a bank as security for his private debt to the bank, and at the same time gave to the bank as collateral security his own note payable to the maker of the accommodation note, which he had previously given to her, but which she had returned to him. The accommodation maker had to pay her note at its maturity, and had returned to her her own note and the note held as collateral security, and it was held that the accommodation maker was entitled to recover from the accommodated party the amount of the promissory note he had given to her as security.

37 L.R.A. (N.S.)

tice, have paid the note, and brought his action for money paid to appellant's use upon an implied assumpsit.

Baker v. Martin, 3 Barb. 634; Neass v. Mercer, 15 Barb. 318; Peterson v. Wing, Sheldon, 437.

When an accommodation indorser or other surety pays the debt of his principal in discharge of his own liability therefor, the statute begins to run from the time of such payment, and not from the time when the principal debt fell due.

Rodman v. Hedden, 10 Wend. 498; Butler v. Wright, 20 Johns. 367, 2 Wend. 369; Frank v. Brewer, 4 Silv. Sup. Ct. 155, 26 N. Y. S. R. 590, 7 N. Y. Supp. 182; Norton v. Hall, 41 Vt. 471; Poe v. Dixon, 60 Ohio St. 124, 71 Am. St. Rep. 713,

#### Accommodation acceptor.

An accommodation acceptor who is obliged to take up a draft may recover the amount from the drawer. Martin v. Muncy, 40 La. Ann. 190, 3 So. 640; Asprey v. Levy, 16 Mees. & W. 851.

A drawer of a bill and sureties thereon are liable upon an implied promise to refund to an accommodation acceptor of a draft who has paid the same. Dickerson v. Turner, 15 Ind. 4.

And in First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. 479, it was held that a drawer becomes a debtor of the accommodation acceptor of a draft, where the latter pays the same, and that therefore the acceptor's claim for money paid can be assigned in equity to the bank that originally cashed the draft, so as to be a good consideration for a mortgage to the bank to secure the debt from the real debtor.

In Kirkman v. Benham, 28 Ala. 501, it was held that an accommodation acceptor who accepted a bill drawn by one as "executor of," etc., had, on being compelled to pay the same, no claim against the estate, as the bill was the personal contract of the executor.

#### —for firm or corporation.

In Pearce v. Wilkins, 2 N. Y. 469, where one partner drew a bill in the firm name, and procured it to be accepted, agreeing in the name of the firm to take care of it at maturity, to which agreement another partner, in the presence of the acceptor, refused his assent, and the acceptor gave a release executed under hand and seal to the party who drew the bill, discharging him from all claim for damages, costs, or charges, as drawer of such bill, it was held that the release to the drawer, as drawer merely, did not discharge him from liability to the accommodation acceptor, and that, as the bill went to the payment of the firm debt with the knowledge and assent of the dissenting partner, the acceptor could maintain an action against the firm for money paid.

Where a draft accepted for the accom-

54 N. E. 86; *Scott v. Nichols*, 61 Am. Dec. 503, and note, 27 Miss. 94; *Thayer v. Daniels*, 110 Mass. 346; *Graves v. Johnson*, 48 Conn. 160, 40 Am. Rep. 162.

*Collin, J.*, delivered the opinion of the court:

The defendant on May 12, 1900, made his negotiable promissory note for \$1,100.15, payable with interest to the order of Flint Blanchard, and to mature August 12, 1900. Flint Blanchard indorsed it for the accommodation of the defendant, who then delivered it to, and received thereupon from, Daniel Griswold the sum of \$1,100.15. Flint Blanchard on July 9, 1900, waived demand of payment and notice of the non-payment thereof. The defendant made no

modification of a corporation is paid at maturity by the acceptor, and thereafter an execution on judgment against the corporation for the amount thereof is returned unsatisfied, a suit in equity may be maintained to enforce the personal liability of the officers of the corporation for the debt. *Byers v. Franklin Coal Co.* 106 Mass. 131, 12 Mor. Min. Rep. 27.

#### Accommodation drawer.

One who draws a bill for the accommodation of the acceptor and indorser may recover from the indorser or acceptor any amount he may have had to pay on said bill. *Lewis v. Williams*, 4 Bush, 678.

But an accommodation drawer of a draft, who, upon the bill being dishonored, voluntarily, and without having received notice of dishonor, and without request from the accommodated party, pays part of it to the holder, cannot recover the amount paid from the accommodated party in an action for money paid to his use. *Sleigh v. Sleigh*, 5 Exch. 514, 19 L. J. Exch. N. S. 345.

#### Accommodation guarantor.

An accommodation guarantor of a note, who pays the same to the holder on default of his principal, is subrogated to rights of the holder, and may recover the amount paid from the principal. *Babcock v. Blanchard*, 86 Ill. 165.

#### Effect of death of accommodation party.

Where an accommodation party dies before the note becomes due, and his administrators afterwards take up the note, they cannot recover from the accommodated party, as the death of the maker discharged his liability on the note, and the payment by the administrator was voluntary and in his own wrong. *Kennedy v. Carpenter*, 2 Whart. 344.

#### Effect of insolvency of accommodated party.

An accommodation acceptor of a draft, who pays the same after drawer became bankrupt, cannot come in for any dividend 37 L.R.A. (N.S.)

payment upon the note. *Flint Blanchard* made two small payments thereon, and after his death, February 17, 1906, and plaintiff's appointment, March 5, 1906, plaintiff paid, February 19, 1907, to Griswold upon his demand \$1,101.50, the amount unpaid thereon; the statute of limitations being then invocable by the defendant, but not by the plaintiff, because the eighteen months next succeeding the death of Flint Blanchard were not a part of the time limited for the commencement of an action upon his indorsement against his administratrix. Code Civ. Proc. § 403. The action, commenced October 8, 1907, rests upon the payment of moneys for the use of the defendant, and the contract, implied by law, of the defendant to repay them. The

under the commission. *Young v. Hockley*, 3 Wils. 346, 2 W. Bl. 839; *Chilton v. Whiffen*, 3 Wils. 13.

An indorser of a note fixed before, but paying after the insolvent discharge of the maker, may recover against the maker, as he is not affected by such discharge. *Ainslie v. Wilson*, 7 Cow. 662, 17 Am. Dec. 532.

In *Seymour v. Minturn*, 17 Johns. 169, 8 Am. Dec. 380, the plaintiff loaned the defendant his promissory note, payable to the defendant or order, who indorsed it and procured it to be discounted at a bank and received the money. The note was protested for nonpayment, and the defendant being insolvent, the plaintiff and the bank signed a written agreement discharging him from all debts and demands. Afterwards plaintiff paid the bank the amount of the note, and brought an action against the defendant for so much money paid to his use, and it was held that the release of the defendant by the bank did not discharge the plaintiff, as the bank did not know for whose accommodation the note was discounted, and that therefore the plaintiff did not pay the money in his own wrong; and neither did the signing of the release by the plaintiff release the defendant from liability, because the plaintiff, having no debt or existing demand at that time, that agreement could not have the effect to discharge a right of action acquired subsequently by the payment of the money by the plaintiff to the holder of the note.

#### Remedy.

The general rule is that an accommodation maker or acceptor must bring his action against the party accommodated upon his implied contract to indemnify, as the payment by him extinguished the security; on the other hand, the authorities generally hold that an accommodation indorser has a right of action either upon the instrument or for money paid.

Thus, an accommodation acceptor who pays a draft has an action against the drawer on an implied obligation, but not

defendant's counsel takes the position that the making, indorsement, and delivery of the note created an express contract between the defendant and Flint Blanchard, which was not annulled or changed through the payments to Griswold, the existence of which prohibits or bars an implication, and plaintiff is confined to an action upon the note, to which the statute of limitations is a perfect defense, and that the consequent loss of plaintiff is the result of the failure of her intestate and herself to take up and sue the note within the six years from August 12, 1906.

The doctrine of implied contract is firmly placed in our system of jurisprudence. With whatever reason or logic it and the legal fiction which it, in part at least, is,

on the bill itself. *Griffith v. Reed*, 21 Wend. 502, 34 Am. Dec. 267.

Where the note is made for the accommodation of the indorser, and the maker is compelled to pay the same, his remedy against the indorser is an action for money paid, and not an action on the indorsement. *Abramowitz v. Abramowitz*, 113 N. Y. Supp. 798.

And in *Sublett v. McKinney*, 19 Tex. 438, the court, in deciding as to the remedy of an accommodation acceptor, said: "Whatever may be said of the action being upon the implied contract to indemnify, it is quite certain that without the request contained in the writing the plaintiff would not have any right of action upon payment of the money. One man cannot make another his debtor by paying his debt without his request, unless he has come under obligation to some third person to make payment. It therefore is not the payment of the money which gives the right of action; but it is founded, in part at least, upon the writing. The doctrine that the plaintiff must sue upon the implied contract is, to say the least, quite technical, and is confined in its application to courts which recognize the distinctions of forms of action. Our law does not recognize these distinctions; but the plaintiff must sue upon his case, and the writing certainly constitutes a very material and essential part of that case. The mere fact of payment does not raise a promise by implication. No promise to indemnify is implied, except it be upon request, and that request in this case is in writing; so the writing is the foundation of the promise, and, discarding technical niceties, it may be said to be the ground of the action. It gives rise to the promise which, in compliance with the request, springs out of and is grounded upon it."

An accommodation indorser who pays a note may maintain an action on the note itself against the maker. *Heaton v. Dickson*, 153 Mo. App. 312, 133 S. W. 159; *Havens v. Huntington*, 1 Cow. 387.

An accommodation indorser who pays a note has a right of action against the ac-

commodated party, either on the note itself as equitable assignee, or for money paid to maker's use. *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16.

may be characterized as a mythical creation or an usurpation, it is too inveterate and useful to be either shattered or discarded; nor are we called upon to justify its existence by writing of the beneficial part it has worked in the historical development of the law. The law is practical and has as a purpose to adjudge, through just and general principles and precedents investing it with certitude and continuity, the actual disputes growing out of the conduct and transactions of those under its jurisdiction. If it is not in all respects logical and conformable to pure reason, no more are the conduct and transactions which are the causes of those disputes.

This action is *ex contractu*, and has no support other than a contract to be by the

commodated party, either on the note itself as equitable assignee, or for money paid to maker's use. *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16.

And an accommodation indorser who pays a note acquires title thereto, and may enforce the same against the estate of the maker. *Fenn v. Dugdale*, 40 Mo. 63.

An accommodation indorser for payee, who is compelled to pay the note, is entitled to recover either on the note or on the account for money paid, laid out, and expended, for the accommodated party. *Baker v. Martin*, 3 Barb. 634.

And in *Borland v. Phillips*, 3 Ala. 718, there is *dictum* to the effect that an accommodation indorser who pays a note may maintain an action against the maker for money paid to his use, but not on the note itself.

But in *Kennedy v. Carpenter*, 2 Whart. 344, it was held that a payee of an accommodation note, who indorses it for the accommodation of the maker, and is compelled to pay the same to the holder, cannot recover the amount thereof from the maker on any of the money counts in *indebitatus assumpsit*, but must sue on the note.

#### When right of action accrues.

Where an accommodation maker of a note pays the same to a bona fide holder, and seeks reimbursement from the payee, or where an indorser of a note has been compelled to pay it, and seeks reimbursement from the maker or prior indorsers, the cause of action accrues, and the statute begins to run, at the date when the payment is made, not at the maturity of the instrument. 25 Cyc. 1114.

An accommodation acceptor's right of action against the drawer accrues at the time of payment. *Reynolds v. Doyle*, 1 Mann. & G. 753, 2 Scott, N. R. 45, 1 Drink. 1; *Angrove v. Tippet*, 11 L. T. N. S. 708.

An accommodation acceptor who is compelled to pay a draft may recover from the accommodated party in an action for money paid, though action on the bill is barred

law implied from the facts and conditions established herein. In case the law refuses to declare the contract, the action fails. The note of the defendant must be eliminated as the basis of a recovery. Under the facts, does the law imply a contract on the part of the defendant to pay the plaintiff the amounts paid by herself and her intestate by reason of his indorsement?

Those payments were not voluntary. As to Griswold, the indorsement was the agreement of Flint that on due presentment the note should be paid according to its tenor, and that, if it were dishonored, and the necessary proceedings on dishonor were duly taken, he would pay the amount thereof to the holder (Laws 1897, chap. 612, §§ 113, 116), which, at the time of the payments, had become certain and obligatory. A payment is deemed in law to be compulsory when the party making it cannot legally resist it. The relation as to the

by the statute of limitations. *Reynolds v. Doyle*, supra.

An accommodation indorser's right of action against the accommodated party accrues at the time he is compelled to pay the note. *Norton v. Hall*, 41 Vt. 471; *Thayer v. Daniels*, 110 Mass. 345; *Rodman v. Heden*, 10 Wend. 498.

An accommodation indorser's action to recover from the accommodated party accrues when the judgment obtained against himself on the note is paid, and the promise by such accommodated party to pay such judgment as soon as he might succeed in arranging or settling with his other creditors the indebtedness then outstanding against him will not suspend operation of the statute. *Wilson v. Crawford*, 47 Iowa, 469.

But in *Kennedy v. Carpenter*, supra, it was held that a right of action against a maker by an accommodation indorser who is compelled to take up the note accrues when the note matures, and not when he pays the same. The basis of this decision is that the court in this action held that the indorser's right of action was upon the note itself, and not for money paid.

Where an accommodation maker is compelled to pay a note, the statute of limitations begins to run against the claim for reimbursement only from the time of payment. *Frank v. Brewer*, 4 Silv. Sup. Ct. 155, 26 N. Y. S. R. 590, 7 N. Y. Supp. 182.

#### Amount of recovery.

As to the amount of recovery by an accommodation party, the authorities are not in accord, especially as to whether he may recover the costs incurred in an action against himself on the bill or note.

An accommodation indorser may recover from the accommodated party the amount paid by him on the judgment or note. *Meek v. Black*, 4 Stew. & P. (Ala.) 374.

An accommodation maker of a promissory note, who pays a judgment obtained 37 L.R.A. (N.S.)

debt between the defendant and Flint, in so far as it is involved in this action, was that of principal and surety. *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 299; *National Exch. Bank v. Silliman*, 65 N. Y. 475; *First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. Rep. 66. The defendant, when he procured the indorsement, impliedly engaged that he would indemnify Flint, and reimburse him in case he was compelled to pay. This engagement was not created by the note. That was not delivered by the defendant to Flint, or had not validity until transferred to Griswold. The failure of the defendant to pay the note did not constitute a cause of action in favor of Flint against the defendant, but a payment by Flint did. A cause of action accrued when he paid; and the statute of limitations then began to run. Each of the payments made by Flint or the plaintiff was within the six years next before the com-

in an action brought against him on such note, may maintain an action against the accommodated party for the amount so paid. *Wheeler v. Young*, 143 Mass. 143, 9 N. E. 531.

An indorser of a draft for the accommodation of the drawer cannot recover from the latter beyond what he has actually paid. *Nolte v. Their Creditors*, 7 Mart. N. S. 9; *Dorsey v. Their Creditors*, 7 Mart. N. S. 499.

And in *Bonney v. Seely*, 2 Wend. 481, it was held that an accommodation maker would be entitled to recover from the accommodated party only the amount actually paid, if less than the face value of the note, and not the amount extinguished by the payment.

But in *Fowler v. Strickland*, 107 Mass. 552, it was held that where the payee of a promissory note, who indorses the same for the accommodation of the maker, is, on maker's default, compelled to take up the note, he may, in an action on the note, recover the full face value thereof, though he paid therefor only one half the amount.

#### —interest.

An accommodation indorser who pays a note bearing interest at stipulated rate is entitled to recover the legal rate only from the date of maturity. *Stanley v. McElrath*, supra.

An accommodation acceptor of a draft bearing a special rate of interest, who is obliged to pay the same, is entitled to reimbursement of the amount of the draft with stipulated interest to date of retirement, and thereafter only legal interest. *Martin v. Muney*, 40 La. Ann. 190, 3 So. 640.

#### —costs.

An accommodation acceptor of a draft cannot recover from the drawer costs in-

mencement of the suit, and was not barred by the statute of limitations. *Norton v. Hall*, 41 Vt. 471; *Thayer v. Daniels*, 110 Mass. 345; *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16; *Hoffman v. Butler*, 105 Ind. 371, 4 N. E. 681; *Bullock v. Campbell*, 9 Gill, 182.

It is undoubtedly the general, though not arbitrary and inflexible, rule of law that a promise by implication does not exist where the parties have made the promise express. This case, however, does not permit the application of the rule. Flint did not receive from the defendant an express promise of indemnity. The relation between them was as it would have been had the defendant, on May 12, 1900, made his note for \$1,100.15, payable with interest to Daniel Griswold, and maturing August 12, 1900, and obtained at the same time from Flint his written agreement of the substance of his indorsement of the note,

and delivered the note and agreement to Griswold, who advanced thereon to defendant the sum of \$1,100.15. The making and indorsement of the note did not make a contract between them, because there was neither consideration nor delivery between them. The note was made payable to Flint, not because the defendant owed him, but in order that he might by his indorsement enable defendant to get the money of Griswold. The transfer of the note by defendant to Griswold did not create a contract between defendant and Flint. If Flint had desired to sue upon the note, he could, as might any other, have purchased it of Griswold, and brought his action upon it within the six years next after its maturity, but therein he would sue not as the surety, but as the assignee and owner of the obligation and indebtedness of defendant to Griswold. *Pinney v. McGregor*, 102 Mass. 186. As

curring in defending an action brought against himself upon the bill. *Beech v. Jones*, 5 C. B. 696.

An accommodation indorser cannot charge the accommodated party with costs of suit for collection of the note he has been compelled to pay. *Baker v. Martin*, 3 Barb. 634.

And an accommodation maker of a note who defends an action against himself without request from the accommodated party cannot recover from the latter the costs of such suit; and the court further said that even had such request been shown, the costs could not have been recovered upon common counts, but should have been specially declared upon in count upon undertaking to indemnify. *Lees v. Westley*, 11 U. C. Q. B. 322.

But where there is an agreement in writing to save an accommodation maker harmless, he is entitled to recover from the accommodated party costs of a suit against him in an action on the note. *Bonney v. Seely*, *supra*.

In *Seaver v. Seaver*, 6 Car. & P. 673, it was held that an accommodation acceptor who was obliged to pay drafts and costs of action brought thereon against him cannot recover costs, where the declaration contains only common money counts.

But in *Jones v. Brooke*, 4 Taunt. 464, it was held that an accommodation acceptor may recover from the drawer costs of an action against himself; and in *Stratton v. Mathews*, 3 Exch. 48, it was said that since the case of *Jones v. Brooke*, there can be no doubt that the party for whose accommodation the bill is accepted is liable not only for the amount of the bill, but also for the costs which the acceptor has been called upon to pay.

And in *Garrard v. Cottrell*, 10 Q. B. 679, it was held that the costs of defending an action against himself upon a bill could be recovered by an accommodation acceptor in an action against the drawer for money 37 L.R.A. (N.S.)

paid, where the drawer had requested the acceptor to undertake the defense.

#### Materiality of payment.

A promissory note which is given by an accommodation indorser to a bank, and accepted by it in payment of a note on which he was such indorser, constitutes such a payment as entitles one to immediate right of action against the accommodated party. *Stanley v. McElrath*, 86 Cal. 449, 10 L.R.A. 545, 25 Pac. 16.

And in *Cornwall v. Gould*, 4 Pick. 444, it was held that the payee and indorser who takes up the note at maturity may maintain an action for money paid against the accommodated party, though in taking up such accommodation note he gave a new note for the same; and it was further held that such indorser could resort to an implied promise although he had taken security for his indemnity, where it was not understood or agreed that such security alone should be looked to for the indemnity.

But an accommodation indorser of a note who takes up the same at maturity, by another note of like tenor, cannot maintain an action against the maker to recover the amount of the first note, where it is not shown that the second note constituted the payment of the first. *Lentell v. Getchell*, 59 Me. 135.

Payment of a money debt by accommodation indorser by conveying land, which is received at that time as payment, will support an action for money paid, laid out, and expended. *Ainslie v. Wilson*, 7 Cow. 662, 17 Am. Dec. 532.

And in *Bonney v. Seely*, 2 Wend. 481, it was held that the accommodation maker of a note who has to pay judgment obtained in an action against himself on the note may maintain an action against the accommodated party for money paid, though the payment of the debt was by conveyance of land instead of money.

J. H. B.



surety, it was his right to pay the debt, thereby canceling the note and the liability of the defendant thereon, and then bring his action upon the implied promise, independent of the promise of the note, of the defendant to reimburse him. This was the right exercised by the plaintiff. These views in no wise conflict with the decision in *Woodruff v. Moore*, 8 Barb. 171. That was the case of an indorser for value of business paper. In such cases the indorsement is an independent collateral contract entered into by the indorser that he may sell the note, and no relation of principal and surety exists between him and the maker. *Colgrove v. Tallman*, 67 N. Y. 95, 99, 23 Am. Rep. 90. Therefore, the only obligation or contract on which he can sue the maker is that expressed in the instrument itself.

The judgment should be affirmed, with costs.

Cullen, Ch. J., and Gray, Haight, Vann, Werner, and Hiscock, JJ., concur.

#### WISCONSIN SUPREME COURT.

CARL SOLBERG, Appt.,  
v.

ROBBINS LUMBER COMPANY, Resp't.

(147 Wis. 259, 133 N. W. 28.)

#### Appeal — possibility of erroneous statement of facts — effect.

1. Where a statute provides that no judgment shall be reversed unless it shall appear that the error complained of affected the substantial rights of the complaining party, the mere possibility that the court made a wrong statement of facts in instructing the jury does not require a reversal.

#### Jury — right to utilize knowledge gained in viewing premises.

2. Jurors may, in determining the credi-

bility of evidence, utilize the knowledge which they acquired in viewing the premises where the transaction out of which the action arose occurred.

#### Same — right to utilize personal knowledge.

3. Jurors may, in weighing the evidence, utilize whatever personal expert knowledge they may have of the subject under consideration, and give the benefit of their knowledge to other jurors who may lack it.

(November 14, 1911.)

**A** PPEAL by plaintiff from a judgment of the Circuit Court for Oneida County dismissing the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

#### Statement by Barnes, J.:

The complaint alleged that the defendant was engaged in the business of manufacturing and dressing lumber, and that defendant had in operation in its planing mill a machine known as a "matcher," equipped with rapidly revolving knives and gearing, the frame of which was about 15 feet long and 6 feet wide, the machine being used for surfacing lumber; that 1 foot distant from the rear end of such matcher, a machine known as a "lath machine," was installed, the front end of which faced the matcher; the beds of the two machines being on a level. These machines were used conjunctively; lumber being passed from the bed of the matcher to the lath machine. The framework of the lath machine was about 5 feet long, three feet wide, and 4½ inches up and down, and the bed or frame plate attached to the top of the frame was about 3 feet from the floor. Above the frame plate were a number of small rotary saws, and immediately below, and 7 inches back of the front end of the frame plate, were two rotary saws, 9 inches in diameter, in per-

#### Note. — Right of jurors to act on their own knowledge.

I. Scope, 790.

II. In general.

a. General principles, 791.

b. Common knowledge, 793.

c. Private or personal knowledge, 794.

d. Influence upon verdict, 794.

III. Knowledge relating to matters not in evidence.

a. Generally, 796.

b. In criminal cases.

1. Generally, 796.

2. Character or previous conduct of accused, 797.

3. Results in former trial for present offense, 799.

c. In civil cases, 800.

37 L.R.A. (N.S.)

IV. Weighing evidence by knowledge as to matters adduced.

a. Generally, 801.

b. In criminal cases, 801.

c. In civil cases.

1. By concrete knowledge of physical facts, 802.

2. By application of general knowledge and experience, 803.

V. Testing credibility of particular witness.

a. Generally, 805.

b. By knowledge of the facts, 805.

c. By knowledge as to reliability of witness, 806.

#### I. Scope.

This question was the subject of annota-

pendicular position, extending about 3½ inches below such plate. The saws were attached to an axle connected with shafting and belting propelled by steam power. For the purpose of raising and lowering these saws, there was a small wheel underneath the frame plate, to one side of and about on a line with the saws. Plaintiff began work for the defendant about November 1, 1908, and in the performance of his duties was required to operate said matcher. On the morning of November 5th, a large pile of sawdust and other mill refuse had accumulated on the floor between the matcher and the lath machine. It is alleged that it was necessary for plaintiff to oil a spindle cock underneath the matcher, and that in attempting to re-

move the sawdust and refuse to make room for him to crawl under the machine, as was necessary in order to accomplish his purpose, his right hand came in contact with the uncovered and unguarded lath machine saws, as a result of which plaintiff's hand was injured. The complaint further alleges violation of § 1636j, Stats. 1898, for failure to properly fence or guard the saws on said lath machine. The answer puts in issue all the material allegations of the complaint, and alleges that such injury was not caused by any negligence on the part of the defendant, but was due to negligence and want of ordinary care on the part of the plaintiff. By its answers to questions submitted on a special verdict, the jury found, among other things, that plain-

tion in the note to 31 L.R.A. 489, and the province of the present note is to discuss only the additional cases. The discussion will be confined to the question whether the jurors, after they become such, may utilize knowledge possessed by some or all of them, and is not concerned with the question whether a juror's competency is affected by the fact that he has personal knowledge of matters pertinent to the issue. As to whether personal knowledge of facts to be proved affects the competency of a juror, see the note in 63 L.R.A. 807. As to whether an opinion gained from newspapers disqualifies a juror in a criminal case, see the note in 35 L.R.A. (N.S.) 988. As to the competency of jurors who have served in the same or similar case, see the note in 68 L.R.A. 871.

And it is also to be observed that while in this note occasional reference has been made to cases stating that a juror is a competent witness, as a reason for denying him the right to use his knowledge except as a witness, no attempt has been made to treat the general and distinctive question as to the competency of jurors as witnesses.

Nor does this note go into the question of the right to act upon knowledge acquired upon a view by the jury. Generally, as to view by jury, see the note in 42 L.R.A. 368.

It remains to be noted that this note, like the earlier one in 31 L.R.A. 489, does not include the question of a juror's right to rely upon his own opinion, judgment, and experience in assessing values and damages.

As to the propriety of experiments by the jury, see the note in 34 L.R.A. (N.S.) 717.

As to the power of a court to disregard testimony because contrary to scientific principles, see the notes in 7 L.R.A. (N.S.) 357; 15 L.R.A. (N.S.) 701, and 28 L.R.A. (N.S.) 648.

## II. In general.

### a. General principles.

As hereinafter shown, there is a clear distinction between an instruction which 37 L.R.A. (N.S.)

permits jurors to use the knowledge and experience which they possess as intelligent men, in weighing evidence or testing its credibility, and an instruction which permits them to apply their personal knowledge and experience to the determination of the issue in the case. *DeGray v. New York & N. J. Teleph. Co.* 68 N. J. L. 454, 53 Atl. 200.

For the jury is bound to determine the case upon the evidence adduced upon the trial, and it cannot be permitted to make a different case from that which it took with it to the jury room. *Bohn v. Chicago & N. W. R. Co.* — Iowa, —, 78 N. W. 200.

They cannot base their verdict upon their own knowledge, without any reference to the testimony introduced. *Doggett v. Jordan*, 2 Fla. 541.

And such knowledge should not be given the weight of evidence in the case. *Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 64.

It has been stated in general terms that the jury must be instructed that it is bound to determine the case from the evidence. *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018.

But, in considering and weighing the evidence, the jury may and should use the same judgment, reason, common sense, and general knowledge of men and affairs as they use in everyday life. *Morrison v. State*, 42 Fla. 149, 28 So. 97; *Marshall v. State*, 54 Fla. 66, 44 So. 742.

Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing power as direct and positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole, entirely and candidly weighed, it convinces the guarded judgment, the jury should act on such conviction. The jurors are not to imagine situations or circumstances which do not appear in the evidence, but are to make those just and reasonable inferences from circumstances proved which the guarded judgment of a reasonable man would

tiff knew and appreciated the danger of coming in contact with the saws, and that plaintiff, by his failure to use ordinary care, proximately contributed to produce his injury. The court ordered judgment dismissing the complaint, from which judgment this appeal is taken.

**Mr. W. K. Parkinson** for appellant.

Messrs. **Aarons & Niven** and **E. D. Minahan**, for respondent:

Jurors have a right to act upon their own knowledge as to that which they saw, in determining the credibility of evidence.

**American States Security Co. v. Milwaukee Northern R. Co.** 139 Wis. 205, 120 N. W. 844; **Washburn v. Milwaukee & L. W. R. Co.** 59 Wis. 364, 18 N. W. 328;

ordinarily make in like circumstances. **State v. Elsham**, 70 Iowa, 531, 31 N. W. 66.

So, a charge that the jury should apply the same rules of good sense to the facts in evidence that they would apply to any other subject that comes under their consideration in life is not improper. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law, and who have made it a study of their lives; and while it is entirely true that the jury is bound to receive the law from the court, and to be guided by its instructions, it by no means follows that the jury is to abdicate the common sense of its members, or to adopt any different processes of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to bear upon the consideration of testimony, and in obedience to the rules laid down by the court, is the most valuable feature of the jury system, and has done more to preserve its popularity than any apprehension that a bench of judges wilfully misuse their power. **Dunlop v. United States**, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375.

Indeed, to tell the jurors that they should consider the evidence in the light of the knowledge which they have obtained as men of affairs is but authorizing them to do what they could not honestly refrain from doing. **Gormley v. Hartray**, 105 Ill. App. 625.

And at least where there is a conflict of opinion of expert witnesses, the jury may, in judging such opinion, bring to the question the application of its own knowledge and experience. **Lafayette Bridge Co. v. Olsen**, 54 L.R.A. 33, 47 C. C. A. 367, 108 Fed. 335.

"If the juror is not to consider his personal opinion as to the facts proven, it would be interesting to know whose opinion he must consider," says the court in **State v. Kremer**, 34 Mont. 6, 85 Pac. 738, in upholding, in a prosecution for larceny, a refusal to charge as follows: "You are instructed that your personal opinion as to the facts 37 L.R.A.(N.S.)

**Blincoe v. Choctaw, O. & W. R. Co.** 16 Okla. 286, 4 L.R.A.(N.S.) 890, 83 Pac. 903, 8 Ann. Cas. 689; **State v. Maine C. R. Co.** 86 Me. 312, 29 Atl. 1086; **Johnson v. Boorman**, 63 Wis. 274, 22 N. W. 514; **Kitzinger v. Sanborn**, 70 Ill. 146; **Douglas v. Trask**, 77 Me. 35; **Johnson v. Hillstrom**, 37 Minn. 122, 33 N. W. 547; **Willis v. Lance**, 28 Or. 380, 43 Pac. 384, 487; **Head v. Hargrave**, 105 U. S. 45, 26 L. ed. 1028; **Patterson v. Boston**, 20 Pick. 166; **Murdock v. Sumner**, 22 Pick. 158.

The charge as a whole was not inconsistent or misleading.

**Topeka v. Martineau**, 42 Kan. 387, 5 L.R.A. 775, 22 Pac. 419; **Neanow v. Uttech**, 46 Wis. 581, 1 N. W. 221; **Stiles v. Neillaville Mill Co.** 87 Wis. 266, 58 N. W. 411;

proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that, and that alone, you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not framed upon the testimony."

But the mere avowal of possession of superior knowledge, stated to be capable of influencing the verdict, while reprehensible upon the part of a juror, does not constitute ground for reversal, where the nature of the facts in his possession was not disclosed to the other jurors, and it appears that the others were not influenced by such conduct. Such was the rule laid down in **Irvine v. State**, 104 Tenn. 132, 56 S. W. 845, where, on a trial for murder, one of the jurors stated or intimated that he was in possession of knowledge which, if he were allowed to tell it, would influence the jury against the defendant.

In Texas the question is controlled by a statute providing that a new trial shall be granted where the jury has received other testimony after having retired to deliberate upon the case. It is held that under this statute a new trial is mandatory, and certainly so where the testimony is of a material character; and that the statute applies as well to a case in which the jurors hear testimony from one of their number, as to the hearing of testimony of an outsider. **Mitchell v. State**, 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456; **Terry v. State**, — Tex. Crim. Rep. —, 38 S. W. 986; **Tate v. State**, 38 Tex. Crim. Rep. 261, 42 S. W. 595; **Holmes v. State**, 38 Tex. Crim. Rep. 370, 42 S. W. 996; **Hardiman v. State**, — Tex. Crim. Rep. —, 53 S. W. 121; **Favro v. State**, — Tex. Crim. Rep. —, 59 S. W. 885; **Blocker v. State**, — Tex. Crim. Rep. —, 61 S. W. 391; **Blalock v. State**, — Tex. Crim. Rep. —, 62 S. W. 571; **Ruessing v. State**, 43 Tex. Crim. Rep. 85, 63 S. W. 318; **Lankster v. State**, 43 Tex. Crim. Rep. 298, 65 S. W. 373; **Barnes v. State**, 43 Tex. Crim. Rep. 355, 65 S. W. 922; **Hopkins v. State**, — Tex. Crim. Rep. —, 68 S. W. 986;

Pelton v. Spider Lake Sawmill & Lumber Co. 132 Wis. 233, 112 N. W. 29; Lela v. Domaske, 48 Wis. 627, 4 N. W. 794; Kelly v. Houghton, 59 Wis. 400, 18 N. W. 326; Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; McCoy v. Milwaukee Street R. Co. 88 Wis. 61, 59 N. W. 453; Northwestern Iron Co. v. Aetna Ins. Co. 26 Wis. 83; Dorsey v. Phillips & C. Constr. Co. 42 Wis. 602; Kohl v. Bradley, C. & Co. 130 Wis. 301, 110 N. W. 265; Bartell v. State, 106 Wis. 345, 82 N. W. 142; Pelitier v. Chicago, St. P. M. & O. R. Co. 88 Wis. 530, 60 N. W. 250.

A judgment on appeal will be affirmed, unless prejudicial error not only exist, but be made affirmatively to appear.

Franke v. Mann, 106 Wis. 124, 48 L.R.A.

Sims v. State, — Tex. Crim. Rep. —, 70 S. W. 90; Hughes v. States, 44 Tex. Crim. Rep. 296, 70 S. W. 746; Hefner v. State, 44 Tex. Crim. Rep. 441, 71 S. W. 964, 14 Am. Crim. Rep. 682; Williams v. State, 45 Tex. Crim. Rep. 240, 75 S. W. 509; McDaniel v. State, — Tex. Crim. Rep. —, 77 S. W. 802; Dixon v. State, 46 Tex. Crim. Rep. 154, 79 S. W. 310; Riley v. State, — Tex. Crim. Rep. —, 81 S. W. 711; Crow v. State, 47 Tex. Crim. Rep. 225, 82 S. W. 1033; Hambright v. State, 47 Tex. Crim. Rep. 518, 84 S. W. 597; Morawitz v. State, 49 Tex. Crim. Rep. 366, 91 S. W. 227; Gilford v. State, 49 Tex. Crim. Rep. 275, 92 S. W. 424; Horn v. State, 50 Tex. Crim. Rep. 404, 97 S. W. 822; Winslow v. State, — Tex. Crim. Rep. —, 98 S. W. 241; Vanduran v. State, 50 Tex. Crim. Rep. 440, 98 S. W. 247; Casey v. State, 51 Tex. Crim. Rep. 433, 102 S. W. 725; Battles v. State, 53 Tex. Crim. Rep. 202, 109 S. W. 195; Hill v. State, 54 Tex. Crim. Rep. 646, 114 S. W. 117; Maples v. States, 60 Tex. Crim. Rep. 169, 131 S. W. 567; Williamson v. State, — Tex. Crim. Rep. —, 136 S. W. 1071.

#### **b. Common knowledge.**

Jurors are not restricted to a consideration of facts directly proved, nor are they expected to lay aside matters of common knowledge, or their own observation and experience of the affairs of life, but, on the contrary, may give effect to such inferences as common knowledge or their personal observation and experience may reasonably draw from the facts directly proved. *Dunlop v. United States*, 165 U. S. 486, 41 L. ed. 799, 17 Sup. Ct. Rep. 375; *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 33, 47 C. C. A. 367, 108 Fed. 335; *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A.(N.S.) 962, 92 C. C. A. 357, 166 Fed. 663; *Sloss-Sheffield Steel & I. Co. v. Hutchinson*, 141 Ala. 221, 40 So. 114; *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591; *Denver & R. G. R. Co. v. Waring*, 37 Colo. 122, 86 Pac. 305; *Morrison v. State*, 42 Fla. 149, 28 So. 97; *Marshall v. State*, 54 Fla. 66, 44 So. 742; *Jenney Elec.* 37 L.R.A.(N.S.)

856, 81 N. W. 1014; *Citizens' Trust Co. v. Scheffels*, 141 Wis. 307, 124 N. W. 301; *Hack v. State*, 141 Wis. 353, 124 N. W. 492; *Manny v. Glendinning*, 15 Wis. 53; *Gingress v. Harvey*, 133 Wis. 669, 113 N. W. 1095; *Wheeler v. Milner*, 137 Wis. 29, 118 N. W. 187.

**Barnes, J.**, delivered the opinion of the court:

Appellant insists that the court erred in giving the following instruction to the jury: "And you should consider and decide whether the plaintiff ever raised and lowered the saws in question by means of the little wheel under the lath machine table, and if you find that he did so before his injury, then you will conclude that

*tric Co. v. Branham*, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448; *Cincinnati, H. & I. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760; *Renard v. Grande*, 29 Ind. App. 579, 64 N. E. 644; *State v. Elsham*, 70 Iowa, 531, 31 N. W. 66; *Purcell v. Tibbles*, 101 Iowa, 24, 69 N. W. 1120; *Missouri River R. Co. v. Richards*, 8 Kan. 101; *Craver v. Hornburg*, 26 Kan. 94; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Metropolitan Street R. Co. v. Summers*, 75 Kan. 342, 89 Pac. 652; *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610; *Lillibridge v. McCann*, 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288; *State v. Kremer*, 34 Mont. 6, 85 Pac. 736; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 21 N. W. 880; *Jenkins v. Southern R. Co.* 146 N. C. 178, 59 S. E. 663; *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107, 89 Pac. 212; *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *State v. Bjelkstrom*, 20 S. D. 1, 104 N. W. 481; *Merrill v. Minneapolis & St. L. R. Co.* — S. D. —, 129 N. W. 468; *Disotell v. Henry Luther Co.* 90 Wis. 635, 64 N. W. 425.

So far as the matter in question is one upon which men in general have a common fund of knowledge and experience, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. But the scope of this doctrine is narrow and should be strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life. *Jenkins v. Southern R. Co.* 146 N. C. 178, 59 S. E. 663.

And the knowledge to which they may resort is that which comes from the common experience of mankind, and is the knowledge that men in general have, not a few in particular; if it is knowledge that comes by the experience of a class in a particular business, it must be proved by evidence. *Bowman v. American Car & Foundry Co.* 226 Mo. 53, 125 S. W. 1120; *Craver v. Hornburg*, 26 Kan. 94.

And they cannot act upon knowledge which is common merely to themselves. *Clark v. Ford*, 7 Kan. App. 332, 51 Pac. 938.

he must have seen the saws and known that they were not covered, and in that event you should take that into consideration." The fault found with the instruction is that the court assumed that it was an established and undisputed fact in the case that the plaintiff must have seen the saws of the lath machine and have known that they were not guarded, if he raised these saws by means of the wheel under the table of the machine; where as the jury would be warranted in reaching a contrary conclusion on the evidence.

A reading of the testimony does not throw any satisfactory light on the question, as very little of it pertains to the point, and that only in an incidental way. In fact, there does not appear to have been

much of a controversy upon the question on the trial. A photograph showing the wheel and the projection of the saws under the table of the lath machine, as well as the absence of a guard, was in evidence. Respondent argues that this photograph shows to a demonstration that the court was right. The trial judge, in his opinion on the motion for a new trial, stated that it was perfectly obvious from an inspection of the photograph that it was impossible to look for and find the little wheel under the lath machine table, by means of which the saws were raised and lowered, and which was located within a few inches of the saws, without seeing the saws and observing that they were unguarded. The conclusion of this court is

Nor can they return a verdict upon common knowledge or experience unsupported by other evidence, or in disregard of other evidence. *Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043; *Hancock v. Chicago, B. & Q. R. Co.* 145 Ill. App. 491; *Burrows v. Delta Transp. Co.* 106 Mich. 582, 29 L.R.A. 468, 64 N. W. 501; *De Gray v. New York & N. J. Teleph. Co.* 68 N. J. L. 454, 53 Atl. 200.

To render improper, arguments and deductions based on common knowledge or experience, it must clearly appear that the verdict was based upon them rather than upon a full and fair consideration of the evidence adduced. *Purcell v. Tibbles*, 101 Iowa, 24, 69 N. W. 1120.

#### *c. Private or personal knowledge.*

The jurors cannot act upon private or personal knowledge of one or more of their number, to the prejudice of one of the parties. *State v. Wright*, 98 Iowa, 702, 68 N. W. 440; *Douglass v. Agne*, 125 Iowa, 67, 99 N. W. 550; *Hydinger v. Chicago, B. & Q. R. Co.* 126 Iowa, 222, 101 N. W. 746; *Missouri River R. Co. v. Richards*, 8 Kan. 101; *Union P. R. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564; *State v. Lowe*, 67 Kan. 183, 72 Pac. 524, 14 Am. Crim. Rep. 693; *State v. Duncan*, 70 Kan. 883, 78 Pac. 427; *State v. Beam*, 1 Kan. App. 688, 42 Pac. 394; *Craver v. Hornburg*, 26 Kan. 94; *Bowman v. American Car & Foundry Co.* 226 Mo. 53, 125 S. W. 1120; *Ewing v. Hoppine*, 55 Neb. 131, 75 N. W. 537; *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 21 N. W. 880; *Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529, 4 Ann. Cas. 272; *DeGray v. New York & N. J. Teleph. Co.* 68 N. J. L. 454, 53 Atl. 200; *State v. Jones*, 29 S. C. 201, 7 S. E. 296; *Ryan v. State*, 97 Tenn. 206, 36 S. W. 930; *Forsyth v. Central Mfg. Co.* 103 Tenn. 497, 53 S. W. 731; *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 392, 64 S. E. 705; *State v. Parker*, 25 Wash. 405, 65 Pac. 776; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064; *Johnson v. Superior Rapid Transit R. Co.* 91 Wis. 233, 64 S. W. 753; *Northern Sup-37 L.R.A. (N.S.)*

*ply Co. v. Wangard*, 123 Wis. 1, 107 Am. St. Rep. 984, 100 N. W. 1066.

No juror has a right to give evidence in the jury room of material facts particularly or peculiarly within his personal knowledge. *Hathaway v. Burlington, C. R. & N. R. Co.* 97 Iowa, 747, 66 N. W. 892.

Indeed, it is held that a juror can neither consider any fact material to the issue, which comes within his personal knowledge, nor can he communicate it to the other jurors, without being in contempt of court and violating his solemn oath. *State v. Jones*, 29 S. C. 201, 7 S. E. 296.

For the province of the jury is to determine a case upon the facts as proved, in connection with the law as given them in the charge by the court; and the jurors should never let their own impressions derived from knowledge of circumstances on their own part, or impressions received from others not introduced as witnesses, to sway their minds or enter into their verdict. *Simms v. Price, Dallam (Tex.)* 554.

So, an instruction authorizing the jury, in arriving at a verdict, to bring to bear their own knowledge, observation, and experience in the business affairs of life, is erroneous when not limited to such knowledge, observation, and experience as they share in common with men generally, since without such limitation the jurors may fairly infer that they are required to bring to bear any special knowledge which they have on the subject, or which is the result of their special observation and experience in like cases. *Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 59 L.R.A. 920, 91 N. W. 880.

And it is held error to instruct the jury that they may use their observation and experience in life in order to arrive at the truth, since they may apply only their common observation and experience, or, in other words, the experience and observation common to ordinary men. *Gloss-Sheffield Steel & I. Co. v. Hutchinson*, 144 Ala. 221, 40 So. 114.

#### *d. Influence upon verdict.*

The successful party ought not to be de-

that it is highly improbable that the plaintiff did not see the saws during the operation, but that it is not an impossibility. The questions therefore are: Does the record show that the court erred, and, if so, was the error prejudicial?

Some significance should be attached to the fact that plaintiff's counsel did not in any way call the attention of the court to the alleged misapprehension of the facts, as we think is customary, though perhaps not obligatory. Trial courts are uniformly careful not to invade the province of the jury in determining questions of fact, and if the court's attention had been called to the alleged error, it would undoubtedly have been corrected, if error it was.

The court and the jury viewed the prem-

feated simply because jurors engage in unnecessary or improper discussion, and a verdict should be set aside where and only where, it appears that it is a result of such misconduct, and that but for the misconduct the verdict would not have been reached. *Montgomery v. Hanson*, 122 Iowa, 222, 97 N. W. 1081.

The rule is that jurors must base their findings upon the evidence adduced on the trial, and may not make an inspection of the *locus in quo*, unless a view is authorized by the trial court. If a juror of his own accord, and without permission, visits and makes an inspection of the premises or thing in dispute, it may be a sufficient cause for vacating the verdict, although it will not have that effect if it is plain that such examination was not influential in obtaining the verdict. *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359.

But the mere statement of the jurors that they were not influenced by statements improperly made by one of their number does not prevent a reversal; it is enough that the matters were such as were calculated to influence the jury. *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

Where the facts wrongfully introduced are calculated to have a powerful effect upon the jurors in reaching their verdict, they cannot forestall the impeachment of the verdict by affidavits that they found their verdict upon the law and the evidence, and were not influenced by any outside pressure. *Mitchell v. State*, 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456.

So, where the statement, although it would not have been admissible in evidence, goes directly to the character of the accused and the very point in issue, and its effect cannot but be prejudicial to him, it is not necessary that the affidavits filed in support of a new trial show actual prejudice. *Terry v. State*, — Tex. Crim. Rep. —, 38 S. W. 986.

For, the statement of jurors that they were not influenced by the consideration of extraneous matters is so fraught with speculation and caprice that it cannot be

ises and the machines in question. The knowledge which jurors acquired from such view they had the right to use in determining the credibility of the evidence offered. *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364, 368, 18 N. W. 328; *Neilson v. Chicago, M. & N. W. R. Co.* 58 Wis. 516, 523, 17 N. W. 310; *Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514; *American States Security Co. v. Milwaukee Northern R. Co.* 139 Wis. 199, 205, 120 N. W. 844, and cases cited. This being so, they had the right to use such knowledge in determining whether the court made a correct statement of fact. We have no means of knowing just what knowledge the jury imbibed from this view. The jurors might have reached a different conclusion from that arrived at by the

made the basis of holding that a fair trial was given, and especially where it appears that the jury, before the matter was discussed, were half in favor of acquittal and half in favor of conviction, and that those who made the statements as a predicate for conviction were themselves insisting upon conviction. *Hughes v. State*, 44 Tex. Crim. Rep. 206, 70 S. W. 746.

Indeed, it has been said that such an affidavit is to be expected from jurors to justify themselves for their own misconduct, and to escape a responsibility imposed upon them by their oath. *Mitchell v. State*, 36 Tex. Crim. Rep. 318, 33 S. W. 367, 36 S. W. 463; *Lankster v. State*, 43 Tex. Crim. Rep. 298, 65 S. W. 373.

So, the fact that, after the improper statements were made by a jury, its attitude changed from a majority for acquittal to a unanimous verdict of conviction, sufficiently shows in itself the pernicious effect of the statements to warrant a reversal, notwithstanding the affidavits of the jurors that they were not unduly influenced. *Mitchell v. State*, 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456.

For, as said in *State v. Burton*, 65 Kan. 704, 70 Pac. 640, 14 Am. Crim. Rep. 688, although the jurors may testify that they were not affected by the statement, this is only because jurors will generally hold to the opinion, and honestly too, that they are not prejudiced by improper influences; and the courts must be vigilant not only when palpable influences have been improperly brought to bear, but also when the influence is such that it will be reasonably supposed to have influenced unconsciously if not consciously, the deliberations of the jury.

Or, as it has been well said, it is not for the juror to say what effect the remarks had upon the verdict; but he may state the facts, and from them the court will determine what was the probable effect upon the verdict. *State v. Parker*, 25 Wash. 405, 65 Pac. 776; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064.

Certainly, the affidavits of only two ju-

court, and might have disregarded his mistake entirely in arriving at a verdict, if any mistake was in fact made.

Section 3072m, Stat. (Laws of 1909, chap. 192), provides: "No judgment shall be reversed . . . on the ground of misdirection of the jury, . . . unless in the opinion of the court to which the application is made, after an examination of the entire action, . . . it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment."

After examining the record, this court is far from being satisfied that the trial court committed any error. The evidence offered, as far as there is any, strongly tends to support the conclusion of the trial court,

and there is no evidence to the contrary. There is, of course, the possibility that the trial court was wrong; but this falls far short of an affirmative showing of prejudicial error, or in fact of any error. Under such circumstances, the judgment should not be reversed. *Wiese v. Riley*, 146 Wis. 640, 132 N. W. 604.

After the jury had been deliberating for some time, they were called into the court room, and the following colloquy took place: "A juror: A question we want to know was this: I asked you the other day if, in deciding this question, jurors were supposed to take into consideration the things in regard to this,—in case they positively know this from experience. For instance, if one has, to use a hypothetical

rors that they were not influenced by the statement are insufficient to show that the verdict was not thereby affected. *Hardiman v. State*, — Tex. Crim. Rep. —, 53 S. W. 121.

### **III. Knowledge relating to matters not in evidence.**

#### **a. Generally.**

It is held that jurors may act upon matters of common observation within their general knowledge, even though there be no testimony as to such matters. *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107, 89 Pac. 212.

And the finding of a jury in respect of matters as to which men of ordinary knowledge and observation have some practical knowledge cannot be attacked on the ground that there was no evidence to sustain it, merely because of the lack of expert testimony on the subject, since on such matters jurors are capable of forming their own opinions, though they might be assisted by the opinions of competent experts. *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A.(N.S.) 962, 92 C. C. A. 357, 166 Fed. 663.

The extraneous matter introduced by jurors into the consideration of their verdict, which will overthrow the verdict, must be statements of prejudicial matters of fact outside the evidence, based upon the personal knowledge or claimed personal knowledge of the juror making the statements, which, from the nature of the statements made, the jury may accept as evidence of the fact asserted, and not as the mere expression of opinion by the juror. *Hulett v. Hancock*, 66 Kan. 519, 72 Pac. 224.

Where something is lacking in the evidence, the jury cannot supply it, and return a verdict upon its own knowledge unsupported by other evidence, whether such knowledge is acquired in or out of court, by a view or otherwise; and a verdict based exclusively on knowledge so acquired will be set aside for want of substantial evidence to support it. *Seaverns v. Lischinski*, 181 37 L.R.A.(N.S.)

Ill. 358, 54 N. E. 1043; *Hancock v. Chicago, B. & Q. R. Co.* 145 Ill. App. 491.

So, a charge which authorizes the jury to call to its aid whatever of experience and observation its members may have had in the matters under consideration is reversible error, in that under it the jury might decide the case upon matters of fact not brought to the attention of the court, parties, or counsel. *Chicago, R. I. & P. R. Co. v. Spring Hill Cemetery Asso.* 9 Kan. App. 882, 57 Pac. 252.

As shown under another subdivision of this note, the question is governed in Texas by a statute providing that a new trial shall be granted where the jury has received other testimony after retiring to deliberate upon the case. As shown under that subdivision, it is held that this statute does not simply authorize, but requires, a reversal, at least where the statements by a juror are material and essentially prejudicial. This statute should be kept in mind in surveying the Texas cases in this subdivision.

#### **b. In criminal cases.**

##### **1. Generally.**

It is improper for the jury to consider extraneous matters concerning the bad reputation of the accused's family, which would not have been admissible in evidence. *Gilford v. State*, 49 Tex. Crim. Rep. 275, 92 S. W. 424.

So, a conviction for homicide will be set aside where one juror stated that a light penalty would be insufficient, since, when the defendant should have served out the short term imposed, he would not be as old as his father when he got out of prison, and called attention to what the father had done upon his release, having reference to a homicide thereafter committed by him; and it also appears that jurors who had previously been in favor of light sentence agreed to a term of twenty-five years. *McDaniel v. State*, — Tex. Crim. Rep. —, 77 S. W. 802.

Where the defense to a prosecution for burglary is that the accused went into the

case, if he is an expert, is the juror supposed to use the information that he knows in regard to that, in weighing this evidence and convincing other jurors as to the facts of the case? The Court: I understand your question, I think. It is usual to instruct a jury in some cases that they are expected to use all of the knowledge, skill, and judgment that they possess, and bring that to bear upon questions involved. A juror who has expert knowledge—that is, personal, not hearsay—is entitled to bring that to bear in assisting him and in assisting the other jurors in arriving at a right verdict. In fact, it is impossible to separate a juror from his personal knowledge anyway, and he is expected to use that. That is part of his mental equipment in

discharging his duty. The juror: In this case, it has developed there are several that understand the construction of these machines. We can't very well separate from— The Court: You are not required to separate that knowledge from anything else. You are entitled to use it."

It is argued that the court committed prejudicial error in that the jury were advised that they might return a verdict upon their knowledge, or supposed knowledge, not derived from the evidence in the case. The language used by the court was not happy, in that there is a possibility that it might have misled the jury into the belief that they were at liberty to treat their knowledge as evidence, and decide the case upon such knowledge, rather than upon the

building to wait for a train, and, after the retirement of the jury, one of its members states that the accused could not have been waiting for a train "because I lived out that way, and the train does not stop at said mill," a conviction will be set aside, no evidence having been introduced upon the point involved in the statement. *Dixon v. State*, 46 Tex. Crim. Rep. 154, 79 S. W. 310.

So, prejudicial error warranting the reversal of a conviction for homicide occurs when, during the deliberations of the jury in the consideration of the necessity for killing the deceased, so as to justify the homicide, one juror states that the deceased was nothing but a bluffer and would not have hurt anyone, and other jurors state that the defendant was found guilty of murder in the first degree on the first trial, and that there was no reason why a different verdict should then be rendered, and that everyone in the vicinity believed the defendant to be guilty of murder in the first degree. *State v. Burton*, 65 Kan. 704, 70 Pac. 640, 14 Am. Crim. Rep. 688.

And a conviction of larceny will be reversed where one of the jurors, during the discussion as to whether the prosecutor had possession and ownership of the property, stated that he knew of a similar case in which the accused was convicted. *Barnes v. State*, 43 Tex. Crim. Rep. 355, 65 S. W. 922.

## 2. Character or previous conduct of accused.

The statement by some of the jurors in a homicide case after their retirement for deliberation, that the accused killed another man some time previously, while highly improper, is not reversible error, where it appears that the matter was mentioned but once, and was then suppressed by the foremen, and that the jurors were not influenced by it. *Moore v. People*, 26 Colo. 213, 57 Pac. 857.

So, where the defendant in a prosecution for forgery has not been prejudiced, his conviction will not be reversed merely be-

cause some of the jurors during, their deliberations stated, apparently for the purpose of influencing the only juror who stood for acquittal, that the defendant had been caught with a woman or women in a certain block, that he had been in numerous "scrapes," that he was generally crooked, and that he was a bad man generally, and ought to be convicted. *State v. Olds*, 106 Iowa, 110, 76 N. W. 644.

But a conviction for larceny will be set aside where, during the jury's deliberations, one juror, notwithstanding his declaration on his *voir dire* that he had no knowledge of the case nor prejudice which would prevent him from giving the defendant a fair trial, stated to the jury that the accused was guilty of another offense; that he had shot a man at one time, and that it had cost the county \$2,800; that he was a bad man, who should not be turned loose, but should be convicted,—when considered in connection with similar statements which he pressed upon the jurors as arguments in favor of conviction. *State v. Lowe*, 67 Kan. 183, 72 Pac. 524, 14 Am. Crim. Rep. 693.

But a conviction of homicide will be set aside where one juror stated in the presence of several of the others, that he was a member of a grand jury which had indicted the defendant for an attempt to commit murder upon another person by going up behind him and hitting him with a heavy wrench, and that the prosecution for that offense was still pending in the criminal court; and the juror stated at another time that the defendant was a dangerous man to the community, or words to that effect. And such misconduct is not less serious because it was not made after the jury retired to consider the verdict, but was casually made some time during the progress of the trial,—not when the jurors were discussing the question of guilt or innocence of the defendant, but when the offending juror was reciting to his fellows the reason for his not wishing to serve upon the jury; nor is it less a cause for reversal, because it was not heard by all of the jurors, or because the jurors other than the one making the statement were examined, and without exception



testimony, and even in opposition thereto. This they might not do. *Washburn v. Milwaukee & L. W. R. Co.* 59 Wis. 364, 370, 18 N. W. 328; *Johnson v. Boorman*, 63 Wis. 268, 22 N. W. 514; *Sherman v. Menominee River Lumber Co.* 77 Wis. 14, 22, 45 N. W. 1079. The court told the jury at the beginning of its charge: "It is your duty to answer these questions according to the fact in each instance, as you shall find the fact to be from the evidence given here in court. . . . In deciding these questions, you should confine your consideration to the evidence given here in court and the proceedings had here in your presence." As to each of the questions propounded to the jury, they were told in substance to answer them according to the preponder-

ance of the evidence. The charge repeatedly informed the jury that the case must be decided upon the evidence given on the trial. The juror who asked the question above quoted undoubtedly so understood the charge, because he did not ask if the jurors might use their special knowledge as evidence, but if the jurors might consider such knowledge in weighing the testimony offered by the parties.

In view of the repeated statements of the court above referred to, we think the jury would construe the somewhat ambiguous language of the court as no more than an affirmative answer to the question asked, and as informing them that they might use the knowledge which they had gained from observation and experience in

testified that the statement did not in the least affect their opinion as to the guilt or innocence of the defendant. *Ryan v. State*, 97 Tenn. 206, 36 S. W. 930.

So, a conviction for homicide will be reversed where it appears that one or two jurors stated, after the jury's retirement, that the accused had previously killed another man, and made other statements tending to show that the accused and other members of his family were dangerous characters,—and especially where it appears that after such statements were made the attitude of the jury changed from a majority in favor of acquittal to a unanimous verdict of conviction. *Mitchell v. State*, 36 Tex. Crim. Rep. 278, 33 S. W. 367, 36 S. W. 456.

And a conviction of homicide will be reversed where, after the jurors had determined the guilt of the accused, and while they were trying to fix the punishment, one of the jurors stated that this was not the first man the defendant had killed, and that if the deceased's dying declarations had been admitted in evidence, the jurors would have known why the deceased had previously gone to the penitentiary, the latter remark having reference to a case in which the defendant and the deceased had previously been indicted for murder, and in which the former was acquitted and the latter convicted. *Blocker v. State*, — Tex. Crim. Rep. —, 61 S. W. 391.

So, a reversal will be granted where, in a prosecution for the stealing of a calf, a member of the jury states, after his retirement, that he knows the accused, and that he is in the habit of stealing calves. *Terry v. State*, — Tex. Crim. Rep. —, 36 S. W. 986.

And the statement of a juror on a trial for bribery, that the defendant had been previously convicted of arson, when taken in connection with comments upon the failure of the defendant to testify, is sufficient to warrant a reversal, where its probable effect was to influence the minds of the jurors, and there was no evidence in the case as to the conviction for arson. *Maples* 57 L.R.A. (N.S.)

*v. State*, 60 Tex. Crim. Rep. 169, 131 S. W. 567.

And a conviction for theft will be reversed where, before a verdict is reached, two of the jurors state that the defendant is the biggest rogue they have ever seen or heard of, that she ought to be hung, and that they would be willing to hang her if the law would permit it; and one of such jurors enumerates several instances of theft by the defendant, and both of such jurors alone stood for the maximum penalty for a considerable time. *Holmes v. State*, 38 Tex. Crim. Rep. 370, 42 S. W. 996.

The statement by two members of a jury in a burglary case, that the defendant had previously been in the penitentiary, when considered together with the fact that before the statement was made some of the jury were in favor of assessing a minimum penalty whereas a longer sentence was afterwards agreed upon, cannot be said not to have influenced the jury so as to warrant the denial of a new trial. *Hardiman v. State*, — Tex. Crim. Rep. —, 53 S. W. 121.

And where, during the jury's deliberation in a burglary case, one juror states that he does not like the defendant's morals, and intimates that he is connected with a gang of thieves, a conviction will be set aside; and especially so where it appears that before the statement, the jury stood seven for acquittal and five for conviction. *Crow v. State*, 47 Tex. Crim. Rep. 225, 82 S. W. 1033.

So, a conviction for rape will be set aside, where, after the jury had retired, some of its members mentioned the fact that the accused had just been convicted of a similar offense, and, although the foreman suppressed any discussion of the matter, it was repeatedly brought up and alluded to by the members of the jury, there being no evidence in the case as to the prior offense. *Hopkins v. State*, — Tex. Crim. Rep. —, 58 S. W. 986.

And a conviction of rape will be set aside, where, in assessing the punishment, a juror referred to certain acts and state-

determining the credibility of the evidence. What the juror said in effect was that he and some of his fellow jurors had practical knowledge of the construction of lath machines, not common to all the panel. The language used by the court was certainly no more calculated to mislead than the charge which was held not to be erroneous in *Neanow v. Uttech*, 46 Wis. 581, 586, 1 N. W. 221. There the court instructed as follows: "You are to bring to bear upon this question [the exercise of ordinary care] your own knowledge and your own judgment. It is for you to examine all the testimony, all the surroundings, all the circumstances, and then apply your own judgment, your own good sense, and answer

the question, either in the negative or the affirmative."

There was no assertion that the jurors had any knowledge of the specific facts in the case on trial, and nothing to indicate that the juror who asked the question, or any of his associates, was a competent witness, rather than a qualified juror. It is well settled that jurors cannot supply a material item of evidence by assuming knowledge on the subject. It is just as well settled that it is highly improper for a juror to assert in the jury room knowledge on some specific point involved in the trial which would make him a material witness. If use is to be made of such knowledge, it should be given under oath from the witness stand, where the party adversely af-

ments not in evidence, tending to show that the defendant was inclined to commit and did commit sexual improprieties. *Sims v. State*, — Tex. Crim. Rep. —, 70 S. W. 90.

And a conviction for violation of the liquor law will be reversed, where it was stated in the jury room that the "defendant had been keeping his sister-in-law," and some of the jurors stated that the defendant had bought an interest in a certain drug store for the purpose of selling liquor, and that liquor was sold in such store everyday, none of these things having any basis in the evidence adduced. *Williamson v. State*, — Tex. Crim. Rep. —, 136 S. W. 1071.

And there is such misconduct as warrants a new trial, where a juror who, on his *voir dire* examination, states that he does not know the accused, that he has not heard of the case or the defendant, and that he is free from bias or prejudice, declares, after the retirement of the jury, that he knows the accused to be equally guilty with his codefendant, because both were members of a gang of toughs who had occupied a shack in which a man had been murdered, and that the defendants had been implicated in the killing. *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

And where there was no evidence concerning the character of the accused, but one of the jurors stated that he was a bad man, and had been on the county convict farm, and that he, the juror, had guarded on that farm, and it appears that the punishment was assessed at a greater period than the jury was inclined to impose before the statement was made,—the conviction will be set aside. *Vanduran v. State*, 50 Tex. Crim. Rep. 440, 98 S. W. 247.

### **3. Results in former trial for present offense.**

It is error for the court, on a motion for a new trial of one convicted of false pretenses, to refuse to hear evidence that during the jury's deliberation, one juror stated that the accused had been convicted 57 L.R.A.(N.S.)

upon a former trial, and that another juror stated as a fact that the accused had some time previously defrauded another out of property. *State v. McCormick*, 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

And a conviction of homicide will be reversed, where it appears that after the jury had agreed on a verdict of guilty, but before they had decided on the punishment to be assessed, one of the jurors mentioned the fact in the presence of the jury that the accused had been tried twice before, and the first jury gave him twenty-five years, and the second fifteen years, in the penitentiary. *Lankster v. State*, 43 Tex. Crim. Rep. 298, 65 S. W. 373.

So, a conviction for homicide will be set aside, where jurors in favor of conviction stated that two former convictions had been reversed, and that the people were expecting a verdict corresponding with the former verdict, even where the jurors make affidavit that they were not influenced by such statements, and expressly refused to consider them, and although their affidavits find some support in the fact that the juries on the former trial assessed the punishment at twenty-five and twenty-one years respectively, whereas the jury whose acts are complained of imposed a sentence of only three and one-half years. *Hughes v. State*, 44 Tex. Crim. Rep. 296, 70 S. W. 746.

And a conviction will be set aside, where, in assessing the punishment, one juror asks what sentence the defendant got on a former trial, and another answers that it was fifteen years, and then a similar verdict is rendered. *Hefner v. State*, 44 Tex. Crim. Rep. 441, 71 S. W. 964, 14 Am. Crim. Rep. 682.

This is so because evidence of the fact would not have been admissible upon the trial. *Morawitz v. State*, 49 Tex. Crim. Rep. 366, 91 S. W. 227.

And the discussion of the matter of the penalty awarded on a former verdict will be ground for setting aside a conviction, even though it does not seem to have any influence, by reason of the fact that a less term of imprisonment was imposed than

fectured would have the right of cross-examination.

So we think the real question here is, May one or more jurors use the knowledge which they have gained from observation and experience, not common to all the jurors, in determining the credibility of the evidence offered, and give the benefit of such knowledge to their fellow jurors who may lack such information? Lawyers know that jurors always have and always will do just what we think the court in effect said might be done here, and it is difficult to see how they could well do otherwise. If a juror knows that a plaintiff in an action is a man of character and standing, whose word is as good as his bond in the community in which he lives, and that the defendant is shift-

tricky, untruthful, and unreliable, and a question of veracity arises between the two, it is well-nigh impossible for him to remain oblivious to the facts which he knows, when he is determining the question of credibility. So, too, when one witness testifies to something which the observation and experience of the juror tells him is false, while another witness has testified in reference to the same matter to what he knows to be the truth, it is difficult to imagine how a juror could disregard what he knows, in passing upon the credibility of the witnesses. If he could do it, it is not desirable that he should, because that knowledge is part of the equipment which he brings with him to the jury box. A person is not supposed to forget everything that he ever

by the former verdict; but the rule which inhibits any sort of discussion by members of the jury in the jury room of the former verdict should be rigidly adhered to, and it cannot be said absolutely that, notwithstanding the verdict for a lesser term than was imposed by the former verdict, the fact of the former conviction could not have had some influence with the members of the jury. *Casey v. State*, 51 Tex. Crim. Rep. 433, 102 S. W. 725.

*A fortiori* a new trial will be granted, where it appears that the jurors used a verdict in a prior trial as an actual predicate for their own verdict, and that the jurors alluded to the defendant's failure to testify, and, after one juror had suggested that the previous verdict was twenty years, another suggested it would not do to make the verdict the same, whereupon they rendered a verdict of twenty-one years. *Hill v. State*, 54 Tex. Crim. Rep. 646, 114 S. W. 117.

But the Texas court holds that a reversal will not be granted for mere comment upon the fact of a former conviction, where the comment gives the jurors no information which they did not possess when they became jurors, and which knowledge they avowed before they were accepted as such. *Oates v. State*, 56 Tex. Crim. Rep. 571, 121 S. W. 370.

The considerations which forbid a discussion of the nature of the verdict and the extent of the penalty on a former trial of the accused make it reversible error for the jurors to consider the nature of the verdict and the extent of the penalty against the accused's codefendant. *Horn v. State*, 50 Tex. Crim. Rep. 404, 97 S. W. 822.

#### *c. In civil cases.*

A reversal will be granted where the case is prejudiced by jurors' statements in the jury room of facts within their knowledge with reference to the issues, and by the fact that outsiders talked and argued the case in the presence of the jurors or some of them. *Hydinger v. Chicago, B. & Q. R. Co.* 126 Iowa, 222, 101 N. W. 746.  
37 L.R.A. (N.S.)

And a verdict will be set aside, where one juror stated to the others that the defendant had, as a compromise, offered to give the plaintiff employment for a certain period at a certain rate, and that, on a former mistrial of the case, ten of the jurors had favored awarding the plaintiff \$8,000 damages, one \$1,500, and the other had favored no damages; and especially where it appears that one of the jurors on the subsequent trial, who had favored a verdict for \$500, agreed after such remark to a verdict for \$2,500. *Jackson & Suburban Street R. Co. v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

So, a verdict for the defendant in an action to recover for injuries to a minor son is vitiated by the fact that it was induced by a statement of some of the members of the jury during its deliberations, that the child had already recovered for the injuries. *Forsyth v. Central Mfg. Co.* 103 Tenn. 497, 53 S. W. 731.

But in *Hulett v. Hancock*, 66 Kan. 519, 72 Pac. 224, it was held that where, on a motion for a new trial of an action between lender and borrower, in which the question of usury was not an issue, it appears that one member of the jury said, after its retirement, that the lender's original investment in the claim was probably very small, and that most of it represented usury, and another juror stated that when a man against whom the lender held a note died, it usually turned up for more than the amount for which it was originally executed, and other jurors stated that if injustice was to be done to either party, it would be best to find against the lender, as he was well able to appeal, while the borrower was not, as she was poor,—the verdict for the borrower would not be set aside, since the statements of the juror, while in their nature prejudicial, and not properly made in the jury room, were more in the nature of expressions of opinions of the jurors making them, than positive statements of fact within their knowledge, or claimed to be within their knowledge, especially where the trial court had passed upon the matter and upheld the verdict.

knew, and become an automaton, when he is sworn as a juror. He may make use of the intelligence with which he is endowed, and the knowledge he has gained, for the legitimate purpose of passing upon the credibility of the evidence.

It is said in the discussion of the first error assigned that jurors may use the knowledge which they acquire from a view of the *locus in quo* in passing upon the credibility of evidence, and the proposition is well settled by the cases cited and referred to. Knowledge gained in this way is no more sacred than knowledge acquired in some other way, provided it is actually acquired. It is proper for trial courts to instruct juries that in weighing testimony they must take into consideration their

knowledge, observation, and experience. Such an instruction has been approved by this court. *Johnson v. Boorman*, 63 Wis. 268, 274, 275, 22 N. W. 514. Juries are frequently and properly told that in determining the credibility of the testimony, they may consider the appearances of witnesses on the stand, the manner in which they give their testimony, and the candor or lack of candor with which it is given. So, too, it has been held proper to instruct a jury in a personal injury action brought by a minor, that they might consider the plaintiff, as he had been exhibited before them on the witness stand, in determining the question of his intelligence and capacity to apprehend and avoid the dangers incidental to his employment. *Disotell v.*

The custom of using coal oil in kindling fires being a matter of common knowledge and observation, it is proper to instruct the jury in an action for injuries resulting from the sale of oil below standard, although there is no evidence on the matter, that they may determine whether the use of coal oil to kindle fires is a usage or custom so general and universal as to be a part of the general knowledge and experience of persons of average intelligence and experience, and whether the defendant at the time he sold oil had reason to believe it might be used for that purpose. *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107, 89 Pac. 212.

#### IV. *Weighting evidence by knowledge as to matters adduced.*

##### a. *Generally.*

Jurors are not artificial beings governed by artificial or fine spun rules; but they should bring to the consideration of the evidence before them their everyday common sense and judgment as reasonable men; and they as jurors should draw and act upon the same just and reasonable inferences and deductions which they as men would ordinarily draw from facts and circumstances proved in the case. *State v. Elsham*, 70 Iowa, 531, 31 N. W. 66.

They are not expected to lay aside matters of common knowledge, or their own observation and experience of the affairs of life, but on the contrary, they are supposed to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct. *Chicago, M. & St. P. R. Co. v. Moore*, 23 L.R.A.(N.S.) 962, 92 C. C. A. 357, 166 Fed. 663.

Indeed, in weighing evidence, they always exercise their judgment in the light of their own general knowledge of the subject in hand, whether instructed to do so or not, and therefore neither an instruction, nor a refusal to instruct, that they may use that knowledge in weighing the evidence, is

error. *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

And an instruction that the jurors have the right in elucidating or explaining the testimony and arriving at their verdict, to take into consideration any knowledge which they may have which is common to mankind generally, touching the matters testified about, is not open to the objection that it authorizes the jury to go beyond the evidence. *Denver & R. G. R. Co. v. Waring*, 37 Colo. 122, 86 Pac. 305.

But if a juror has personal knowledge respecting matters in issue in the cause, he should make the same known during the trial, and testify as a witness in the case, for it is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him; and in any event, it is the jury's duty to be governed by the evidence introduced on the trial, and by the instructions of the court. *Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537.

However, a reversal will not be ordered where the personal knowledge was not so closely related to the subject under consideration as to justify the court in thinking that substantial prejudice resulted from its communication to the jury. *Karner v. Kansas City Elev. R. Co.* 82 Kan. 842, 109 Pac. 676.

##### b. *In criminal cases.*

Where one charged with perjury concerning a certain occurrence defends upon the ground that he was so drunk at the time of the occurrence that he could not remember what happened, and a juror, during the deliberation on the case, states that he met the defendant the day following the occurrence, and that his mind and general appearance seemed to be all right, a verdict of guilty will be reversed. *Hambright v. State*, 47 Tex. Crim. Rep. 518, 84 S. W. 597.

And a conviction for assault with intent to murder, alleged to have been committed upon the defendant's wife, will be reversed, where it appears that some of the jurors stated that the defendant was not the

Henry Luther Co. 90 Wis. 635, 64 N. W. 425. In fact, cases in this court, and generally elsewhere, are to the effect that jurors may use common knowledge in deciding the weight that is to be accorded to the evidence adduced.

There is authority for the proposition that the knowledge which a juror may use in enabling him to pass upon the credibility of testimony must be knowledge that is common to all the jurors, and an *obiter* expression, in *Northern Supply Co. v. Wan-*

father of the wife's child, as the child had been born at a certain time, and the defendant was in the penitentiary at that time and previously, and such statements were considered by the jury for the purpose of weighing the defense that the defendant did not call upon his wife for the purpose of committing the assault, but for the purpose of seeing his child. *Favro v. State*, — Tex. Crim. Rep. —, 59 S. W. 885.

And a conviction will be reversed where, in connection with the question whether or not certain footprints were those of the defendant or a third person who lived in the neighborhood, one or two jurors who were familiar with the location explained to the others the location of the third person's house with reference to the prosecutor's and the accused's, and drew a plat of the surroundings for the purpose of showing that the tracks could not have been made by the third person in the route he traveled, no evidence having been introduced with respect thereto. *Buessing v. State*, 43 Tex. Crim. Rep. 85, 63 S. W. 318.

But the making of a map from personal knowledge and memory will not warrant a reversal, where it had no effect upon the verdict. *Makey v. Dryden*, — Tex. Civ. App. —, 128 S. W. 633.

And a reversal was denied where the drawing of a diagram by one personally acquainted with a building in which the shooting was alleged to have occurred did not prejudice the defendant. *Railey v. State*, 58 Tex. Crim. Rep. 1, 121 S. W. 1120 125 S. W. 576.

A conviction of larceny will not be set aside upon an affidavit on information and belief that, after the jury's retirement, one member said to the others that he had been told by one who claimed to have heard the statement from a third party, that the defendant had keys to some buildings in the city, and that he (the third party) had good reason to believe that the defendant had entered his store by means of such keys. *State v. Sprague*, 149 Mo. 409, 50 S. W. 901.

A jury in a prosecution for the larceny of live stock may be properly instructed that they have the advantage of being men who are acquainted with the situation in the country, and the manner of procedure in relation to stock, in all the little details which go to form their general knowledge of the character of the business, and the way property of the kind is handled; and 37 L.R.A. (N.S.)

gard, 123 Wis. 1, 107 Am. St. Rep. 984, 100 N. W. 1066, might well be understood as so holding. This would seem to be a narrow rule, if not an unwise one. The knowledge which men acquire in the rugged school of experience is a valuable asset to them, when they are called upon to perform jury duty. If there is a conflict in evidence pertaining to some fact upon which a farmer has acquired knowledge by his experience, which is not common to the general run of mankind, but which enables him

that this gives them an opportunity to use their knowledge in judging the rightful owner of the property. Such an instruction does not authorize the jury to reach a verdict on its own knowledge, irrespective of the evidence in the case. *State v. Belkstrom*, 20 S. D. 1, 104 N. W. 481.

It has been held in Iowa that the act of a juror in a trial for maintaining a liquor nuisance, in stating to the other jurors that he knew that liquor had been sold at this place, as he had drank it there himself, while highly reprehensible, is not ground for reversal, unless it appears that the jury acted upon the statement rather than upon the evidence submitted to them. *State v. Wright*, 98 Iowa, 702, 68 N. W. 440.

But the Kansas supreme court holds that a new trial of a prosecution for the illegal sale of liquor should be granted where it appears that during the jury's deliberations, one juror stated that he knew it was beer which the accused was selling, because he drank some of it himself; and that he knew the accused sold intoxicating liquors, and that he had followed the business for years. *State v. Duncan*, 70 Kan. 883, 78 Pac. 427.

And the Kansas appellate court holds that where, in a prosecution for violation of the liquor law, it becomes material to determine whether the person alleged to have done the physical act of selling was the employee of the defendant, a statement by one juror to the other that such person was in the defendant's employ, and had been for some time, is sufficient to set aside the conviction, where, although there was some slight evidence tending to establish such fact, it is impossible to say, in view of the fact that the evidence was slight, that the jury were not governed by such statement rather than the evidence, in making up their verdict. *State v. Bean*, 1 Kan. App. 688, 42 Pac. 394.

### c. In civil cases.

#### 1. By concrete knowledge of physical facts.

See also subdivisions V. b, *infra*, and IV. b, *supra*.

Where, in an action for damages for change of the grade of a street, one juror states his personal knowledge and observation as to the improvement and its effect, and not only bases his own conclusion part-

to decide with accuracy who is telling the truth, the half dozen farmers who may be on a jury should be permitted to use their knowledge, and give their *confrères* the benefit of it. The other jurors are not bound to accept the statements as conclusive, but may give them such weight as they think they are entitled to. What is true of the farmer is true of those following other vocations. Usually our juries are cosmopolitan in character, being made up of the farmer, the mechanic, the business man,

and the ordinary laborer. It is largely because juries are selected from all the walks of life that they ordinarily make such desirable triers of fact. Some jurors on almost every panel are at least apt to have some knowledge that is not common to all the jurors, and which may be a valuable aid in separating false or mistaken testimony from that which is true. Take the ordinary case of an accident at a street crossing, where the alleged negligence consists in running the car at an excessive rate of

ly thereon, but uses them to influence his fellow jurors in arriving at their verdict, the verdict will not be permitted to stand. *Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529, 4 Ann Cas. 272.

And where, in an action against the city for injuries on a sidewalk, one member of the jury, during its deliberations, states to his fellow jurors what he claims to be the facts within his personal knowledge relating to the sidewalk in question, his conduct will be regarded as prejudicial error, where the fact that the statements were given some weight, and may have affected the verdict, is apparent from their nature. *Wilberding v. Dubuque*, 111 Iowa, 484, 82 N. W. 957.

So, the granting of a new trial for misconduct of the jury does not constitute an abuse of discretion, where, in an action involving the sufficiency of a railroad fence, two of the jurors stated, after the jury's retirement, that they as employees of the railroad company had helped to build the fence, and that it was good, strong, and well built, and another stated that the company always braced the fence when it was necessary, and other jurors stated facts and circumstances within their observation relating to the violence of the cyclone by which the fence was alleged to have been torn down. *Bohn v. Chicago & N. W. R. Co.* — Iowa —, 78 N. W. 200.

But conceding the impropriety, in an action in which the exhaustibility of the water of a well became material, of the statement of one member of the jury, during its deliberations, that he has put down walls, and that when sheet water is reached, it cannot be pumped out; and the remark of another, speaking of wells in his own neighborhood, that when sheet water is reached, it cannot be exhausted,—they will not constitute reversible error, where it does not appear that they were at all instrumental in inducing the verdict, nor that a fair and impartial trial has not been had. *Purcell v. Tibbles*, 101 Iowa, 24, 69 N. W. 1120.

## 2. By application of general knowledge and experience.

The jurors must not, in determining the sufficiency of guards and warnings around an excavation in a boulevard, allow their personal knowledge and experience to have the weight of evidence in respect of the common use of the boulevard for speed-  
57 L.R.A. (N.S.)

*ing. Karrer v. Detroit*, 142 Mich. 331, 106 N. W. 64.

And it is error to instruct the jurors that they may take into consideration their own experience as to whether telephone lines are detrimental to the market value of abutting property, and make compensation, if in their experience such structures are detrimental; for such an instruction gives the jurors the impression that they are at liberty to accept or reject as they choose the evidence taken in the cause. *DeGray v. New York & N. J. Teleph. Co.* 68 N. J. L. 454, 53 Atl. 200.

The distance in which a railroad locomotive going at a certain rate can be stopped is not a matter of common knowledge, and the jury therefore cannot ignore uncontradicted evidence of an expert with respect thereto, for if jurors have expert knowledge on the question, they must present it as witnesses, and not as jurors. *Union P. R. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564.

So, they cannot act upon their own knowledge and experience, instead of the evidence introduced, in determining whether the use of a screen in a smoke stack would have prevented the communication of fire. *Burrows v. Delta Transp. Co.* 106 Mich. 582, 29 L.R.A. 468, 64 N. W. 501.

As to whether the fact that a pile of pig iron is 7 or 8 feet high renders it dangerous, men of particular experience in that business may be allowed to testify; but neither the court nor the jury can take judicial cognizance that such is the fact. *Bowman v. American Car & Foundry Co.* 226 Mo. 53, 125 S. W. 1120.

The jury may, as a matter of common knowledge, take into consideration the fact that a person walking at an ordinary rapid gate will travel about 4 miles per hour, for the purpose of approximating the rate of a locomotive engine upon the basis of the period which elapsed from the time the person stopped, looked, and listened until he was struck by the engine. *Merrill v. Minneapolis & St. L. R. Co.* — S. D. —, 129 N. W. 468.

And the jury will be assumed to know in a general way, of the amount and character of the traffic ordinarily carried on upon a public street, at least to the extent of recognizing that the street was not merely a laid-out highway, but an important thoroughfare of the city; and they may take these facts into consideration in determin-

speed, and some witnesses swear that it was running 30 miles an hour, while others say it was running but 3 or 4 miles an hour, and the undisputed evidence is that the car was stopped within 10 feet or less from the place of collision. Many jurors who live in rural districts may not know anything about the distance within which a car may be stopped. Other jurors may know from their observation and experience that a car

going at the rate of 30 miles an hour cannot be stopped in 10 feet. Must they devote themselves of this knowledge, because it is not common to all the jurors? We do not think so. Looking at the question from a practical point of view, they cannot do so, and there is little use in building up a theoretical rule of law that will not, and in fact cannot, work when it is put to practical application. There is a greater dearth

ing whether a street car was run at a dangerous rate of speed, so as to render the railway company liable for damages thereby caused. *Metropolitan Street R. Co. v. Summers*, 75 Kan. 342, 89 Pac. 652.

A reversal will not be granted where, during the jury's deliberations involving the speed of a street car, one member told the others that he had been a railroad man and knew how long it took to stop an engine and train, and how far a train would run in stopping when running at a certain speed, and advanced that fact as an argument against the plaintiff's right to recover; but it is not shown just what bearing the statement had upon the controversy. *Karner v. Kansas City Elev. R. Co.* 82 Kan. 842, 109 Pac. 676.

So, a new trial of an action for setting fire by a railway locomotive will not be granted merely because two members of the jury who had had experience in running engines talked with the other jurors about their conclusions from such experience, where it is not shown what their conclusions were, and it cannot be said that any prejudice resulted therefrom. *Lillard v. Chicago, R. I. & P. R. Co.* 79 Kan. 25, 98 Pac. 213.

In *Jenkins v. Southern R. Co.* 146 N. C. 178, 59 S. E. 663, involving the propriety of leaving it to the jury to say whether freight was transported within a reasonable time, the court said that the rule permitting jurors to use their own common sense, knowledge, and experience should be cautiously applied, but that the jury were warranted in finding for the plaintiff where it appeared that it took thirty-five days to transport the goods 200 miles. "While we are clearly of the opinion," said the court, "that in this case the jury were fully justified in finding the issue for the plaintiff, we do not commend the practice becoming too common of submitting causes to juries upon slight evidence, especially when the party having the burden of the issue may so easily show the very truth of the matter. When the distance is greater and the time shorter, we would not be disposed to relax the safe rule that the plaintiff must make out his case by the introduction of evidence. If, as is contended, the matter is so well known that jurors are asked to act upon their common knowledge, it certainly cannot be an unreasonable burden upon the plaintiff to require him to introduce some evidence."

In determining whether a defect in a plank alleged to have caused the death of a servant is such as to charge the master 37 L.R.A. (N.S.)

with notice of it, the jurors are not, when a part of the plank is introduced into evidence, bound by the testimony of expert witnesses, but may use their own intelligence and their own experience with lumber, which they brought with them into the jury room, it being as much their duty to use that information as the information they get from the witnesses. *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 33, 47 C. C. A. 367, 108 Fed. 335.

And in *Stiles v. Neillville Mill Co.* 87 Wis. 266, 58 N. W. 411, involving the sufficiency of a wall alleged to have been defective, because after a certain height surplus material was used, so as to deprive the wall of uniformity and straightness, the court upheld the following charge, without comment: "I might as well charge you here as a matter of law that you are not obliged to take the testimony of any witness whose testimony seems improbable, and who has had no better opportunity to observe and judge of the strength of such a wall than you have. So, if any witness has testified here that this wall, by reason of being constructed in the manner it is, is less safe than if constructed in line, and that does not accord with your experience, observation, and knowledge of such matters, of course, you will use your judgment, and reject this testimony."

So, although there is no competent proof as to the proper manner of unloading a section of fire escape from a wagon, the question as to whether the method adopted was improper, so as to warrant an action for injuries received in the operation, may be submitted to the jury, where a description of the section and the actual method of unloading it is placed before it by competent evidence. *Dow Wire & Iron Works v. Smith*, — Ky. —, 124 S. W. 819.

The jury may draw such inference as common knowledge will suggest, respecting negligence in lying down and going to sleep in a barn, upon hay or straw, with a lighted pipe in one's mouth. *Lillibridge v. McCann*, 117 Mich. 84, 41 L.R.A. 381, 72 Am. St. Rep. 553, 75 N. W. 288.

And in an action by a minor for personal injuries, it is not error to instruct the jury in effect that they may consider the appearance of the plaintiff as he has been exhibited on the witness stand, in determining the question of his intelligence and capacity to apprehend and avoid the dangers incident to his employment. *Disotell v. Henry Luther Co.* 90 Wis. 635, 64 N. W. 425.

Where, in an action for the communica-

of authority upon the point than one would expect to find. The Massachusetts court, without discussion or citation of authority, intimated, if it did not decide, in *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529, that a juror could use his personal knowledge of some particular fact in weighing evidence only when the fact was a matter of common observation or general knowledge. The South Carolina court holds

tion of fire, it becomes material to determine the direction and velocity of the wind, and a weather bureau expert testifies with respect thereto from observations made from a distant point, it is proper to instruct the jury with respect to the record of the weather bureau as follows: "That record is not made by the hand of man; it is made automatically. It gives the direction and the velocity . . . by means of machinery, and, connected with that machinery, these matters, the velocity and the direction of the wind, are recorded. But that instrument, you will observe, according to the testimony of the witness, was situated in an elevated position, clear from obstruction, and when a man comes before you, and says that the direction of the wind at a certain time was from such a quarter, so many miles away, and was blowing at the rate of so many miles per hour, irrespective of hills or mountains or forests, you will take into consideration your own experience, and the experience of other witnesses who have testified here, whether that instrument is to be believed under such circumstances and at such a distance, or whether your own experience and the testimony of the witnesses are worth anything. Consult your own experience, as well as the report made by the officer." *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487.

#### ***V. Testing credibility of particular witness.***

##### ***a. Generally.***

Jurors may take into account their experience and relations among men, in determining the credibility of witnesses, and an instruction to that effect is not open to the objection that it permits the disposition of a cause upon the whims of jurors, rather than upon the law and evidence as they were learned in the trial. Jurors should be, and as a rule are, selected because of their extensive experiences among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives, and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, even if possible, be laid aside in passing upon the inducement which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering

that a juror who has knowledge of the infamous character of a witness may use that knowledge in passing upon the credibility of the witness, although it may not be common to all the jurors, and in support of its conclusion says, in *State v. Jacobs*, 30 S. C. 131, 136, 14 Am. St. Rep. 897, 8 S. E. 698, 701:

"While it is undoubtedly true that a jury is not at liberty to consider any fact perti-

manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. *Jenney Electric Co. v. Branham*, 145 Ind. 314, 33 L.R.A. 395, 41 N. E. 448; *Cincinnati, H. & I. R. Co. v. Cregor*, 150 Ind. 625, 50 N. E. 760; *Renard v. Grande*, 29 Ind. App. 579, 64 N. E. 644.

And it is reversible error for the court to charge that, in passing upon the question of the credibility of witnesses, the jury should consider motives and temptations to perjury, and should also consider the character of the witness "so far as you know it as bearing upon the question whether a witness would be truthful and reliable or not. My observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth." And the error is not cured by the fact that the court tells the jury that nothing is to be found by conjecture, but that the verdict must be based upon evidence and facts inferable from the proofs. *Johnson v. Superior Rapid Transit R. Co.* 91 Wis. 233, 64 N. W. 753.

But as instruction is vicious which commands the jury to apply its knowledge of human nature to each witness, and, after it has done that, to judge of the weight that ought to be given to the witness's testimony. *Illinois C. R. Co. v. Burke*, 112 Ill. App. 415.

##### ***b. By knowledge of the facts.***

See also *supra*, subdivisions IV. b, and IV. c, 1.

A conviction should be set aside where a juror contradicted testimony of the accused as to a specific and material point, with the result that, whereas the jury was previously hung, it thereafter agreed upon a conviction. *Winslow v. State*, — Tex. Crim. Rep. —, 98 S. W. 241.

And a defendant in a prosecution for convicting at the prostitution of his wife, who is convicted, notwithstanding his testimony that he had never consented to his wife being in a house of prostitution, is entitled to a reversal, where it appears that after the jury had retired, one of its members stated that the place at which the defendant worked, and he and his wife lived, was a house of prostitution. *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064.

So, there is reversible error where, in an action for seduction, in which the plaintiff testified that the act complained of occurred at a certain place, and the jurors considered



nent to the issue which they are called upon to try, unless it is found in the testimony adduced, even though such fact may be known to some one or all of the jury, yet this rule does not, and cannot from the very nature of things, forbid a juror, in weighing the credibility of the testimony, from taking into consideration his own knowledge of the character of the witness delivering such testimony. The credibility of testimony is a question exclusively for the jury, and we do not see how it is possible for a juror in considering that question to

exclude from his mind his own knowledge of the character of the witnesses. The question is, What impression does the testimony make upon the minds of the jurors? and that impression must necessarily be affected by their own knowledge of the character of the witnesses from whom such testimony proceeds. We suppose that it rarely, if ever, happens that the character of at least some of the witnesses is not known to some or all of the jurors, and we do not see how any rule of law can prevent such knowledge from having its weight. If a

statements of the foreman of the jury, that the plaintiff had declared at his home, and previously to the trial, that the intercourse had occurred in another place, and had not stated that it occurred at the place indicated by her testimony. *Douglass v. Agne*, 125 Iowa, 67, 99 N. W. 550.

It is held in *Citizens' Street R. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085, that where a juror inquires of the court as to the proper course for the jury when one member, knowing the circumstances, is satisfied that as a physical fact the statement of one of the witnesses cannot be true, it is error to charge as follows: "Well, that's just a mistake. I have charged you that way before. It don't make the rest of his testimony not the truth, but he is just mistaken as to that. It don't make what he tells as the truth not the truth. It is just a mistake." The court declared that not only was the charge so obscure as to be erroneous in any event, but that it was invading the province of the jury to tell it to consider any statement of a witness as a mistake, and to give full credence to the remainder of his testimony; and that the jury should have been told that the case was to be tried upon the evidence given upon the trial, and not upon knowledge or information which any one or more of the jurors might have outside the record.

#### *c. By knowledge as to reliability of witness.*

A conviction for murder will be reversed where it appears that during the deliberation of the jury, one member said that he would swear he would not believe an important witness for the defendant under oath, and other jurors stated that there had been too many killings of late, and an example should be made of somebody. *Riley v. State*, — Tex. Crim. Rep. —, 81 S. W. 711.

And it is error for a juror to state facts and circumstances tending to show that a witness for the defendant, notwithstanding his acquittal of participating in the offense, was nevertheless guilty. *Williams v. State*, 45 Tex. Crim. Rep. 240, 75 S. W. 509.

Where, on a trial for homicide, an important witness for the state claims the ability to read, but, upon being tested by the court, was unable to do so, the statement of one member of the jury after its

retirement, that the witness had worked for him and was known to him to be an honest and truthful boy, and would not willingly state an untruth; and that the juror knew that the witness could read,— is sufficiently material and prejudicial to warrant a reversal under the Texas statute referred to under other subdivisions of this note, which provides that a new trial shall be granted when the jurors hear other evidence after their retirement. *Tate v. State*, 38 Tex. Crim. Rep. 261, 42 S. W. 595.

And a new trial will be granted of a prosecution for violation of the liquor law, where it appears that after the jury retired, one of its number stated that he knew the state's witness and that he was a truthful man, and another juror stated that a witness for the defendant was under indictment for horse theft, and was unworthy of belief. *Blalock v. State*, — Tex. Crim. Rep. —, 62 S. W. 671.

So, reversible error occurs where one juror states to the other that he personally knows the prosecuting witness, knows him to be truthful and honest, no attack having been made upon his credibility in the trial; and it is also stated in the jury room that there were other indictments against the accused charging him with rape upon the same person involved in the then present prosecution. *Battles v. State*, 53 Tex. Crim. Rep. 202, 109 S. W. 195.

Of course, the accused is not prejudiced so as to warrant a reversal, where a juror states during the deliberations, that he personally knew the prosecuting witness, whose credibility the accused had attacked, and that his reputation was not good, but that nevertheless he (the juror) believed the defendant guilty. *Lemmons v. State*, — Tex. Crim. Rep. —, 103 S. W. 896.

The inference from the decision in *State v. Jones*, 29 S. C. 201, 7 S. E. 296, is that jurors may use their personal knowledge of a witness in reaching a conclusion as to his credibility. This inference arises from the statement that a charge that a juror can neither consider any facts which come within his personal knowledge, nor communicate them to the other jurors, without being in contempt and violating his solemn oath, did not prevent the jurors from using their personal knowledge of witnesses in reaching a conclusion as to their credibility, and was therefore unobjectionable. L. A. W.

fact is testified to by a witness whom the jurors know to be of such an infamous character as to render him totally unworthy of belief, it is difficult to understand how any rule of law can compel a jury to believe that which they cannot believe. The constitution of the human mind renders such a rule as that contended for utterly impracticable." To the same effect is *M'Kain v. Love*, 2 Hill, L. 506, 27 Am. Dec. 401.

The form of instruction that appears to be most generally approved is that the jury, in examining the evidence and in determining the weight to be given to it, may use such general practical knowledge as they may have upon the subject. *Willis v. Lance*, 28 Or. 371, 43 Pac. 384, 487; *Douglas v. Trask*, 77 Me. 35; *Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547; *Kitzinger v. Sanborn*, 70 Ill. 146; *People v. Zeiger*, 6 Par. Crim. Rep. 355; *Brackwood's Sackett*, Instructions, § 410. This rule does not say, and we think it does not mean, that the knowledge must be common to all the jurors. We conclude that the instruction rightly understood was not erroneous. Moreover, we do not think that the instruction could prejudice the jury in answering the questions which were answered adversely to the contention of the plaintiff. Judgment affirmed.

#### ARKANSAS SUPREME COURT.

T. J. STEWART and Wife, Appts.,

v.

J. T. PRITCHARD.

(— Ark. —, 141 S. W. 505.)

#### Homestead — removal — abandonment.

1. Removal from a homestead, with no present or constant and abiding intention

*Note. — Power of husband without wife's consent to abandon homestead, or to convey premises by his sole deed after abandonment.*

The question of whether the husband by abandoning the wife, as distinguished from the homestead, can terminate the homestead right, is not covered in this note.

Although there is some conflict as to the husband's right to abandon the homestead without the consent of the wife, it is generally held that he has such power, and that he may then make a valid conveyance by his sole deed if he acts in good faith.

Thus in *Beranek v. Beranek*, 113 Wis. 272, 89 N. W. 146, where the husband in good faith decided to change his home, and rented another, and sought to move his family there, his abandonment of his first home was held to remove the disability of the homestead law, requiring the wife to

of returning, constitutes an abandonment of the right.

#### Same — determination of intent.

2. The intent with which one removes from his homestead will, for the purpose of determining whether or not he has preserved his right, be determined from all the facts and circumstances accompanying the removal,—his express declarations relative thereto, its adaptability as a homestead according to his views and desires, his acts thereafter, and the prolongation of his absence therefrom.

#### Same — abandonment — conveyance — signature of wife.

3. A statute making a conveyance of a homestead of no validity unless executed by the wife does not prevent abandonment of the homestead, or apply to a conveyance made thereafter.

(Kirby, J., dissents.)

(November 20, 1911.)

**A**PPEAL by defendants from a decree of the Miller Chancery Court in plaintiff's favor in an action brought to compel specific performance of an alleged oral contract to convey certain land. Affirmed.

The facts are stated in the opinion.

Mr. L. A. Byrne, for appellants:

The wife cannot be deprived of her homestead, except in the way pointed out by the statutes.

*Wassell v. Tunnah*, 25 Ark. 101; *Pipkin v. Williams*, 57 Ark. 242, 38 Am. St. Rep. 241, 21 S. W. 433; *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S. W. 39; *Shattuck v. Byford*, 62 Ark. 431, 35 S. W. 1107; *Bluff City Lumber Co. v. Bloom*, 64 Ark. 492, 43 S. W. 503; *Park v. Park*, 71 Ark. 283, 72 S. W. 993.

There was no abandonment of the homestead.

*Tumlinson v. Swinney*, 22 Ark. 400, 76

join in the alienation of the homestead, and his sole conveyance was held valid although his wife refused to follow him to his new home. The court said: "Thus it is seen that, while the husband may not alienate or encumber his homestead without his wife's consent, he may relinquish or abandon it at will without her consent or against her wishes. This results from the dependent condition of the wife, and the giving of the husband, as the head of the family, the right to make and select the family domicile. If it be thought there is anything amiss in this condition of things, it is for the legislature, and not the courts, to afford a remedy. Applying the law to the facts presented in this case, we cannot escape the conclusion that the evidence shows a relinquishment and abandonment of the homestead in question by Frank Beranek in his lifetime, binding upon his wife, and fatal to the recovery herein. It is not to be under-

Am. Dec. 432; Euper v. Alkire, 37 Ark. 283; Brown v. Watson, 41 Ark. 309; Gates v. Steele, 48 Ark. 539, 4 S. W. 53; Robinson v. Swearingen, 55 Ark. 55, 17 S. W. 365; Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; White Sewing Mach. Co. v. Wooster, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000; Mason v. Dierks Lumber & Coal Co. 94 Ark. 107, 26 L.R.A. (N.S.) 574, 125 S. W. 656.

Mr. W. H. Arnold, for appellee:

Before the claim of homestead can prevail, it must be shown that the absence of defendants was merely temporary, and not with the intention of changing their place of residence, and that they should have a fixed and unqualified intention to preserve it.

stood that such homestead right can be defeated by the husband abandoning his family and leaving them to shift for themselves. Such was not this case. The husband, in apparently good faith, decided to change his home, rented another house, and sought to move his family thereto. He had an absolute right to do so, and thus relieve himself from the disability of the statute. The refusal of the wife to follow him did not preserve the status of the homestead."

And in the following cases the husband's right to abandon the premises was upheld upon the theory that, as head of the family, he had the right to determine its domicile: Farmers' Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; Wilmoth v. Gossett, 71 Ark. 594, 76 S. W. 1073; Brennan v. Wallace, 25 Cal. 108; Allen v. Hawley, 66 Ill. 164; Vasey v. Township One, 69 Ill. 188; Titman v. Moore, 43 Ill. 169; Inge v. Cain, 65 Tex. 75; Drew v. Wooten, 27 Tex. Civ. App. 456.

So, where the husband acts in good faith, his designation, without consulting his wife, of certain land out of a large tract as his homestead, is valid although he abandoned some cultivated land more convenient and better than that designated, and although some of the land selected was the separate property of the wife. Brin v. Anderson, 25 Tex. Civ. App. 323, 60 S. W. 778. The court said: "No evidence was submitted tending to show that W. C. Anderson, in designating his homestead, acted otherwise than in good faith, or had any purpose to defraud his wife. It is true that he did not consult her in reference to the designation, and she was ignorant of the fact that it had been made, until after this suit was brought. And it may be true that he did not make the wisest selection that could have been made, but there is nothing to indicate that he was influenced by any benefit secured or promised to him individually, and not participated in by his wife, or that he was actuated by any feeling of malice, ill-will, or spite toward her. If the selection made was disadvantageous to the wife, it was probably more so to the husband, as it is not likely that she would go to and from the several 37 L.R.A. (N.S.)

Wilks v. Vaughan, 73 Ark. 174, 83 S. W. 913; Gibbs v. Adams, 76 Ark. 575, 89 S. W. 1008; Shell v. Young, 78 Ark. 479, 95 S. W. 798; Tillar v. Bass, 57 Ark. 179, 21 S. W. 34; Farmers' Bldg. & L. Asso. v. Jones, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062.

Frauenthal, J., delivered the opinion of the court:

This was an equitable action instituted by J. T. Pritchard, the plaintiff below, to obtain the specific performance of a verbal contract of sale of land made by defendant to him. The plaintiff alleged that in February, 1910, the defendant sold the land to him by verbal contract for \$500. In pursuance of said contract, he was placed in

tracts of land in cultivation as often as he would. The fact that some of the land designated as homestead was separate property of the wife is of no importance. If it was impressed with the homestead character, the husband had the right to designate it as part of the homestead; and his doing so, and thereby excluding the land in controversy from his homestead, would not be a fraud upon her."

And where a block appropriated as a homestead is larger than necessary for the uses and conveniences of a home, the husband, if he acts in good faith, may, without the wife's consent, appropriate a part of it for mercantile uses, although such appropriation withdraws from that part its homestead character. Wynne v. Hudson, 66 Tex. 1, 17 S. W. 110.

And where a homestead is only given to residents of the state, and the widow's right therein arises only upon the husband's death, his removal from the state for the purpose of acquiring another residence terminates the homestead although his family does not follow him. Finley v. Saunders, 98 N. C. 462, 4 S. E. 516.

Although the wife does not expressly consent to the abandonment of the homestead, it is generally held that if she accompanies her husband when he, in good faith, leaves the homestead, she cannot subsequently assert her right of homestead in the premises.

Thus, where the husband, in good faith, moved from his homestead with his wife and family, from Texas to Mexico, and the homestead property was afterward sold under execution, it was held that the wife could not thereafter assert her homestead right in the premises. Smith v. Uzzell, 56 Tex. 315. The court said: "When the wife voluntarily leaves the homestead with intent never again to return to it, and seeks, with her husband, a home in a foreign land, that whatever right she may have had in and to the homestead exemption is lost. . . . If, however, the husband, in fraud of the right of the wife and without her consent, should seek by an abandonment to withdraw the homestead from the pale of its

possession of the land, and made valuable and permanent improvements thereon. He also alleged that the consideration was to be paid with a note and mortgage for \$500, which was owned by him, and that he turned same over to defendant's agent in pursuance of their agreement to that effect.

The defendant resisted the action upon two grounds: (1) He alleged that the consideration was to be paid in cash, which was not done; (2) and that the land was his homestead, and that his wife had not joined in the execution of a conveyance thereof, or in a contract of the sale therefor. Considerable testimony was taken relative to these two issues, and, upon final hearing of the cause, the chancellor made findings in favor of the plaintiff, and entered a decree direct-

ing specific performance of the contract for the sale of the land. Upon this appeal the only ground urged by the defendant why the decree should be reversed is that the land was his homestead, and the alleged sale thereof was void because his wife had not joined in the execution of such contract or of the conveyance for the land. The sole question to be determined, then, is whether or not the land was the homestead of the defendant at the time he sold same to plaintiff. Defendant bought the land above five or six years prior to the time he entered into the verbal contract for its sale to plaintiff, and moved thereon with his family, and improved same as his homestead. He remained in possession of the land until January, 1908, when he moved off the land and

exemption given for the benefit of the family, he could have no power to do so; but while he acts in good faith, and not against the will of the wife having alone in view the good of the family, of which by nature and by law he is the recognized head, his power to abandon a homestead ought not to be questioned; and in the absence of evidence to the contrary it ought to be presumed when a removal from a homestead is made, that it was made in good faith and with the consent of the wife."

And in the following cases where the wife voluntarily accompanied the husband in the abandonment of the homestead, it was held that she could not thereafter assert her right of homestead therein: *Phillips v. Springfield*, 39 Ill. 83; *Kramer v. Lamb*, 84 Minn. 468, 87 N. W. 1024; *Jordan v. Godman*, 19 Tex. 274; *Rockwell Bros. & Co. v. Hudgens*, 57 Tex. Civ. App. 504, 123 S. W. 185; *Levison v. Abrahams*, 14 Lea, 336, overruled in *Collins v. Boyett*, *infra*.

So, where the husband sold the homestead and moved from it with his wife and family, and no claim of homestead was made for about twenty years, it was held that the wife could not claim a right of homestead in the premises. *Hart v. Randolph*, 142 Ill. 521, 32 N. E. 517.

And if she willingly leaves the homestead with the husband, and remains away for twenty odd years, she cannot assert a right of homestead against those claiming under a conveyance executed by the husband without her consent shortly after leaving the homestead. *Portwood v. Newberry*, 79 Tex. 337, 15 S. W. 270.

And in *Nash v. Herring*, 5 Tex. Civ. App. 95, 23 S. W. 739, where the husband had abandoned the homestead property at the time he sold it, it was held that the wife could not assert a homestead right in the premises, when it appeared that she had voluntarily and willingly left the homestead with the intention never to again occupy it as a homestead, although she did not wish her husband to sell the property.

And where a husband abandons one homestead and moves with his wife to

other property upon which he acquires a homestead, the wife has no right of homestead in the property abandoned. *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622; *Marler v. Handy*, 88 Tex. 421, 31 S. W. 636.

And in *Slavin v. Wheeler*, 61 Tex. 654, it was held that the fact that the wife retained an intention to return to a homestead which the husband had conveyed, without her consent, after it had been abandoned by himself and his family and another one had been acquired, would not avoid such conveyance.

In *Reece v. Renfro*, 68 Tex. 192, 4 S. W. 545, it was held that where the wife moved to another state with her husband, and they there purchased a house, and the husband subsequently sold the former homestead, and both remained absent from it for a number of years, she could not assert a right of homestead against bona fide purchasers of the premises, although she claimed to have left the homestead unwillingly.

Where an abandonment of the homestead is shown, it is generally held that the husband may make a valid conveyance of the property without the wife's consent. *Farmers' Bldg. & L. Asso. v. Jones*, 68 Ark. 70, 82 Am. St. Rep. 280, 56 S. W. 1062; *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440; *Brennan v. Wallace*, 25 Cal. 108; *Phillips v. Springfield*, 39 Ill. 83; *Titman v. Moore*, 43 Ill. 169; *Williams v. Moody*, 35 Minn. 280, 28 N. W. 510; *Wilson v. Gray*, 59 Miss. 525; *Robertson v. Hefley*, 55 Tex. Civ. App. 368, 118 S. W. 1159; *Inge v. Cain*, 65 Tex. 75; *Portwood v. Newberry*, 79 Tex. 337, 15 S. W. 270; *Woolfolk v. Rickets*, 41 Tex. 358, s. c. on subsequent appeal, 48 Tex. 28.

In *Guiod v. Guiod*, 14 Cal. 506, 76 Am. Dec. 440, the court said: "The statute confers upon the wife no right to the homestead, independent of the husband, which she can enforce against his consent. It affords protection to him, and only through him to the wife and children. It does not purport to interfere with the natural dependence of the latter upon the former. She is bound by her marital obligations to

has never returned to it. It is claimed by the plaintiff that he abandoned the land as a homestead at that time, and that it was not his homestead when the defendant sold same to him in February, 1910.

The abandonment of a homestead is almost, if not entirely, a question of intent. This intent must be determined from the facts and circumstances attending each case.

The mere removal of the owner with his family from the homestead will not constitute such an abandonment. It is well settled that a temporary absence from the land, where there is a fixed and abiding intent to return to it, will not occasion an abandonment of it as a homestead. It has been frequently held that if a removal from a homestead is caused by necessity, or for business purposes, or for any other reason

which requires the temporary absence of the owner, who at the time has and retains a fixed and unqualified intention to preserve it as a homestead and to return to it, this will not result in an abandonment of the land as a homestead. *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Euper v. Alkire*, 37 Ark. 283; *Brown v. Watson*, 41 Ark. 309; *Gates v. Steele*, 48 Ark. 539, 4 S. W. 53; *Robinson v. Swearingen*, 55 Ark. 55, 17 S. W. 365; *Wilks v. Vaughan*, 73 Ark. 174, 83 S. W. 913. On the other hand, if, at the time of the removal, there is no present or constant and abiding intention to return to it and preserve same as a homestead, then such removal from the land will constitute an abandonment of it as a homestead.

The intent of the owner will be gathered

live with him, and when he changes his place of residence, she must accompany him. There is no obligation resting upon him to permanently occupy the same place; indeed the highest interest of himself and family, their health and maintenance, and the proper education of his children, may require a relinquishment of the homestead. As by his act, the premises were originally impressed with the character of a homestead, so by his act they may be abandoned as such. The wife, from the nature of her dependent relation to her husband,—a relation not only essential to the peace and happiness of the family itself, but to the well-being of society,—must abide the consequences of such abandonment. So long as the premises retain the character of homestead, the conveyance of the husband, without the signature and acknowledgment of the wife, is invalid, so as to entitle the grantees to their possession, but no longer. It is around the actual, not the former, homestead of the head of the family that the law throws its protection. If, then, the premises in controversy were in fact abandoned, with no intention on the part of the head of the family to reoccupy them as a homestead, at the date of the conveyance, the entire estate passed to the grantee absolutely; but if not thus abandoned—if the removal were temporary in its nature, made for a specific purpose, for the repair or reconstruction of the building which had fallen—the premises remained subject to his right to claim their enjoyment and use as such homestead. The assertion of this right does not rest with the wife."

And in *Russell v. Rumsey*, 35 Ill. 362, where it was contended that inasmuch as it had been held that the legislature had authority to pass a homestead act preventing the sale of the family residence without the wife's joinder, the same might be done to bar the assertion of the right of dower, the court said: "The homestead act does not prevent the sale, but only requires that the premises shall not be occupied as a homestead at the time of the conveyance. The vendor, being the head of the family, may 37 L.R.A. (N.S.)

choose their residence, and if he desires to sell the homestead without the concurrence of his wife, he has only to abandon and to cease to occupy it as a residence. It is not the case of vesting the wife with an interest in the property beyond the control of the husband. He has the right to sell or retain it as he may choose, but if he desires to sell it he has only to cease to occupy it as a residence. It is not like prohibiting the sale of property, or transferring the husband's lands to the wife."

And a conveyance of a homestead, executed before, but not delivered until after, the acquisition of a new homestead, does not require an acknowledgment by the wife, and is not invalid because her acknowledgment is defective. *Woodstock Iron Co. v. Richardson*, 94 Ala. 629, 10 So. 144.

And in *Alvord Nat. Bank v. Ferguson*, — Tex. Civ. App. —, 126 S. W. 622, it was held that premises which were the separate property of the husband or community property could be conveyed by the husband without the wife's consent, after they had been abandoned by the husband and wife as a homestead.

And where a family consisted only of husband and wife, and the wife, a month before the execution of a sole deed by the husband, left both husband and homestead, with an intention never to return to either, and the husband sold the furniture three weeks before the execution of the deed, and left the premises the day of or the day before the execution thereof, it was held that, as between the grantee and a subsequent judgment creditor, a finding that the homestead right had so far ceased prior to the execution of the deed as to make it a valid conveyance should not be reversed. *Anderson v. Kent*, 14 Kan. 207.

And whenever a business homestead ceases to be so used, its homestead character is lost, and the husband can dispose of it without being joined by the wife in the conveyance. *Dickson v. Allen*, — Tex. Civ. App.—24 S. W. 661.

And an assignment of a land contract

from all the facts and circumstances accompanying his removal and absence from the homestead,—from his express declarations relative thereto, from the adaptability of the land as a homestead according to the owner's views and desires, as well as from his acts thereafter, and the prolongation of his absence therefrom. *Newton v. Russian*, 74 Ark. 88, 85 S. W. 407; *Gibbs v. Adams*, 76 Ark. 575, 89 S. W. 1008; *Farmers' Bldg. & L. Asso. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062. While a temporary change of residence will not constitute an abandonment of a homestead, yet an actual removal therefrom will result in such an abandonment, unless there is at the time a fixed and definite purpose to return to it and preserve it as a homestead.

The act of March 18, 1887 (*Kirby's Dig.*

§ 3901), providing that no conveyance or other instrument affecting the homestead shall be of any validity unless the wife shall join in the execution thereof, does not in any manner restrict the right of abandonment by the owner. When he has chosen to exercise the right of abandonment, and actually does abandon the property which formerly was his homestead, it thereby becomes subject to sale or other alienation without his wife's concurrence. *Farmers' Bldg. & L. Asso. v. Jones*, supra. In construing the above act, this court in the case of *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648, said: "It vested no additional interest in the wife. The husband could abandon the homestead, and it would become liable to his debts notwithstanding the act of March 18, 1887." *Newton v. Russian*, supra.

by the husband alone is valid where the wife had no homestead interest in the property at the time, the parties having sometime previously purchased other property where they resided, and rented the property in question. *Newbro v. Friar*, 131 Mich. 368, 91 N. W. 609.

The husband cannot, however, by a sale and abandonment in fraud of his wife, destroy her homestead rights. *Gray v. Fussell*, 48 Tex. Civ. App. 261, 106 S. W. 454.

And where the husband and family had moved from the homestead temporarily to other property belonging to him, on account of his health, and he secretly determined to make the latter property his homestead, a mortgage of the old homestead executed in fraud of the wife's right, to one whose agent knew of the secret nature of the transaction, is invalid as against the wife. *St. Louis Brewing Asso. v. Walker*, 23 Tex. Civ. App. 6, 54 S. W. 360.

Some conflict exists, however, as has been stated, as to the right of the husband to abandon the homestead without the wife's consent.

Thus, in *Blumer v. Albright*, 64 Neb. 249, 89 N. W. 809, it was held that the wife could not be deprived of her homestead right by the removal therefrom with her husband, where she did not participate in his intention not to return. The court said: "It is contended with much earnestness and ability by counsel for appellant that the husband, being the head of the family, has the right to determine and control the domicile of the family, if he acts in good faith, and not fraudulently; that by removing from the homestead, and taking up his abode elsewhere, he can divest both himself and his wife of their homestead right; especially is this true, it is contended, where the wife and family accompany the husband to the new abode. Many cases from other states than our own are cited in support of this doctrine. We are unable to adopt this view. It seems very clear, from an examination of the provisions of our statute relating to homesteads, that the purpose of the legislature was to

secure a home, not for the benefit of the husband alone, or of the wife, but for the family as an entirety; and it is accordingly provided that no conveyance of the homestead can be made except by a deed in the execution of which both husband and wife have freely and voluntarily joined. Thus the husband is wholly deprived of his power of alienation unless with the free consent of his wife. To sustain the contention of appellant would result in permitting a dissolute and worthless husband, whose sense of responsibility for the preservation of the family had been blunted by vice and dissipation, to deprive his wife and family of the benefits of the homestead law, by simply abandoning it and taking his family with him elsewhere, without regard to the wife's wishes, rights, or intentions; the husband thus being empowered to accomplish by indirection what the legislature has sought, by express provision, to prevent him from doing directly. . . . The wife cannot be compelled to elect between her husband and her homestead. We have no doubt that, under the laws of this state, departure from the homestead cannot be construed into an abandonment thereof, unless the intention not to return is shared in by both husband and wife. The testimony in this case clearly shows that the wife never intended to abandon the homestead, and therefore the finding of the trial court that the property in controversy was the homestead of appellee and her husband is right."

And in *Collins v. Boyett*, 87 Tenn. 334, 10 S. W. 512, it was held that the removal of the husband and wife from the homestead, after a conveyance by the husband alone, did not defeat the wife's right of homestead, where no other homestead had been acquired. The court said: "The wife not having signed the deed and been privily examined, no other consent will deprive her of her homestead. It is argued that the removal of the wife with her husband was an abandonment of the right, and in support of this *Levison & Co. v. Abrahams*, 14 Lea, 336, is relied on. That case

In the case of *Hart v. Randolph*, 142 Ill. 521, 32 N. E. 517, it was held that where the husband and family left his former homestead, and thereupon sold and conveyed the property, and placed the purchaser in possession thereof, and never returned or attempted to return, nor, so far as appeared from the testimony, claimed it as a homestead for a number of years thereafter, this clearly constituted an abandonment thereof as a homestead. See also *Anderson v. Kent*, 14 Kan. 207; *Nethercutt v. Herron*, 10 Ky. L. Rep. 247, 8 S. W. 13. But, as before stated, the abandonment of a homestead by the owner thereof is entirely a question of intention upon his part; and must be determined by the facts and circumstances adduced in evidence in the case. *Thompson, Homestead & Exemption*, §§ 273 et seq.

The testimony in the case at bar tended to prove that in January, 1908, the defendant removed from the land which was his homestead, and has never returned to it. The land consisted of 40 acres, with a small house thereon. At the time of his removal, there was no chimney to the house, and no sash in the windows; and the panels of the doors had been broken out and the roof leaked. The well on the place had failed to furnish water, and posts which had been placed under the house had rotted to such an extent that it was in danger of falling. The defendant was a white man, and, on removing from the land, placed a negro in possession of the house, who rented the land during the year 1908. In 1909 defendant rented the land to another negro, but the house remained unoccupied. In 1908 he moved about 16 miles from the place, and some time later moved to the city of Texarkana, which is about 3 or 4 miles from the place. Here he remained about a year, when he moved to a farm in the adjoin-

ing state of Texas. He spoke to different parties relative to selling the land, prior to his sale thereof to the plaintiff, and stated that his wife would not live on the place because there was no water there, and that she desired to move to Texas. It appears that his wife also made this declaration. During all the time since his removal, defendant has evinced no intention of returning to the land, either by word or act. Although he stated in his testimony that he claims the land as his homestead, he did not testify either that it was his intention to return to the land and preserve it as a homestead at the time that he removed therefrom, or that he entertained any such intention at any time since said removal.

The testimony tends further to prove that in March, 1910, after he had entered into the contract of sale of the land with the plaintiff, he placed the plaintiff in possession thereof, who, with this knowledge, made lasting improvements upon the land. In his original answer filed in this case, he resisted the action instituted by the plaintiff solely upon the ground that the land was sold for a cash consideration, which had not been paid, and he did not therein set up as a defense the invalidity of the sale by reason of the land being his homestead. Subsequently he filed an amended answer in which he made this defense.

We have carefully examined the testimony in this case, and we have come to the conclusion that it sufficiently shows that when the defendant moved from the land in 1908 he had no present intention of returning to the same, or of preserving it as a homestead; that since his removal he has not, by any declaration or act, evinced any intention of returning to the land or preserving it as a homestead. And we are convinced that the finding of the chancellor that the defendant had abandoned the land

does sustain the contention, but it is unsound, and not in accord with reported decisions of this court. The wife cannot be thus compelled to elect between her husband and homestead."

So, in *Jarman v. Jarman*, 4 Lea, 671, where the widow's right of homestead was involved, the court said that neither the husband nor wife could dispose of the homestead without the consent of the other, and that the wife's right could be lost only by her voluntary alienation or abandonment.

And in *Dunn v. Tozer*, 10 Cal. 167, where the question of abandonment was involved, the court said that the act of the wife in going with the husband to reside on another place could in no way affect her homestead right, but that this right could only be extinguished by her joining with her husband in a conveyance of it.

In *Gardner v. Gardner*, 123 Mich. 673, 82 N. W. 522, it was held that the surrender 37 L.R.A. (N.S.)

by the husband, without the wife's consent, of the contract of purchase under which they held a homestead, would not bar the wife's right of homestead.

As to conveyance of homestead by husband after abandonment by wife, see note to *Murphy v. Renner*, 8 L.R.A. (N.S.) 565.

As to validity of conveyance or encumbrance of homestead by wife after abandonment by husband, see note to *Somers v. Somers*, 36 L.R.A. (N.S.) 1024.

And for a note on abandonment, conveyance, or encumbrance of homestead during insanity of one of the spouses, see *Weatherington v. Smith*, 13 L.R.A. (N.S.) 430.

As to estoppel of wife living apart from husband to claim homestead or dower as against purchaser ignorant of relationship, see notes to *Mason v. Dierks Lumber & Coal Co.* 26 L.R.A. (N.S.) 574, and *Wright Lumber Co. v. McCord*, 34 L.R.A. (N.S.) 762.

J. T. W.

as a homestead prior to the time he entered into the contract for the sale thereof to the plaintiff is not against the clear preponderance of the evidence.

It follows that this finding of the chancellor, according to the repeated rulings of this court, should not be disturbed. The decree is accordingly affirmed.

**Kirby, J., dissents.**

Petition for rehearing denied.

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

**FRANCIS L. NEUBECK, Admr., etc., of**  
**William Moore, Deceased, Appt.,**  
**v.**

**PATRICK J. LYNCH.**

(37 App. D. C. 576.)

**Limitation of actions — amended complaint — adding beneficiary — effect.**

Inserting a designation of the beneficiary in a complaint filed to recover money for wrongful death, which, under the statute, can be recovered only for the benefit of widow and next of kin, does not, although the complaint is insufficient without it, state a new cause of action so as to be ineffectual if the limitation period had elapsed before the amendment.

(December 4, 1911.)

**A**PPPEAL by plaintiff from a judgment of the Supreme Court in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

**Mr. E. M. Hewlett, with Messrs. Benjamin Carter and F. Carter Pope, for appellant:**

The amendment of the declaration was not a statement of a new cause of action, and the bar of the statute of limitations cannot be invoked as a defense.

**Kerrigan v. Market Street R. Co.** 138 Cal. 506, 71 Pac. 621; **Chicago & R. I. R. Co. v. Morris**, 26 Ill. 400; **Foley v. Suburban R. Co.** 98 Ill. App. 108; **Chicago Terminal Transfer R. Co. v. Helbreg**, 99 Ill. App. 563; **Stewart v. Terre Haute & I. R. Co.** 103 Ind. 44, 2 N. E. 208; **Jeffersonville, M. &**

**Note.** — The general subject of the relation of new pleadings to the statute of limitations is considered in the notes to **Missouri, K. & T. R. Co. v. Bagley**, 3 L.R.A. (N.S.) 259-306, and **Bourdreaux v. Tucson Gas, E. L. & P. Co.** 33 L.R.A. (N.S.) 196, and see particularly pages 304, et seq. of the earlier note as to changes in parties. 37 L.R.A. (N.S.)

**I. R. Co. v. Hendricks**, 41 Ind. 48; **State ex rel. Meriwether v. Walford**, 11 Ind. App. 392, 39 N. E. 162; **Missouri P. R. Co. v. Barber**, 44 Kan. 612, 24 Pac. 969; **State v. Grand Trunk R. Co.** 60 Me. 145; **Com. v. Boston & W. R. Corp.** 11 Cush. 512; **Walker v. Lake Shore & M. S. R. Co.** 104 Mich. 606, 62 N. W. 1032; **Schwarz v. Judd**, 28 Minn. 371, 10 N. W. 208; **McIntosh v. Missouri P. R. Co.** 103 Mo. 131, 15 S. W. 80; **Warren v. Englehart**, 13 Neb. 283, 13 N. W. 401; **Burlington & M. R. Co. v. Crockett**, 17 Neb. 570, 24 N. W. 219; **Love v. Southern R. Co.** 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475; **Geroux v. Graves**, 62 Vt. 280, 19 Atl. 987; **Lewis v. Washington & G. R. Co.** 6 Mackey, 558; **District of Columbia v. Frazer**, 21 App. D. C. 154; **Howard v. Chesapeake & O. R. Co.** 11 App. D. C. 330; **Texas & P. R. Co. v. Cox**, 145 U. S. 603, 36 L. ed. 832, 12 Sup. Ct. Rep. 905; **Morris v. Wheat**, 11 App. D. C. 213; **Texas & N. O. R. Co. v. Miller**, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534, and **Texas & N. O. R. Co. v. Gross**, 221 U. S. 417, 55 L. ed. 796, 31 Sup. Ct. Rep. 536.

**Mr. Leon Tobriner, for appellee:**

The amended declaration stated a new cause of action,—one that had never been stated before,—and hence the statute of limitations is a good defense. There can be no restatement of the cause of action in an amended declaration unless the cause of action had been stated in the original declaration.

**Tiffany, Death by Wrongful Act**, § 80; 5 Enc. Pl. & Pr. 868; **Foster v. St. Luke's Hospital**, 191 Ill. 94, 60 N. E. 803; **Louisville & M. R. Co. v. Pitt**, 91 Tenn. 86, 18 S. W. 118; **Lilly v. Charlotte, C. & A. R. Co.** 32 S. C. 142, 10 S. E. 932; **Serensen v. Northern P. R. Co.** 45 Fed. 407; **Stewart v. Terre Haute & I. R. Co.** 103 Ind. 45, 2 N. E. 208; **State ex rel. Meriwether v. Walford**, 11 Ind. App. 392, 39 N. E. 162; **Webster v. Norwegian Min. Co.** 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; **Western U. Teleg. Co. v. McGill**, 21 L.R.A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 609; **Boston & M. R. Co. v. Hurd**, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; **Burlington & M. R. Co. v. Crockett**, 17 Neb. 570, 24 N. W. 219; **Chicago, B. & Q. R. Co. v. Oyster**, 58 Neb. 1, 78 N. W. 359; **Gulf, C. & S. F. R. Co. v. Younger**, 10 Tex. Civ. App. 141, 29 S. W. 948; **Westcott v. Central Vermont R. Co.** 61 Vt. 438, 17 Atl. 745; **Oulighan v. Butler**, 189 Mass. 289, 75 N. E. 726; **Kansas City v. Hart**, 60 Kan. 684, 57 Pac. 938; **Safford v. Drew**, 3 Duer, 627; **Sparks v. Kansas City, S. & M. R. Co.** 31 Mo. App. 111; **McIntosh v. Missouri P. R. Co.** 103 Mo. 131, 15 S. W. 80; **Schwarz v. Judd**, 28 Minn. 371, 10 N. W. 208.



Van Orsdel, J., delivered the opinion of the court:

This is an action for the recovery of damages for the alleged negligent killing of one William Moore, on February 13, 1909. The action is brought by Francis L. Neuleck, the administrator of the estate of the deceased, William Moore. The declaration is in two counts, charging, in substance, that the death of Moore was caused by the discharge of a loaded pistol negligently handled by defendant, Patrick J. Lynch, and concluding "to the damage of plaintiff in the sum of \$10,000." On March 9, 1911, plaintiff, by leave of court, amended the declaration by inserting in the proper connection the following: "Plaintiff's decedent left surviving him a widow and four minor children, whose sole support he was, and by his death as aforesaid they were damaged in the sum of \$10,000; wherefore plaintiff brings this suit under §§ 1301 and 1302 of the Code of the District of Columbia, 31 Stat. at L. 1394, chap. 854, and demands judgment," etc.

To the amended declaration defendant entered pleas of not guilty and of the bar of the statute of limitations. Plaintiff demurred to the plea of limitations. The court overruled the demurrer, and, plaintiff electing to stand upon the demurrer, judgment was entered for defendant.

This is a statutory proceeding. In an action for damages for negligently causing the death of a person, the statute provides that the action shall be brought "in the name of the personal representative of such deceased person, and within one year after the death of the party injured;" that "such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person," and that "the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia." D. C. Code, §§ 1301-1303.

The original declaration is assailed on the ground that it failed to state a cause of action, because the beneficiaries were not named. It is conceded that the defect was cured by the amendment; but, as the amendment was not filed within the one year allowed for the bringing of the action, it came too late. Therefore, the sole question presented is whether the amendment stated a new cause of action. If the amendment simply related back to, and cured the cause of action defectively stated in the original declaration, the bar 37 L.R.A. (N.S.)

of the statute cannot be invoked as a defense.

The primary cause of action consists in the charge that appellee negligently killed appellant's intestate in the manner described in the original petition. The allegation of the existence of beneficiaries within the statute is undoubtedly essential to the right of recovery; and, as generally held by the courts, a verdict will not support a judgment or be sustained in its absence. But neither the cause of action nor the jurisdiction of the court depends entirely upon the naming of the beneficiaries. Without them the cause of action is at most defectively stated. That jurisdiction existed was sufficiently shown in the original petition.

Closely analogous to the case at bar are a number of Federal cases construing the bankruptcy act, which provides that the person whom it is sought to have adjudged an involuntary bankrupt must not be "a wage earner or a person engaged chiefly in farming or the tillage of the soil." 30 Stat. at L. 547, chap. 541, U. S. Comp. Stat. 1901, p. 3423. Also those construing the provision that requires as a condition precedent to the right of the petitioner to file his petition an averment setting forth the number of creditors. 30 Stat. at L. 561, chap. 541; *Re Pilger*, 118 Fed. 206; *Re Bellah*, 116 Fed. 69; *Beach v. Macon Grocery Co.* 57 C. C. A. 150, 120 Fed. 736; *Re Brett*, 130 Fed. 981; *Re Mero*, 128 Fed. 630; *Re Plymouth Cordage Co.* 68 C. C. A. 434, 135 Fed. 1000; *Re Broadway Sav. Trust Co.* 81 C. C. A. 58, 152 Fed. 152; *Re Haff*, 68 C. C. A. 648, 136 Fed. 78; *First State Bank v. Haswell*, 98 C. C. A. 217, 174 Fed. 209.

The general rule, as repeatedly stated by the Federal courts, is "that an amendment to a petition which sets up no new cause of action, . . . but merely amplifies and gives greater precision to the allegations in support of the cause of action . . . originally presented, relates back to the commencement of the action." *Crotty v. Chicago Great Western R. Co.* 95 C. C. A. 91, 169 Fed. 593, and cases cited. In *First State Bank v. Haswell*, 98 C. C. A. 217, 174 Fed. 209, the court, referring to this rule, said: "This rule is also applicable to cases where jurisdictional facts which existed at the time the original petition was filed are subsequently made to appear for the first time by an amendment." In *Ryan v. Hendricks*, 166 Fed. 94, the court, applying the rule to a bankruptcy case, said: "The amendments related to the number of the petitioning creditors, and the amount and nature of their claims, and to the occupation of the debtor. There is no doubt that at

the time the original petition was filed Logerman was a bankrupt, and all the conditions existed which made it proper for his estate to be administered under the bankruptcy law. If the original petition failed to set forth these conditions fully and clearly, the court did right in allowing the amendments, and the amendments, when made, related back to the time of the filing of the original petition, and had the same effect as if originally incorporated therein." Where large property rights are liable to be involved in the priority of liens, and the rights of judgment creditors attaching within four months of the commencement of the bankruptcy proceedings, it might be assumed that a strict rule of pleading would be invoked; but on the contrary a very liberal and sensible rule has been adopted.

Conceding, as we must, that the averment setting forth the beneficiaries is one of the ingredients necessary to state a cause of action in a suit for the wrongful and negligent killing of a person, it is, nevertheless, but one of the elements, and does not, of itself, constitute the cause of action or a separate cause of action. The averment is essential, together with other allegations of the petition, to state a proper cause of action. Its omission merely results in stating a defective cause of action, which may be cured by an amendment, which will relate back in point of time to the filing of the original petition. *Love v. Southern R. Co.* 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475; *Geroux v. Graves*, 62 Vt. 280, 19 Atl. 987; *Burlington & M. R. Co. v. Crockett*, 17 Neb. 570, 24 N. W. 219; *Walker v. Lake Shore & M. S. R. Co.* 104 Mich. 606, 62 N. W. 1032.

Counsel for appellee has cited many cases where it has been held that a petition which does not name the beneficiaries in an action based upon a statute similar to ours is so defective that it will not support a verdict; but that does not argue that the defect may not be cured by amendment before verdict and judgment. On the other hand, the courts of a number of states, whose decisions are entitled to the highest respect, support appellee's contention that a petition so amended states a new cause of action. The question is one involved in difficulty, but we are constrained to adopt the liberal rule. Indeed, this court has established a liberal rule as to the right of amendment, in order that the ends of justice may be attained. *Steven v. Saunders*, 34 App. D. C. 321.

In *District of Columbia v. Frazer*, 21 App. D. C. 154, an amended declaration was filed after the bar of the statute of limitations had run, dismissing a codefendant, omitting acts of negligence originally al-

leged, and charging new and different acts of negligence. The court, sustaining the right of amendment, said: "Where, as in this case, there has been a substitution of the original declaration by an amendment, the test is whether the cause of action remains the same in substance, notwithstanding differences of specification. *Howard v. Chesapeake & O. R. Co.* 11 App. D. C. 330, 336; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604, 36 L. ed. 829, 833, 12 Sup. Ct. Rep. 905. Applying this test, we are of opinion that there was no error in overruling the plea of limitation. The foundation of the action, in both pleadings, is the negligence of the defendant in the performance of its duty to keep its sidewalks in a safe condition." So, here the foundation of the action in both the original and amended petitions is the negligent shooting of appellant's intestate by the appellee.

In the recent case of *Texas & N. O. R. Co. v. Miller*, 221 U. S. 408, 55 L. ed. 789, 31 Sup. Ct. Rep. 534, suit was brought in Texas to recover damages for a death caused by the alleged negligence of the railroad company in Louisiana. The Louisiana statute, like ours, required the action to be brought within one year. The courts of Texas, under the prevailing rule in the state, refuse to take judicial cognizance of the statutes of other states unless pleaded. The petition was filed within the year, but failed to set out the Louisiana statute under which the suit was brought. After the year had expired the defendant company answered, setting up the statute. The Texas court held that the answer cured the defect in the petition, which holding was affirmed by the supreme court. If a defect so vital as the failure to plead a statute upon which the cause of action is based could be cured by answer, it must follow logically that it could have been cured by amendment. There, the statute of Louisiana was required to be pleaded as a condition precedent to recovery. Here, the beneficiaries under the statute must be named in the declaration as a condition of recovery.

The original judiciary act, 1 Stat. at L. 91, chap. 20, U. S. Comp. Stat. 1901, p. 696, provides that no proceeding in civil cases in any court of the United States "shall be abated, arrested, quashed, or reversed for any defect or want of form, but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer, as the cause thereof; and such court shall amend

every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." From this it will be observed that, in the establishment of the Federal courts, a most liberal rule of pleading was enjoined by statute. It should not be the policy of the courts to defeat justice by indulging in mere technicalities and fine-spun theories of pleading. Where an amendment does not operate totally to confer jurisdiction, or to change the cause of action or shift the right of action, but merely supplies an additional element essential to a proper statement of a cause of action defectively stated, or an additional jurisdictional averment essential to clothe the court with complete power to conduct the suit to a legal conclusion, it should be allowed.

The judgment is reversed, with costs, and remanded for further proceedings.

#### IDAHO SUPREME COURT.

EDGAR J. VAUGHN, Appt.,

v.

J. P. JOHNSON et al., Respts.

(20 Idaho, 669, 119 Pac. 879.)

#### Deposition — cross-examination — admissibility.

1. Where the evidence of a witness is taken by deposition after notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of the deposition of the same witness, and in pursuance of such notice takes the deposition of such witness, and in so doing cross-examines the witness on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case and before defendant has opened his side of the case. The party taking such deposition should be required to withhold the same, and introduce it as a part of his defense in making his own proofs.

#### Bills and notes — bona fide purchase — fraud in procuring.

2. Mere evidence of fraud or deception in procuring a negotiable promissory note

#### Headnotes by AILSHIE, J.

**Note.** — As to the circumstances sufficient to put a purchaser of negotiable paper on inquiry, see note to *Mee v. Carlson*, 29 L.R.A.(N.S.) 351.  
87 L.R.A.(N.S.)

which is fair and regular on its face is not sufficient to raise a presumption of bad faith against the purchaser of such paper in due course, nor should such fact be given any consideration by a jury in determining the other fact; namely, that the holder of the instrument had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

#### Evidence — burden of proof — fraud in procuring note.

3. Evidence of fraud in procuring the execution of a negotiable instrument shifts the burden of proof as to the good faith of a purchaser thereof before maturity, and is admissible for that purpose, but of itself in no way tends to establish bad faith on the part of such purchaser.

#### Bills and notes — execution — care.

4. Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than is chargeable to those who purchase such paper in due and regular course of business.

#### Same — purchaser — duty of inquiry.

5. The purchaser of negotiable paper in due course, and before maturity, is under no duty to make inquiry as to the title to such paper, fair and regular on its face, nor is he under any duty to inquire into the consideration given for the note, or of the transaction out of which it arose. He is only chargeable with facts which actually come to his knowledge; that is, actual knowledge of a defect in the title, want of consideration, or such facts as would constitute a defense to the note as between the maker and original payee, or actual knowledge of such facts and circumstances as would lead an honest and fair business man to make further inquiry, and which inquiry, if made, would lead to the discovery of the fraud, defect, and defenses.

#### Appeal — instruction — negotiable paper — other transactions.

6. An instruction to the jury that, if they find from the facts of the particular transaction, "or knowledge of other like transactions of McLaughlin Brothers, that the plaintiff is not acting honestly, then they had a right to find that he did not act honestly in the purchase of this note," was erroneous, in that it authorized the jury to infer that the purchase of a negotiable instrument was fraudulent where they found that such purchaser had subsequently done some act they did not consider honest and fair.

#### Costs — taking deposition — cross-examination.

7. Where a party failed to appear at the time and place designated in a notice for taking deposition and cross-examine the witness, and thereafter duly and regularly served notice of the taking of the deposition of the same witness, and in pursuance thereof took the deposition of such witness, which consisted of a cross-examination of the witness on the deposition previously given, the costs and expense of taking such

subsequent deposition should not be allowed as a part of the costs of the case.

(Stewart, Ch. J., dissents from prop. 7.)

(November 27, 1911.)

**A** PPEAL by plaintiff from a judgment of the District Court for Kootenai County in defendants' favor in an action upon a promissory note. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Reed & Boughton and Robert H. Elder, for appellant:

Evidence of the defendant's witnesses which tended to show the condition of the horse and the alleged fraud surrounding the inception of the contract upon which the note was based was inadmissible.

Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291; Goetz v. Bank of Kansas City, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Canon v. Farmers' Bank, 3 Neb. (Unof.) 348, 91 N. W. 585; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115; Greer v. Yosti, 56 Mo. 307; Lehman v. Press, 106 Iowa, 389, 76 N. W. 818; Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; Merritt v. Boyden, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; Gray v. Goode, 72 Ill. App. 504; Kent v. Barnes, 72 Ill. App. 617; Metcalf v. Draper, 98 Ill. App. 399; Mann v. Merchants' Loan & T. Co. 100 Ill. App. 224; Merchants' Bank v. McClelland, 9 Colo. 608, 13 Pac. 723; Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130; Coors v. German Nat. Bank, 14 Colo. 202, 7 L.R.A. 845, 23 Pac. 328; Rand v. Pantagraph Stationery Co. 1 Colo. App. 270, 28 Pac. 661; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; First State Sav. Bank v. Webster, 121 Mich. 149, 79 N. W. 1068; Drovers' Nat. Bank v. Blue, 110 Mich. 31, 64 Am. St. Rep. 327, 67 N. W. 1105; Reeves v. Liverpool, L. & G. Ins. Co. 39 Wis. 520; Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. Rep. 172, 2 Ann. Cas. 265.

Messrs. Whitla & Nelson, for respondents:

Defendants are absolutely entitled to the cross-examination of the plaintiff.

Pfefferhorn v. Seefeld, 66 Minn. 223, 68 N. W. 1072; Strom v. Montana C. R. Co. 81 Minn. 346, 84 N. W. 46; Graham v. McReynolds, 88 Tenn. 240, 12 S. W. 547.

Defendants' signatures to the note were secured by fraud, and they were entitled to recover.

City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; Union Nat. Bank v. Winsor, 37 L.R.A. (N.S.)

101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999, 11 Ann. Cas. 204; Union Invest. Co. v. Wells, 39 Can. S. C. 625, 11 Ann. Cas. 33; Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525; Park v. Winsor, 115 Minn. 256, 132 N. W. 264; Citizens' Sav. Bank v. Houtchens, 64 Wash. 275, 116 Pac. 866.

In a proper case the expense of taking depositions is a proper item of costs to be allowed to the prevailing party.

11 Cyc. 121; Pyne v. National S. S. Co. 44 N. Y. S. R. 791, 18 N. Y. Supp. 166; Finch v. Calvert, 13 How. Pr. 13; Cox v. Charleston F. & M. Ins. Co. 3 Rich. L. 331, 45 Am. Dec. 771; Smith v. Servis, 59 Hun, 552, 13 N. Y. Supp. 941.

Allshie, J., delivered the opinion of the court:

The motion to dismiss the appeals in this case must be denied, and it is so ordered. On the 29th day of March, 1906, the respondents herein executed and delivered their promissory note to McLaughlin Brothers as part payment of the purchase price of a stallion. Thereafter and prior to the maturity of the note, and on about the 5th day of February, 1910, McLaughlin Brothers sold and delivered the note to the appellant herein, who thereafter commenced this action against the makers for the collection of the principal and interest thereon. The case was tried before a jury, and a verdict was rendered for the defendants, and a judgment was thereupon entered accordingly.

A large number of errors have been assigned, but most of the questions presented have been considered by this court and passed upon in Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, and Park v. Johnson, 20 Idaho, 548, 119 Pac. 52. We will therefore only consider such questions as have not received consideration in the foregoing cases.

It seems that the deposition of the appellant was taken in conformity with the statute, at Columbus, Ohio, on the 3d day of February, 1911; that at the time of the taking of the deposition no one appeared on behalf of the respondents and no cross-examination was had. Thereafter, and about the 27th of March, the attorneys for the defendants served notice on the attorneys for plaintiff that they would take the deposition of the plaintiff at Columbus, Ohio, on the 6th day of May following. The deposition was thereafter taken in conformity with the notice. When this deposition was taken, however, on the part of the defendants, it was taken as if it were a cross-examination of the witness on his previous deposition. The questions were propounded in the form of cross-examination, and the

witness's attention was called to the evidence previously given by him. When the case came on for trial, the plaintiff introduced the deposition containing the evidence he had first given. Before the plaintiff rested his case, the defendants offered "deposition on cross-examination." The plaintiff's counsel objected to the introduction of this deposition as a deposition on cross-examination, and insisted that, if it be admitted at all, it should go in as a part of defendants' evidence when they came to make their defense. The court overruled the objection and admitted the deposition, and the appellant now urges the ruling as erroneous. We think as a matter of procedure it was error for the court to admit this deposition as a part of the plaintiff's case. While it was taken on the theory that it was a cross-examination of a witness, and was in fact so treated, it had not been taken at the time and in the manner authorized for the cross-examination of the witness. If the defendants failed and neglected to appear at the time noticed and cross-examine the witness, it was their own fault. If, on the other hand, they saw fit to take the deposition of the witness for their own use as a part of their own case, they had a right to do so, but they should have been compelled to introduce this evidence as a part of their own case. We do not think, however, that the error thus committed calls for a reversal of the judgment. Had the plaintiff been nonsuited after the introduction of this deposition, and without putting the defendants on their defense, there might be some merit to the contention made by the appellant, and there might be prejudicial error under such circumstances. In the case at bar, however, the bulk of the record consists of evidence introduced on the part of the defendants, and so the jury had the entire case before them for their consideration.

It is contended that the court erred "in admitting the evidence of the defendants' witnesses which tended to show the condition of the horse and the alleged fraud surrounding the inception of the contract upon which the note was based." In other words, the appellant contends that evidence of failure of consideration or fraud in procuring the note could not properly go to the jury and had no bearing on the case, unless the defendants could successfully show that the plaintiff, who purchased the note before maturity, either "had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." This contention is substantially correct. *Winter v. Nobs*, 19 Idaho, 26, 112 Pac. 527. The difficulty, however, with 37 L.R.A. (N.S.)

which appellant is confronted in the case at bar, is that the facts and circumstances in the present case tending to show "actual knowledge" and "bad faith" were sufficient to go to the jury, and were likewise sufficient to justify them in concluding and finding as a matter of fact that the plaintiff either had actual knowledge of the fraud and deception that had been practised and the infirmity in the instrument, or had knowledge of such facts and circumstances that would have led him, if acting in good faith, to ascertain the true situation. The frequency with which these cases are arising and finding their way into this court leads us to suggest that mere evidence of fraud or deception in procuring negotiable promissory notes which appear fair on their face is not sufficient to raise any presumption against the purchaser of such paper; nor should such facts be given any consideration whatever by a jury in determining the other fact, namely, that the holder of the instrument had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. This latter fact is an independent fact, which must be determined upon evidence wholly independent of the original transaction in which the note was executed. Bona fide holders of negotiable paper are entitled to absolute protection, and cannot be in the least chargeable with any fraud to which they were not parties, that was practised in procuring the note, or in the contract out of which the note arose.

Evidence of fraud in procuring the execution of a note shifts the burden of proof as to good faith, but of itself in no way tends to establish the bad faith of a purchaser of such note.

Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than is chargeable to those who purchase such paper in the due and regular course of commercial transactions. The frequency with which such defenses as the one set up in this case are being pleaded reminds us that there is either a grave need of invoking the criminal statutes of this state against persons who are procuring the execution of negotiable paper through fraud, deception, and misrepresentation, or else there is gross negligence on the part of many who are executing such paper, and sending it broadcast in the channels of commerce.

The appellant has assigned a great many errors against the action of the court in admitting certain evidence offered by respondents. We have examined the record in this respect, and do not think there was any prejudicial or substantial error com-

mitted by the court in the admission of evidence. These questions have all been considered and passed upon in *Park v. Johnson* and *Winter v. Nobs*, supra.

The appellant has assigned as error the action of the court in giving a number of instructions, and in modifying certain instructions requested by the appellant. We shall only notice two of these instructions. Instruction No. 22 is, to say the least, misleading, and we do not think should be given in such a case. It is as follows: "The court instructs the jury that a person who, in purchasing negotiable paper, wilfully remains ignorant of facts which are apparent from the transaction, or refrains from making inquiry lest he should become possessed of knowledge of infirmities in the title of the paper which he is about to purchase, shows lack of good faith; and a plaintiff cannot say that he did not know the facts regarding the title of negotiable paper when such lack of knowledge is predicated upon an evasion of plain duty, and you have a right to consider all of the facts and circumstances surrounding the alleged purchase of this note in determining whether or not the plaintiff wilfully refrained from making inquiry regarding the title of McLaughlin Brothers to the note in controversy, in order not to learn anything regarding their title thereto; and the court charges you that wilful ignorance, if it be shown by the evidence, involves bad faith, and is as binding upon the plaintiff as a positive knowledge of the defendants' title would have been." The foregoing instruction is calculated to mislead a jury. They are likely to infer from such an instruction that the purchaser of a negotiable instrument cannot "wilfully refrain from making inquiry regarding the title" to a note he is about to purchase; in other words, that it is the duty of such a purchaser to always make inquiry as to the title. Such is not the law. The purchaser of negotiable paper in due course, and before maturity, is under no duty to make inquiry as to the title to paper, fair and regular on its face, nor is he under any duty to inquire into the consideration given for the note, or of the transaction out of which it arose. *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665. He is only chargeable with facts which actually come to his knowledge. Those facts may be actual knowledge of a defect in the title, want of consideration, or such facts as would constitute a defense to the note as between the maker and original payee; or actual knowledge of such facts and circumstances as would lead an honest and fair business man to make further inquiry, and 37 L.R.A. (N.S.)

which inquiry, if made, would lead to the discovery of the fraud, defect, and defenses. In other words, it must be such actual knowledge of the defenses, or such actual knowledge of facts and circumstances, that a failure to make further inquiry would charge a reasonably prudent business man with bad faith and dishonest motives. *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525; *Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52; *Bothwell v. Corum*, 135 Ky. 766, 123 S. W. 291. The first part of the instruction with which we are dealing proceeded upon the correct view of the law, but the vice is to be found in the closing part of the instruction. In view of the fact, however, that the court had correctly instructed the jury on this subject and in consideration of the nature of the evidence that was submitted to the jury, we are satisfied that the jury were not misled in this respect.

The other instruction which we think was erroneous is No. 26, and is as follows: "The question of honesty of the plaintiff in this transaction is one of the things by which you are to be guided in determining his bona fides, and if you find from the facts and circumstances given in evidence surrounding this transaction, and the knowledge of the plaintiff of other like transactions of McLaughlin Brothers, if shown in evidence, that the plaintiff is not acting honestly, then you have a right to find that he did not act honestly in the alleged purchase of this note." This instruction advised the jury that, if they found from the facts of this particular transaction, "or knowledge of other like transactions of McLaughlin Brothers, that the plaintiff is not acting honestly, then they had a right to find that he did not act honestly in the purchase of this note." This was erroneous. The jury might conclude that the holder of a note had acted dishonestly with the maker in some respect, as, for example, a failure to make the proper indorsement of interest or principal paid, or a failure to defer bringing a suit for a given length of time, or in any number of respects, and yet there be no evidence whatever that he acted dishonestly or in bad faith in the purchase of the note itself. However dishonestly the purchaser of a note may have acted subsequent to the purchase thereof, that fact alone would not justify the conclusion that he acted in bad faith or dishonestly in the purchase of the note.

The appellant has also prosecuted an appeal from the order of the district court in taxing costs. It appears that the respondents claimed costs in the sum of \$15.15 for taking the deposition of appellant which has been hereinbefore considered. The specific items for which this \$15.15 is charged

do not appear in the memorandum of costs. The cost bill reads: "Expenses in securing deposition of Edgar J. Vaughn for notary fee, stenographer, securing attendance of witness, swearing witness, and return of witness, and transcribing testimony." In the first place, this is not properly itemized to show what was a legal charge and what was not; and, in the second place, this extra expense was incurred by reason of the failure of the defendants to appear at the time and place specified when and where the deposition was taken and cross-examine the witness. This also entailed extra trouble and expense on the plaintiff in attending and having counsel present a second time for the taking of this deposition. For these reasons this item should have been stricken from the cost bill, and it will be so ordered.

We do not think that any error which has been committed is of such a nature or character as to require a reversal of the judgment. From a view of the whole record, we are satisfied that the same result would have been obtained and the same conclusion would have been reached by the jury had the errors hereinbefore pointed out not been committed, and we are satisfied that the evidence adduced in this case justified the verdict returned. The judgment should therefore be modified to the extent of striking therefrom the item of \$15.15 taxed as costs, and as so modified, is hereby affirmed. Costs of appeal will be equally divided between appellant and respondents.

Cause remanded, with directions to modify the judgment as herein indicated.

Sullivan, J., concurs.

Stewart, Ch. J., dissenting:

I concur in the majority opinion upon the merits of the case, but I dissent to that portion of the opinion in relation to the costs disallowed for the taking of the deposition for cross-examination of Edgar J. Vaughn, the plaintiff, and also in dividing the costs upon this appeal.

The only record presented to this court as to the costs for taking the cross-examination of Edgar J. Vaughn consists in the cost bill itself and the affidavit supporting the same, made by E. V. Boughton, and the affidavit of E. R. Whitla in opposition thereto. The item as shown upon the cost bill is as follows: "Expense in securing deposition of Edgar J. Vaughn for notary fee, stenographer, securing attendance of witness, swearing witness, return of witness, and transcribing testimony, \$15.15." This court disallows this item. It appears from the transcript that this item was incurred in taking the second deposition upon 37 L.R.A. (N.S.)

the cross-examination of the witness Vaughn. The evidence of said Vaughn so taken by a deposition was admissible, and considered proper, relevant, material, and proper cross-examination, and properly admitted in evidence at the trial. That being true, it should make no difference in the allowance of the expense of same as costs whether it was taken at the same time that the original deposition was taken or afterward, because, if taken when the original deposition was taken, the same expense would necessarily have been incurred in taking and certifying the same by the stenographer, and would have been a proper charge as costs in said case, and, if such evidence was proper and thereafter taken and the same expense incurred, I can see no reason why the same should be disallowed as costs of the trial. It is admitted in the evidence of E. V. Boughton, filed in support of the motion to retax, that at least \$6 could properly be taxed as such costs of said deposition, and, under this admission, there can be no reason given that I can see why at least \$6 should not be allowed. The only additional costs that necessarily were incurred in cross-examining the witness at a time different from the time when the deposition was originally taken was in swearing the witness and certifying to his testimony by the notary. The act of the notary in writing down the questions and answers was the same as would necessarily have been incurred had such examination been taken at the time the original deposition was taken, and would have been properly chargeable as costs.

I am unable, also, to concur in the majority opinion which divides the costs of this appeal between plaintiff and respondents. The main appeal upon the merits of this case is decided in the majority opinion in favor of the defendants, while upon the appeal from the order overruling the motion to retax the costs the order of the trial court is modified and the item of \$15.15 is disallowed. The transcript consists of 237 pages, 210 of which contains the record of the appeal upon the merits, while only 10 pages of the transcript is devoted to the question of the appeal from the order of the trial court refusing to retax the costs, and, even allowing the record containing the cross-examination of the witness Vaughn as a necessary part of the appeal from the order, the total record thus made would be 27 pages, making at most the record on appeal from the order 27 pages. Yet the majority opinion taxes the respondents with half the costs of this appeal when the record necessary to have presented the appeal from the order was only 27 pages, while the record upon the merits,

which also necessarily includes the deposition of the same witness, amounts to 237 pages, and yet the appellant is only charged with costs upon this appeal the same as is charged to the respondents. I cannot agree with this principle of adjustment of costs. To my mind it is unfair and unjust, and may often lead to injustice in disposing of the question of costs.

**UNITED STATES CIRCUIT COURT  
OF APPEALS, SEVENTH CIRCUIT.**

COMPTOGRAPH COMPANY, Appt.,

v.

BURROUGHS ADDING MACHINE COMPANY.

(Two cases.)

(105 C. C. A. 533, 183 Fed. 321.)

**Patent — license — renunciation —  
aiding infringer.**

The mere filing by a licensee under a patent who is not in default under his contract, of a brief interpreting adversely to the patent the record in a suit which the patentee had instituted against an alleged infringer, is not such a repudiation, renunciation, or forfeiture of the license that the licensee can no longer enforce rights under it, or as to justify a court of equity in decreeing its cancellation.

(October 14, 1910.)

**Note. — Patent: forfeiture of license by  
aiding infringement or attempt to de-  
feat patent.**

But two other cases have been found which involve this question, and they lend support to the position taken in *COMPTOGRAPH CO. v. BURROUGHS ADDING MACH. CO.*

As a general rule a violation of the patent by abuse of the patented privilege outside of the license does not work a forfeiture of the right conveyed, in the absence of a specific provision to that effect in the contract creating it. In such circumstances a forfeiture can only occur when the licensee has taken a stand against the patent, and has assumed such a hostile attitude toward it as amounts to a repudiation of the right conveyed by the license. The mere fact that in the course of business the licensee has infringed the patent will not work a revocation, and especially in a case where the license covers a distinct and specific privilege which has been paid for once for all, and conveys without further fee or consideration rights which are fixed and definite. Such a privilege, conveyed absolutely and for a consideration paid, becomes a clear vested right, and to the extent to which it has become so vested a court of equity, as well as a court of law, is bound to recognize it. Such is

**A** PPEAL by complainant from a decree of the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois dismissing bills filed to restrain infringement of a patent for a tabulating machine and for the cancellation of a license under said patent. Affirmed.

**Statement by Grosscup, Circuit Judge:**

The bill, No. 1674, was to restrain infringement of letters patent No. 628,176, issued to Dorr E. Felt, July 4, 1899, for a tabulating machine; to which appellee pleaded that it was licensed under said patent, and, on account of said license, could not be held for infringement—counsel for appellant stating upon the record that appellee would not claim that appellee had infringed any of the claims of the patent in suit other than those covered by the plea; and upon this plea issue was joined and proof had. The decree appeared from held that the plea was proved, and dismissed the bill for want of equity.

The bill, No. 1679, was for cancellation of the license above mentioned; to which a general demurrer was filed, which, upon hearing, was sustained and a decree entered dismissing the bill. Practically, the same questions are presented on the appeals in both cases. The two appeals will therefore be considered together in this opinion. Further facts are stated in the opinion.

the doctrine of *Wood v. Wells*, 6 Fish. Pat. Cas. 382, Fed. Cas. No. 17,967, holding that, although a license to attach a certain invention to carriages and to sell the carriages in a finished state only does not grant the right to deal in the fixtures as articles of merchandise, nevertheless, if the licensee does so deal in these fixtures he sells in violation of the patent, but not in breach of any condition of the license which will work a forfeiture of the latter.

So, a person who receives from a patentee a grant of the right to use one machine in a certain quarry, and no other place, does not forfeit his right thereby given to use one machine, by reason of the fact that he allows it to be used by another person in another quarry, although he thereby becomes an infringer; but his right under another provision of the contract, that he shall have the right to use additional machines upon payment to the patentee of specified sums, is forfeited when he further infringes the patent by placing in his quarry infringing machines designed by another; and, after being notified that such machines constitute an infringement, takes from their author an agreement to defend them against claims of infringement. *Steam Cutter Co. v. Sheldon*, 10 Blatchf. 1, Fed. Cas. No. 13,331.

L. A. W.



Argued before Grosscup, Baker, and Seaman, Circuit Judges.

Mr. John W. Munday for appellants.  
Messrs. Edward Rector and Robert H. Parkinson for appellees.

Grosscup, Circuit Judge, delivered the opinion:

The patent involved in these suits was before this court in the case of the Universal Adding Mach. Co. v. Comptograph Co. 77 C. C. A. 227, 146 Fed. 981, and was held invalid on the ground that it was either anticipated by the Hiett and Cable patent, which had been issued before this patent was applied for, or that, accepting the contention that the invention was conceived in 1890, so as to carry the concept back of the Hiett and Cable patent, the same had been abandoned by nonuse. The correctness of that decision is not involved in this case; nor is any evidence brought into this case that was not in that case, except as it may bear upon the question of whether the license agreement of January 20th, 1904, has been renounced, repudiated, or forfeited by the conduct of appellee and its counsel in that case, as contended for now by appellant.

The original license agreement is admitted. The contention is that it has been renounced. The agreement, as executed, after reciting that appellant is the owner of the letters patent above described, relating to adding machines equipped with transversely movable wide-frame paper carriages, and that appellee's assignor, the American Arithmometer Company, had been and was then engaged in the manufacture and sale of adding machines employing transversely movable wide-frame paper carriages, claimed by the appellant to embody a material part of the invention patented, in consideration of the payment of the sum of \$5,000 in cash by the American Arithmometer Company to appellant, releases and discharges the said American Arithmometer Company, its agents, and customers from all claims whatsoever, growing out of said letters patent, on account of the machines manufactured by the said American Arithmometer Company prior to the 1st day of January, 1904; and grants to the said American Arithmometer Company an exclusive license, except as against appellant's right to manufacture, use, and sell such machines, for the full term of the patent. The agreement then further provides as follows:

"3. Said first party (appellant) agrees to promptly bring suit upon said letters patent against existing and future infringers thereof, and to diligently and vigorously prosecute such suit or suits to a final determination, for the purpose of judicially de-

termining the scope and validity of said letters patent and of suppressing infringements thereof and securing a monopoly of said invention to the parties hereto.

"4. Said second party (American Arithmometer Company, appellee's assignor) agrees, upon the terms and conditions herein specified, to pay the first party the following royalties upon all machines embodying the invention described and claimed in said letters patent which said second party may manufacture on and after the 1st day of January, 1904, and during the full term of said letters patent, and all reissues and extensions thereof:

"a. On all machines manufactured by the second party during the pendency of the first suit of the aforesaid litigation, and prior to a final determination thereof, the sum of \$1 per machine.

"b. On all machines manufactured by the second party after a final determination of the first suit of said litigation which shall result in an adjudication establishing the validity and scope of said letters patent in such manner as to control and monopolize under it all adding machines employing transversely-movable wide-frame paper carriages of the general nature and purpose of the machines now being manufactured by the parties hereto, the sum of \$10 per machine until an aggregate royalty at that rate of the sum of \$200,000 shall have been paid by the second party to the first party.

"c. On all machines manufactured by the second party after the payment of said sum of \$200,000, and during the remainder of the term of said letters patent and any reissues and extensions thereof, the sum of \$5 per machine.

"5. Said second party agrees to pay the first party a minimum sum of \$10,000 prior to a final determination of the first suit of the aforesaid litigation, on account of the royalties provided for in clause 4 hereof, but the payment of \$5,000 upon the execution of this instrument, as hereinbefore provided, shall be considered a part of and an advance payment upon said sum of \$10,000. Said final determination of the first suit shall be secured, if possible, on or before December 31, 1905, but if not had by such date, party of the second party shall be relieved of the payment of any royalties whatever upon any machines manufactured by it between December 31, 1905, and the date when such final determination shall be had."

After making provision for the keeping of true, full and accurate accounts by appellee's assignor under the license, with prompt remittance for royalties due thereunder, the license agreement further provides: "7. This contract is based upon the

assumption that the aforesaid letters patent are good and valid in law, and that they can be and will be sustained by the courts, and given a construction which will secure to the parties hereto a substantial monopoly of the manufacture, use, and sale of all adding machines employing a transversely movable wide-frame paper carriage, and is to be construed and enforced between the parties accordingly; and if, as a final result of the litigation hereinbefore mentioned, or as a final result of any subsequent litigation upon said letters patent, said letters patent shall be declared invalid, or shall be so construed by the court as to fail to substantially cover and control all adding machines employing such transversely movable wide-frame paper carriages, then, and in such event, said second party shall have the right to surrender this agreement and license, and be relieved of any further obligations thereunder."

Under this license agreement, appellee and its assignor has paid appellant \$12,209, which admittedly covers all the royalties due or claimed to be due thereunder, at the time that the conduct took place which is said to have been a repudiation, renunciation, or forfeiture, upon the part of appellee, of the license; and up to that time, too, appellee is admitted to have fully performed all its obligations to appellant under the license contract.

The conduct of appellee, urged as a repudiation, renunciation, or forfeiture of the license, was the filing of a brief by appellee's counsel in this court, on behalf of appellee, in the suit of appellant against the Universal Adding Mach. Co. supra, brought by appellant pursuant to, and in accordance with, the terms of the license contract, and determined first in favor of appellant in the circuit court, and subsequently, on appeal, against appellant in this court, as above stated; the brief being filed by leave of this court, obtained upon application of counsel for appellee, of which due notice was given to the parties in the then pending case, including counsel for appellant.

The record before us does not disclose any intention, upon the part of appellee, in the filing of that brief, to consciously repudiate, renounce, or forfeit the license contract; on the contrary, it was clearly stated that they were appearing as persons interested in the license contract and under the terms of that license. The record does not disclose that appellee took any part in the making of the record in the case of the Universal Adding Mach. Co. v. Comptograph Co. So far as anything going into the record was concerned, in the way of facts upon which the judgment of the court was to be invoked, nothing was either add-

ed or subtracted by the brief filed by appellee. The conduct of appellee was confined to an interpretation solely of that record for the benefit of the court. There is nothing in the record before us showing that the appearance of appellee, by brief, resulted in the appellant's changing its position in any respect; all that appellant did, after appellee's brief was filed, was to write a letter to appellee, stating that it took the filing of that brief as a repudiation and renunciation of the license; to which no reply was sent. True, appellee in its brief interpreted the evidence showing facts different from the interpretation put upon the same evidence by appellant; and true, also, appellee, in its brief, stated the law applicable to the evidence differently from the law as stated by appellant; but, unless a licensee, situated as this licensee was, must remain silent at the peril of losing his license, even though, thereby, the court may be misled into misinterpreting the facts or misapplying the law, this appellant has set up no sufficient answer to the plea of appellee in case No. 1674, nor has it set out in its bill, in case No. 1679, facts which would warrant a court of equity in decreeing cancellation of the license contract. It is, therefore, the doctrine of the law that a licensee, situated as this licensee was situated, may not inform the court of its view as to what interpretation should be put upon the evidence, and what application should be made of the law (having had no part in the making of the record), except at the peril of losing its license?

We think not. No case is called to our attention that applies the doctrine that a licensee or tenant may not deny the landlord's title, to cases like this. *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.* 83 C. C. A. 343, 154 Fed. 365, is cited, emphasis being laid upon the sentence in that case that the patentee has the right to the licensee's "silence respecting the validity and prima facie scope of the patent." But in that case, the licensee was in default on its contract, and was refusing to pay the stipulated royalties on the ground that the patent was invalid; the court simply holding that in such a suit, to enforce the contract, the patentee, like the landlord, was entitled to have the case heard, as if the contract, as between the parties thereto, was conclusively presumed to be valid and binding. *Willison v. Watkins*, 3 Pet. 43, 7 L. ed. 596, was the case of a plaintiff seeking to obtain possession of land, which had been in the possession of the defendant and his father continuously for over thirty years—five years adverse possession under the law of the state being sufficient to defeat the landlord's title—and defendant,

during all that time having refused to admit that he held under plaintiff's title. The court held that such adverse possession defeated plaintiff's title, and, dealing with the limitation within which the suit must be brought, used the language quoted by appellant, to wit: "If the tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry."

But the "disclaimer" or "attornment to another," here spoken of, is, of itself, a breach of the tenant's contract relations with the landlord, if any such relation once existed,—a breach, too, that if persisted in for a sufficient length of time would transfer, by operation of law, the title from the landlord to the tenant, and for that reason alone gives a right of action to recover possession the moment it occurs. *Steam Cutter Co. v. Sheldon*, 10 Blatchf. 1, Fed. Cas. No. 13, 331, was a license to use a patented invention in a single machine in the licensee's quarry, and nowhere else; provided, however, that additional machines might be used upon the payment of certain additional stipulated sums. Covering the single machine to be used in the quarry, the royalty was paid, and thereby the license fully performed; but without paying the additional sums, the defendant undertook to use additional machines and thereupon was sued for infringement; the court holding that the license contract was divisible, the portion relating to the single machine in the quarry becoming absolute upon the payment of the stipulated royalty, and the portion of the contract relating to possible additional machines being merely options that, upon failure of acceptance of payment when the machines were used, constituted such use of the machines, independently of the original machines, infringements of the plaintiff's patent. Certainly, no such proposition as appellant contends for here was involved in that case.

The true principle, it seems to us, is set forth by the supreme court in *Blight v. Rochester*, 7 Wheat. 547, 5 L. ed. 519 (partly quoted by appellant). The attempt there was to apply the principle of legal policy, that forbids a party denying the title under which he has received a conveyance, to vendor and vendee. That principle of legal policy is stated as follows: "If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of

estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title. This principle originates in the relation between lessor and lessee, and so far as respects them, is well established, and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged and the obligation of which is still continuing, and in full operation."

Or, to put the doctrine on a more practical basis, where suit is brought by the landlord against the tenant to enforce the landlord's title, recognized in the contract under which the tenant obtained possession, the court will not, at the instance of, or as a matter of defense by the tenant, put the landlord in the position of proving his title before he can collect his rent,—the tenant, in the meantime, remaining in a position where he may eat off of the stock, while the title of the one who gave him the stock is being settled.

But neither the moral policy, nor the practical consideration, on which this doctrine is founded, is present in this case. The suit in which appellee appeared by brief was not the case of the licensor against the licensee to enforce the contract. No license money was due under the contract. There was no refusal to pay license money. There was no putting of the licensor, as against the licensee, to prove his title while the licensee was eating off the stock. There was no reason or moral policy why the brief should not be filed. Indeed, appellee was standing squarely upon its contract with the appellant. It had, as assignee of the American Arithmometer Company, settled and paid up for all past infringements; it had settled and paid upon for all royalties thus far accrued; it agreed that in case the patent embodied a substantial monopoly of adding machines employing a transversely movable wide-frame paper carriage, and after such monopoly had been judicially determined, it would pay additional royalties. These royalties were large; the monopoly

itself, if upheld, was extremely valuable; and the question whether the monopoly had been judicially determined was therefore a matter of deep consequence to appellee. Why may not the appellee, without violation of its contract, or violation of any ethical duty it owes to appellant, contribute toward clarifying the vision of the court by which this judicial determination is to be made both right and final? We see nothing in the conduct of appellee that is a renunciation, repudiation, or forfeiture of its contract; on the contrary we see simply a precaution upon its part that the judgment of the court, upon which its additional obligations and its additional advantages alike depend, shall be as free from error as a full discussion of the record before the court can make the judgment, that is to follow, free from error.

The decree of the Circuit Court is affirmed in each case.

Petition for rehearing denied November 18, 1910.

#### NEW YORK COURT OF APPEALS.

JOHN J. HOPPER, Appt.,

v.

J. GABRIEL BRITT et al., Board of Elections of City of New York, Resp'ts.

(203 N. Y. 144, 96 N. E. 371.)

**Voter — ballot — single appearance of nominee — validity.**

Under constitutional provisions that officers shall be chosen by the electors, and that no one shall be disfranchised except by the law of the land or the judgment of his peers, a statute is void which establishes

**Note. — Constitutionality of legislation restricting candidate to one place on ballot.**

The authorities are in conflict as to the constitutionality of a statute permitting a candidate to have his name appear but once on the official ballot.

In Michigan, Wisconsin, Ohio, North Dakota, and Washington similar statutes have been held constitutional.

The only reported decision besides *HOPPER v. BRITT* in which the constitutionality of such legislation is denied is *Murphy v. Curry*, 137 Cal. 481, 59 L.R.A. 98, 70 Pac. 461, where it was held by a divided court that the statute was an unconstitutional interference with the rights of political parties and candidates.

The court argued that as the Australian ballot law saw fit to recognize political parties as entities, and to circumscribe their spheres of action, it became its duty to treat all justly and impartially; that it 37 L.R.A. (N.S.)

a blanket ballot with a separate column for the nominees of the several parties and independent nominees, but provides that in case a candidate is nominated by more than one party, his name shall appear only once on the ticket, since it discriminates against certain of the electors who may wish to vote for him in the casting of their ballots.

(October 10, 1911.)

**A** PPEAL by relator from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County, Part I., granting writ of mandamus directing defendants to provide sample and official ballots for a general election, in accordance with the provisions of a former election law. Reversed.

The facts are stated in the opinion.

Messrs. Clarence J. Shearn and Herbert R. Limburg, for appellant:

Mandamus is a proper remedy.

*State ex rel. Lloyd v. Rotwitt*, 15 Mont. 29, 37 Pac. 845; *Baird v. King County* (People ex rel. Baird v. Brown) 138 N. Y. 95, 20 L.R.A. 81, 33 N. E. 827; *Markland v. Scully*, 131 N. Y. Supp. 364.

The portions of the Levy bill (chap. 946, Laws of 1911) which amend §§ 331, 368, and 134 of the election law, are clearly unconstitutional and void.

*Re McClosky*, 21 Misc. 365, 47 N. Y. Supp. 294; *Re Bulger*, 48 Misc. 584, 97 N. Y. Supp. 232; *Re Independent Nominations*, 186 N. Y. 278, 79 N. E. 708; *Wynehamer v. People*, 13 N. Y. 393; *People ex rel. Devery v. Coler*, 173 N. Y. 115, 65 N. E. 956; *People ex rel. Goring v. Wappinger's Falls*, 144 N. Y. 616, 39 N. E. 641; *Re Madden*, 148 N. Y. 136, 42 N. E. 534; *Fernbacher v. Roosevelt*, 90 Hun, 441, 35 N. Y. Supp. 898.

was unjust, discriminating, and illegal to deprive a political party of the right to place the name of its nominee upon the official ballot.

As to the rights of the nominee, the court said that as it must be conceded "that a political party has the right to nominate (with a limitation of legal qualification) anyone for office whom it sees fit to select, it follows that the nominee, under our present ballot system, has the corresponding right to have his name placed upon the ticket as the nominee of such political party or parties, and upon the state is imposed the correlative duty of seeing that this is done."

In *Com. ex rel. McGowan v. Martin*, 6 Pa. Dist. R. 645, and in *Com. ex rel. Smith v. McCormick*, 8 Pa. Dist. R. 117, it was said that such a statute was probably unconstitutional, though the question was not decided, as that provision of the statute was held void and incapable of execution, as being inconsistent with other portions of

Messrs. A. S. Gilbert and Julius M. Mayer also for appellant.

Mr. Albert C. Bard, for Citizens' Union:

The ballot provisions of the statute are unconstitutional because of the arbitrary discrimination between different political organizations with respect to the granting or withholding of a place on the ballot.

Re Callahan, 200 N. Y. 59, 140 Am. St. Rep. 626, 93 N. E. 262; Murphy v. Curry, 137 Cal. 479, 69 L.R.A. 97, 70 Pac. 461.

Messrs. Abram I. Elkus, Terence Farley, and George P. Nicholson, with Mr. Archibald R. Watson, for respondents:

The presumption is that the act is constitutional.

People ex rel. Killeen v. Angle, 109 N. Y. 564, 17 N. E. 413; People v. Lochner, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373; People ex rel. Rochester v. Briggs, 50 N. Y. 553.

The act is a reasonable regulation, and is within the legislative discretion.

Re Madden, 148 N. Y. 136, 42 N. E. 534.

Messrs. D-Cady Herrick, R. Burnham Moffat, John B. Stanchfield, Bartow S.

Weeks, and Ellwood M. Rabenold, with Mr. Frank M. Patterson, for Democratic State Committee.

Cullen, Ch. J., delivered the opinion of the court:

This appeal presents a single issue,—the constitutionality and validity of certain provisions of an act of the legislature of this year (chap. 649, Laws 1911), entitled, "An Act to Amend the Election Law Generally." In this state for some years in the conduct of elections we have had the official ballot. Under the various statutes prescribing the form and character of that ballot, every political party that cast at the preceding election 10,000 votes for governor is entitled to a column on the ballot in which are placed the names of its nominees for the various offices to be filled by election. In the caption of the column is the name of the party and also any emblem that it may select to designate it. Further provision is made for independent nominations; that is to say, any body of electors may by certificate place in nomination for

the statute. And in Com. ex rel. Crow v. Richmond, 5 Pa. Dist. R. 647, a peremptory writ of mandamus was awarded directing election officers to place relator's name upon the ballot.

On the other hand, it was held in State ex rel. Shepard v. Superior Ct. 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233, that such a statute is not unconstitutional as depriving a political party of its right to appear upon the ballot, since the Constitution does not guarantee any rights to political parties as such, but only protects the elector in his right to cast a ballot for the candidate of his choice, whether he be upon one ballot or another.

And it was also held that the statute was not unconstitutional because it may tend to destroy party organizations, since political parties are neither mentioned, protected, nor favored in the Constitution. Ibid.

So, in State ex rel. Runge v. Anderson, 100 Wis. 523, 42 L.R.A. 239, 76 N. W. 482, it was held that the provision limiting the right of a candidate to one place on the official ballot did not violate that section of the Constitution which provides that all votes shall be by ballot, in that it deprived the voter of a political party of his right to vote the ticket of the party to which he belonged.

Nor is the statute permitting the name of a candidate to appear but once on an official ballot, and also providing that no party shall be entitled to a place on such a ballot unless it cast at least 2 per cent of the vote at the preceding election, unconstitutional on the ground that a party cannot nominate the same list of candidates that another party has nominated without losing its right of representation upon the official ballot at the next election. Ibid. 37 L.R.A. (N.S.)

And in State ex rel. Bateman v. Bode, 55 Ohio St. 224, 34 L.R.A. 498, 60 Am. St. Rep. 696, 45 N. E. 195, it was held that such a statute does violate the constitutional rights of the voters. (The reasoning of the court is fully set out in the opinion of HOPPER v. BRITT.)

Likewise, in State ex rel. Fisk v. Porter, 13 N. D. 406, 67 L.R.A. 473, 100 N. W. 1080, 3 Ann. Cas. 794, it was held that the statute which prohibited the printing of the name of a candidate for office in more than one column of the official ballot is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional.

In Todd v. Election Comrs. 104 Mich. 474, 29 L.R.A. 330, 62 N. W. 564, 64 N. W. 496, it was held that the ballot law which permits the name of a candidate to appear on the official ballot but once, although he may be nominated by different parties, is not unconstitutional, although some voters may be unable to vote as voters of other parties can, for all the candidates of their party, without marking the ballot more than once, or to have all the candidates of their party appear on the party ballot. (The reasons assigned by the court are fully set out in the opinion to HOPPER v. BRITT.)

It was also said in the above case that the nominee's sole constitutional guaranty was that his name should appear upon the ballot, and that every voter should have a reasonable opportunity to vote for him.

As to constitutionality of legislation affecting party representation on official ballot, see note to State ex rel. McGrath v. Phelps, 35 L.R.A. (N.S.) 353. A. L. R.

offices any persons they choose, and select a party name and party emblem. Such independent nominations are given a column or part of a column, as may be requisite, together with a caption giving the name and emblem adopted by the body, the same as in the case of nominations by political parties. For such independent nominations, if the nominees are candidates for state offices, 6,000 or more voters are required to execute the certificate. If for municipal offices, 2,000 in cities of the first class, 1,000 in those of the second class, and 500 in those of the third. Finally, there is a blank column containing no names of candidates, in which the elector may write the name of any person whom he chooses. Prior to the legislation under review, a voter might by a cross mark in the circle at the head of any column vote for all of the nominees contained in such column, and, if he chose to vote for some other person for any particular office, he might make a similar mark opposite the name of that person, if such name was printed on the ballot; or, if not, write the name in the blank column. Physically disabled or illiterate voters, unable to read the ballot, are entitled to assistance in preparing their votes. A narration of further details is unnecessary for the disposition of this case.

It will be seen by this statement that the names of various candidates if placed in nomination by more than one political party or independent body would appear on the ballot in more than one place. By the statute of this year it has been enacted that "if any person shall have been nominated by more than one political party or independent body for the same office, his name shall be printed but once upon the ballot, and shall appear in the party column of the party nominating him which appears first upon said ballot, unless the said candidate shall, by a certificate in writing, duly signed and acknowledged by him, request the custodian of primary records to print his name in the column of some other party or independent body which shall have nominated him, in which event his name shall be printed in such other column only. . . . When the same person has been nominated for the same office to be filled at the election, by more than one party or independent body, the title of such office shall be printed in the columns where his name is not printed, and underneath such title shall be printed in brier capital type the words, 'See column,' the blank space to contain the name of the party column in which his name is printed, excepting that if any independent body shall have nominated only the candidates of the other party or independent body, no separate column for the

independent body in which the candidates' names do not appear shall be printed upon the ballot." Section 12. The relator contends that the statute is unconstitutional as unjustly discriminating between electors in the facilities afforded them for casting their respective votes, because, where candidates are nominated by two or more organizations, they can receive the "straight vote" of the electors of but one organization, while those affiliated with the other organizations which have placed them in nomination are compelled to seek other columns on the ballot, referred to only by name, and there make the necessary additional marks, thus tending to confuse the electors and defeat their intention to vote for all the nominees of their organization. The special term of the supreme court held these provisions of the statute bad, and granted a writ of mandamus to the election officers, commanding the preparation and issue of the ballots in accordance with the old form. The appellate division has, by a divided court, reversed this order and denied the application as a matter of law, and not in the exercise of discretion.

In the consideration of the question before us, we are not unmindful of the principle that, before a court should declare a statute of the legislature invalid, it must be clearly shown that the statute is irreconcilable with the Constitution; nor do we fail to appreciate the hesitation with which courts should hold enactments of the legislature void. It may be true, as urged by the learned counsel for the respondents, that at the present day some courts are disposed to invade the constitutional prerogatives of a co-ordinate branch of the government by regarding what they believe to be the spirit of the Constitution, rather than its express mandates. But necessarily in all Constitutions or other instruments there are certain propositions which the instruments import, as well as those they expressly and in terms assert.

Therefore it is well settled that legislation contravening what the Constitution necessarily implies is void equally with the legislation contravening its express commands. A notable instance of this is the right to condemn private property. Our Constitution has never expressly forbidden taking private property for private use, but only prescribes that, "nor shall private property be taken for public use without just compensation." Art. 1, § 6. Yet the courts early held that this necessarily excluded the right to take such property for private use, with or without compensation (*Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618),—a doctrine which has been steadily adhered to (*Taylor v. Porter*, 4

Hill, 140, 40 Am. Dec. 274; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88). The only provision of the Federal Constitution on the subject which affects the power of the states is that contained in the 14th Amendment, that no state shall deprive any person of property without due process of law. It was said by the Supreme Court of the United States in *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 251, 49 L. ed. 462, 467, 25 Sup. Ct. Rep. 251, 256: "There ought not to be any dispute at this day in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle, this court has said, grows out of the essential nature of all free governments."

The qualifications of voters are prescribed by § 1 of article 2 of the Constitution, and those qualifications are exclusive. By § 5 of the same article it is provided that "all elections by the citizens, except of such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." By § 1 of article 1 it is enacted that no member of this state shall be disfranchised unless by the law of the land or the judgment of his peers. It is therefore clear that the otherwise plenary power granted to the legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting or from voting for the candidate of his choice violates the Constitution. We have said "unnecessarily," for there is no practicable system of conducting elections at which some electors, by sickness or other misfortune, may not be able to vote. Under our law the blanket ballot affords a voter who may be unable to read the ballot, from illiteracy or physical defect, an opportunity to vote by securing assistance, and to every elector the right to vote for whom he chooses by writing the name in the blank column if the name of his candidate is not on the ballot. If these rights were not accorded, the present election law would be unconstitutional. In *People ex rel. Goring v. Waplinger's Falls*, 144 N. Y. 616, 620, 39 N. E. 641, 642, a vacancy occurred in the office of the police justice of the village. At the next election the official ballot did not con-

tain the name of that office or of any candidate to be voted therefor. The relator received votes at the election, the voters writing his name and the office on the ballot. It was contended that under the language of the election law the votes were invalid. This court held the election good, saying: "The legislature may prescribe regulations for ascertaining the citizens who shall be entitled to exercise the right of suffrage, for that power is given to it by the Constitution. In prescribing regulations for that purpose, or in respect to voting by ballot, it does so subject to, and, presumably, in furtherance of, the constitutional right, and its enactments are to be construed in the broadest spirit of securing to all citizens possessing the necessary qualifications, the right freely to cast their ballots for offices to be filled by election, and the right to have those ballots, when cast in compliance with the law, received and fairly counted. Legislation which fails in such respects and prevents the full exercise of the right as secured by the Constitution is invalid." Indeed, there has been serious criticism on the constitutionality of the system because so many votes had been declared void by reason of the irregularity in the form of the marks made by the voters.

We think the constitutional provisions recited and the provision that certain officers shall be chosen by the electors necessarily further imply that every elector shall have the right to cast his vote with equal facility to that afforded to other voters; or, to speak more accurately, without unnecessary discrimination against him as to the manner of casting his vote. The learned counsel for the respondents have cited the decisions of the courts of several states upholding election laws with provisions similar to that under discussion. The clearest expression of the ground on which the decisions of those courts proceed is found in the opinion of the supreme court of Michigan in *Todd v. Election Comrs.* 104 Mich. 474, 29 L.R.A. 330, 62 N. W. 564, 64 N. W. 496: "The Constitution does not guarantee that each voter shall have the same facilities with every other voter in expressing his will at the ballot box, or, to apply the rule to the present case, it does not guarantee to each voter the right to express his will by a single mark. . . . It follows, then, that every voter has a reasonable opportunity to vote for him [the candidate]. This is the sole constitutional right guaranteed."

Doubtless the Constitution of this state does not guarantee to each voter the right to express his will by a single mark or in any other particular manner; but, with great deference to the learned court from

which we have quoted, in our opinion the Constitution, by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot box, so far as practicable. Any other principle, in our judgment, would be destructive of fair elections. Some impediments to the exercise of the right to vote are, as already stated, under any practicable system of conducting elections, unavoidable; and when these impediments are dependent on circumstances and conditions not connected with the status of the candidates for whom the vote is to be cast, they rarely affect the result of an election; the losses of one candidate being offset by those of the others. Not so with the impediments of the kind prescribed by this statute, which are directed solely at the status of the particular nominee for whom the vote is to be cast. The change from the old system does not diminish the size of the ballot, nor does it decrease the printing on it. It does not tend to make voting easier for the elector, or to avoid confusion on his part, but has the contrary effect. Surely the name of a candidate printed in the appropriate column is less confusing to the elector than a reference to some other column, denoted only by its party name. While the Constitution does not guarantee that the elector shall be allowed to express his will by a single mark, our position is that he is guaranteed the right to express his will by a single mark if other voters are given the right to express theirs by a single mark, and there is no difficulty in according the right to all. It is said by the supreme court of Ohio in *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 34 L.R.A. 498, 60 Am. St. Rep. 696, 45 N. E. 195, in upholding a law of this kind: "There is no discrimination against or in favor of anyone; and, if any inequality arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than others. Distance, bad roads, means of transportation, bad health, and many other considerations may and do render it much more difficult for some men to cast their ballots than others. But these difficulties inhere in the men themselves, and not in the law. . . . The inconvenience is only that which is experienced by everyone who votes other than a straight ticket." This argument ignores the distinction between difficulties or inconveniences occurring by nature or accident, and inconvenience created by statute. Inequality in the facilities afforded the

electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disfranchisement of voters. In 1884 the control of the government of the whole country was transferred from one political party to another through the votes of this state by an average plurality of less than 1,150 votes. The vote for the electors of the successful party was over 560,000. Therefore, if an inconvenience in the method of casting his vote applicable to one candidate only had affected the vote of but one man in 470, the result would have been changed. If it were provided that voting on the blanket ballot should be done by either writing or pasting thereon, under the names of the offices to be filled, the names of the candidates, it is not certain that this plan could be condemned as creating such obstacles to the exercise of the rights of the electors as to render the scheme unconstitutional; but if the plan went further, and provided that the candidates of the party polling the highest vote at the last election should be printed in one column, and the electors allowed to vote therefor by a cross mark, while all the other candidates were required to be voted for by writing or pasting their names on the ballots, I think no one would hesitate to condemn the scheme as unconstitutional. Certainly under that plan there would be great difficulty in turning out the party in power. The condemnation of such a statute would proceed, at least primarily, not on the ground that it disfranchised the voters, but on account of the unequal opportunities to vote afforded the electors. That we are right in the position that equality of opportunity should be afforded electors is a fundamental principle of the constitutional law of this state, we need only refer to the first Constitution adopted by us. Previous to the Revolution elections in the colony were held *viva voce*. The Constitution of 1777 recited: "Whereas, an opinion hath long prevailed among divers of the good people of this state, that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce*: to the end, therefore, that a fair experiment be made, which of these two methods of voting is to be preferred." [Act 6.] And it directed that, after the termination of the war then existing between the colonies and Great Britain, the legislature should enact that elections for senators and representatives should be by ballot, and should direct the manner in which the same should be conducted. We therefore hold the statutory provisions challenged to be unconstitutional because they unnecessarily and substantially discrimin-



ate between electors in the opportunities and facilities afforded for voting for the candidates of their choice. If the discrimination were trivial, our decision would be different; but we know from the election litigations that have come before us that the discrimination here is of a very substantial character, and, where voting machines are used, the difficulty of voting a split ticket is still greater than where voting is by ballot.

At this point we may call attention to a later decision made by the supreme court of Michigan. In *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60, the validity of a provision which required that before the name of any candidate should be placed on the ballot such candidate should on oath declare his purpose to become such was challenged and held unconstitutional. It was said by the learned court: "The man who may be willing to consent to serve his state or his community in answer to the call of duty when chosen by his fellow citizens to do so is excluded, and the electorate has no opportunity to cast their votes for him. It is not an answer to this reasoning to say that the electors may still vote for such a man by using 'pasters.' We cannot ignore the fact that parties have become an important and well-recognized factor in government. Certain it is that this law fully recognizes the potency of parties, and provides for party action as a step towards the choice of an officer at the election. The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise." As already said, we think it doubtful whether a form of official ballot by which all voting should be done by pasters which are easily attached to the ballot could be held such an obstacle as to destroy or defeat the enjoyment of the elective franchise. But the decision could very properly have proceeded on the ground that an unnecessary and substantial discrimination against any body of electors was unconstitutional.

It is urged that there are inequalities under the old form of ballot; but, at least, the most of those inequalities are unavoidable. The party that polled at the last election the greatest number of votes is given the first column on the ballot. As long as the face of the ballot is a plain surface, which has always been the case with us, and there is a party column, some party must have the first place. Every candidate is not given the right to have his name printed on the official ballot. Such a provision would render an official ballot impossible. But not only are all parties or bodies polling

10,000 votes, which is less than 1 per cent of the whole vote of the state, given the right to a separate column, but independent bodies, on the petition of but a small fraction of the electorate, have the same right. Thus the rights of the electors of all organizations which have the most remote or shadowy chance of electing their nominees are given equal rights with those of the great parties, while the inviolable right of every elector is secured by the blank column. But, if the character of the ballot necessarily involves discrimination against certain classes or bodies of electors, it is a reason that the statute should not increase the discrimination.

It has been urged in justification of the statutory provisions before us that independent bodies are often organized for the sake of trading or combining with the regular parties or other organizations on corrupt considerations. It is not pretended, however, that the statute tends to prevent that evil, save in one way, by making it more difficult to vote fusion or coalition tickets. The same argument was advanced in *Re Callahan*, 200 N. Y. 59, 62, 140 Am. St. Rep. 626, 93 N. E. 262, 263, where it was held that the legislature could not constitutionally prevent the nomination of fusion or combination candidates. We there said: "The liberty of the electors, in the exercise of the right vested in them by the Constitution, to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are therefore criminal, such as bribery, violence, intimidation, or fraud, cannot be denied." The legislature might make combinations effected by bribery or illegal considerations criminal, and punish the actors. On proof that an organization was effected and nominations made in pursuance of such criminal bargain, the courts might be authorized to strike such nominations from the ballot. But, because many coalitions between various bodies of electors are corrupt and criminal, it cannot forbid coalition nominations, or indirectly effect the same thing by rendering it more difficult to vote for a coalition nominee. One great object of the present ballot was to prevent bribery by rendering it difficult to determine how any elector voted. There is, however, an opportunity for identification left. The elector may in the blank column write the name of some particular candidate, and thus identify his vote. Undoubtedly the voter may be punished for so doing on proof of the unlawful purpose for which he wrote the name of the particular person. Fortunately the evil does not seem at all common. But, even if it were prev-

alent, to correct the evil, the inviolable right of the elector to vote for whom he chose could not be invaded.

The method of voting on an official ballot which has prevailed with us now for a number of years probably has corrected evils that formerly were prevalent. But personally I fear that in some respects it has undermined public morality on the question of right of the elector to vote for whom he will, provided it is dictated by no criminal consideration. Ever since the adoption of the present scheme there has been an attempt to provide a ballot in such form as to prevent the elector from voting in the way he wishes to vote. In this constant effort it must be conceded that persons desirous of so-called ballot reform, and not political partisans, have been the most active, although by the present legislation the latter seem to have been more successful. All labors by a citizen to induce his fellow citizens to change the principle on which they cast their votes, when he believes that principle is injurious to the welfare of the community, are praiseworthy and patriotic. But, however gross may be the error of his fellows, he has no moral right to correct that error by making it difficult for them to exercise their constitutional rights.

The order of the Appellate Division should be reversed and that of the Special Term in substance affirmed, without costs. There are some errors, however, in the form of the Special Term order, for which reason it must be modified, and the order may be settled on two days' notice before the judge writing the opinion.

**Haight, Vann, Werner, Willard Bartlett, Hilscock, and Chase, JJ., concur.**

Ordered accordingly.

#### NORTH CAROLINA SUPREME COURT.

TOBE McLAWHORN et al., Appts.,  
v.  
BETTIE HARRIS.

(156 N. C. 107, 72 S. E. 211.)

**Jury — court officer — eligibility.**

1. One is not incompetent to serve as a

**Note. — Right of former cotenant to acquire title in his own right through or under a purchaser at a sale under a title or interest paramount to the common title.**

It is a general rule, subject to some exceptions, that the relation of cotenancy, 37 L.R.A. (N.S.)

juror by reason of the fact that, as an officer, he has been in charge of another jury at the same term of court.

**Appeal — admission of irrelevant evidence.**

2. The admission of irrelevant and incompetent evidence is not reversible error if it does not bear upon the real issues in the case.

**Mortgage — sale by transferee — right of bondholder to bid.**

3. The holder of a bond secured by mortgage of real estate has a right to bid at a sale of the property made by the trustees named in the mortgage.

**Cotenant — securing title from bidder at foreclosure sale.**

4. One of the tenants in common of mortgaged property may secure a title adverse to his cotenant by purchasing the property from one who bids it in at a foreclosure sale.

(October 4, 1911.)

**A** PPEAL by plaintiffs from a judgment of the Superior Court for Pitt County in defendant's favor in an action brought to establish a parol trust in an undivided half interest in certain lands. Affirmed.

**Statement by Brown, J.:**

The plaintiffs, children and heirs of Robert A. McLawhorn, deceased, bring this action against the *feme* defendant, Bettie Harris, only child and heir of L. Francis McLawhorn, deceased, to set up and establish a parol trust as against said Francis McLawhorn in the lands described in the pleadings, claiming to own one undivided half of the lands in common with the said Francis. His Honor submitted these issues: "First, Did L. F. McLawhorn take title to said land from J. P. Elliott in trust, to hold one half of the same for the benefit of plaintiffs? Answer: No. Second. At the time of the purchase of the land described in the complaint by L. F. McLawhorn, did he agree to take and hold said land as trustee for himself and the children of R. A. McLawhorn? Answer: No." The plaintiffs moved for a new trial. Motion overruled. The plaintiffs excepted and appealed from the judgment rendered.

**Mr. Harry Skinner** for appellants.

**Messrs. F. G. James & Son and L. I. Moore** for appellee.

while it is in existence, precludes one of the cotenants from purchasing for his exclusive benefit an adverse or outstanding claim or title. Cases sustaining this proposition are not included herein, neither are cases included which pass upon the question what constitutes the relation of cotenancy, nor cases considering the right of

Brown, J., delivered the opinion of the court:

The land in controversy was conveyed to Robert and Francis McLawhorn, brothers, in 1890, by Harry Skinner; the purchase price payable in cotton bonds. To secure the delivery of the cotton, certain bonds were taken, payable to the copartnership of Latham & Skinner, and secured by deed in trust to Harry Skinner. Before the death of Robert McLawhorn, which occurred in 1893, the cotton bonds were duly assigned by Latham & Skinner to Elliott Brothers of Baltimore. In default of the discharge of the bonds, the land was advertised and sold under the trust on March 24, 1894, by Harry Skinner, who conveyed it on said date to J. P. Elliott of said firm. On May 28, 1894, J. P. Elliott conveyed the land to L. Francis McLawhorn, defendant Bettie's father, and took from him on same

day a mortgage on the land securing the purchase price, to wit, 100 bales, 500 pounds each, merchantable lint cotton. This is the same price in cotton which the brothers, Robert A. and L. Francis McLawhorn, contracted to pay Latham & Skinner for the land.

There are nine assignments of error, all of which have received our consideration. None of them are of sufficient importance to justify an extended discussion, except the sixth.

As one exception relates to a juror, we say that we do not think it is well that deputy sheriffs who summon jurors, mingle with, and have charge of, them, should serve as such during the terms of court when they are acting for the sheriff. In their discretion, the trial judges may well excuse them; but there is no statute, of which we are aware, which disqualifies

one cotenant to purchase the property in his own right at a sale under an encumbrance created by one through whom the cotenants derived title. For cases of the latter character, see *Jackson v. Baird*, 19 L.R.A.(N.S.) 591, and note thereto.

The rule that the relation of cotenancy, while in existence, is regarded as being of a sufficiently confidential character to preclude one of the cotenants from acquiring any adverse or hostile rights as against his cotenants in the common property, does not apply to property not held in cotenancy, nor, by the weight of authority, does it apply after the severance of the relation of cotenancy. In general it may be said that where there is no longer a common interest in the property, the privity and all consequences flowing from it cease.

Thus it has been held that a sale in partition proceedings of land held in cotenancy severs the relation of cotenancy, and a cotenant purchasing the property at this sale cannot thereafter buy an outstanding tax title, and compel his former cotenant to pay his proportion of the purchase price. *Stephens v. Ellis*, 65 Mo. 456.

As a corollary to the foregoing, it is held that, in the absence of fraud, after the expiration of the time for the redemption from the sale of unseated land for taxes, a cotenant may purchase for his exclusive benefit the outstanding tax title, since the sale of the land and the expiration of the time for redemption operate to sever the cotenancy, and therefore terminate the trust relation theretofore existing. *Lewis v. Robinson*, 10 Watts, 354; *Reinboth v. Zerbe Run Improv. Co.* 29 Pa. 139; *Brickell v. Earley*, 115 Pa. 478, 8 Atl. 623.

This doctrine is also applied in *Alexander v. Sully*, 50 Iowa. 192, holding that where a superior title, although a tax title, is vested in a stranger, and has been for some time, a former joint owner can purchase such title for his exclusive benefit. The court here, however, points out that it did not appear that any of the cotenants

were in possession of the real estate at the time the stranger acquired the tax title, or at the time the cotenant purchased it from him, and hence such title was not purchased to protect the possession or any other right the cotenants then had.

And in *Keele v. Cunningham*, 2 Heisk. 288, a cotenant was held entitled to purchase for her exclusive benefit an outstanding tax title where the right of redemption had expired, the court pointing out that there was no proof showing that such tenant purchased in any other way than for her own benefit. In this case it does not appear that anyone was in possession of the property.

These cases suggest a distinction not made in all the cases, that is, that there must be not only a severance of the relation of cotenancy by cutting off their common title by the sale of the property for unpaid taxes, or in foreclosure of a lien upon property, but also that there must be an actual eviction of the cotenants,—a complete severance of the relation by loss of possession,—thus giving practical application to the theory of the relation of cotenancy, that unity of possession is essential to the cotenancy, and that the destruction of this unity severs the relation.

It has, however, been asserted in general terms, without qualification, that one tenant in common may purchase the whole estate from the purchaser at a sale made for the payment of taxes, after the right to redeem has expired, and in the absence of fraud such purchase will be for his own exclusive benefit, his cotenants deriving no benefit therefrom. *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637.

This doctrine is denied, however, in *Duson v. Roos*, 123 La. 835, 131 Am. St. Rep. 375, 49 So. 590, holding that the general rule that a purchase by one cotenant of an outstanding title inures to the benefit of the other cotenants applies to the purchase by one cotenant of an outstanding tax title, although the purchase was not directly at the tax sale, but was from a

them. But in this case Manning, the juror challenged, was not a deputy sheriff, but had been an officer in charge of another jury.

There were certain deeds and records introduced, over plaintiff's objection, which are excepted to as irrelevant and incompetent; but it is manifest that they did not bear upon the real issue, and if, erroneously received, the error was entirely harmless. If there is any error, it lies in the refusal of the court to charge the jury that, if they believe the evidence in the case, to answer the first issue, "Yes."

The plaintiffs rest their case upon two contentions, *viz.* (a) That Francis McLawhorn purchased the land from J. P. Elliott in May, 1894, upon an express agreement that he would hold the land in trust for himself and the plaintiffs, his brother's children. This claim is embodied in the

purchaser at the tax sale, and the purchasing co-owner was not in possession of the property during any part of the time in which the tax should have been paid, and did not at any time occupy any trust relation towards the other co-owners other than the bare fact of the former co-ownership of the property.

The general doctrine of the right of a cotenant to purchase an outstanding title for his exclusive benefit after the relation of cotenancy has been severed has also been applied to an outstanding title under a purchase at a mortgage foreclosure sale, and the right so to do sustained where the cotenancy was severed by loss of possession. *Sutton v. Jenkins*, 147 N. C. 16, 60 S. E. 643.

And *Kirkpatrick v. Mathiot*, 4 Watts & S. 251, sustains the right of a cotenant of unseated land to purchase an outstanding title based on a sheriff's sale in foreclosure of a mortgage on the common property, where made some time after the severance of the relation of cotenancy, and it is held that such purchase does not inure to the benefit of his former cotenants.

But if a cotenant causes real estate owned in common to be sold under a deed of trust or a mortgage or other lien, for the purpose of purchasing the outstanding title thus created, for his own benefit, he is guilty of a breach of trust which precludes him from taking advantage of such title as against the other cotenants. *Hinters v. Hinters*, 114 Mo. 26, 21 S. W. 456 (trust deed); *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569, 29 N. E. 1013 (mortgage); *Dray v. Dray*, 21 Or. 59, 27 Pac. 223 (execution).

So, where a mortgagee of land owned in common by several persons agrees to purchase the property at a sale thereof in foreclosure of his mortgage, for the joint benefit of all the cotenants, one of the cotenants cannot thereafter, by procuring from the mortgagee a deed of the premises, acquire

second issue. Under this issue, the plaintiffs attempted to establish an express trust; and it must be admitted that they introduced parol evidence which would have well warranted the jury in finding it for them. But the fact was controverted, and other evidence offered tending to deny the existence of any such agreement. The charge of the court upon this phase of the case presented the plaintiffs' contention with fullness and clearness, and was as favorable to them as they were entitled to. (b) The other contention is based upon two theories: First, that J. P. Elliott bought at his own sale, and consequently the sale was void; that the relation of mortgagor and mortgagee continues to exist; and that, therefore, the tenancy in common between the plaintiffs and Francis McLawhorn has never been severed.

We do not find anything in the record

for his exclusive benefit the mortgagee's title based on the mortgage foreclosure sale. *Caldwell v. Caldwell*, — Ala. —, 55 So. 515.

Where a contract for the purchase of an adverse title based on a mortgage foreclosure sale of the real estate held in common was in fact made before the expiration of the redemption period, and hence at the time when the relationship of co-owner still existed, the completion of the contract of purchase by procuring the conveyance, although after the right of redemption had expired, does not enable the purchasing tenant to claim for his exclusive benefit the adverse title purchased, but it inures to the benefit of all the tenants. *Oliver v. Hedderly*, 32 Minn. 455, 21 N. W. 478.

Where the cotenants have become emphatically antagonistic to each other in their claims and interests, and the sale of the entire property is ordered, and a stranger to the tenants becomes the purchaser at such sale, a subsequent purchase by one of the cotenants from the stranger does not inure to the benefit of the other cotenants. *Wells v. Chapman*, 13 Barb. 561.

Or where, by ejectment proceedings under an adverse claim, the tenants in common are evicted, the cotenancy thereupon ceases, and one of the former cotenants may thereafter acquire such adverse title for his exclusive benefit. *Coleman v. Coleman*, 3 Dana, 398, 28 Am. Dec. 86.

Or where, by agreement between the cotenants, each takes possession of a separate portion of a parcel of land owned jointly, and each has his respective portion assessed to him individually, one of the cotenants may purchase for his exclusive benefit an outstanding tax title upon one of the portions of the land assessed to another of the cotenants, the title arising from the failure of the latter to pay his taxes on such portion. *Davis v. Cass*, 72 Miss. 985, 18 So. 454.

A. G. S.

upon which to found such claim. The pleadings state that the sale was made by Skinner, the trustee in the deed, and the deed to Elliott executed by him and introduced by plaintiffs contains every essential recital; among others, that Skinner advertised the land according to the terms of the deed, and sold it to Elliott, the highest bidder. There is no evidence whatever which tends to controvert this, or to show that Elliott or his attorney made the sale, or controlled it. As the holder of the bonds secured in the deed, Elliott had a right to bid at the sale by the trustee. It was not his sale, but Skinner's, the person appointed by the mortgagors to make it, and in whom reposed the legal title. There is no evidence or even suggestion of any fault, undue advantage or oppression. So far as the record discloses, the sale was fair, open, and "above board," and made by the person vested with the power to sell.

The second theory is that J. P. Elliott purchased the land, not for himself, but for Francis McLawhorn; and that, inasmuch as he could not legally acquire title to the land adverse to his cotenants at said sale, Elliott could not do so for him. The only evidence upon which to base this contention is that Elliott bought the land on March 24, 1894, and conveyed it to L. F. McLawhorn on the 28th of the following May; and the further fact that he sold it for 100 bales of cotton, the same price that the two brothers had agreed to pay Latham & Skinner for it. These may be suspicious circumstances, but it is manifest they do not warrant the charge asked for by plaintiffs. They are open to explanation, and different inferences may be drawn from them. They were properly submitted to the jury for what they were worth.

Assuming that Elliott purchased the land for himself or his firm, to save his debt, we cannot agree with the learned counsel for plaintiff that Francis McLawhorn could not afterwards acquire title adverse to the plaintiffs, his former cotenants. We recognize the just principle that a cotenant, while such relation exists, may not acquire an outstanding title or lien upon the common property, and hold it for his own exclusive benefit. His cotenants may share it with him. *Jackson v. Baird*, 148 N. C. 29, 19 L.R.A.(N.S.) 591, 61 S. E. 632. But, nevertheless, a tenant in common, as such, is not a trustee for his cotenant. *Saunders v. Gatlin*, 21 N. C. (1 Dev. & B. Eq.) 92. It is also true that where a cotenant in common acquires title from a sale under a deed of trust made by all the cotenants, for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot, under his 37 L.R.A.(N.S.)

rights so derived, hold the land against his cotenants. *Reed v. Bachman*, 61 W. Va. 452, 123 Am. St. Rep. 996, 57 S. E. 769.

But the jury has not accepted the theory that Elliott purchased for Francis McLawhorn; and there was very little evidence, so far as Elliott was concerned, to support that claim. Therefore, when the trustee conveyed all the land to Elliott, the unity of possession was destroyed, and the tenancy in common ended. Unity of possession is the only unity essential to such cotenancy; anything that operates to destroy this unity will dissolve the cotenancy in common. *Sutton v. Jenkins*, 147 N. C. 16, 60 S. E. 643; 17 Am. & Eng. Enc. Law, 711. After the tenancy in common is actually dissolved, there is nothing in the law which forbids a former tenant in common from acquiring the entire property. He then has the same rights as any other individual. *Sutton v. Jenkins and Jackson v. Baird*, supra.

Upon a review of the record, we find no error.

#### MICHIGAN SUPREME COURT.

LUKE RILEY, Plff. in Err.,

v.

WILLIAM R. ROACH.

(— Mich. —, 134 N. W. 14.)

#### Master — automobile — liability for acts of chauffeur.

1. The owner of an automobile who, upon leaving home, instructs his chauffeur not to take the machine out without orders from himself or wife, is not liable for injury done by the machine while it is being used by the chauffeur contrary to the express orders so given him.

#### Evidence — declarations of chauffeur — disobedience of orders.

2. Statements made by a chauffeur at the time of an accident which occurred while he was using the machine in violation of his express orders are not binding upon the owner.

(January 23, 1912.)

#### Note. — Liability of owner for injuries caused by automobile while being used by a servant or a third person for his own business or pleasure.

The early cases upon the question here considered are gathered in the notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 214; *Hayes v. Wilkins*, 9 L.R.A.(N.S.) 1035; *Jones v. Hogue*, 14 L.R.A.(N.S.) 216; *Danforth v. Fisher*, 21 L.R.A.(N.S.) 93; *Steffen v. McNaughton*, 26 L.R.A.(N.S.) 382; and *Fleischner v. Durgin*, 33 L.R.A.(N.S.) 79.

In *McKiernan v. Lehmaier*, — Conn. —,

**E**RROR to the Circuit Court for Oceana County to review a judgment in defendant's favor and an order denying a motion for new trial in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Cross, Vanderwerp, Foote, & Ross and V. V. Barnes, for appellant:

In directing a verdict for defendant, the trial court usurped the province of the jury. It was not for the court to say that under all the evidence, defendant's chauffeur was not acting within the scope of his employment.

Moon v. Matthews, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl.

81 Atl. 969, the owner was held liable, where, upon being left at the theater, he loaned his chauffeur money with which to have his hair cut, telling him to be at the theater at a given time, and the chauffeur drove to numerous barber shops in two cities finding them all crowded, and on his way back to the theater to wait for the owner, struck and killed a person. The court said: "In the case before us the servant, with the knowledge and consent of his master, left him with his motor vehicle to engage in a matter personal to the servant for a limited period. The services of the day in which the servant was engaged had not been completed when the accident happened. He was not then wholly at liberty from his master's engagement and pursuing his own business exclusively. If the injury had been inflicted while Shatzer was going from barber shop to barber shop in Norwalk and South Norwalk, the question would have been different. But we do not deem it necessary to express any opinion upon this phase of the case, because the accident occurred when the private business of Shatzer had been completed, and he was operating the defendant's automobile back over the road which he had previously traveled, for the purpose of discharging the duty for which he was employed and intended to perform. When the automobile struck Seiler, Shatzer was not engaged in any affair of his own, but was attending to the business of the defendant in the scope of his employment."

And see also Moon v. Matthews, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219, set out in RILEY v. ROACH.

And where the owner of an automobile, when he went abroad, left his machine for the convenience of his family, he is liable for an injury occurring while the machine was out under the orders of his married daughter, who was at the time a member of his household. Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276.

So, the owner of an automobile who leases it, with a licensed chauffeur in charge of it, at a certain sum per day, is liable to strangers for the negligent acts of the chauffeur, 37 L.R.A. (N.S.)

219; Barr v. Guelph Patent Cask Co. 129 Mich. 278, 88 N. W. 640; Elwood v. Western U. Teleg. Co. 45 N. Y. 549, 6 Am. Rep. 140; Michigan Pipe Co. v. Michigan F. & M. Ins. Co. 92 Mich. 482, 20 L.R.A. 277, 52 N. W. 1070; Gibbons v. Farwell, 63 Mich. 344, 6 Am. St. Rep. 301, 29 N. W. 855; Myrning v. Detroit, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; Fox v. Spring Lake Iron Co. 89 Mich. 387, 50 N. W. 872; Chamberlain v. Detroit Stove Works, 103 Mich. 124, 61 N. W. 532; Wager v. Lamont, 135 Mich. 521, 98 N. W. 1; Wilson v. Royal Neighbors, 139 Mich. 423, 102 N. W. 957; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. ed. 502; Cosgrove v. Ogden, 49

where the lessee has no control over him except as to when and where the car shall be driven. Shepard v. Jacobs, 204 Mass. 110, 26 L.R.A. (N.S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392.

And in Kneff v. Sanford, 63 Wash. 503, 115 Pac. 1040, it was held that a prima facie case was shown against one who operated automobiles for hire, where his chauffeur, who received a commission on the fares collected, while on duty at his stand in front of a hotel, where some orders were taken by telephone, invited a telephone operator employed at the hotel to ride home gratis, and on his way back to his stand he injured a person, after which, his employer testified, he had retained the chauffeur in his employ for a number of months.

And such a prima facie case is not overcome as a matter of law by the testimony of the owner and chauffeur that the former had instructed his chauffeurs, including the one in question, not to take telephone girls home in the automobiles unless so instructed by the owner, or upon payment of their fares, and that the chauffeur involved had received no instruction to take the operator home at the time of the accident. Ibid.

The owner of an automobile, however, is not liable for injuries inflicted while the machine is in charge of a chauffeur employed by the owner's brother, to whom the machine had been loaned. Parsons v. Wiener, 113 N. Y. Supp. 922; Freibaum v. Brady, 143 App. Div. 220, 128 N. Y. Supp. 121.

And the owner of an automobile is not liable on the theory that it is a dangerous machine, for its negligent use to the injury of a stranger, by one to whom he had loaned it, and who was in complete control of its operation, although the owner was at the time of the accident present in the machine as a guest. Hartley v. Miller, 165 Mich. 115, 33 L.R.A. (N.S.) 81, 130 N. W. 336.

And where a chauffeur, at the time an accident occurs, is riding for his own pleasure in his employer's machine, without the latter's knowledge or consent, the employer is not liable for the injury. Howe v. Leighton, 75 N. H. 601, 75 Atl. 102.

N. Y. 255, 10 Am. Rep. 361; Ellegard v. Ackland, 43 Minn. 352, 45 N. W. 715; Fitzsimmons v. Milwaukee L. S. & W. R. Co. 98 Mich. 257, 57 N. W. 127; Cleveland v. Newsum, 45 Mich. 62, 7 N. W. 222; Weber v. Lockman, 66 Neb. 469, 60 L.R.A. 313, 92 N. W. 591; 20 Am. & Eng. Enc. Law, 2d ed. 167; Patterson v. Kates, 152 Fed. 492; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 386, 124 N. W. 1016, 19 Ann. Cas. 1227.

Declarations of the chauffeur made at the time of the accident were admissible as a part of the *res gesta*, and should not have been excluded.

Zart v. Singer Sewing Mach. Co. 162 Mich. 393, 127 N. W. 272.

Messrs. Rufus F. Skeels, Fred J. Russell, C. O. Smedley, and F. E. Wetmore, for appellee:

Statements made by the chauffeur while he was violating defendant's express instructions are not binding on him.

Sisson v. Cleveland & T. R. Co. 14 Mich. 489, 90 Am. Dec. 252; Patterson v. Wabash, St. L. & P. R. Co. 54 Mich. 91, 19 N. W. 761; Keyser v. Chicago & G. T. R. Co. 66 Mich. 390, 33 N. W. 867; Hall v. Murdock, 119 Mich. 389, 78 N. W. 329.

The chauffeur, Hall was not acting within the scope of his employment, but in direct violation of the instructions given him by defendant, and for such acts the defendant is not liable.

Keating v. Michigan C. R. Co. 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346; Schulwitz v. Delta Lumber Co. 126 Mich. 559, 85 N. W. 1075; Mahler v. Stott, 129 Mich. 614, 89 N. W. 340; McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 60 Am. St. Rep. 537, 50 N. E. 500; Wiltse v. State Road Bridge Co. 63 Mich. 639, 30 N. W.

370; Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057; Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336; Schulte v. Holliday, 54 Mich. 73, 19 N. W. 752; Reaume v. Newcomb, 124 Mich. 137, 82 N. W. 806; Ritchie v. Waller, 63 Conn. 155, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29; Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897; Herlihy v. Smith, 116 Mass. 265; King v. New York C. & H. R. R. Co. 66 N. Y. 181, 23 Am. Rep. 37; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946; Huddy, Law of Automobiles, p. 95; Clark v. Buckmobile Co. 107 App. Div. 120, 94 N. Y. Supp. 771; Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161.

Stone, J., delivered the opinion of the court:

This is an action on the case to recover damages for an injury received by the plaintiff on July 28, 1909, by reason of an alleged collision of defendant's automobile with the plaintiff's buggy, in which he was riding on a highway.

The declaration consists of two counts. In the first count the plaintiff alleges as follows: "And which automobile of said defendant was then and there under the care, direction, and supervision of a certain then servant, to wit, one Hall, a chauffeur, of the said defendant, who was then and there driving the same in and along the highways in said county and state by the order, direction, and knowledge of said defendant,

In Simeone v. Lindsay, — Del. —, 65 Atl. 778, where it was sought to recover for an injury sustained by being run into by an automobile, the court instructed the jury as follows: "If the automobile at the time of the accident was entirely operated and controlled by someone other than the defendant, the plaintiff could not recover. It is not, however, necessary that the defendant should have been the owner of the automobile, because if you believe that he had, at the time of the accident, control of the machine, so as to be able to govern its management or operation, any negligence in operating the machine would be the negligence of the defendant."

Where the evidence is conflicting upon the questions of whether the operator of an automobile had hired it of the owner for his own use, or was acting as an employee of the owner, they are questions of fact for the jury, and the jury's findings are con-

clusive. Ottomeier v. Hornburg, 50 Wash. 316, 97 Pac. 235.

Where there is a question as to whether a son was operating an automobile at the time of an accident as the servant of his father, or only on his own account, although the weight of testimony is that he was using it with his father's permission for his own purposes, evidence is admissible that he was the regularly employed chauffeur of his father, that he lived in his father's family, and that his father was present when he started to take persons whom he had carried to a dance home, and told him that he had better light his headlights,—such evidence being proper for the consideration of the jury on the question of whether the son was representing his father at the time of the accident. Bourne v. Whitman, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404.

J. T. W.

and in the prosecution of his business aforesaid." In the second count it is alleged: "And which automobile of said defendant was then and there under the care, direction, and supervision of a certain then servant, to wit, one Hall, a chauffeur of the said defendant, who was then and there driving the same along the highways in said county of Oceana with the consent of said defendant."

Upon the trial the following undisputed facts were shown: The defendant was the owner of a valuable automobile which he bought the season before the accident. The defendant was called by the plaintiff for cross-examination under the statute.

After testifying that the chauffeur, Hall, had been in his employ nine days when the accident occurred, the following was his testimony:

Q. Did you engage Mr. Hall to do any work other than to operate your automobile?

A. No, sir; I did not. Operate and keep it clean, keep it in repair, you understand,—the general work of a chauffeur. He came to me well recommended. I was in the Upper Peninsula of Michigan on July 28, 1909. I left Hart the night of Sunday, July 25, 1909. I know a Mrs. Blake who resides in Albion. I don't know her given name. She is in no way related to me or to my wife. She was not in Hart when I left for the Upper Peninsula. I understood that she was at my place while I was gone.

Q. As a guest?

A. Well, she was there, and my wife was away from home, Mrs. Roach and I was away from home, and she was gone when I got back, and I understand she came to visit Mrs. Nott.

Q. Who is Mrs. Nott?

A. Mrs. Nott is my brother-in-law's wife, Mr. Nott, who was an Albion lady before her marriage.

Q. Where was she living at that time?

A. She was living in the village of Hart.

Q. Occupying your residence?

A. Oh, no.

Q. Did your wife accompany you on your trip to the Upper Peninsula?

A. No, sir.

Q. Did you leave anybody in charge of your house while you were gone?

A. We did.

Q. Who?

A. Miss Harriett Nott.

Q. That is not the Mrs. Nott that you speak of?

A. No, no. This is a "Miss."; I didn't say "Mrs."

Q. Who is Miss Harriett Nott?

A. My wife's sister.

37 L.R.A. (N.S.)

Q. She was given general charge of the house, was she, while you were gone?

A. She was; yes, sir.

Q. When did your wife leave Hart?

A. Some two or three weeks before.

Q. That is before you left?

A. Before I left; yes sir. I can't just tell you the exact date, some two or three weeks.

Q. I am not particular about that. But you were both gone?

A. Yes, sir.

Q. And you left your residence in charge of Miss Harriett Nott, and were there any guests at your house at the time you left?

A. I think my wife's sister was visiting between Mr. B. C. Nott's and my wife's house, our home.

Q. What is your wife's sister's name?

A. Mrs. Royce.

Q. Is that Mrs. Carrie Adelle, or Adellia, do you pronounce it, Royce?

A. That is the lady.

Q. Any other guests there?

A. Not that I remember of. We had guests coming and going all the time; men coming to see me on business that I always entertained at my home.

Q. Your wife's sister was not there in the same capacity of men who drop in to see you on business, and that you entertain, was she?

A. No, sir. She was there spending her summer. She came to Hart to spend her summer vacation. She was spending it between our home and Mr. Nott's home.

Q. I suppose you did the best you could to entertain her, didn't you?

A. Why, we didn't,—she entertained herself.

Q. You furnished an automobile for her use, if she desired it, didn't you?

A. No, sir.

Q. Never?

A. No, sir.

Q. Up to the time you left, hadn't she ridden in your automobile?

A. No, sir.

Q. Why was that?

A. Well, one reason was that we hadn't a chauffeur for some considerable time; hadn't had anybody to drive the car. I don't know how to drive the car myself, and the time she came to visit us, up to the time that Mr. Hall came, we hadn't had anybody to drive the car.

Q. You made quick use of him when you got him, didn't you?

A. Why, no. I didn't make particularly quick use of him.

Q. What use did you make of that automobile after Mr. Leslie Hall came there?

A. My instructions to Mr. Hall—

Q. (Interrupting) I am not asking you about your instructions. Read the question.



A. I think I had it out twice.

Q. Who had it?

A. Leslie Hall and I.

Q. Now, your purpose in getting Leslie Hall there as chauffeur just before your departure was for the purpose of having somebody to operate that automobile for the benefit of anybody that might want to use it there at the house, didn't you?

A. Oh, no; I beg your pardon.

Q. Nothing of that sort?

A. Nothing of that sort.

Q. For what purpose then?

A. Please state your question again.

Q. The stenographer will read it. (Last question read.)

A. No, sir. My purpose of employing Leslie Hall was for the purpose of operating my automobile at such times as myself and my wife might want it.

Q. You mean by that that you didn't expect he would take one of your guests in your automobile,—your wife's sister?

A. I meant by that I do not take my automobile out without myself or Mrs. Roach goes with it.

Q. Has that always been true?

A. Up to that time; yes, sir.

Q. How has it been since that time?

Mr. Smedley: I object to that as incompetent.

Mr. Wetmore: And immaterial.

The Court: I think you may answer.

A. Practically the same.

Q. What did you use your automobile for?

A. I use my automobile for the pleasure of myself and wife and invited friends, when we take them to ride with us.

Q. For any purpose connected with the factory?

A. I have used my automobile when I wanted to for my own individual use, whether it was for the factory, or whether it was my personal use. If I was going,—it became necessary for me to go to Shelby or Muskegon, the automobile is my individual property; and if I choose to ride in the automobile rather than to go in the train, I did as I thought best about the matter.

Q. In whose charge did you leave this automobile when you left for the North?

A. I left it in Leslie Hall's charge, if anybody's.

Q. There isn't any question about it, is there, but what you left it in his charge?

A. I left it in his charge to do certain things with it. His instructions were complete.

Q. How soon did you return after July 28th?

A. I got back to Hart some time after 5 o'clock on the following Thursday. That would be the day following the accident.

37 L.R.A. (N.S.)

Q. To what use did Mr. Hall put your automobile while you were away, other than taking the trip on the occasion that Mr. Riley was injured?

A. I wired—I called up by telephone—to have Leslie Hall take my automobile and come to Ludington, and meet me at Ludington.

Q. When did you do that?

A. On the morning of the 29th. I was gone from home Monday, Tuesday, Wednesday, and almost all Thursday. I left Sunday night on the evening train for Chicago.

Q. What was done with that automobile on Monday and Tuesday, or either of those days?

A. To my best knowledge, there wasn't anything done with it.

Q. You happen to know about the use on Wednesday because of this accident, do you?

A. Yes, sir. I first learned of what had occurred after the Hart plant had shut down on Thursday; it was 8 or 9 or 10 o'clock, or possibly 11 o'clock. I got the word when I was driving between here and Pentwater with Mr. Daggett, who is one of our stockholders, associated with me in business, and an officer of the company at the present time; he told me about it. He wasn't an officer in the company at that time.

Q. How were you paying Mr. Leslie Hall?

A. Paying him by the week.

Q. Did you pay him for the week that this accident occurred?

A. Yes, sir.

Q. Continued him in your employ?

A. Yes, sir.

Q. He is now in your employ?

A. Yes, sir.

Q. In the same capacity?

A. Yes, sir.

Examination by Mr. Smedley:

Just before I employed Leslie Hall as my chauffeur, my machine was out of commission.

Q. And what did you have to do in order to fix it so that it would run?

A. Well, now, I am not very familiar with automobile terms; I don't run a car myself, because I am too busy a man. There was two little bearings in the hind axle, or in the hind mechanism, that we needed to get before we could run the car, because the bearings in that were worn out, or become deficient. I ordered those bearings, and they came, but they were the wrong size. I ordered them again, and they came, and they were the wrong size again, and I ordered them again, and they were the wrong size, and then I gathered up the old bearings and sent them down to Chicopee Falls, Massachusetts, and got the right bearings. The correspondence in my office will show that it was their fault, and not mine.

Q. Was this after you employed Mr. Hall?

A. This was previous to my employing Mr. Hall.

Q. What, if any, work did he do in the machine?

A. He put those bearings in, and went over the car in a general way; went over it all through, took the rear axle down,—I am not familiar with automobile terms.

Q. After he got it fixed, did you use it before you went to the Upper Peninsula?

A. I did, I think, twice; Leslie Hall was with me. Those trips were to test the machine and see if it was in running order. Before I went away, I gave him some instructions. My instructions to him were to go all over the car, be as careful as he could with it, see that the machinery was all in working order, scour up the brass, brush out the top, clean it all up in good shape, and not take it out until my return, unless Mrs. Roach or I called for it. Mrs. Roach at that time was ill over to Mr. White's cottage on the beach, under a doctor's care. I think that beach is called Oceana Beach. It is 8 miles from Hart by road. Mrs. Roach had been there probably three weeks before I employed Mr. Hall. She was still out there in the cottage when I got back. She was very nervous, and I think the doctor called it nervous prostration.

Q. Did she use the automobile during that time that you were away?

A. Oh, no; the automobile was out of commission.

Q. It was in commission before you went away?

A. In commission before I went away; yes, sir.

Q. While you were gone to the Upper Peninsula, did your wife use that?

A. No, sir.

Q. Who was staying with her out there to the beach?

A. Mrs. Daggett at that time, and a girl.

Q. Were those two women alone?

A. With the exception of one young girl.

Q. Who, if anybody, went out there nights to stay?

A. Well, during her sojourn there, I either went out, or Mr. Daggett, or sometimes my brother-in-law, Mr. Nott, went out, if I had to be away from home.

Q. How did they go and come?

A. Sometimes we took Mr. Daggett's car; sometimes we drove with a horse.

Q. And when you went to the Upper Peninsula at this particular time, who went out there nights to stay?

A. Well, either Mr. Daggett or Mr. Nott was to go out there; they promised me faithfully when I went away that one of them would go every night, and I think it was Mr. Daggett who went.

57 L.R.A. (N.S.)

Q. Do you know who was out there Tuesday night?

A. No, sir.

Q. Do you know what business this man Hall was on at the time he took out your car?

A. Yes, sir.

Q. Did you or your wife give him any orders to take that machine out?

A. We did not.

Q. When he took it out, was it without your knowledge and without your consent?

A. It was.

Q. And contrary to your instructions?

A. Yes, sir.

Q. How long had he been in your employ when you gave him these instructions not to take the car out,—clean it up, but not to take it out until you got back, unless your wife instructed him to?

A. Well, he came Monday on the train, and I think we got there,—well, I can't say just when it did get here; it got here some time in the forenoon, and that was the following Saturday night.

Q. And he worked for you only five days?

A. That is the time; yes, sir.

Q. Now, why was it that you told him to clean it up, but not to take the car out until you got back unless your wife told him to?

A. Well, sir, from the fact that I had just gotten the young man, and from the fact that the car had been needing some repairs, and from the fact that it was good business, as any other good business man would do.

Q. How expensive a machine was that?

A. Thirty-five hundred dollars, besides about \$300 of extra repairs, fixtures, extra fixtures that always go to the car,—apertenances that goes onto the car.

Q. What was the total cost of the machine to you?

A. About \$3,800. The car was a first-class equipped car.

Recross-examination by Mr. Cross:

Q. Your wife was stopping where, you say, at this time?

A. She was living over to Mr. White's cottage on the beach.

Q. How far from Hart?

A. Why, it is 8 miles; it is considered 8 miles to Pentwater, and I guess, perhaps, it is a half or three quarters of a mile over to the cottages. I couldn't say just exactly; possibly more, possibly not so much.

Q. Telephone communication between that cottage and your home?

A. No, sir; no telephone.

Pursuant to the promise which had been made to defendant, Mr. Daggett, on the evening of July 27, 1909, in company with

defendant's sister-in-law, Miss Nott, who had charge of the Roach house, and one Carl Flood, went in Mr. Daggett's automobile to the cottage at Oceana Beach, occupied by Mrs. Roach and Mrs. Daggett. While making the return trip to Hart the following morning, their supply of gasoline became exhausted, and left them stranded or "stalled" 3½ miles north of Hart. Mr. Flood and Miss Nott were with Mr. Daggett. Mr. Flood was not a witness. As to what was done at this point appears by the testimony of Mr. Daggett, as follows:

Q. Now, when you exhausted your supply of gasoline, what did you do to replenish it?

A. Why, we were right by Mr. Cox's barn, and Mr. Flood was with me, and I says, "Well," he says, "We will see whether Mr. Cox has any or not." We met Mr. Cox at the barn; asked him if he had any gasoline. He said: "No; but Mike might have some at the corner." And Mr. Flood said: "Well, we can get gasoline from Hart about as quick as we could get it from the corner, a little over a half mile away." "Well," I says, "all right, then; you go and call Dikeman and have him bring us out some."

Q. Where was Miss Nott during this time?

A. She was way back in the road, in the car.

Q. Who is Dikeman?

A. Why, he is the man that does repairing here; he repaired my car several times.

Q. Who telephoned in?

A. Mr. Flood.

Q. Do you know to whom he telephoned?

A. I don't, sir; I was not in the house.

Q. Who came with the gasoline?

A. Why, Mr. Hall, Mr. Roach's chauffeur.

Q. Whose automobile did he have?

A. Mr. Roach's automobile.

Q. And who accompanied him on this trip out?

A. The two ladies and a gentleman, Mrs. Royce, and the other two parties I had never seen before.

Q. There was Mr. Hall and Mrs. Royce?

A. Mrs. Royce and the other two parties I had never seen before.

Q. Mrs. Royce is a sister of Mrs. Roach?

A. Mrs. Roach's sister; yes.

Q. Was visiting there at the time?

A. Yes.

Q. And there was another lady and gentleman?

A. Yes.

Q. That you were not acquainted with?

A. Not acquainted with at the time.

Q. Did you make their acquaintance, so that you can tell us who they were?

A. Yes; I was introduced to them.

37 L.R.A. (N.S.)

Q. Who were they?

A. Mrs. Blake and her son.

Q. Do you know where they were visiting in Hart?

A. No; I don't.

Mr. Blake, whose deposition was taken, testified that he and his mother, in company with Mrs. Royce, with Hall as chauffeur, in response to a telephone message, left Hart with defendant's automobile to take a can of gasoline to Mr. Daggett. The gasoline was furnished in this manner, and, after replenishing his car, Mr. Daggett, with Miss Nott and Mr. Flood, proceeded on their way to Hart. The chauffeur continued on in the opposite direction until he found a suitable place in which to turn around, which he did, and it was while returning to Hart that the collision occurred which is the subject-matter of this suit.

At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendant, on the ground that the plaintiff had not made a case. In other words, the court held that at the time of the accident the chauffeur was not acting within the scope of his employment by defendant, but contrary to his directions, and was in fact performing a service for Mr. Daggett, and that the evidence did not warrant a submission of the case to the jury.

Verdict and judgment were entered for the defendant, and, after a motion for a new trial was denied, the plaintiff brought the case here upon writ of error, assigning as error that the trial court erred in directing a verdict for the defendant, and in refusing a new trial.

It is urged by appellant that it was not for the court to say, under all the evidence, that defendant's chauffeur was not acting within the scope of his employment; and that the presumption arising from the attendant facts and circumstances was not so completely overcome by the testimony of the defendant as to warrant the court in determining this question.

The appellant relies largely upon the case of *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A. (N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219. Counsel quote at length from this case, and claim that it is in its facts almost identical with the instant case. The headnote of that case is to the effect that the mere fact that a chauffeur, in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of the family, disobeys the master's command not to take out the car unless the master accompanies it, does not show that he is acting outside the scope of his employment, so as to relieve the mas-

ter from liability for injury done by the negligent handling of the car.

That case also holds that the facts and circumstances at the time of the accident may raise a presumption that the regular chauffeur employed by the owner, and in charge, was acting within the scope of his employment. In that case it appeared that the owner had forbidden the chauffeur to take out the car unless he (the owner) was with it, and that upon the night of the accident, the car was taken out by the chauffeur under the direction of the sister of the owner and defendant, who made her home with the defendant, and was regarded as a member of the family.

We think that case is readily distinguished from the instant case. Here, when the chauffeur, Hall, took the automobile out on the trip when the accident occurred, he had no orders to do so from defendant, defendant's wife, or Miss Nott, who had been left in general charge of the house. No member of the family had given any orders to take it out. It was taken out without defendant's knowledge or consent, either express or implied, and was contrary to his express instructions. From this record, we think that it appears uncontradicted that the chauffeur acted in direct violation of his instructions, and outside the scope of his employment. He was acting either upon his own motion, or was obeying the instructions of Mr. Flood, Mr. Daggett, or someone else, who had no authority to bind the defendant.

Counsel for appellant also cite and quote from *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227. In that case it was held that a chauffeur employed by the owner of an automobile to care for the machine and operate it at the request and direction of the owner or any member of his family, and who is to go to his home for his mid-day meal, is not, when using the automobile to go to such meal, without the permission or knowledge of the owner, acting within the scope of his employment, so as to render the owner liable for his negligent act in injuring a pedestrian with the machine. Counsel quote the following language from the opinion: "The law governing the liability of a master for the acts of the servant in this class of cases is embodied in the following comprehensive statement: 'For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given, and the circumstances under which the act is done, the

'master is responsible.' *Ritchie v. Waller*. 63 Conn. 160, 27 L.R.A. 161, 38 Am. St. Rep. 361, 28 Atl. 29. While the rule of such liability may readily be comprehended, its application to the varying facts in cases of this class is often attended with difficulty. The ultimate inquiry usually resolves itself into one of fact, under the particular evidential facts and circumstances of the case."

We have examined with care the authorities cited by appellant's counsel, but are unable to agree with counsel as to their applicability. In order to render the cited cases applicable, counsel are forced to the position that the testimony shows conclusively that the chauffeur, Hall, on the day and at the time of the accident, was using the machine for the benefit of Mrs. Roach, as well as for the defendant, and that the machine was used for the guests of the family and those in charge of the household.

We think that this position is not warranted by the undisputed evidence in the case. We have already quoted from and called attention to the evidence, which shows conclusively, in so far as this record is concerned, that the chauffeur was not acting by authority of defendant, his wife, Miss Nott, or any member of the family, but against the positive and explicit instructions of the defendant. If it can be said that there is any presumption in such a case that the chauffeur was acting within scope of his general employment, we think that in this case that presumption is completely overthrown by the uncontradicted evidence in the case. Upon the facts, it cannot be said that there is any conflict in the case. For that reason, the numerous Michigan cases cited by appellant's counsel are not in point.

In the recent case of *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, we discussed somewhat at length the rules of law applicable in cases of this kind, in this state, prior to the going into effect of act No. 318 of the Public Acts of 1909. We there said that the doctrine of *respondet superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time, and in respect to the very transaction out of which the injury arose; and that the cases are controlled by the general rules of law governing the relation of master and servant, or principal and agent.

In addition to the authorities cited in *Hartley v. Miller*, *supra*, we call attention to the discussion of this subject in *Berry on Law of Automobiles*, §§ 135 to 145, and the many cases there cited; *Huddy, Automobiles*, 2d ed. pp. 245 to 251, and cases cited.

The test of the liability of the master for

his servant's acts is whether the latter was at the time acting within the scope of his employment. The phrase "in the course or scope of his employment or authority," when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business. It is not synonymous with "during the period covered by his employment." We are of opinion that the trial judge did not err in directing a verdict for the defendant.

Error is also assigned because the court excluded evidence of the statements of the chauffeur made on the occasion of the accident. The statements not being made by the chauffeur while engaged in the business of the defendant, but while he was violating the defendant's express orders, he could not bind defendant by any of his acts or statements, and it was no part of the *res gestæ*. *Patterson v. Wabash, St. L. & P. R. Co.* 54 Mich. 91, 19 N. W. 761; *Hall v. Murdock*, 119 Mich. 389, 78 N. W. 329.

We find no error in the record, and the judgment of the Circuit Court is affirmed.

#### NORTH CAROLINA SUPREME COURT.

##### RE WILL OF W. T. JENKINS.

DOLISCA JENKINS et al., Appts.

(157 N. C. 429, 72 S. E. 1072.)

Statute — alteration of language — effect — "and" and "or."

1. No change is effected in a statute providing that to be sustained a holographic

*Note. — Custody of holographic will.*

Under the statutes of North Carolina and Tennessee, certain requirements as to the place of finding of a holographic script, testamentary in its nature, must be satisfied in order that it may be established as a will. In North Carolina, the original statute (Laws 1784, chap. 10, § 5) provided that, to make a holographic will valid, it must, among other things, be found among the valuable papers or effects of the deceased, or be lodged in the hands of some person for safe-keeping. The present statute, as appears in *RE JENKINS*, is changed only in the conjunction used in the first alternative requirement, which does not change its force and effect.

The original Tennessee statute was the North Carolina statute of 1784, which, in Tennessee, was subsequently changed by the omission of the words "or effects," so that the present Tennessee statute (Code 1858, § 2163; Shannon's Code, § 3896) prescribes as one of the requirements necessary to sustain a holographic will that it shall have been found, after the testator's death, 37 L.R.A. (N.S.)

will must be found among the valuable papers or effects of deceased, by changing the word "or" to "and."

**Will — holographic — place of finding.**

2. A holographic will found in an envelop containing insurance papers, some of which had expired, in a little-used table drawer in testator's dwelling, is within a statute requiring it to be found among his valuable papers and effects, although his securities are kept at his place of business.

(December 13, 1911.)

**A**PPEAL by the caveators from a decree of the Superior Court for Halifax County in favor of propounders in an action brought to determine whether a certain paper writing was the will of W. T. Jenkins, deceased. Affirmed.

Statement by Walker, J.:

This is a caveat to a paper writing which purports to be the last will and testament of W. T. Jenkins. Upon issues submitted to them, the jury found that the script and every part thereof is in the handwriting of the said Jenkins. It was unattested. The jury also found that the paper writing, which had been proved in common form, is the will of W. T. Jenkins.

The evidence tended to show that Jenkins died in May, 1909, and after his death a search was made for a will by Levi Browning, who married his niece, and had lived in the house with him three years; his wife having lived there practically all her life. The witness Browning testified that they searched the clothes of the deceased, and looked over the papers and his

"among his valuable papers, or lodged in the hands of another for safe-keeping."

Under these statutes, if a testamentary paper be found among the valuable papers of the deceased, and be proved in the manner required, "these circumstances are equivalent to an express publication before witnesses, because it is to be inferred from them that the party intended to give effect to the paper as his will." *Crutcher v. Crutcher*, 11 Humph. 377.

The nature of the place of deposit is immaterial. As said in *Tate v. Tate*, 11 Humph. 465, "the place of deposit will depend upon the condition and arrangements of the testator; it is sufficient if the will be kept and found amongst his other valuable papers or effects."

So, a holographic will found in one of the apartments of a sugar chest, under lock, with other valuable papers and a ten dollar bank note,—another deposit for papers having been disused, because the key to the lock had been lost,—is within the statute, the intention of which is "that it shall appear to be a will, whose existence and place of deposit are known to the testator,

house and his room. On direct examination, he said there were no papers in the house, but on cross-examination corrected that statement, and said that there were some papers in W. T. Jenkins's bedroom, in a bureau. They did not find a will in the house, according to Browning, and proceeded to examine the papers at W. T. Jenkins's store.

The witness was asked:

Q. W. T. Jenkins was a business man, was he not?

A. Yes sir; so far as I know.

Q. He did have some papers that you found at the store?

A. Yes, sir.

Q. Valuable papers—notes and mortgages, were they not?

A. I don't know that they were so valuable; didn't seem to be kept up. Of course, there were some valuable papers in them,—some deeds and things.

According to the evidence of Browning and other witnesses, Captain Jenkins was a man of good business judgment, and a great many of the people in the neighborhood would come and get him to write papers for them. The paper writing was dated April 9, 1909, and the witness testified that W. T. Jenkins's mind was sound at that time. Browning further testified that after N. E. Jenkins, a brother of the deceased, had qualified as administrator, which was twelve or fifteen days after the death of Captain Jenkins, he renewed the search for a will, and found the paper writing offered for probate in a table drawer in the hall of Captain Jenkins's house.

The paper was in an envelop with some insurance papers,—insurance on his gin and dwelling,—only one of which was then in force. After finding this paper, the witness, according to his own admission, did not tell any one connected with the estate or with Captain Jenkins about finding this paper, until it was offered for probate, and he refused to let anybody compare the handwriting. Carrie E. Browning, who will take one half of the estate of Captain Jenkins if this will is sustained, and who is the wife of Levi Browning, testified that it was two or three weeks after the death of Captain Jenkins before the will was found. She describes the finding of it as follows: "Well, as there had not been one found, of course, we were on the lookout for one. We were hunting for some medicine my husband was taking. There was a person in the neighborhood who wanted some poison, and he wanted to send him some sugar of lead, and he, with the object in view of finding a will, if there was one, and to get this medicine, happened to think of this drawer, and went in there and found this paper." Mrs. Browning was asked why the table was not examined earlier. She answered: "Because we did not think of papers being in there, as it was used for this poison medicine generally, as well as other kinds." The witness also said that she had turned the drawer to the wall, to keep the children from going in where this medicine was. She further said: "I knew what was in the drawer, but it was a drawer not used much,—in everyday use, I should have said."

Asked, "How long, Mrs. Browning, be-

and that he has it in his care and protection, preserving it as his will." Ibid.

"The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as to show that the deceased regarded it as a valuable paper, and desired it to take effect as his will." *Hughes v. Smith*, 64 N. C. 493.

Valuable papers, within the meaning of the statute, "consist of such as are regarded by the testator as worthy of preservation, and therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations of money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards it as valuable." *Marr v. Marr*, 2 Head, 303.

So, in *Reagan v. Stanley*, 11 Lea, 316, where writings propounded as a holographic 37 L.R.A. (N.S.)

will were embodied in and formed parts of a diary continuously kept by the deceased in a large blank book, which, on the second day before his death, he directed his servant, in the event of his death, to hand to the person whom one of the writings stated he wanted to take charge of what little he had, the court said: "Valuable papers, within the meaning of the statute, are not papers having a money value, but only such as are kept and considered worthy of being taken care of by the particular person." *Marr v. Marr*, 2 Head, 306. Entries of daily transactions, whether on separate sheets of paper or in book form, preserved by the writer, and which the proof shows he directed his servant to deliver to the person selected by him to manage his estate after his death, would be valuable papers. If the testamentary papers in controversy had been written on separate sheets of paper, and deposited by the writer within the leaves of the book in which the diary was kept, it would scarcely be contended they would not be found among his valuable papers. For a stronger reason they must be so considered if actually written in the book it-

fore the death of Captain Jenkins, did you go in the drawer?" she answered, "Well, it probably might have been several months since we needed an article in that drawer."

Q. During his sickness, you kept his medicines in that drawer?

A. No, no; did not keep them in there. We had them fresh from the doctor; kept them right on his table, and administered them from his table.

Levi Browning was recalled, and testified that he found the paper in an envelop, which was offered in evidence, and that insurance policies were also in the envelop. There was evidence that the will was found in an envelop on which was written, in the handwriting of W. T. Jenkins, the word "Important." Much testimony was introduced by the propounders, to prove that the script was in the handwriting of W. T. Jenkins, and by the caveators to show the contrary. Evidence was also offered by the caveators as to the circumstances under which the paper was found in the drawer. N. E. Jenkins, a witness

for the caveators and a brother of the deceased, testified that he examined all the papers of W. T. Jenkins, both at his house and store, but could not find a will. About fifteen days after his brother's death, he qualified as administrator, and several days later, about the 18th or 19th of May, he received notice of the existence of this paper, but was not notified by Browning.

At the close of the caveators' evidence, Levi Browning was again recalled, and testified that there was another policy in the envelop that had expired. At the close of the evidence, the caveators requested the court to instruct the jury that, upon the evidence, they should answer the issue, "No," thereby finding that the paper writing exhibited by the propounders is not the last will and testament of W. T. Jenkins; and they also asked for special instructions, based upon the insufficiency of the evidence to establish the will, all of which were refused, and caveators excepted, and from the judgment against them appealed to this court.

self and as parts of its entries. Moreover, the proof shows that this book was in the hands of the deceased on the night before his death, and was found, with other manuscript books of account in which the deceased kept his accounts as treasurer of the town of La Grange, and of certain secret lodges. These books were all lying upon a shelf of the washstand, within a step of the bed of the deceased, and where he seems to have been in the habit of keeping them."

But a holographic writing, to be valid as a will, "must have been deposited by the testator, or with his assent, among his papers which he regarded as valuable, or desired to preserve; or in the hands of another for safe-keeping, with the intent that it should operate as his will." *Hopper v. McQuary*, 5 Coldw. 129.

So, in *Little v. Lockman*, 49 N. C. (4 Jones, L.) 494, it was held that an alleged holographic will found after the death of the writer in the drawer of a bureau belonging to him, among loose receipts, an old copy book, and a purse which had belonged to one of his deceased children, containing a few pieces of silver, amounting in all to 80 cents, and also among several imperfect instruments of a testamentary character, while in another drawer of the same bureau are found deeds, notes, and other papers relating to important transactions, tied up in hundles and labeled, and a silver watch, a knife, and a few dollars in silver,—cannot be probated as a will, under the statute providing that a holographic script, to be good as a will, must be found among the valuable papers or effects of the deceased; though if the deceased had more than one place of deposit for his "valuable papers or effects," it seems that his holographic script found in either may be probated.

37 L.R.A. (N.S.)

The phrase "among the valuable papers and effects" does not necessarily and without exception mean among the most valuable. "If that were required, it might be difficult for one who had two or more places for keeping his valuable papers, to know in which he could safely place his will. The values in cash would be liable to change more or less frequently. It might well happen that a bond or a large sum might be paid off and the money deposited in bank or invested in real estate, so that the place which contained the most valuable papers to-day might to-morrow contain only those of comparatively insignificant value. The phrase cannot have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition and business and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed, viz., whether at home or on a journey, etc." *Winstead v. Bowman*, 68 N. C. 170.

And "where a person has two or more depositories of his valuable papers and effects, the finding in either will suffice. It is not necessary it should be found in that which contains the most valuable papers and effects." *Brown v. Eaton*, 91 N. C. 26.

So, where the deceased had two places, in both of which he kept papers of value, although the value of those in one was greatly in excess of that of those in the other, and his alleged holographic will was found in the one of them containing the papers of lesser value, which was a locked trunk in a

Messrs. Joseph P. Pippen, George C. Green, and Murray Allen, for appellants:

The will was not among the valuable papers and effects of the deceased.

St. John's Lodge v. Callender, 26 N. C. (4 Ired. L.) 339; Harrison v. Burgess, 8 N. C. (1 Hawks) 384; Little v. Lockman, 49 N. C. (4 Jones, L.) 495; Hill v. Bell, 61 N. C. (Phill. L.) 122, 93 Am. Dec. 583; Hughes v. Smith, 64 N. C. 494; Winstead v. Bowman, 68 N. C. 170; Brown v. Eaton, 91 N. C. 26; Re Sheppard, 128 N. C. 54, 38 S. E. 27; Harper v. Harper, 148 N. C. 453, 62 S. E. 553; Brogan v. Barnard, 115 Tenn. 260, 112 Am. St. Rep. 822, 90 S. W. 858, 5 Ann. Cas. 634.

The words "valuable papers" and "effects" have different and well-defined meanings.

Brogan v. Barnard, 115 Tenn. 260, 112 Am. St. Rep. 822, 90 S. W. 858, 5 Ann. Cas. 634; Little v. Lockman, 49 N. C. (4 Jones, L.) 495.

Messrs. W. E. Daniel and R. C. Dunn for appellees.

Walker, J., delivered the opinion of the court:

There was sufficient evidence in the case to prove that the script was found in the drawer with policies of insurance, some of which had expired, and that it had been placed there by W. T. Jenkins, in an envelop upon which he had written the word "Important," and that Levi Browning, when he found it, immediately took it from the envelop and read it to his wife, and the next morning she read it. In the paper the testator devised and bequeathed his property to his nieces, Bessie M. Liles and Carrie E. Browning, wife of Levi Browning, who seem to have had the best claim upon his bounty, and appointed as his executor Honorable E. L. Travis, who had been his attorney and legal adviser.

The formal execution of the script was sufficiently proved before the clerk, and at the trial of the issue devisavit vel non, but the contention of the caveators is that the paper was not found "among the valuable papers and effects" of the deceased, as re-

room which he had occupied, and which was also locked, the trunk containing also certain wearing apparel; while the more valuable papers were found in a tin box left in the care of a bank, which box also contained the key to the trunk,—the will was found among the testator's valuable papers as required by statute to entitle it to probate. Winstead v. Bowman, 68 N. C. 170.

And a holographic will written in a book in which the decedent kept accounts against his tenants meets the requirement of the statute, that to constitute a valid will it must have been found among the testator's valuable papers and effects, where, although the will was not discovered until eight months after the testator's death, the book containing it was found directly after his death, either in a bureau drawer or a valise, both of which were kept locked, and each of which contained other valuable papers and some coin or paper currency. Brown v. Eaton, 91 N. C. 26.

A holographic will found in a drawer of a bureau, in testator's dwelling, where his wife kept her money and jewels, and which was constantly kept locked, is within the statute requiring it to be found among testator's valuable papers or effects. Harrison v. Burgess, 8 N. C. (1 Hawks) 384.

And an alleged holographic will which is found after the testator's death, with his more valuable papers and some money, in his trunk, which was legally in his possession, though for the time deposited at the house of another person, is found among the valuable papers and effects of the deceased within the statute. Hill v. Bell, 61 N. C. 122, 93 Am. Dec. 583.

Likewise, a holographic script propounded for probate, which was found in a drawer inside of a desk, deposited between a bag of gold coin and a bag of silver coin, 37 L.R.A. (N.S.)

while just above the drawer, in pigeon holes, were found notes, bonds, and other valuable papers properly arranged in files,—the drawer and pigeon holes being secured by the same door and lock,—meets the requirement of the statute that to be good as a will it must have been found among the valuable papers and effects of the deceased. Hughes v. Smith, 64 N. C. 493.

And a holographic will written on the outside of an envelop which contained certain insurance policies referred to in and disposed of by the will, and found in a drawer in a locked iron safe in a dental office which deceased had occupied, which safe was used for the purpose of keeping valuable papers, money, and other personal effects,—meets the requirements of a statute, in having been found "among his valuable papers," although there were no other papers in that particular drawer of the safe. Harper v. Harper, 148 N. C. 453, 62 S. E. 553.

In Brogan v. Barnard, 115 Tenn. 260, 112 Am. St. Rep. 822, 90 S. W. 858, 5 Ann. Cas. 634, it was held that the valuable papers referred to by the legislature are papers which the decedent considered valuable and worthy of preservation as records of facts purported to be stated and perpetuated in them, and in which he had an interest of some nature; and accordingly, that an alleged holographic will cannot be sustained when found in a box in which the testator, a small merchant and country postmaster, who had his office in his store, kept postage stamps and stationery belonging to the Federal government,—especially where valuable papers consisting of deeds and notes were found in a locked trunk at his residence, some distance from the store.

But where a holographic will was found in a desk of the deceased which contained



quired by statute. Revisal, § 3127. Prior to the enactment of the Revised Code, the language of the statute (Laws 1784, chap. 10, § 5) was "that such will was found among the valuable papers or effects of the deceased." We do not think the substitution of the copulative for the disjunctive conjunction was intended to make any substantial change in the law, and the word "and" should be construed as "or." Otherwise a person owning effects of ever so much value, but not having any valuable papers, or a person having valuable papers, but no valuable effects, could not execute a valid holographic will. We cannot believe that the legislature contemplated such a radical change in the law, and that any such result should follow the change of a single word, and it has been so held. with good reason. *Hughes v. Smith*, 64 N. C. 493; *Winstead v. Bowman*, 68 N. C. 170. In the last case, Justice Rodman said: "We do not think that this substitution ["and" for "or"] was intended to make any change in the meaning of the act. At all events, it made none to affect the present case. We only notice it to put it out of the way." Besides, the word "effects" is comprehensive in meaning, and is broad enough to include policies of insurance, which will answer both descriptions,—

papers of little value as well as valuable papers, it is not necessary, in the absence of evidence that the desk was divided into parts, in one or more of which valuable papers were kept, and in others papers of no value, to further show that the paper was found in such a portion of the desk as indicated that the deceased attached importance to it and preserved it as of value. *Allen v. Jeter*, 6 Lea, 672.

Where a holographic script propounded for probate as a will was written in a book containing valuable memoranda of the deceased's moneys, accounts, etc., which had been kept in a box on a table within his reach, with his deeds and account books, and which, when the box had been moved out three weeks before his death, he had caused to be brought back to him, after which he retained it in his immediate possession, in the bed with him, where it was found under his body, at his death, and the finder placed it on a bureau at the head of the bed, behind which it fell, and was found a week later on the floor behind the bureau,—it is a question for the jury whether the alleged will was not found "among the valuable papers and effects" of the deceased, within the meaning of the statute. *Re Sheppard*, 128 N. C. 54, 38 S. E. 27.

And where papers of a decedent were very numerous and were found in several places about his house, and after his death were collected together and placed in two trunks, under lock, and a thorough search among

valuable papers and effects. *Brown v. Eaton*, 91 N. C. 26.

We will now proceed to consider the other question, whether the paper was found in a proper place of deposit. "The statute of frauds in England, in relation to wills, and our act upon the same subject, have in view the same object; namely, the protection of the heirs at law and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English, and our statute, except as to the number of witnesses, are substantially the same. It is well known to the profession how strictly—we may say, sternly—the courts in both countries have demanded a compliance with these provisions of the law. The same policy must govern us when we come to decide whether the requisitions of our statute have been complied with in the execution of a paper writing propounded as a holographic will. One alternative requisition of the statute is that it must 'be found among the valuable papers or effects' of the alleged testator." *Little v. Lockman*, 49 N. C. (4 Jones, L.) 495. The provisions of the statute are, of course, mandatory

them failed to disclose a will,—the mere fact that an alleged holographic will, found six months later, was found in a bundle or file of papers which the deceased had labeled "of no value" is not conclusive against the will, under the statute, but the force and effect of this label is for the jury to determine, and it is their province to determine, upon all the surrounding circumstances and the legitimate presumptions to be made by them from all the facts proved, whether the paper was found among the "valuable papers" of the deceased. *Marr v. Marr*, 5 Sneed, 385.

But proof merely that an alleged holographic will was produced, after the death of the testator while abroad, by his surviving partner and confidential friend, sealed up and indorsed in the handwriting of the testator: "Copy Joseph Deans will, June 17th, 1802, to be opened after his death by" certain specified persons,—does not bring the will within the statute providing that it must have been found among the valuable papers or effects of the deceased, or must have been by him lodged in the hands of some person for safe-keeping. *St. John's Lodge v. Callender*, 26 N. C. (4 Ired. L.) 335.

Under the second alternative provision, that to be sustained, a holographic will must have been lodged in the hands of some person for safe-keeping, the testator's wife is a proper depositary. *Harrison v. Burgess*, 8 N. C. (1 Hawks) 384.

And in *Alston v. Davis*, 118 N. C. 202,

and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holographic script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably.

"The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as to show that the deceased regarded it as a valuable paper [worthy of preservation], and desired it to take effect as his will." *Hughes v. Smith*, supra. This court said, in *Winstead v. Bowman*, supra: "We are led to conclude that the phrase 'among the valuable papers and effects' cannot, necessarily and without exception, mean 'among the most valuable,' etc. If that were required, it might be difficult for one who had two or more places for keeping his valuable papers to know in which he could safely place his will. The values in cash would be liable to change more or less frequently. It might well happen that a bond or a large sum might be paid off, and the money deposited in bank or invested in real estate, so that the place which contained the most

valuable papers to-day might to-morrow contain only those of comparatively insignificant value. The phrase cannot have a fixed and unvarying meaning, to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed, viz., whether at home or on a journey, etc. It was not the intention of the legislature to destroy or unreasonably restrict the power of making a holographic will, but simply to assure that the writing offered as a will was really and deliberately intended as such. The place in which it is found, supposing it to be found among valuable papers and effects, is but one circumstance in evidence upon that issue." Referring to this passage in Judge Rodman's opinion, the present chief justice said, in *Re Sheppard*, 128 N. C. 54, 38 S. E. 27: "In *Winstead v. Bowman*, supra, that court criticized, if it does not overrule, the narrow rule which had been laid down in *Little v. Lockman*, 49

24 S. E. 15, it was held that a letter showing an unmistakable purpose to make a disposition of the writer's property, after his death, to the addressee, his sister, which letter was sent by mail to the sister, and is found in her custody, after the death of the writer, is good as a holographic will, under the statute requiring as one alternative that such a will, to be good, must have been lodged by the testator in the hands of some person for safe-keeping,—although the writer made no special request that the addressee, his sister and beneficiary, should preserve the letter, as "it is clearly a reasonable inference that a letter transmitted by mail to one deeply interested in preserving it is sent by the writer for safe-keeping."

But in *McCutchen v. Ochmig*, 1 Baxt. 390, the court said: "The mere writing of a letter to another, containing testamentary provisions, without affirmative and direct proof that the writer intended to lodge it with his correspondent as a will and for safe-keeping, would not answer the demand of the statute." And it was accordingly held that a holographic script in the form of a letter was not sufficiently shown to have been lodged with the plaintiff, the addressee thereof, by the deceased, for safe-keeping, as his will, where it appeared merely that the deceased wrote and sent the letter to the plaintiff, his cousin, by mail, requesting him to pay certain accounts of the writer, and saying, "if anything is left after I am dead, it is yours. You may have it." 37 L.R.A. (N.S.)

In the absence of any statutory provision as to the custody of a holographic will, the fact that such a will, complete and perfect in form, is found on a table, under and among a lot of old letters, circulars, medical journals, and other papers of no value, in the room in the testator's residence in which he died, while a will written years before is found in the decedent's trunk, where he kept his valuables, is of little importance in determining the validity of the later will, where, by statute, an instrument which has been executed in such manner as to constitute a valid will remains such will until revoked by the making of a subsequent will, or by the testator's destroying, canceling, or obliterating the same, or causing it to be done in his presence. *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753.

As to the sufficiency of the showing that a paper offered as a holographic will was intended as such, see note to *Smith v. Smith*, 33 L.R.A. (N.S.) 1018.

As to the necessity of witnesses to a holographic will, see note to *La Rue v. Lee*, 14 L.R.A. (N.S.) 968.

As to writing the name in the body of a holographic will as a signature thereto, see note to *Meads v. Earle*, 29 L.R.A. (N.S.) 64.

As to violation of requirement that holographic will shall be written by testator, see note to *Re Noyes*, 26 L.R.A. (N.S.) 1145.

A. C. W.

N. C. (4 Jones, L.) 494,"—citing with approval *Tate v. Tate*, 11 Humph. 466, to this effect: "The intention of the statute is that it shall appear to be a will, whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will." And also *Reagan v. Stanley*, 11 Lea, 316, to this effect: "In a diary was found, embedded among other entries, a disposition of property, written and signed. This diary was found among his books of account, and the will therein written was [held to have been properly] admitted to probate." Substantially to the same effect is *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

The fact that it is found among the writer's valuable papers and effects implies that it must have been placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will, and not that it was deposited surreptitiously by another person, for the purpose of defeating, instead of executing, his will. If the paper is so found, it will be presumed that the deposit of it in the place was made by him, or with his assent; and, in the absence of evidence to the contrary, or of suspicious circumstances, no proof of the fact is required. *Pritchard, Wills*, § 236; *Hooper v. McQuary*, 5 Coldw. 136. The statute does not demand proof that the author of the paper made the deposit, but only that it was found among his valuable papers and effects, and proof of this fact is quite sufficient, at least in the first instance, and when there is no countervailing proof.

"Valuable papers," within the meaning of the statute, are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator." *Pritchard, Wills*, § 237; *Winstead v. Bowman*, 68 N. C. 170; *Marr v. Marr*, 2 Head, 303, Id. 5 Sneed, 385; *Allen v. Jeter*, 6 Lea, 672; *Reagan v. Stanley*, 11 Lea, 316.

Applying these principles to the facts 37 L.R.A.(N.S.)

of our case, it would seem that there had been such a full compliance with the provisions of the statute as to constitute the paper writing, found in the drawer of the table, the will of the writer. He appears not to have been very careful in handling his papers. There were these places of deposit: His desk in the store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. It would appear that of the four he regarded the drawer of the table as the most important place of deposit; for he not only placed in it his policies of insurance, but the script was found in an envelop on which he had written the word "Important." What could be more indicative of his desire that the paper should take effect as his will, and of the fact that he considered the place as one for the deposit of his valuable papers, than his words that the papers inclosed in the envelop were "important." But, aside from this fact, a policy of insurance is a valuable paper (*Harper v. Harper* and *Hooper v. McQuary*, supra), within the meaning of the statute, and it was evidently so considered by him. As testified by one of the witnesses, the papers in the other places of deposit were not so kept as to show that he regarded them as of any great value; nor, under the circumstances, would it be any more likely that his will should have been found there than in the drawer of the table at his home. The court left it to the jury to say whether, under all the facts and circumstances, W. T. Jenkins had placed the paper in the drawer with the intention to preserve and take care of it as his will, telling them that, within the meaning of the law, a policy of insurance is a valuable paper. The jury were properly instructed as to how they should consider and apply the evidence in the case. We do not see why this was not a proper instruction, and as much so as similar ones which were given in the cases we have cited. Whether the table drawer was a proper place of deposit under the statute was a question to be determined largely by the jury upon the particular facts of the case. It was certainly not error to submit the question to the jury, instead of deciding it as matter of law. *Re Sheppard*, supra. If the jury found that W. T. Jenkins placed the paper in the envelop, with the policies of insurance, and deposited them in the drawer, intending that it should be his will, the requirements of the statute were fully observed, and their verdict, declaring the paper to be his last will and testament, was warranted in law.

The case of *Brogan v. Barnard*, 115 Tenn. 260, 112 Am. St. Rep. 822, 90 S. W. 858,

5 Ann. Cas. 634, cited by appellants' counsel, is not in point. It was decided upon the ground that the stamps and stationery were not valuable papers, as they did not record anything; and, besides, they did not belong to the writer of the script, but to the United States.

We find no error in the rulings or charge of the court.

### VERMONT SUPREME COURT.

J. K. BATCHELDER, Guardian of Howard Scott,

v.

JENNIE WALWORTH et al.

(— Vt. —, 82 Atl. 7.)

#### Adoption — right of children of party adopted.

1. Under a statute providing that the same right of inheritance shall exist between the parties to an adoption as though the party adopted had been the legitimate child of the person making the adoption, a child of the person adopted will, in case of the latter's death before that of the person making the adoption, inherit from the adopting parent by right of representation. Same — construction of statute — words "child" and "issue."

2. The use of the words "child" and "issue" in the statute governing the descent of property does not prevent the application of the rules of descent to adopted children so as to permit the issue of deceased ones to represent them, where the statute of adoption creates the same rights of inheritance between the parties as though the person adopted had been the legitimate child of the person making the adoption.

#### Descent — woman marrying adoptive father — rights.

3. The rights of a woman who marries a man with an adopted child, in his estate, are, although she does not consent to the adoption, the same as though the child was the fruit of the marriage.

(January 8, 1912.)

**EXCEPTIONS** by defendants to rulings of the Bennington County Court decreeing plaintiff heir at law of an estate and entitled as such to two thirds of the estate remaining for distribution. Affirmed.

The facts are stated in the opinion.

**Note.** — The question whether the terms "child," "children," "issue," etc., in statutes governing distribution of decedent's estate, include adopted children, is treated in the note to *Morse v. Osborne*, 30 L.R.A. (N.S.) 914; and as to whether such terms in a will include adopted children, see note to *Re Leask*, 27 L.R.A. (N.S.) 1159.

Messrs. Holden & Healy for defendants.  
Messrs. Batchelder & Bates, for plaintiff:

The legislature had the power to make plaintiff the heir at law of said Walworth, and so entitled to receive a distributive share of his estate.

*Stanley v. Chandler*, 53 Vt. 619.

Plaintiff inherits, as a legal representative of his deceased mother, the estate of George W. Walworth.

*Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Andrus v. Foster*, 17 Vt. 556; *Lunay v. Vantyne*, 40 Vt. 501.

The general intent of the statute is to place the adopted child in relation to either of his adopted parents, so far as their property is concerned, in the same position that he would be if their natural child.

*Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768; *Pace v. Klink*, 51 Ga. 220; *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; *Power v. Hadley*, 85 Ky. 671, 4 S. W. 683; *Lathrop v. Young*, 25 Ohio St. 451; 1 Cyc. 935; *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; *Moore v. Moore*, 35 Vt. 98; *Warren v. Prescott*, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948; *Morrison v. Sessions*, 14 Am. St. Rep. 500, and note, 70 Mich. 297, 38 N. W. 249.

*Watson, J.*, delivered the opinion of the court:

On the 18th day of April, 1909, George W. Walworth died intestate at Bennington, this state, the place of his residence, leaving a solvent estate in this state consisting mostly of real property. He left surviving him a wife, Jennie L. Walworth, and several brothers and sisters (the exceptants in this case), but no father or mother. On January 15, 1885, by an instrument of adoption properly executed, filed, and recorded pursuant to the statute (R. L. chap. 127), the intestate, then single, duly and legally adopted one Maggie Mitchell, then a minor, as his heir at law. Subsequent to such adoption, and on October 17, 1901, the intestate married Jennie L., she then knowing of said adoption, but at no time assenting or dissenting to or from the same. Subsequent to her adoption Maggie married, and after the marriage of her adoptive father and within his lifetime, she died, leaving a son, Howard M. Scott, born in marriage, surviving her. Howard M., now a minor, by his guardian, claims in consequence of the adoption of his mother to be an heir of the intestate by right of representation, and as such entitled to a distributive share of his estate. No children were ever born to the intestate. The court

below decreed *pro forma* that Howard M. is an heir at law of the intestate, and that he is entitled to two thirds of the intestate's estate remaining for distribution, the widow to the remaining one third, and that the brothers and sisters of the intestate take nothing. To this decree exceptions were severally taken by the widow, the brothers, and sisters.

By Laws of 1880, No. 137, § 1, "any person other than a married woman, of full age and sound mind, and any husband and wife, may adopt any other person as his or their heir at law with or without change of name of the person adopted." Sections 2, 3, 4, and 5 prescribe the method of procedure, and the form of the instrument to be executed to effect such adoption. And by § 6 "such instrument shall, if it appears to the probate court that the provisions of the statute have been complied with, be recorded in the probate office where it is filed. And upon the proper execution and filing of such an instrument, the same rights, duties, and obligations, and the same right of inheritance, shall exist between the parties as though the person adopted had been the legitimate child of the person or persons making the adoption, except that the person so adopted shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parties making such adoption. And the natural parents of a minor shall be deprived, by the adoption, of all legal rights as respects the control of such minor, and such minor shall be freed from all obligation of obedience and maintenance as respects his natural parents." The law of these sections appears in R. L. 2536-2541, without change, and was in force at the time of the making of the adoption hereinbefore mentioned.

The question, then, is whether the child of the adopted daughter deceased is entitled to inherit through her, by right of representation, a share in the adoptive father's intestate estate. This question, now for the first time before this court, is not, on the face of the statute, altogether free from doubt. The doctrine of adoption was unknown to the common law of England, and in this country, in states whose jurisprudence is based exclusively on that system, it exists only by statute. *Re Thorne*, 155 N. Y. 140, 49 N. E. 661; *Burrage v. Briggs*, 120 Mass. 103; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Morrison v. Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. 249. It has, however, been recognized by the civil law from the earliest days of its existence, and on the provisions of that law our statute, as well as largely the statutes of adoption in the dif-

ferent states of the Union, has been founded. It is therefore reasonable and proper to look to the civil law for the proper definition of the term, and in aid of the interpretation of the provisions in question. *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788. In the case last cited, where the construction of an adoption statute was under consideration, the court said: "A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted."

By the civil law before the time of Justinian, the effect of adoption was to place the person adopted in the same position he would have held had he been born a son of the adopter. All the property of the adopted son belonged to the adoptive father. The adoptive son was heir to his adoptive father, if intestate, bore his name, etc., and shared the sacred rites of the family he entered. It sometimes happened under this law that a son lost the succession to his own father by being adopted, and to his adoptive father by a subsequent emancipation. To remedy this, Justinian provided that the son given in adoption to a stranger should be in the same position to his own father as before, but gained by adoption the succession to his adoptive father if he die intestate. And by that law the adopted son is declared "assimilated, in many points, to a son born in lawful matrimony." *Sanders's Justinian*, 113, 115, 119. Lord Mackenzie, in his work on the Roman Law, p. 131, says that "by the ancient civil law adoption created the relation of father and son for all practical purposes, just as if the adopted son were born of the blood of the adoptive father in lawful marriage. The adopted child quitted entirely his own family and entered the family of his adopter, passing under the paternal power of his new father, and acquiring the capacity to inherit through him." The same author says: "Augustus did not adopt Tiberius, who succeeded him in the Empire, till

Tiberius had adopted his nephew Germanicus; and the effect of this was that Tiberius became the son and Germanicus the grandson of Augustus at the same time." In *Vidal v. Commagere*, 13 La. Ann. 516, a leading case on the civil law pertaining to the subject, the minor child was adopted under an act of the legislature authorizing Vidal and wife "to adopt" her. The controversy was between the nephews and nieces of the deceased adopting wife and the adopted child for the property of the succession of said wife. Vidal and wife were simply authorized "to adopt" the child, naming her, "provided the adoption be executed within a specified time. The court said the whole question was one of interpretation: What rights did the legislature intend to confer upon the child by authorizing Vidal and wife to adopt her? "What was meant by adoption?" The court said: "Under the Roman law, the person adopted entered into the family, and came under the power of the person adopting him. And the effect was such that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person."

It was held "that, as by the common acceptance of the word 'adoption' the relationship of parent and child, with all the consequences of that relationship, is understood, as such was the legal meaning of the word under the former laws of Louisiana, and as such is its acceptance among civilians and those conversant with the sources of our laws, we cannot say that the legislature used the word in a more restrained sense, in a sense not understood in common parlance, not given in any dictionary, and not known in any system of laws. As by the former laws of Louisiana the person adopted bore the relation of child to the person adopting, and inherited his estate, so we think the legislature, by the solemn expression of its will, intended to confer the same right upon the plaintiff to the estate of those who were authorized to adopt her." By the decree it was ordered that she be recognized as the sole heir of the deceased, and be put into the possession of all the property of the succession. Mr. Holland, in his *Elements of Jurisprudence*, says that parental right extends to the custody and control of children, and to the produce of their labor till they arrive at years of discretion; and that it is acquired on the birth, and also under some systems, on the adoption, of a child. Holland, *Jur.* 10th ed. 172. In *Ross v. Ross*, cited above, the question was whether a child legally adopted in Pennsylvania and thus entitled to

inherit real estate there, having, with the adopting parent, become resident in Massachusetts, could inherit the real estate of such parent in the latter state, upon his dying there intestate. Holding that generally the law of the domicile of the parties is the rule which governs the creation of the status of a child by adoption, it became necessary for the court to determine the legal status of the adopted child by the statute of Pennsylvania, under which the adoption was had, as construed by the highest court of that state. Referring to two such cases, the court said: "The opinion in each of those cases clearly recognizes what is indeed expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such. According to one of the most learned and thoughtful writers on jurisprudence of our time, it is the rights, duties, and capacities arising from the event which creates a particular status that constitutes the status itself, and afford the best definition of it. 2 Austin, *Jur.* 3 ed. 706, 709-712, 974. By the law of Pennsylvania, therefore, as enacted by its legislature and expounded by its highest judicial tribunal, the demandant, as between him and his adopting father, has in all respects the legal status of a child."

By the statute of Indiana, a child after its adoption takes the name in which it is adopted, and is entitled to all the rights and interests in the estate of the adopter, by descent or otherwise, that it would if the natural heir of the adopter; and the adoptive father or mother occupies the same position toward such child that he or she would if the natural father or mother, and is liable for the maintenance, education, and every other way responsible as a natural father or mother, in substance not materially unlike our own statute, except that ours excludes from the right of inheritance property expressly limited to the heirs of the body of the adopter. In *Markover v. Krauss*, 132 Ind. 294, 17 L.R.A. 806, 31 N. E. 1047, the court, recognizing the civil law as the source from which the statutory rules of adoption in this country have been borrowed, said that under that law, after the revision by Justinian, as before, the adopted child while held in the bonds of adoption was still in the position of a natural child born to the adopting father; that the law could and did make the legal status of the child adopted in every respect that of the natural child; and that the son of the adopted son was by the law made the grandson of the adopting father, with all the legal rights incident

to that relation. It was held that the intention of the statute was to give to adopted children the same relation to adopting parents that was given them by the civil law, and that, so far as property rights were concerned, it was the intention to give them the same rights as if they were their natural children or children of their blood.

Although the direct effects of adoption under our statute are not left to rest upon the determination of the meaning of that term by construction, yet such effects expressly declared by the lawmaking power correspond in most respects with the principles of the early civil law; as respects his control, and the duties and obligations resulting from the adoption, the person adopted is placed in exactly the same position he would have held had he been born a son of the adopter; and in such respects all rights, duties, and obligations between the child and his natural parents terminate. And, except as to property expressly limited to the heirs of the body of the adoptive parent (an exception of no apparent moment on the question of the status created), the right conferred upon the child to inherit from such parent is also measured by that in law of a natural child. We think it logically follows from the authorities to which reference has been made that under the statute, construed in the light of the civil law, the adopted child by the event of the adoption becomes the legal child of the person or persons making the adoption, and stands as to the property of the adoptive parent in the same position as a child born in lawful wedlock, except as to property expressly limited to the heirs of the body of the adopter. *Ross v. Ross*, cited above; *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768; *Flannigan v. Howard*, 200 Ill. 396, 59 L.R.A. 664, 93 Am. St. Rep. 201, 65 N. E. 782; *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942; *Hilpire v. Claude*, 109 Iowa, 159, 46 L.R.A. 171, 77 Am. St. Rep. 524, 80 N. W. 332; *Moran v. Moran*, 151 Mo. 558, 52 S. W. 378.

Furthermore, the status of parent and child is a correlative one. Where there is a legal child there is a legal father. In *Humphries v. Davis*, cited above, the court said it was not to be presumed that the legislature meant to violate logical results by creating the legal relation of child without the corresponding one of parent. As a logical sequence, the children of such legal child are the grandchildren of the legal father. The status of *Howard M.* is, therefore, that of a legal grandchild to the intestate, and as such he is entitled to stand in his mother's place and right respecting

the interstate estate, and share in it as her legal representative, unless prevented from so doing by the restrictions contained in either the statute of adoption or the statute of descent, presently to be considered. The exceptants rely upon the cases of *Moore v. Moore*, 35 Vt. 98, and *Stanley v. Chandler*, 53 Vt. 619, as authorities against such right of representation. Yet they are not so. In the *Moore Case* by the special act the name of the person was changed, and she was "constituted heir at law of," etc., "in as full and perfect a manner as if she had been the daughter of the said" man and wife named, "born in lawful wedlock." The word "adopt" or "adoption" is not used in the act; hence a construction based upon the meaning of the term "adoption" under the civil law, as in the *Louisiana case*, could not be given; nor did the act confer upon either party any rights, duties, or obligations other than such as resulted from the mere creation of an heir at law. And it should seem that the court had this peculiar feature of the act in mind, for it says: "It is hardly claimed that, if the act had merely constituted Mrs. Wright heir at law of Mr. and Mrs. Dunbar, it would have had this effect [make her "the child and lineal descendant of" them], but the subsequent words, it is insisted, could have been used for no other purpose, and are mere useless surplusage, unless such effect be given them. But it seems to us that these additional words were used to show the extent and define the limits of the heirship thus created." The real question there was whether Mrs. Wright, by right of representation through Mrs. Dunbar, deceased, became heir to the estate of the latter's brother, subsequently dying intestate. It was held that the right conferred to inherit from Mrs. Dunbar did not give the right thus to inherit through her. The *Stanley Case* was based upon a similar special act, though even briefer in terms; no additional words of definition or limitation being used therein, such as were noticed by the court in the *Moore Case*. The instrument of assent was executed by John Bullock alone, then a married man, and the opinion states that it was not shown that his wife was instrumental in procuring the passage of the act, or ever approved of it, and it was in derogation of her rights secured by law in case she survive her husband, as she did. The question involved, as stated by the court, was: "Did the adoption of John Chauncey Chandler in the manner in which it appears he was adopted constitute him in a legal sense the child or issue of John Bullock, so that under the general statutes of descent or

the special act constituting him heir he would be entitled to the estate of John Bullock by inheritance, to the exclusion of the widow?" It was held that it did not; and the widow was allowed, under the statute, \$1,000 and one half of the remainder of the estate. We think the Moore Case and the Stanley Case are so distinguishable in bases, and in the question involved, from the case at bar, that they have but little force as precedents in solving the questions before us.

The special act under which the adoption was had in *Power v. Hasley*, cited above, changed the name of the child from that of her natural parents to that of the adoptive parents, and made her "capable of taking and holding, by descent, the estate of" the latter "in as full and complete a manner as if she was his lawful child." The language of that act is certainly no broader than that of the statute now under consideration. After adoption the child died, leaving children (the appellants in that case), and after her death the adoptive father died intestate. The question was whether the appellants, as such children, were entitled to the estate of the intestate by right of representation. It was held that by the law of adoption the adopted child was made a full legal heir to the adopting father; and was put precisely upon the same footing, so far as taking and holding the latter's property by descent was concerned, as a natural child; that, taking the logical sequence of the language of the act, aided as it is by the principles of the civil law, the conclusion was inevitable that the appellants were the legal grandchildren of the adopting father, and as such by right of representation entitled to share in the distribution of his estate. The doctrine of this case was reaffirmed in *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942. To the same effect is *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596. In *Pace v. Klink*, 51 Ga. 220, the legislative act of adoption changed the surname of the adopted child to that of the adopter, and provided "that he be entitled to all rights and privileges that he would have been entitled to had he been born the son of" the adopter, and be made capable "of taking, receiving, and inheriting all manner of property under the statute of distribution . . . so far as relates to the" latter's estate. The adopted son died before the adoptive parent, leaving children surviving him. The question was whether these children, by right of representation, were entitled to take the same distributive share of the estate of the adoptive father, intestate, that their father would have taken if living. It was held that by the

statute of adoption the adopted, so far as the adopter and his estate were concerned, was made the lawful son and lawful heir of the adopter; and that, so far as the property of the latter was concerned, the adopting act made the children of the adopted son the representatives of their father should he die first. From the examination we have given the subject, it is believed that in no other reported case has a like question been determined, and hence that there is no diversity of decision.

It is said, however, that the words "between the parties," used in the section of the statute pertaining to the effects of the adoption, should be literally and strictly applied, and that with such application they clearly indicate an intention by the legislature to limit the right of inheritance to "between the parties" to the instrument of adoption. The statute expressly defines the direct effects produced by the event of adoption; but it contains nothing which excludes the incidental consequences of the status produced, either alone or coupled with subsequent facts. An "incident," says Lord Coke, is "a thing appertaining to or following another as a more worthy or principal." Co. Litt. 151. b. The direct effects of the adoption are complete when that event is entered upon. But the incidents are attached to the status by fixed rules of law, and whether they become operative in resulting rights may be contingent upon subsequent circumstances. Thus we have seen that by operation of law the minor child, Howard M., is the legal grandchild of the intestate, consequent on the correlative relation of the parties to the adoption. Yet the right of such grandchild to inherit from the intestate arises not out of the status produced by the adoption alone, but out of that status coupled with the subsequent fact of his mother's death before that of her adoptive father intestate; and therefrom the law fixes the results. "Every right," says Mr. Justice Holmes, "is a consequence attached by the law to one or more facts which the law defines, and, wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights." Holmes, Com. Law, 214. As respect the right of inheritance, we think the words "between the parties" are intended to limit such right of the person adopted to inherit from the person or persons making the adoption, and to this end they in effect negative any right to inherit through such



person or persons by right of representation; and, if the statute be mutual (a question not considered), the right of the adopter to inherit is limited in like manner. Yet, as such limitations do not pertain to incidental consequences flowing from the legal parental relations, the right of the minor child in this case, through his mother by right of representation, to share in the intestate's estate, is not affected thereby.

It is further contended that the word "children," as used in the first canon of descent (P. S. 2936), does not include an adopted child, and that the word "issue," as used in the second canon, does not include either an adopted child or the children of such child. In *Ross v. Ross*, cited above, it is said that the statute of descent "must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words 'children' and 'child,' for instance, in the first clause, 'issue,' in the phrase 'if he leaves no issue,' in subsequent clauses, and 'kindred,' in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under § 4 of the same chapter, or a child adopted under the provisions of chapter 110 of the General Statutes, or chapter 310 of the Statutes of 1871." Exactly the same holding was had in *Fosburgh v. Rogers*, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82.

If the contention of the exceptants in this regard were sound, the provisions of the statute of adoption expressly conferring upon the person adopted the capacity to inherit would be in conflict with the statute of descent. And yet in this respect these two statutes, relating to same subject, are *in pari materia*; and should be construed together as if they are one law. *Highgate v. State*, 59 Vt. 39, 7 Atl. 898; *Isham v. Bennington Iron Co.* 19 Vt. 230; *State v. Central Vermont R. Co.* 81 Vt. 463, 130 Am. St. Rep. 1065, 71 Atl. 194. We have already held in this case that the adopted child was in a legal sense the child of the intestate. As to the property of the estate, she is to be deemed his child, the same as if born to him in lawful wedlock. It follows, as seems clearly was the intention of the lawmaking power, that the word "children" in the first canon of descent should

be construed to include a child adopted under the general provisions of the statute of adoption. By such construction the two statutes are made to harmonize and to operate together consistently with the evident intent of the enactment. In *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480, the special act of adoption made the adopted child the heir at law of the adoptive parents, and declared her to be entitled to all the rights that would belong or pertain to her were she their daughter, and conferred upon her full power to take, hold, enjoy, and transmit any and all property from them by descent, in the same manner as if she had been their natural born child. On the death of the adoptive father it was claimed that he left no child, and that the widow by renunciation of the will was entitled to take under the dower act as in such case provided. The language of the statute was: "If a husband die testate, leaving no child or descendants of a child," etc. *Hurd's Rev. Stat.* 1897, p. 635. It was held that the adopted child in the eye of the law was as much the child of the testator as though she had been born his natural child, and consequently the renunciation amounted to nothing. To the same effect are *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993; *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, more particularly noticed in a later paragraph. The word "issue" in the second canon of descent has a broader significance than the word "children" in the first, since it must necessarily include the "legal representatives of deceased children," also within the first. Indeed, by statute (P. S. 10) the word "issue," as applied to the descent of estates, shall include the lawful lineal descendants of the ancestor. We are not called upon to define the term beyond the necessities of this case. To render the second canon consistent with the first,—and no one for a moment can suppose it was intended to be otherwise,—the word "issue" therein must include all "children" and all "legal representatives of deceased children" within the proper interpretation of the first; for otherwise the descent of an estate above the widows' third might fall within both canons, a result so absurd that any construction producing it is to be avoided as not within the purpose of the lawmakers. *Re Howard*, 80 Vt. 489, 68 Atl. 513. By the Civil Code of California, after adoption, the child is to "be regarded and treated in all respects as the child of the person adopting," and the two "shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation." [§ 228]. In *Re Newman*, 75 Cal.

213, 7 Am. St. Rep. 146, 16 Pac. 887, it was held that these provisions of the law extended to all the rights and duties of natural parents and children; that the word "issue" in their statute of descent does not limit the right of inheritance to natural children only, but is used in the same sense as the words "child" or "children;" and that if the adopted child was by virtue of its status to be "regarded and treated in all respects as the child of the person adopting," and was to "have all the rights and be subject to all the duties of the legal relation of parent and child," the right to succeed to the estate of the deceased parent must be included. To the same effect are the cases of *Atchison v. Atchison*, *Rowan's Estate*, 132 Pa. 299, 19 Atl. 82, and *Buckley v. Frasier*, all cited above.

It is further said that the widow's share of the estate should not be affected by the adoption, since she never consented thereto nor took any part therein, and reference is made to *Stanley v. Chandler* in support of this position. But in that case, as before observed, the person was made "heir at law" by a married man without the joinder or consent of his wife. In such circumstances it seems to be pretty generally held, as there, that the rights of the widow in the estate of the husband are not affected thereby. *Carroll's Estate*, 219 Pa. 440, 123 Am. St. Rep. 673, 68 Atl. 1038; *Nulton's Appeal*, 103 Pa. 286; *Baskette v. Streight*, 106 Tenn. 549, 62 S. W. 142; *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924; *Barnes v. Allen*, 25 Ind. 222. In *Bancroft v. Bancroft*, 53 Vt. 9, the adoption was by the husband and wife together, and the person adopted was made heir at law of them both. No question was raised by the widow, but the matter of the distribution of the adoptive father's intestate estate above the widow's third, to the adopted child, was contested by the brothers and sisters of the intestate on the ground of ineffectual execution of the instrument of adoption. The instrument was held to have been properly executed to constitute the child heir at law of the intestate, and the judgment of the county court was affirmed. In the case at bar, as seen, the adoption was made by the intestate when single, more than six years before his marriage to the woman now his widow. And she knew of the adoption at the time of her marriage. The case is one, therefore, where the husband died intestate, leaving in the sense of the law "legal representatives of deceased children," within the meaning of the first canon of descent, and of the first clause of division 3, P. S. 2925. Hence under the statute of descent the widow's share of the intestate estate is affected thereby the same as it would be 37 L.R.A. (N.S.)

were such "representatives" of the intestate's deceased natural children. In *Rowan's Estate*, 132 Pa. 299, 19 Atl. 82, the testator died, leaving a widow and an adopted daughter, but no natural child. The adoption was made by the testator before his marriage to the woman who survived as his widow. The widow having elected to take the share of the estate to which she would have been entitled under the intestate laws, it was claimed in her behalf that, as the decedent died without issue, she was entitled to one half of the fund. The court below awarded her one third, from which she appealed. So the question was whether, as between the widow and the adopted child of the decedent, the child had all the rights of a natural child in the distribution of the estate. It was held that by the adoption the child became a child and heir of the person adopting her, so far as she could be made such by legislative enactment, and had all the rights of a child and heir of the adopting parent; that the widow had no reason to complain that her rights had been interfered with by the act of her husband in making the adoption prior to their marriage, and the decree was affirmed. In *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, the adoption was by husband and wife, as their child and heir. The wife died, leaving her husband surviving. He subsequently married the plaintiff in suit. He died testate, having devised 400 acres of land in question to his adopted son. The widow elected to take one half of the real and personal estate of the deceased in lieu of dower. She then brought suit for the partition of the 400 acres, basing her claim to one half on the theory that her husband died "without any child or descendant in being capable of inheriting," within the meaning of a certain section of the statute to which reference was made. It was held that under the statutes of that state, for all the purposes of inheriting from the adopting parent, the adopted child became, and was, the lawful child of the adopter, the same as if born in lawful wedlock; that as the testator died leaving a child capable of inheriting from him, it was clear that the widow was not entitled to one half of the lands in suit, and the judgment was affirmed. This doctrine was reaffirmed in a subsequent case between the same parties, involving other lands. 132 Mo. 73, 33 S. W. 443. And it was reiterated in *Moran v. Moran*, 151 Mo. 558, 52 S. W. 378. To the same effect is *Markover v. Krauss*, 132 Ind. 294, 17 L.R.A. 806, 31 N. E. 1047.

Judgment affirmed. To be certified to the probate court.

## MARYLAND COURT OF APPEALS.

H. WINTER STOVER, Appt.,

v.

ELIZABETH A. STEFFEY et al.

(115 Md. 524, 81 Atl. 33.)

**Dedication — plat — park — boundary on lots sold.**

1. The sale of lots with reference to a plat does not dedicate to public use lands shown on the plat as a park, if the lots sold are not contiguous or adjacent to the park. **Same — failure to prepare ground.**

2. A dedication to the public of a piece of land marked on a plat as a park is not shown by the mere planting of a few trees upon it, where it is never used as a park, and nothing is ever done to fit it for that purpose.

(June 22, 1911.)

**A**PPPEAL by plaintiff from an order of the Circuit Court for Washington County refusing to grant an injunction restraining defendants from using the designated "Park" lot for other than park purposes. Affirmed.

The facts are stated in the opinion.

Mr. Charles D. Wagaman for appellant.

Mr. C. A. Little for appellees.

Pattison, J., delivered the opinion of the court:

Samuel Cost and wife, on the 28th day of October, 1890, conveyed to J. Clarence Lane a tract of land containing 30 acres, more or less, known as the Cost farm, situated immediately outside of and adjacent to the corporate limits of Hagerstown, Washington county, Maryland, and upon the east side of the turnpike road leading from Hagerstown to Leitersburg. J. Clarence Lane was the only grantee mentioned in said conveyance, but the record discloses that other persons, including James Findlay, one of the appellees, and one Edward P. Steffey, who devised his interest therein to Elizabeth A. Steffey, the other appellee, were interested in said lands and part owners thereof. This land so conveyed unto J. Clarence Lane was thereafter laid out in lots, streets, and alleys, and a plat showing such lots, streets, and alleys, as well as the building line and a portion thereof marked "Park," was made and

placed on the plat record in the office of the clerk of the circuit court for Washington county, although not marked "filed." Upon the plat was written the following: "Plat No. 1. 'East Park,' Addition to Hagerstown, Md."

On the 15th day of August, 1896, J. Clarence Lane sold and conveyed unto the appellant, H. Winter Stover, plaintiff below, two of said lots fronting on Leitersburg pike, otherwise known as Potomac street. In the deed therefor the lots of land thereby conveyed are referred to as "lots number nine (9) and ten (10) on East Park addition to Hagerstown, as designated on plat of said addition," and in said deed it is provided that "any building erected on said lots or either of them to conform to the building line as shown on said plat, and not to be located less than 20 feet from said marginal line."

On the 27th day of July, 1898, J. Clarence Lane conveyed unto James Findlay, one of the defendants in this cause, and to Edward P. Steffey, as tenants in common, by deed dated and recorded as of the last-named date, all that portion of the aforesaid tract or parcel of land which is designated on the said plat as "Park," and also lot No. 17, as designated on said plat. These lots were conveyed subject to the restrictions of the building line appearing upon the plat, which restrictions are set forth in the deed in the words following, to wit: "Provided, however, and this conveyance is upon the condition that no building shall be erected upon the parcel hereby conveyed nearer than twenty five (25) feet to the east marginal line of said North Potomac street or the Leitersburg pike."

The lot of ground designated on the plat as "Park" is adjacent to the line of the Western Maryland Railroad, and situate, lying, and being in the northeast corner formed by the intersection of the said railroad and the Leitersburg pike, with the frontage of 227 feet on North Potomac street, and running back with the southward side of Park avenue 370 feet to the west side of Dewey street, 57 feet from the railroad property; thence with the westward side of Dewey street extended to said railroad property; thence with the line of the railroad to the place of beginning. By reason of its location, it is said to be well suited for manufacturing or business purposes.

On the 1st day of July, 1899, J. Clarence Lane filed with the clerk of the circuit court for Washington county another plat of the same land. On this second plat other streets and alleys were laid out, and the bed of Dewey street was thereby changed, it being located on this plat 50 feet nearer Potomac

**Note.** — As to effect of conveyance of lots laid down on plats, to prevent a change in the use or form of the property, see note to Herold v. Columbia Invest. & Real Estate Co. 14 L.R.A. (N.S.) 1067.

Leaving blank in plat as a dedication, see note to Poole v. Lake Forest, 23 L.R.A. (N.S.) 809.  
37 L.R.A. (N.S.)

street than upon the original plat; that is to say, the depth of the lots fronting on Dewey street and running back to the alley separating them from the lots fronting on Potomac street was lessened to the extent of 50 feet, and Park avenue was changed to Manilla avenue, and the designation "Park" upon the lot of land lying to the southward of Park or Manilla avenue was removed; the same not appearing upon the second plat. Upon this plat was written the following: "It is not intended by anything herein contained to dedicate any of the streets or alleys mentioned or designated in the plat, or the beds of the same or any part thereof, the streets and alleys being mentioned and designated for the purpose of location and description merely, and not for the purpose of dedication, and the fee therein is hereby reserved." While this plat was not filed until July, 1899, the record does not disclose when it was made, but it is shown by the deed from J. Clarence Lane to Findlay and Steffey, dated the 27th day of July, 1898, that Park avenue was at that time known as Manilla avenue, or at least it was so referred to in said deed, and that Dewey street had been changed and relocated on the plat 50 feet nearer Potomac street, thus reducing the depth of this lot conveyed unto Findlay and Steffey, the dimensions of which are given above, from 420 feet, as appearing upon the first plat, to 370, upon the second plat.

In going north from Hagerstown upon the Leitersburg pike or Potomac street, the first lot reached after crossing the railroad is the designated "Park" lot, conveyed as aforesaid to Findlay and Steffey. Then comes Park or Manilla avenue, beyond which are the other designated lots upon Potomac street, commencing with lot No. 17 and ending with lot No. 1, including the lots of the appellee, numbered 9 and 10. It will thus be seen that the designated "Park" lot lies entirely to itself, not adjacent to any of the other lots, and separated from the appellant's lots by Park or Manilla avenue and the seven intervening lots numbering from 11 to 17, both inclusive. Some of these lots were sold and conveyed in the interim between the placing of the No. 1 upon the plat record, and the filing of the second plat in the office of the clerk of the circuit court for Washington county, while other lots were sold and conveyed after the filing of the second plat, but all were conveyed subject to the building-line restrictions alike laid down upon both of said plats. The record discloses that dwelling houses have been erected upon most of the lots so sold, but not upon the appellant's lots, at considerable costs to those erecting the same, and 37 L.R.A. (N.S.)

that the location, as to residential section, is now regarded as one of the most desirable in the suburbs of Hagerstown.

At the time of the purchase by Findlay and Steffey of the designated "Park" lot, it was partially inclosed by a part of the fence that originally inclosed the entire tract of land when a farm; that is to say, the old farm fence still stood upon the front of the lot bordering upon Potomac street, and also on the side thereof binding with the railroad property. This lot of land, since its purchase by J. Clarence Lane, had at times been cultivated, but at the time of its conveyance to the grantees aforesaid it was, as described by one of the witnesses, a weed patch; the weeds thereon being from 4 to 5 feet high. On it were also shade trees, at that time 10 or 12 feet tall, which had been planted thereon by J. Clarence Lane, the former owner. Some of these trees were thereafter cut down and displaced by the appellees in the erection of the buildings on said lot. Not long after its purchase, Findlay and Steffey first built on this lot a lumber shed, later a stable, and then followed the erection of other buildings, including an office, built by the appellees about three years before the institution of these proceedings, which was thereafter occupied by them, and at which place they henceforth conducted the lumber, wood, coal, lime, and cement business, and whereat the said business is still conducted.

In the erection of one or more of said buildings, the restrictions as to the building line were disregarded by the appellees; the same being built upon the line of the street, and not 25 feet therefrom, as designated by the plat and as required by the deed conveying said lot to the grantees aforesaid. It was because of the violation of said restrictions in the erection of said buildings, and because of the use made of said lot by the appellees, whereby its use as a public park was prevented, that the appellant filed his bill in this case, alleging that said lot had been dedicated for park purposes, and that he was entitled to have the same used exclusively for such purposes; and further alleging that the erection of said buildings thereon nearer than 25 feet of the east marginal line of Potomac street or Leitersburg pike, and the destruction of the shade trees on said lot, and the use and occupation of said lot as above set forth, were unwarranted and unlawful under the circumstances stated, and in violation of his rights, and asking the court: First, to enjoin the appellees from building on said lot nearer than 20 feet to the east marginal line of Potomac street, and that they be required and directed to remove from the prohibited area any and all buildings standing thereon;

second, that they be also enjoined and prohibited from using and occupying said lot of ground for other than park purposes, and that they be required to remove from said lot any and all buildings, lumber and merchandise of every description thereon.

The learned court below passed an order requiring the defendants to show cause why the injunction should not pass as prayed, whereupon the defendants answered, to which the plaintiff filed his replication; and the court, after hearing testimony upon the issues thus joined, granted an injunction restraining the defendants from erecting upon the parcel or parcels of land so conveyed unto James Findlay and Edward P. Steffey by the deed of J. Clarence Lane, dated July 27, 1898, any building nearer than 25 feet to the east marginal line of Potomac street, and requiring and directing the said defendants to remove from the said area or space of 25 feet, within thirty days from the service of the injunction, any or all buildings standing thereon. The court, however, denied the relief sought in the prayer of the bill, asking that the defendants be restrained from using or occupying the said designated park lot for other than park purposes, and it is from this order refusing to grant the injunction restraining the defendants from using the designated park lot as it is now being used, or for other than park purposes, that this appeal is taken.

"It has been always held in this state and elsewhere that whether a dedication to the public has been made depends in every case upon the intention of the parties, and this, whether dedication is claimed by acts *in pais*, by solemn conveyances of record, or by judicial proceedings. And it is also as well settled that such intention to dedicate must be established by clear, satisfactory, and unequivocal testimony." South Baltimore Harbor & Improv. Co. v. Smith, 85 Md. 541, 37 Atl. 27. "The principle of dedication rests largely upon the doctrine of estoppel *in pais*, and, while there are general rules applicable to certain lines of conduct on the part of the owner of the land, each individual case must, after all, be decided upon its own facts and circumstances. Baltimore v. Frick, 82 Md. 83, 33 Atl. 435;" Canton Co. v. Baltimore, 106 Md. 83, 11 L.R.A. (N.S.) 129, 66 Atl. 679.

This court, in the case of Hawley v. Baltimore, 33 Md. 270, said: "The law is now too well settled to admit of any doubt that if the owner of a piece of land lays it out in lots and streets, and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. This rule is founded upon the doctrine of implied covenants, and the dedication will be

held to be coextensive with the right of way acquired as an easement by the purchaser. It is upon the implied covenant, in the grant to him that the dedication to public use rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. . . .

The doctrine of implied covenants will not be held to create a right of way over all of the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further."

The question involved in this appeal is not the dedication to public use of the bed of a street, but here we are to ascertain if the designated park lot was dedicated by J. Clarence Lane to the public, to be used by it as a park, through an implied covenant with the grantee, Stover; for it is only upon the theory of an implied covenant for its use as a park, arising from the reference to the plat in the deed, that the grantee Stover can claim any interest or privilege in the park. As was said in the case of Canton Co. v. Baltimore, 106 Md. 86, 11 L.R.A. (N.S.) 129, 66 Atl. 681: "Although the law relating to the dedication to public use of streets has been settled by numerous decisions of this court, we have seldom been called upon to consider the nature and extent of the dedication of a park to such use when it is so dedicated on a plat of the grantor's land, and reference is made to the plat in deeds conveying portions of the land." In some jurisdictions it is held that the streets mentioned in the deed or laid out on the plat are embraced in the dedication to the full extent that they are owned by the grantor; but, as above stated, this is not the law of this state, and in such jurisdictions they have held that the principle controls with equal force the dedication of parks and other places designated on such plats. This, however, is not held to be the law in other jurisdictions.

In the case of Light v. Goddard, 11 Allen, 5, which was quoted by this court in the case of Canton Co. v. Baltimore, *supra*, that court, through Bigelow, Ch. J., said: "An attempt is made in the present case to extend this rule of interpretation much further than is warranted by any of the adjudicated cases. The plaintiff claims under

a deed in which he described the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is designated on the plan as 'ornamental grounds' and as 'play ground.' The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent to, the land granted, amounts to a covenant that those grounds shall forever continue to be appropriated and used for the uses and purposes so designated. We are by no means prepared to adopt as a sound rule of exposition the general proposition on which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation that the condition of land, not adjacent to, but lying in the vicinity of that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same, so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant."

The appellant's land, consisting of lots Nos. 9 and 10, as well as the designated park lot, is located on the east side of North Potomac street, but the said land of the appellant is not adjacent or contiguous to the park lot, but is separated therefrom by lots Nos. 11 to 17 both inclusive, and Park avenue or Dewey street. The lots of the appellant at the nearest point are over 400 feet from the park lot. If, therefore, the reasoning of the restrictive principle or rule of law in force in this state, "that the sale of a lot of land calling to bind on an unopened street works a dedication to public use of the street, if it is of the land of the grantor, only until it reaches the next opened or unopened street," were applied, as we think it should be, in cases of this sort where the alleged dedication is for park purposes, we do not think from the facts of this case a dedication of this lot to the public for use as a park should be presumed. The land in this case was never used as a park by the public or by any person, nor was anything done to beautify it or render it suitable or attractive for

park purposes, more than to plant a few trees thereon. The original fences were not removed, and at the time of its conveyance to Findlay and Steffey it was in weeds and altogether unattractive and unsuitable for park purposes. The facts in this case, in our opinion, do not establish a dedication by J. Clarence Lane of the lot to public use as a park. A plat showing the lots, streets, and alleys as laid out by Lane, the owner, was made and placed in the office of the clerk of the circuit court, though not marked "filed." Upon this plat the lot in question was designated "Park." Afterwards, in August, 1896, lots Nos. 9 and 10 were conveyed to the appellants, and in 1898 this designated park lot was conveyed to Findlay and Steffey, and about this time a second plat was made out and in 1899 filed with the clerk of the circuit court. On this plat the park lot was no longer so designated, and upon it is written the announcement by Lane that it was not intended by anything therein contained to dedicate the streets or alleys designated thereon, and that they were mentioned and designated for the purpose of location and description merely, and that the fee was reserved by him. After this a number of other lots were sold. None of the deeds offered in evidence profess to convey to the grantees any title to, interest in, or use of, said park lot, nor do any of the lots conveyed in said deeds touch or bind on the lot itself. The plat is referred to in the deed, and the fact of the park to be located on the lot was mentioned to the appellant by the agent of Lane at the time of the sale. These facts, it is claimed by the appellant, somewhat influenced him in the purchase of said lots. They, however, when considered with the other facts of the case, controlled and governed by the principle or rule of law that we have quoted, are not, in our opinion, sufficient to establish the dedication of this lot to the public use as a park. Therefore we find no error in the ruling of the court below.

Decree affirmed, with costs to the appellees.

#### MICHIGAN SUPREME COURT.

WILBUR W. STEELE

v.

ALLASEBA M. BLISS et al.

(166 Mich. 593, 132 N. W. 345.)

#### Limitation of actions — execution levy — effect of injunction.

The running of a statute making void a lien secured by levying an execution on real estate, if the property is not sold with-

in a specified time, is tolled by the granting of an injunction restraining the sale of the property.

(September 9, 1911.)

**M**OTION by complainant for the vacation of an order granting defendants' motion for modification of an injunction, allowing them to advertise and sell certain real estate under a certain levy made upon execution. Granted.

The facts are stated in the opinion.

Mr. Alex J. Groesbeck for complainant.

Messrs. John A. McKay, Gray & Gray, and L. T. Durand for defendants.

**Per Curiam:**

In the above-entitled cause, now pending in this court, two motions have been made: The first, by defendants, asking for a modification of the injunction in the case, to allow them to proceed to advertise and sell certain real estate situated in Wayne county, under a certain levy made upon execution, which was granted. The second motion asks that the order granted upon the first motion be vacated and set aside. The first motion presented a case of emergency, and was granted to preserve to defendants their rights under an execution levy, which, by the running of the statute of limitations relative to execution liens on real estate (§ 9233, 3 Comp. Laws), were represented would be lost, upon the theory that the injunction in the case did not interrupt the running of the statute. The opposite view is taken by the movers in the second motion, which is relied upon as one of the grounds of said motion. The merits of the controversy are not involved. The only question necessary to discuss and determine is the construction and application of this statute.

Different phases of the litigation out of which this suit arises have been before the court some seven or more times, and to make a statement of its history would be of no benefit at this time. Suffice it to say that an execution upon a judgment was issued and levied, and the importance of the determination of these motions is apparent when it is stated that the rights under this execution lien will be decided. The material portion of the statute under consideration is as follows: " . . . And all liens by execution on real estate hereafter to be made shall become and be void at and after the

expiration of five years from the making of such levy, unless such real estate be sooner sold thereon." The question as to the construction and application of this statute of limitations under such a state of facts is one of first instance in this court, and is of more than ordinary importance. The statute is not a part of the general statute of limitations of actions relating to real property, which has been in force since the Revised Statutes of 1846. It was enacted in 1889, and, except for a provision relative to execution liens in force at that time, is all included in the quotation above given.

Upon the question of the effect of injunctions upon the running of statutes of limitations, the authorities are not in harmony. In 1 High on Injunctions, ¶ 87, an early English case is cited as laying down the proposition that, if a party were stayed by injunction from prosecuting his suit, the court would not permit him to be prejudiced by the statute. This appears to be the fundamental principle recognized by all of the authorities, which hold that the running of a statute of limitations is interrupted by an injunction. This has been the holding of the supreme court of Minnesota. In a case exactly in point that court said: "At common law the right to sue out an execution in a personal action was limited to a year and a day from the entry of judgment. . . . This limitation of the common law was as inflexible and as positive as that of our statute; yet it was well established at common law that when the plaintiff had judgment with stay of execution, or execution was stayed by injunction, the plaintiff might sue out an execution within one year after the stay terminated, or the injunction was dissolved. . . . It would be unreasonable and inconsistent for the law to present to a party in one hand a command to do an act within a certain time under the penalty of losing his rights, and with the other hand restrain him from doing the act. For this reason the time during which the plaintiff was thus prevented by the law from issuing execution was at common law excluded from the year allowed for that purpose." *Wakefield v. Brown*, 38 Minn. 363, 8 Am. St. Rep. 671, 37 N. W. 790. Where courts have held that the running of the statute is interrupted by injunction, it has generally been upon the ground that the statute was not intended to bar a remedy because it was not exercised within the limited time, if such a state of affairs existed as rendered it impossible for the party to act within that time. 19 Am. & Eng. Enc. Law (2d ed.), 215, 216. This doctrine has been accepted by the Supreme Court of the United States. In *United*

**Note.**—For effect of injunction against suing to prevent the running of the statute of limitations, see notes to *Hunter v. Niagara F. Ins. Co.* 3 L.R.A. (N.S.) 1187, and *Lagerman v. Casserly*, 23 L.R.A. (N.S.) 673.

37 L.R.A. (N.S.)

States v. Wiley, 11 Wall. 513, 20 L. ed. 213. Mr. Justice Strong, speaking for the court, said: "But it is the loss of the ability to sue, rather than the loss of the right, that stops the running of the statute. The inability may arise from a suspension of right or from the closing of the courts, but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitations are, indeed, statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue.

. . . But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have." In *Braun v. Sauerwein*, 10 Wall. 223, 19 L. ed. 895, Mr. Justice Strong, speaking for the court, said: "It seems, therefore, to be established that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself." In the latest Federal case examined, — *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537, the above is quoted and affirmed in an opinion written by Mr. Justice Bradley, of which the court said: "There is one class of cases which is excluded from the operation of the statute by act of law itself, of which the case in which Mr. Justice Strong made the remark referred to is one. This class embraces those cases in which no action can be brought at all, either for want of parties capable of suing, or because the law prohibits the bringing of an action. In such cases the general law operates as a qualification, or tacit condition of the particular statute. . . . Besides this general exception created by act of law, it is difficult to find any other ground or cause for suspending the operation of the statute not specified in the act itself." The same doctrine has been indorsed in several other states. The weight of authority holds that the running of the statute is interrupted by an injunction. A few of the states hold to the contrary. In the instant case the parties are by process of law prohibited from acting, and it is clearly within the class of cases pointed out in the authorities cited.

Our attention is called to § 9754, 3 Comp. Laws, relative to suits at law in cases affected by proceedings in chancery, as to the running of the statute of limitations, and also the case of *Sweet v. Haldane*, 68 Mich. 639, 36 N. W. 698, construing it, as applicable to the case under consideration. As to this proposition, we think it necessary only to say that this section and decision are of 37 L.R.A. (N.S.)

force as indicating the policy of the legislature and the court to preserve to individuals rights which for the time being they may be disabled from exercising by a "paramount power," without fault on their part. Our construction and determination, based upon both reason and authority, is that the injunction operated as an interruption of the running of this statute of limitations in question, and will so operate as long as in force. The motion granted modifying the injunction was therefore unnecessary, and the same, for the reasons given, is vacated and set aside.

**MISSOURI SUPREME COURT.**  
(Division No. 2.)

JOSEPH GRISHAM and Wife, Appts.,  
v.

WESTERN UNION TELEGRAPH COMPANY et al., Respts.

(238 Mo. 480, 142 S. W. 271.)

**Evidence — presumption — notice of advertisement.**

1. For the purpose of charging a telegraph operator with libel for transmitting a message stating that a text-book committee had sold out, it cannot be presumed that he knew they were in session from the fact that they had inserted in a newspaper which came into his possession a notice advertising for bids for books.

**Libel — telegraph company — notice.**

2. Under a statute imposing a penalty for refusal to transmit a telegram, neither a telegraph company nor its operator is guilty of libel in transmitting a message stating that "board here sold out," without anything to charge the operator with notice of the meaning intended to be conveyed, although it in fact purports to state that a committee to select text-books for the schools had been bribed.

(December 19, 1911.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Schuyler County in defendants' favor in an action brought to recover damages for an alleged libel. Affirmed.

Statement by Ferriss, J.:

Suit for libel by plaintiffs, husband and wife, because of the sending over the wires of the defendant telegraph company, by its

**Note. — Liability of telegraph company for handling libelous message.**

The question of the liability of a telegraph company for handling libelous messages is covered in the note to *Western U. Tele. Co. v. Cashman*, 9 L.R.A. (N.S.) 140, and



agent in Lancaster, Schuyler county, Missouri, the following telegram, which it is claimed libeled the wife, Mrs. Nettie Grisham:

To Silver Burdett & Co.,

378 Wabash Ave., Chicago.

Board here sold out Memphis Saturday morning Dockery Hotel Kirksville Saturday night.

W. H. M.

The case was tried before a jury. At the close of plaintiffs' evidence the court sustained a demurrer, and directed a verdict for defendants. Plaintiffs appeal.

The facts disclosed by the evidence are as follows: The plaintiff, Nettie Grisham, was a member of the school board of Schuyler county. Under the act of 1907 this board constitutes a text-book commission. This commission advertised in two county papers a notice with this caption, "Notice to Publishers of School Text-Books," to the effect that bids would be received on July 5th following, for schoolbooks for use during the ensuing year in the public schools of Schuyler county. This notice specified the subjects for which text-books were desired. The notice was signed: "Mrs. Nettie H. Grisham, President. J. F. Botts, Secretary." There appeared before the board, at the meeting held July 5th, agents for several publishers, among them W. H. Maddock, for the Silver Burdett Book Company, Chicago. While the board was in session Mrs. Grisham telephoned several times to defendant Beer, who, was the local operator for the defendant telegraph company, to know whether there were any packages for herself or Mr. Botts; that the board was busy at work, and wanted the books from Ginn & Company, but did not advise him that the board was sitting as a text-book commission. Beer was also the express

the present note is merely supplementary to that.

In *Western U. Teleg. Co. v. Cashman*, 65 C. C. A. 607, 132 Fed. 805, it was held that the telegraph company was liable for the damages resulting from the transmission of an alleged libelous message during the process of which it came to the knowledge of four agents pledged to secrecy; but that it was not liable for such damages as resulted from the actual publication of the libelous matter by the plaintiff in his newspaper.

And where no evil motive or malice beyond that which the law infers from the wrongful transmitting of the libelous message was shown, and the wrongful act was not conceived by the telegraph company or its agents in the spirit of mischief or criminal indifference to civil obligations, it was held that the company was not liable in punitive damages. *Ibid.*  
37 L.R.A. (N.S.)

agent in Lancaster. Mrs. Grisham had merely a casual acquaintance with Beer. Copies of the papers containing the advertisements had been sent to Beer by the publishers, under the terms of a contract covering an advertisement for the railroad in such papers, to enable Beer, who was also station agent, to cut out same and send to the company for checking purposes.

From the testimony of E. C. Hickey, one of the book agents in attendance at Lancaster on that day, it appears that the board decided to postpone any announcement on the bids for a week.

This witness testified:

I left Lancaster that day on the "Q" train going east, shortly after 6 o'clock. I was at the depot, I would guess, twenty minutes before the train arrived. There were six book men representing book companies at the depot at that time besides myself.

Q. Was the question of the adoption of books by the Schuyler county board of education discussed among the book men at the depot at that time?

A. There seemed to be quite an interesting discussion among the agents, myself included, at the east end of the depot, but I was not near enough to hear more than an occasional word.

Q. Do you know whether or not there was any discussion in the waiting room of the depot in reference to the adoption of the books?

A. Mr. Maddock and Mr. Chapman were engaged in a low conversation regarding the matter, but the purport of their remarks I at no time caught the full meaning of. They were apparently conferring over the sending of a telegram. The station agent at that time was engaged at the keyboard, sending or receiving a message. Mr. W. H. Maddock prepared and

And there being no proof that the telegraph company's agents were actuated in handling the libelous message by such ill-will or evil motive as to warrant the allowance of punitive damages, the court passed the question of ratification by the company with the suggestion that the subsequent reception by it of the bulk earnings of the originating office, without specific knowledge of its source, and also the employment eighteen months later of the boy who, in the absence of the regular agent, had received the message, could not be considered as a serious ratification of the agents' acts. *Ibid.*

And it was held that where there was no evidence warranting the award of more than compensatory damages, evidence showing the great corporate wealth of the defendant telegraph company, for the purpose of obtaining enhanced damages, was inadmissible. *Ibid.* J. T. W.

delivered to the station agent a telegram. I saw him write it. After that I heard him say to Mr. Chapman: "Chap, will this do all right?" to which Mr. Chapman answered, "That's the proper stunt." He then walked into the ticket room, laid the telegram down at the right side of the operator, who was seated at his desk. When he got the operator's attention, he asked him the cost of sending the message, also stating that he was anxious to get the message off at once. When Mr. Maddock wrote the telegram he was standing at the window in the waiting room. I saw him writing the telegram, but had not noticed the blank before. The telegram was written on the regular form of blank furnished by the telegraph company. Mr. Maddock then paid the agent for sending the telegram. I read the telegram after it was written by Mr. Maddock. I read it twice. When I read it the first time it was lying on the operator's desk before he sent it. When I read it the second time it was in the same position, while I suppose it was being sent. When I read it the first time I had stepped into the ticket office, ostensibly to get a ticket; in reality, to see the contents of the message. When I read it the second time, I was standing on the depot platform before an open window and in front of the operator's desk. The operator was present.

Q. State if you heard any further conversation between the agent and Mr. Maddock other than you have stated?

A. But a query, "Will that message get through all right to-night?" to which the agent answered, "I think it will." I did not hear any other conversation between the agent and the representatives of the book companies. The agent was at his desk when Mr. Maddock wrote the telegram.

Mr. Botts, a member of the board, testified that he sometimes got books by express, addressed to him as a member of the board of education. Plaintiffs offered to prove that Maddock made "insinuating remarks" on the way to the depot and at the hotel; objection to which was sustained. Witness Hickey was asked what construction he put upon the message: objection to which question was sustained. Another witness was asked this question: "Was it not currently reported around here in town, after these book agents left, that the board had sold out?" Objection sustained. To all of these rulings plaintiffs excepted. The court instructed the jury to find for each defendant.

Messrs. Fogle & Fogle, W. M. Saxbury, and Rolston & Rolston, for appellants:

A telegraph company is held liable for its agent's sending a libelous telegram. 37 L.R.A. (N.S.)

Cooley, Torts, 139; Peterson v. Western U. Tele. Co. 75 Minn. 368, 43 L.R.A. 581, 74 Am. St. Rep. 502, 77 N. W. 985; 1 Joyce, Damages, § 409; 10 Cyc. 1215; Whitfield v. South Eastern R. Co. El. Bl. & El. 115, 27 L. J. Q. B. N. S. 229, 4 Jur. N. S. 688, 6 Week. Rep. 545.

If Beer knew that the telegram was libelous, or if he knew of the circumstances and the parties to whom the word "board" referred, or if he had reasonable grounds, as a man of ordinary intelligence, to know the facts and circumstances, and still sent the telegram, he and the other defendants are liable.

Nye v. Western U. Tele. Co. 104 Fed. 630.

It was proper to introduce the newspapers in evidence, to show that Beer knew to whom the word "board" referred.

Van Ingen v. Mail & Exp. Pub. Co. 156 N. Y. 376, 50 N. E. 981.

Mr. Charles E. Yeater, for respondents:

When the language of the message is ambiguous, and a doubt arises as to the propriety of the message, the operator must resolve that doubt in favor of the sender, and forward the message.

Western U. Tele. Co. v. Ferguson, 57 Ind. 495; Gray v. Western U. Tele. Co. 87 Ga. 350, 14 L.R.A. 95, 27 Am. St. Rep. 259, 13 S. E. 562; Com. v. Western U. Tele. Co. 112 Ky. 355, 57 L.R.A. 614, 99 Am. St. Rep. 299, 67 S. W. 59.

The telegram from Maddock to his employer was confidential between them, and privileged, and there could be no recovery against either of them without proof of express malice on the part of Maddock, and *a fortiori* no liability against the telegraph company.

25 Cyc. 397; Sullivan v. Strathan-Hutton-Evans Commission Co. 152 Mo. 268, 47 L.R.A. 859, 53 S. W. 912; Finley v. Steele, 159 Mo. 299, 52 L.R.A. 852, 60 S. W. 108.

Ferriss, J., delivered the opinion of the court:

The theory of the plaintiffs appears from this extract taken from their brief: "Said Beer well knew that said telegram referred to and meant the county board of education, and he well knew that Nettie Grisham, one of the plaintiffs, was a member of that board. He knew that the language of said telegram, to wit, 'board here sold out,' meant that said board had been bribed. He knew that Maddock meant to charge the board with being bribed. He knew that Silver, Burdett, & Company, the great book concern of Chicago, understood that said telegram meant to charge the board here with being bribed. All of this he knew, and well knew it before he sent said telegram."

The proof utterly fails to establish the foregoing allegations, with the possible exception that Beer did know that Nettie Gisham was a member of the school board. There is no proof that Beer knew that the board was in session that day as a text-book commission for the purpose of receiving bids, or that any agents appeared before that commission. It cannot be presumed that he read in the newspaper a notice addressed to publishers of text-books. There is no proof that he knew that the expression "board here sold out" meant that the school board had been bribed. There is no evidence of any communication to him, or of any knowledge conveyed to him in any manner, aside from the telegram itself, which would explain the meaning of these words. If there was ambiguity in the language, it was still his duty to send the message without investigation. Under the law it is the duty of the agent to send the message, if it is expressed in decent language, on payment or tender of the charge. *Western U. Teleg. Co. v. Ferguson*, 57 Ind. 495; *Gray v. Western U. Teleg. Co.* 87 Ga. 350, 14 L.R.A. 95, 27 Am. St. Rep. 259, 13 S. E. 562; *Com. v. Western U. Teleg. Co.* 112 Ky. 355, 57 L.R.A. 614, 99 Am. St. Rep. 299, 67 S. W. 59.

Section 3330, Rev. Stat. 1909, makes it the duty of a telegraph company to receive a despatch from any individual, and, on payment of the usual charge, to transmit and deliver it to the addressee promptly, impartially, and in good faith, under a penalty of \$300 for every neglect or refusal so to do. Section 3334 provides a penalty of \$50 for disclosing the contents of a message to any person other than the addressee. Section 4810 provides that any employee of a telegraph company who wilfully refuses or neglects to transmit or deliver a message, or discloses the contents except to a court of justice or the addressee, shall be deemed guilty of a misdemeanor, and punished (§ 4630) by imprisonment in the county jail not exceeding one year, or by fine not exceeding \$500, or by both such fine and imprisonment.

These statutes would not compel the sending of a telegram that was manifestly libelous. *Nye v. Western U. Teleg. Co.* (C. C.) 104 Fed. 628; *Peterson v. Western U. Teleg. Co.* 65 Minn. 18, 33 L.R.A. 302, 67 N. W. 646. But unless it is manifestly a libel the operator must send it; any doubt or ambiguity is to be solved in favor of the message. On this point the supreme court of Georgia says: "On no other rule would it be practicable for telegraph companies to perform their legitimate functions as servants of the general public. They could not wait to question and investigate the motives of those who

offer ambiguous despatches for transmission." *Gray v. Western U. Teleg. Co.* 87 Ga. 350, 14 L.R.A. 95, 27 Am. St. Rep. 259, 13 S. E. 562.

Counsel for plaintiffs have furnished us a voluminous brief of the law of libel, presenting fairly and fully all phases of the subject, with authorities cited. Appellants, in their brief, state the law as follows: (Italics are theirs.) "Now then, let us see what the rules are that are laid down by the law that makes the defendants liable. In the case of *Nye v. Western U. Teleg. Co.* (C. C.) 104 Fed. 630, the court lays down the rule as follows: That 'where a message presented to the receiving clerk of a telegraph company for transmission is in language such that a person of ordinary intelligence, knowing *nothing of the parties or circumstances*, would not necessarily conclude that its purpose was defamation, it is his duty to send it, and for the performance of such duty the company incurs no liability.' In the case of *Peterson v. Western U. Teleg. Co.* 67 N. W. page 646, and the same case in 65 Minn. page 18, the court says: 'Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning on its face, and is forwarded *in good faith* by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly and forward the message without delay, *if it is a proper one*; and for any honest error of judgment in the premises, the telegraph company cannot be held responsible. But where the message on its face is clearly susceptible of a libelous meaning [and this one was: *Julian v. Kansas City Star Co.* 209 Mo. 79, 107 S. W. 496], is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator in sending the message was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel, a publication under such circumstances 'is not privileged.' A telegram cannot be privileged because it passes through the hands of unprivileged persons."

Measured by the foregoing rules, it is clear that the circuit court committed no error in sustaining a demurrer to the evidence.

Here is the situation: The defendant Beer is sitting at his table, working the telegraph keys. A stranger steps up and lays down a telegram, written on the usual blank,

without punctuation. The original message was offered in evidence, and is copied into the record thus:

Form No. 2  
**THE WESTERN UNION TELEGRAPH COMPANY**  
 —INCORPORATED—  
**21,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.**

To <u>Silver Burdett &amp; Co.</u>		<u>378 Wabash Ave.,</u>			
		<u>Chicago.</u>			
<u>Memphis</u>	<u>Board here</u>	<u>Saturday</u>	<u>sold out</u>	<u>morning</u>	<u>night</u>
<u>Dockery Hotel</u>		<u>Kirksville</u>		<u>Saturday</u>	
				<u>W. H. M.</u>	

The sender asks and pays the price of service, and asks further whether there can be prompt delivery. Beer, so far as the record discloses, heard no conversation before the message was handed to him, knew nothing about a meeting of the text-book commission, and did not know that the sender was a book agent. He had no knowledge of any kind about the meaning of the message, save such as he would gain from the telegram itself. There is nothing in the language of the message, unexplained and disconnected from extrinsic facts, to even suggest a libelous meaning. It might have one of several meanings, depending on the punctuation. It was not the duty of the operator to study this telegram to try to determine its meaning. A large proportion of the messages that pass through his hands are more or less obscure. His first duty is prompt service. The law does not require him to look for a meaning not manifest on the face of the telegram. There is nothing in the record to challenge the good faith of Beer, and nothing to impute knowledge to him that the message referred to the board of education or any member thereof.

37 L.R.A. (N.S.)

There was no reversible error in the rulings on the admission of evidence.

**The judgment is affirmed.**

**Kennish, P. J., and Brown, J., concur**

**OKLAHOMA SUPREME COURT,**

**C. C. AYERS, Plff. in Err.,**

**PAUL B. MACOUGHTRY.**

(29 Okla. 399, 117 Pac. 1088.)

**Damages — dog bite — cost of treatment.**

1. Plaintiff brought action to recover for injuries inflicted by a vicious dog. In his petition he pleaded damages in the sum of \$150, expenses incurred by him in traveling from Muskogee, Oklahoma, to Austin, Texas, to take the Pasteur treatment as a preventive of hydrophobia. The defendant answered, denying the incurring of this expense, and that it was necessary. Held that the evidence shows the same to have been incurred, that it was necessary, and a proper item of damages.

**Evidence — notice of viciousness — sufficiency.**

2. The keeping of a dog, with knowledge on the part of the owner or his wife that the same had bitten or attempted to bite one or several persons prior to the time of the attack upon the plaintiff, is evidence sufficient to support a verdict rendered on an instruction declaring defendant liable if he had notice, either actual or constructive, of the vicious and dangerous character of the dog.

**Trial - instructions - refusal - correctness.**

3. Defendant submitted to the jury the following interrogatory: "Did the plaintiff, immediately after he was bitten by the dog, say to defendant: 'Don't worry about it, Captain; it don't amount to anything; it was my own fault'?"—and the jury replied: "Not proven." In this connection, defendant requested, and the court refused, an instruction relating to the presumption obtaining in reference to the weight to be given affirmative and negative evidence. Held not error.

(June 27, 1911.)

### Headnotes by DUNN, J.

**Note.**—Measure of damages for personal injury by dog.

**In general.**

In *Barclay v. Hartman*, 2 Marv. (Del.) 351, 43 Atl. 174, it is held that the elements of damage for injury by a dog are such as arise from the injury, including nursing, medical attendance, mental and physical suffering, and loss of employment. In *Schaller v. Connors*, 57 Wis. 321, 15

**E**RROR to the District Court for Muskogee County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries inflicted by defendant's dog. Affirmed.

The facts are stated in the opinion.

Messrs. Cook & de Graffenried for plaintiff in error.

Messrs. S. V. O'Hare and Farrar L. McCain, for defendant in error:

The apprehension and fear of hydrophobia, if they exist, are an element of damage regardless of whether or not they were well founded.

Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; The Lord Derby, 4 Woods, 247, 17 Fed. 265.

N. W. 389, it was held that the person responsible for the dog was liable for injury to both the person and clothing of plaintiff.

Epilepsy resulting from physical injury or fright was held to be a proper element of damages in Fye v. Chapin, 121 Mich. 675, 80 N. W. 797.

Generally, as to right to recover for physical injury resulting from fright caused by a wrongful act, see notes in 3 L.R.A. (N.S.) 49; 22 L.R.A. (N.S.) 1073; and 24 L.R.A. (N.S.) 1159.

In Swift v. Applebone, 23 Mich. 252, it was held that although the statute upon which the action was based did not make the liability of the defendants depend upon the *scienter*, the fact of knowledge of the vicious nature of the dog might be taken into account in estimating the damages, as the sense of injury suffered will depend very largely upon the disposition shown by the owner to respect or disregard the rights of others.

And in Kelly v. Alderson, 19 R. I. 544, 37 Atl. 12, under a statute making proof of knowledge of the vicious nature of the dog unnecessary, evidence of lack of such knowledge was held to be inadmissible in mitigation of damages.

#### Medical treatment.

In Buck v. Brady, 110 Md. 568, 132 Am. St. Rep. 459, 73 Atl. 277, it appeared that, the dog having showing symptoms of rabies, plaintiff took the Pasteur treatment as a preventive measure, and a verdict for \$1,000 was sustained, the report of the case not showing definitely whether the expense of the treatment was included in the verdict, but it appearing probable that such was the fact.

In Gries v. Zeck, 24 Ohio St. 329, it is held that reasonable expenses incurred for care and medical attendance made necessary by the injury may properly be included by the jury in their estimate of compensatory damages, although they have not been actually paid.

But defendant is not chargeable with the results of grossly unskillful treatment of the 37 L.R.A. (N.S.)

Plaintiff was entitled to recover all necessary expense incurred.

2 Cyc. 392; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; Feeney v. Long Island R. Co. 116 N. Y. 375, 5 L.R.A. 546, 22 N. E. 402; Hart v. Charlotte, C. & A. R. Co. 33 S. C. 427, 10 L.R.A. 794, 12 S. E. 9; 1 Sutherland, Damages, 96; McGarrahan v. New York, N. H. & H. R. Co. 171 Mass. 211, 50 N. E. 610; Lake Shore & M. S. R. Co. v. Frantz, 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22; Sherwood v. Chicago & W. M. R. Co. 82 Mich. 374, 46 N. W. 773, 88 Mich. 108, 50 N. W. 101.

Defendant is liable for all injuries resulting from the dog's vicious character.

Crowley v. Groomell, 73 Vt. 45, 55 L.R.A. 876, 87 Am. St. Rep. 690, 50 Atl. 546; Brice

wound by a physician selected by plaintiff. Moss v. Partridge, 9 Ill. App. 490.

See also Barclay v. Hartman, *supra*, and Lemoine v. Cook and Warner v. Chamberlain, *infra*, holding that expenses for medical treatment are a proper element of damages.

#### Apprehension, fright, etc.

Mental suffering from apprehension of tetanus or hydrophobia resulting from the bite is a proper element of damages. Heintz v. Caldwell, 9 Ohio C. D. 412, 16 Ohio C. C. 630.

Thus, in Buck v. Brady, *supra*, questions as to whether plaintiff had or continued to have fear of hydrophobia as a result of the bite were held to be proper as to the question of damages.

And in Friedmann v. McGowan, 1 Penn. (Del.) 436, 42 Atl. 723, a question, "Have you or not been afraid of hydrophobia ever since you were bitten by this dog?" was held to be relevant.

In Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751, the court, in speaking of the measure of damages for injury by a vicious dog, says: "The apprehension of poison from the bite of the dog, and the fear and solicitude as to evil results therefrom,—all pain, anguish, solicitude occasioned by the bite,—were proper matters for consideration by the jury in estimating the damages."

In The Lord Derby, 4 Woods, 247, 17 Fed. 265, in sustaining a judgment for \$2,500 as damages from the bite of a dangerous dog permitted on board a vessel, the court said: "The bite of a dog, particularly in this climate, is a very serious matter, outside of the actual pain and suffering experienced. The dangers of lockjaw and the fear of hydrophobia are added to the mental and nervous sufferings attendant upon such injuries; and, as the evidence shows, they were experienced by the libellant in this case. To many people the shock to the system resulting from the most insignificant bite of a dog drawing blood is such that no money compensation is adequate. The ghost

v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695; Knowles v. Mulder, 74 Mich. 202, 16 Am. St. Rep. 627, 41 N. W. 896; Strouse v. Leipf, 101 Ala. 433, 23 L.R.A. 622, 46 Am. St. Rep. 122, 14 So. 667; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; Martinez v. Bernhardt, 106 La. 368, 55 L.R.A. 671, 87 Am. St. Rep. 306, 30 So. 901.

Dunn, J., delivered the opinion of the court:

This case presents error from the district court of Muskogee county, to which it was transferred after statehood, having been originally brought in the United States court for the western district of the Indian territory, at Muskogee. Plaintiff in error,

of hydrophobia is raised, not to down during the lifetime of the victim."

And in Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638, the court said: "If the jury should find for the plaintiff, he is entitled to such damages as necessarily arose from such an injury as he sustained, including nursing, medical attendance, pain, suffering in body, and fear and apprehension of hydrophobia, if such be shown to have been incurred or felt; and also any loss he sustained from having been disabled from pursuing his usual business."

But in Trinity & S. R. Co. v. O'Brien, 18 Tex. Civ. App. 690, 46 S. W. 389, while the court recognized mental suffering resulting proximately from the bite of a dog as an element of damages, it excluded statements made to plaintiff by her physician as to danger from hydrophobia, tetanus, or blood poisoning, offered as tending to show the effect of the injury upon plaintiff's mind.

In Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752, fright and mental terror and the nervous shock produced by the attack of the dog were recognized as proper elements of damage.

And in Fitzgerald v. Dobson, 78 Me. 559, 7 Atl. 704, a verdict for \$1,450 for injuries to a little girl from an attack by a vicious dog was held not to be excessive in view of the fact that the assault was a severe one, and she was not only severely injured, but was greatly shocked and frightened.

#### Future damages.

In Lemoine v. Cook, 36 Mo. App. 193, expenses for medical treatment, loss of wages, and bodily and mental suffering were recognized as proper elements of damages, and the court said the damages recoverable were not limited to those accruing up to the date of the institution of the suit.

In Price v. Wright, 35 N. B. 26, the probability that a scar left by a bite on the face of a girl would lessen her prospects of making a good marriage was held to be too remote and speculative to be considered by the jury as an element of damage.

And in Sanders v. O'Callaghan, 111 Iowa, 37 L.R.A. (N.S.),

as defendant, was sued by defendant in error for damages which he alleged were suffered by him in consequence of being bitten by a vicious dog kept and owned by the defendant.

The averments of the petition are substantially as follows: That defendant resided in the city of Muskogee, and kept at his house a vicious and dangerous dog, which was accustomed to bite mankind. That, knowing of this propensity on the part of the animal, its owner had allowed it to go at large on and about the property of people residing in that neighborhood. That, on or about the 15th day of July, 1906, plaintiff became a tenant of a residence adjoining the property of the defendant, and that the defendant neglected to restrain his said dog in any

574, 82 N. W. 969, an instruction which permitted the jury to enter the domain of conjecture as to future suffering was held to be erroneous.

#### Punitive damages.

When the vicious nature of a dog is known to the owner, he is liable for punitive as well as compensatory damages. Triolo v. Foster, — Tex. Civ. App. —, 57 S. W. 698; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6.

And it has been held that under a statute providing that "every person owning, having, or keeping any dog shall be liable to the party injured for all damages done by such dog," knowledge of the vicious propensities of the dog will make its owner liable for punitive damages. Koestel v. Cunningham, 97 Ky. 421, 30 S. W. 970; Klingman v. Smith, 12 Ky. L. Rep. 96; Dillehay v. Hickey, 24 Ky. L. Rep. 760, 69 S. W. 1095, rehearing denied, 24 Ky. L. Rep. 1220, 71 S. W. 1.

In Falardeau v. Couture, 2 Lower Can. Jur. 96, punitive damages were allowed where the dog was kept and trained for the purpose of fighting other dogs, and was allowed to run unmuzzled.

In Von Fragstein v. Windler, 2 Mo. App. 598, it is held that where defendant has knowledge of the vicious propensities of the dog, punitive damages may be assessed in addition to injuries to the person and clothing of plaintiff.

In Cameron v. Bryan, 89 Iowa, 214, 56 N. W. 434, it was held that an allegation that defendants wilfully, unlawfully, and maliciously harbored and kept the dog, with full knowledge of its ferocious and vicious habits, laid a foundation for the recovery of punitive damages.

And in Hahn v. Kordula, 5 Kan. App. 142, 48 Pac. 896, an allegation that defendant knowingly, and without regard for the rights of others, kept and harbored a dog that was liable to attack persons at any time, was held to be sufficient to sustain punitive damages, though there was no direct allegation that the harboring was wanton, wilful, malicious.

R. L. S.

manner whatsoever, and allowed it to leave its owner's premises and to go onto and around plaintiff's residence, and while there, on or about the 27th day of August, 1906, the said dog made a violent attack upon plaintiff, bit and wounded him in his ankle, leg, thigh, and arms, by reason of which plaintiff became sick and disabled, and suffered great bodily pain for over four weeks, to his damage in the sum of \$2,250. That, by reason thereof, plaintiff was detained from his labor, at a loss of \$100. That, by reason of the fact that the bite of a dog having rabies or hydrophobia is infectious and fatal to the life of a man being so bitten, and by reason of the fact that it was impossible at the time to ascertain whether or not a dog has rabies or hydrophobia, plaintiff suffered great mental pain, and was put in fear of his life by reason of his apprehension of said wounds causing the said disease. That, by reason of this fact, plaintiff was compelled to undergo the Pasteur treatment, being the only known preventive for hydrophobia, and was put to great expense for medical treatment and attention, and the expense incident thereto, in the sum of \$150.

To the complaint the defendant filed an answer admitting that he owned a dog at the date named in the complaint, but denied that the dog was vicious and dangerous, or, if it was, that he knew it, and denied that he permitted said dog to run at large in the city of Muskogee, and go at will upon the property and private residences of others adjoining his home. He disclaimed any knowledge of whether the dog had bitten or wounded plaintiff in the manner alleged, and as to whether or not plaintiff became sick and disabled and suffered as he averred, and therefore demanded strict proof of the same. He denied that plaintiff was damaged in the sum of \$2,500, or any other sum, by reason of the bite of the dog; denied that plaintiff was unable to perform his accustomed work for four weeks, and that he was damaged in the sum of \$100 thereby. His answer then continued as follows: "Further answering herein, defendant says that it was wholly unnecessary for the plaintiff to take Pasteural treatment in order to prevent hydrophobia from the bite of said dog, and denies that plaintiff was damaged in the sum of \$150, as actual damages for the taking of the Pasteur treatment."

On the trial before a jury, a verdict was returned in favor of plaintiff in the sum of \$500, to review which the action has been lodged in this court.

Counsel argues, first, that the court erred in admitting the testimony concerning plaintiff's expenses to Austin, Texas, occasioned by taking the Pasteur treatment, his pain

and suffering while under the same, and the loss of time while going to, staying, and returning from, Austin, which consumed twenty-seven or twenty-eight days, for the reason, as it is averred, the expenses were not necessary, and that the reasonableness of the charges was not established. It will be noticed from the pleading that the issue tendered in regard to the Pasteur treatment was, not that the charges were unreasonable, but that it was unnecessary for plaintiff to take the treatment, and also that plaintiff was not damaged in the sum of \$150, which he alleged he had paid as expenses for the medical attention and expense incident to taking the said treatment. The question, then, on the issues as made by the pleadings, is whether the treatment was necessary, and whether it was in fact taken. The evidence on the issue thus tendered is quoted at length in the brief of plaintiff in error as follows, plaintiff testifying:

Q. Now, tell the jury how long you experienced pain and suffering from these wounds altogether.

A. Well, the actual pain of the wounds, this perhaps lasted only a few days.

Q. Well, how many, Mr. Macoughtry?

A. Five or six, perhaps; but the ankle and knee joints were very stiff for over two weeks.

Q. State whether or not you experienced any mental pain or anxiety.

A. I was very apprehensible of the wounds. Always afraid of dog bites.

Q. State what your apprehension was,—in fear of taking the rabies?

A. I was in fear of acquiring it; yes, sir.

Q. Did that produce any mental anguish?

A. Yes, sir; there was a good deal of anxiety, and I experienced it.

Q. Now, after your treatments by Dr. Oldham, state whether or not you went under any other treatment.

A. I took the Pasteural treatment at Austin, Texas.

Q. When did you go to Austin after the bite?

A. The day following.

Q. What time?

A. On the fast mail, I think it was.

Q. State whether or not there was any pain connected with the taking of the Pasteural treatment.

A. It is a very severe treatment and causes a great deal of suffering and pain.

Q. What was it occasioned you to go to Austin to take the treatment?

A. The apprehension of taking hydrophobia from the dog bite.

Q. Now, what, if any, expense did you incur by reason of this trip to Austin?

A. About \$150.

Q. Does that include your railroad fare?

A. Yes, sir.

Q. Now, how long were you absent from your duties on account of this?

A. Practically a month. The treatment required twenty-one days, and there was the best part of two days, and some in going, and two days in coming back, and counting the days I was absent prior to my departure would make about twenty-seven or twenty-eight days.

Q. What compensation did you receive per month during that time?

A. One hundred dollars per month.

Q. And you were absent about, you say, about twenty-seven or twenty-eight days?

A. About that.

Q. Now, did you pay anything to Dr. Oldham

A. Yes, sir; I paid for his services.

Dr. Oldham, plaintiff's attending physician, was introduced on behalf of plaintiff, and testified:

Q. Doctor, in the case where a man has been attacked and bitten by a dog in three or four different places on his body, what would you say as to the necessity for that man taking the Pasteural treatment?

A. The number of bites has nothing to do with it, and the Pasteural treatment in that case would be a prophylactic measure; in other words, a preventive from hydrophobia.

Q. What do you say the necessity was in taking that treatment?

A. There may absolutely be no necessity, but to satisfy the patient's mind, and to preclude any after effects he might have, I would recommend the Pasteural treatment as a prophylactic treatment.

Q. Now, explain that to the jury.

A. That is a treatment in advance of a disease; treatment to prevent certain diseases.

Q. Is it a preventive?

A. It has proven so, as I understand it. The main benefit from Pasteural treatment is preventive.

Q. State whether or not, in your opinion, it was advisable and necessary for Macoughtry to take the Pasteural treatment?

A. Well, I would like for him to divide that question. He asks two questions in one. I think it is advisable sometimes when it is not necessary.

Q. Well, was it advisable or necessary?

A. Yes, sir.

Q. Did you charge Macoughtry anything for doctoring him?

A. Yes, sir.

Q. How much?

37 L.R.A. (N.S.)

A. I only treated him twice, and I charged him \$5 for the time I first saw him and dressed him, and he was in the office the next day, and I charged him \$1 for that treatment. It was \$6, as my books show.

#### Cross-examination:

Q. Doctor, Mr. McCain asked you if it was advisable or necessary to take the Pasteural treatment, and you answered, "Yes." What do you mean by that?

A. I meant as a prophylactic measure.

Q. Did you mean it was necessary?

A. No, sir, advisable.

It is contended on the part of defendant that the foregoing evidence does not disclose that it was necessary that defendant incur the expense incident to going to Austin, Texas, to take the prophylactic treatment to relieve him of either the anxiety or the effect of rabies or hydrophobia from the wounds which had been inflicted by defendant's dog. It is true that neither the local physician who treated him, nor plaintiff himself, testified that it was necessary that he take this treatment, but we submit that plaintiff was not required to wait until rabies developed before he took those reasonable, precautionary measures which any intelligent man would naturally take to relieve himself from the danger. Courts take judicial knowledge of the fact that smallpox is a terrible disease, whose ravages have sometimes swept away thousands of human being in a few weeks. It is also known that a large number of the medical profession and people generally consider vaccination a preventive of the disease, and of these facts courts take judicial knowledge. In *Re Viemeister*, 179 N. Y. 235, 70 L.R.A. 796, 103 Am. St. Rep. 859, 72 N. E. 97, 1 A. & E. Ann. Cas. 334; *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719. Likewise, it is a matter of general knowledge that one of the most horrible forms in which death can visit humanity is that of hydrophobia, and that this is incurred by being bitten by dogs which have it. The wounds in this case were inflicted in August, and everybody, even courts, take knowledge of the fact that any precaution which could be said to be advisable would, in view of the consequences which its omission might entail, be deemed to be reasonable and necessary. Knowledge that the Pasteur treatment is generally considered proper for the prevention of rabies or hydrophobia may be considered to be judicially known, without proof thereof; and a consideration of plaintiff's injuries and of the possible results, taken in connection with the issue made and the evidence introduced, are sufficient, in



our judgment, to support the conclusion that the expenses incurred in taking the same were reasonable and necessary. The instruction which the court gave on this matter, and to which exception was taken, reads as follows: "You are instructed that if you find for the plaintiff in this case, you may return a verdict in such sum as you believe from the evidence will compensate him for the damages which he has sustained by reason of the injuries. And in determining said damages you may take into consideration the expenses which you believe from the evidence he has paid, incurred, or become liable for, medical and surgical services, if any, in consequences of being bitten by the dog, if he was so bitten; and in determining such amount you may take into consideration the apprehension of poisoning from the bite of said dog and the fear of evil results therefrom, and of the physical and mental suffering endured by him in consequence of being bitten by said dog." In view of the issues, this instruction was not error.

A similar instruction was before the supreme court of Michigan in the case of *Sherwood v. Chicago & W. M. R. Co.* 82 Mich. 374, 46 N. W. 773, the salient portions thereof reading as follows: "In estimating the compensatory damages in cases of this character, . . . the elements of damages which the jury are entitled to take into account consist of all effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff endured, the loss of time, all bodily and mental suffering, impairment of capacity to earn money, the pecuniary expenses, the disfigurement or permanent annoyance which is liable to be caused by the deformity resulting from the injury." Of this the court said: "We see no error in this charge."

In further considering the case, it developed that the plaintiff was permitted to testify as to the costs and expenses of a trip which she made from Michigan to Indiana for medical treatment. The court under this instruction allowed plaintiff to recover for the entire expenses of the trip, her board and medical treatment for a period of six months, including board for her sister. The evidence introduced tended to show that the injuries received might be relieved by the treatment sought. The plaintiff suggested to her physician the taking of the treatment in question, and the evidence discloses that the advice which she received was that "it would be a good idea, and that it might improve her general health, and indirectly help the health of the muscles." The court, taking into consideration all of these matters, held that it could not be said

that the expenditures under the circumstances were unreasonable, and said: "It is further contended that the court erred in permitting the plaintiff to testify as to the costs and expenses of her trip to La Porte, Indiana, and the medical treatment which was given her at the time of her attendance there. The reason of this objection, stated by counsel, is that this treatment was not necessary or usual for an injury of this kind, and that, by permitting this testimony, the court allowed the jury to charge the defendant with the entire expenses of the trip, her board and medical treatment from December 5 until May 28 following, at the rate of \$21.50 per week, including the board of her sister. . . . She was entitled, as a part of her damages, to recover whatever was a reasonable and necessary outlay in her attempt to be cured of the injuries resulting from the negligence of the defendant. It cannot be said, under the circumstances, that this was an unreasonable expenditure."

An instruction for similar allowances was also considered by the supreme judicial court of Massachusetts in the case of *McGarrahan v. New York, N. H. & H. R. Co.* 171 Mass. 211, 50 N. E. 610; the instruction being as follows: "There is evidence in the case as to medical attendance. Dr. Coxwell told you the number of visits he had made to the plaintiff for the purpose of treating him. There is no evidence as to what the ordinary charge for such a visit is. There is no evidence as to what the charges of Dr. Coxwell ordinarily are. . . . I must assume that you have some knowledge, in common with men in general, as to the charges ordinarily made by physicians for attendance and services such as you find upon the evidence in this case have been rendered; and you may avail yourselves of that knowledge for the purpose of determining what sum the plaintiff should have by reason of the expense he has properly and reasonably incurred in endeavoring to effect a cure." From the foregoing it will be noticed that the evidence did not disclose the amount of expense, as in the case at bar, but the appellate court, in passing on the verdict which was rendered under the same, speaking with reference to the duty of the jury in cases of this character, said: "Jurors take with them their knowledge and experience of affairs, and are not only at liberty to use, but ought to use, that knowledge and experience in drawing conclusions from the evidence. Evidence that one who practices as a physician or surgeon attends a patient, and gives him professional assistance, justifies a finding that the services are rendered

for a pecuniary recompense, to be paid by the patient."

In the case at bar, the specific amount was definitely set forth in the plaintiff's petition, proved by him on the trial, and the issue made on it was, not that it was an unreasonable charge, but that it was not made, and, if made, was unnecessary. Anyway, it would have added practically nothing to the knowledge possessed by any of us for plaintiff to have testified that the charge was reasonable. The force of the situation shows it to be. Other cases in which the question has been considered and passed on in accord with our holding may be noted as follows: *Wallace v. Western North Carolina R. Co.* 104 N. C. 442, 10 S. E. 552; *Hart v. Charlotte, C. & A. R. Co.* 33 S. C. 427, 10 L.R.A. 794, 12 S. E. 9; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Huizega v. Cutler & S. Lumber Co.* 51 Mich. 272, 16 N. W. 643; *State, Evans, Prosecutor, v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 902, 6 Atl. 653; *Lake Shore & M. S. R. Co. v. Frantz*, 127 Pa. 297, 4 L.R.A. 389, 18 Atl. 22. See also *Baldwin, Personal Injuries*, § 437.

It is next contended that the court erred in rejecting certain relevant and material testimony duly offered by the defendant, which it is contended went to the point of showing defendant's knowledge of the vicious character of the dog. Plaintiff's petition alleged that the dog was vicious, and that the defendant knew about it. The defendant's answer denied that the dog was vicious and dangerous, and that, if it was, denied that he knew it. Quoting from the brief of the defendant, evidence on this point is shown to be as follows:

Q. State whether or not, previous to the injury of the plaintiff, you had any notice of the dog making vicious attacks upon anyone.

A. I never had. Those cases where it had bitten people I did not regard as vicious, from circumstances under which they occurred. The dog, as I say, was a most affectionate dog, obedient dog, that I ever knew, except with his, what you might call, peculiarities or eccentricities; and we always accounted for his disposition from the circumstances that he was raised from a puppy on human milk.

Q. Now, what do you mean by his peculiarities?

A. His peculiarities were that he would not submit to being hit; he would jump at you, and raise his bristles; and he had a very peculiar tail. It was very bushy, and yet when he was angry the hairs on that tail would all stand out; and his other peculiarities are that after you had given

him something to eat, you couldn't take that away from him.

Q. You—would he compare in appearance with a bulldog?

A. Oh, there was no resemblance between him and a bulldog, except that he was a dog; but, so far as any similarity with a bulldog, anyone that knew anything about a bulldog wouldn't class him with a bulldog in his appearance or actions.

Q. Captain, did you have any notice whatever of the matter detailed here this morning by the Smith girl as to how she had been bit?

A. I know only of the Smith transaction only by information from my wife, and the Smith child is evidently mistaken. It didn't occur in that way.

Q. I am not asking you whether you are contradicting her or not; I am asking you this, Did you have any notice that it occurred in the manner in which she detailed it here this morning?

A. No, sir; my recollection is I didn't know of the Smith girl being bitten until a long time afterwards.

Q. What was your information as to how the child was bitten? (Objection. Sustained. Defendant excepts.)

Q. Did you ever notice the disposition of the dog to run out of the yard to bark at people, or made demonstrations as if he was going to attack them?

A. He was very little addicted to that.

The error which is alleged to have been committed is that the defendant was denied the right to show his information as to how the Smith girl was bitten; it being made to appear that this information was to the effect that the Smith girl was interfering with the dog, trying to take its bone, and that the dog did not act viciously, but simply in defense of its food. It appears from the evidence that, including the plaintiff in this case, the dog had, to the knowledge of the defendant, on one pretext or another, bitten or attempted to bite five different persons. The defendant testified that he did not know much about the Smith girl circumstances, and that all that he knew of it was information given him by his wife. Conceding that the explanation which defendant sought to make of the occurrence was admissible, and should not have been excluded, the verdict is abundantly supported by other evidence. The dog appears to have had an extremely sensitive nature, which caused it to resent, by attacking people, what it deemed unwarranted interferences with its food or its rights. These peculiarities, or eccentricities, as they are denominated by the defendant, are accounted for by him on the theory that the dog was

raised from a puppy on human milk. Defendant testified to facts showing that he had notice of these propensities, and from whatever cause they were occasioned, whether from feeding on human milk, from inherent viciousness, or otherwise, the keeping of the animal with such knowledge, and permitting it to run at large, renders him liable for all damages which it might inflict. It is the keeping of the animal, with knowledge, either actual or constructive, of its dangerous or vicious propensities, which creates the liability. *Emmons v. Stevane*, 77 N. J. L. 570, 24 L.R.A.(N.S.) 458, 73 Atl. 544, 18 A. & E. Ann. Cas. 812; *Grissom v. Hofius*, 39 Wash. 51, 80 Pac. 1002, 4 A. & E. Ann. Cas. 125; *Robinson v. Marino*, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752; *King v. Muldoon*, 131 App. Div. 847, 116 N. Y. Supp. 308; *Boler v. Sorgenfrei* (Sup.) 86 N. Y. Supp. 180; *Barclay v. Hartman*, 2 Marv. (Del.) 351, 43 Atl. 174; *Fake v. Ad-dicks*, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450; *Strouse v. Leipf*, 101 Ala. 433, 23 L.R.A. 622, 46 Am. St. Rep. 122, 14 So. 667; *Turner v. Craighead*, 83 Hun, 112, 31 N. Y. Supp. 369, affirmed in 155 N. Y. 631, 49 N. E. 1105, without opinion. Nor is it necessary that the dog's disposition or peculiarity be such as to render it liable to or inclined to bite all with whom it comes in contact; it being held in a number of cases that, if the dog had bitten one person prior to the injuries sued for, knowledge thereof is sufficient notice of his character to bind the owner. *Smith v. Pelah*, 2 Strange, 1264, cited in the case of *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Keenan v. Gutta Percha & Rubber Mfg. Co.* 46 Hun, 544; *Arnold v. Norton*, 25 Conn. 92; *O'Rourke v. Finch*, 9 Cal. App. 324, 99 Pac. 392. In the old case of *Smith v. Pelah*, supra, which has never been departed from, *Lee, Ch. J.*, "ruled that if a dog has once bit a man, and the owner, having notice thereof, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King's subject sought not afterwards to be endangered."

Counsel next object to the seventh instruction, wherein the court instructed the jury that, if it was satisfied that the defendant "was the owner of a vicious and dangerous dog, and that, either by actual or constructive notice, this fact was brought home to him, then, in that case, your verdict should be for the plaintiff," etc., the objection being that the instruction was erroneous, because the court went beyond the rule, requiring the owner to have actual

knowledge, thereby imposing an additional unwarranted method by which he could be charged with knowledge, to wit, "Constructive notice." In our judgment, the instruction was not erroneous. It has been held in numerous cases that where knowledge was had of dangerous and vicious propensities of a dog by others of the owner's household, he was held to have the knowledge which they possessed. For instance, in the case of *Barclay v. Hartman*, supra, a wife's knowledge was sufficient to charge the husband with responsibility. Likewise, in the case of *Boler v. Sorgenfrei*, supra, the knowledge of the wife was deemed sufficient. In the case of *King v. Muldoon*, supra, a complaint to the housekeeper of the defendant, who testified that she was in general charge of the place in the absence of the defendant, was held sufficient; and in the case of *Grissom v. Hofius*, supra, evidence that the watchman of the owner knew of the previous instances of the dog attacking and biting persons was sufficient to go to the jury upon the question of whether the owner knew or should have known of the vicious disposition of the dog. There was no error in the charge.

Under his fourth assignment, defendant argues that the court erred in its refusal to give a certain instruction on the weight to which affirmative, as contradistinguished from negative, evidence was entitled. The defendant submitted to the jury the following interrogatory: "Did the plaintiff, immediately after he was bitten by the dog, say to the defendant: 'Don't worry about it, Captain; it don't amount to anything; it was my own fault?'" To which the jury answered, "Not proven." It is the contention of counsel that the court should have instructed the jury that in the weighing of evidence the presumption is that ordinarily a witness who testifies to an affirmative is to be credited with preference to one who testifies to a negative, because he who testified to a negative may have forgotten a thing which did happen, while it is not possible to remember a thing that never existed. The refusal of such an instruction is not error. See the following authorities: 3 *Brickwood's*, Sackett, Instructions, § 3303; *Chicago & A. R. Co. v. Robinson*, 106 Ill. 142; *Louisville, N. A. & C. R. Co. v. Shires*, 108 Ill. 617; *Himrod Coal Co. v. Clingan*, 114 Ill. App. 568.

No error having been made to appear, the judgment of the trial court is affirmed.

All the Justices concur.

Petition for rehearing denied September 26, 1911.

## COLORADO SUPREME COURT.

PEOPLE OF THE STATE OF COLORADO  
FOR USE OF BERNARD L. TAMPLIN,  
Plff. in Err.,

v.

GEORGE E. BEACH, Sheriff, et al.

(49 Colo. 516, 113 Pac. 513.)

**Sheriff — bond — injury by deputy — liability.**

1. The bond of a sheriff conditioned that he shall faithfully perform and execute the duties of his office is not liable for an injury inflicted upon a bystander by the discharge of a revolver negligently dropped by his deputy after it had been taken from a prisoner, if the prisoner was not lawfully arrested, or it was not necessary to relieve him of the revolver, so as to make it part of the official duty of the deputy to have possession of the weapon.

**Pleading — action on official bond — alleging facts — conclusion.**

2. One attempting to hold the official bond of a sheriff liable for an injury caused by his deputy must allege facts showing that the act was within the scope of his official duty, and it is not sufficient merely to allege that conclusion.

(February 6, 1911.)

**E**RROR to the District Court for the City and County of Denver to review a judgment in defendants' favor in an action brought to recover damages for the alleged misfeasance of a deputy sheriff. Affirmed.

The facts are stated in the opinion.

Messrs. F. T. Johnson and S. W. Johnson, for plaintiff in error:

The liability of a sheriff and his bondsmen, for the wrongful acts of a deputy while in performance of official duties, is well established by statute as well as by adjudicated cases.

1 Mills's Anno. Stat. §§ 850-852; Barton v. Continental Oil Co. 5 Colo. App. 341, 38 Pac. 432; Brown v. Weaver, 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388; Brandt, Suretyship, § 487; 4 Am. &

Eng. Enc. Law, 681; Brayton v. Town, 12 Iowa, 346; Grinnell v. Phillips, 1 Mass. 530.

The bond sued on is in the form of the ordinary statutory bond, and while it does not on its face insure against negligent acts of a deputy, yet the statute so provides, and therefore such liability should be read into the bond.

1 Mills's Anno. Stat. § 852; Davis v. State, 44 Ind. 62; Ramsay v. People, 197, Ill. 572, 90 Am. St. Rep. 177, 64 N. E. 549; 27 Am. & Eng. Enc. Law, 542.

The amended complaint charges that the deputy sheriff, while acting under color and by virtue of his office, and while in the due performance thereof, committed the injury complained of. This states a good cause of action.

People use of Tritch v. Cramer, 15 Colo. 155, 25 Pac. 302; Knowlton v. Bartlett, 1 Pick. 270; Turner v. Sisson, 137 Mass. 191; Clancy v. Kenworthy, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427; People ex rel. Kellogg v. Schuyler, 4 N. Y. 179; Lammon v. Feusier, 111 U. S. 19, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; Barton v. Continental Oil Co. 5 Colo. App. 341, 38 Pac. 432; Campbell v. People, 154 Ill. 595, 39 N. E. 578; 25 Am. & Eng. Enc. Law, 723; Murfree, Sheriffs, §§ 20-76a.

It is the duty of a sheriff to take from the person arrested a dangerous weapon, such as a revolver, and hold it as evidence.

State ex rel. Bruns v. Clausmeier, 154 Ind. 599, 50 L.R.A. 73, 77 Am. St. Rep. 511, 57 N. E. 541; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; Holker v. Hennessey, 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090.

The sheriff and his bondsmen are liable for official misconduct.

Horan v. People, 10 Ill. App. 21; Cash v. People, 32 Ill. App. 250; Clancy v. Kenworthy, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427; State ex rel. McPherson v. Beckner, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; Greenberg v. People, 225 Ill. 174, 8 L.R.A.(N.S.) 1223, 116 Am. St. Rep. 127, 80 N. E. 100; Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927; People ex rel. Kel-

**Note. — Liability of bondsmen of peace officer for acts of latter in respect of property taken from prisoner.**

While there are numerous cases holding that the sureties on the bond of a peace officer are liable only for acts done by virtue of or under color of his office, there seems to be but one beside PEOPLE v. BEACH, in point on the specific question suggested by the title.

In State ex rel. Zimmerman v. Schaper, 162 Mo. App. 538, 134 S. W. 671, a deputy constable, having arrested persons charged with having dangerous explosives concealed 37 L.R.A.(N.S.)

in a dwelling, took from them a quantity of dynamite, and deposited it in a thickly settled locality, where, during a fire, it exploded, killing a fireman. In an action on the constable's bond for the death of the fireman, it was held that in the absence of evidence that the property was stolen or acquired by any of the means specified in the statute on which the officer's right to possession was based, he acted as a private individual in taking charge of the dynamite, and not in the discharge of any duty as constable, and that therefore the bondsmen were not liable.

J. D. C.

logg v. Schuyler, 4 N. Y. 173; Johnson County v. Williams, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759; Brown v. Weaver, 76 Miss. 7, 42 L.R.A. 423, 71 Am. St. Rep. 512, 23 So. 388.

Mr. Daniel Prescott for defendants in error.

Campbell, J., delivered the opinion of the court:

Action upon the official bond of a sheriff, to recover of him and the surety on his official bond damages for alleged misfeasance of his deputy. The bond was conditioned that the sheriff "shall faithfully perform and execute the duties of the office of sheriff." To the judgment dismissing the action, following a ruling sustaining a demurrer to the complaint, plaintiff has sued out this writ of error. The complaint in substance alleges that Wedow, the deputy sheriff, while acting as such and in the performance of the duties of his office, had under arrest and in custody a certain prisoner whom he was conveying to the county jail for temporary detention or safe-keeping, as the law provides. They were riding in a street car from Englewood, in Arapahoe county, to the city of Denver, and while plaintiff, who was a passenger, was sitting in his seat in the same car near to them and free from fault, the deputy, being then intoxicated, and so acting under color and by virtue of his office, negligently dropped a loaded revolver which was then on his person, or negligently permitted it to be dropped from his person, to the floor of the car, and the same was exploded and the bullet struck plaintiff in his leg, causing the injuries complained of. The revolver belonged to the prisoner, and was taken from his person by the deputy, acting in his official capacity, some time prior to the injury, and was being carried by the deputy under color and by virtue of his office, and, to the deputy's knowledge, was loaded; that when the deputy sheriff took possession of the revolver, or soon afterwards, acting in his official capacity, he cocked the same, and negligently and recklessly put it into his pocket in that condition, in which it remained until it fell to the floor of the car and was exploded. An indemnity or security contract, like written instruments generally, is to have a reasonable interpretation or construction, but when its meaning has once been judicially determined, it is *strictissimi juris*. It is not to be extended by construction to bring within its scope things other than those therein expressed, merely because the judicial mind may think that they, equally with those included, ought to have been provided for. Bearing in mind, then, this rule of construction, let us analyze this 37 L.R.A. (N.S.)

complaint to see if the surety's contract indemnifies plaintiff against the acts charged against the deputy. Of course, the sheriff is bound equally with his deputy, if the acts of negligence charged against the latter can properly be said to be an official duty pertaining to the office.

As we understand from the briefs, the theory of the plaintiff is that the deputy sheriff was acting by virtue and under color of his office in taking the revolver from the person of the prisoner, and continued so to act while transporting him from the place of arrest to the county jail. In other words, that the failure to act with due care occurred while the deputy was doing an official act, or one which was done by him as an officer under a claim of a right to do so. It is not every act which a sheriff or his deputy does while, or during the time that, he is engaged in the performance of an official duty, for which the sureties on his bond are liable. The true distinction is, we think, that liability does not attach unless the act complained of is an official act, constituting a part, and directly connected with the doing, of an official act. If, for example, the sheriff steps aside from his official duty, and negligently does, or omits to do, an act in no wise connected with the discharge of such duty, though done or omitted during the time of its performance, by which another is injured, the sureties certainly could not be held liable in damages therefor. This distinction is well illustrated in the case of *People use of Purdy v. Pacific Surety Co.* 50 Colo. 273, 109 Pac. 961, and cases therein cited. To bring this case within the rule, upon plaintiff's own theory, he must, *inter alia*, by apt words, allege in his complaint that, in making the arrest of the prisoner, it was the duty of the deputy, and a part of his official act, and directly connected therewith, as one continuous transaction, to take from him the loaded revolver found upon his person, and safely to keep the weapon until he delivered it and the prisoner to the keeper of the jail; and that while conveying the prisoner from the place of arrest to the jail, the deputy sheriff, in keeping the loaded revolver on his person, was engaged in the performance of an official act, in negligently dropping the weapon and causing the injury to plaintiff, before the sheriff and his official bondsmen can be held liable. This court has held, in the case of *Newman v. People*, 23 Colo. 300, 47 Pac. 278, that, at the common law, when a sheriff lawfully arrests an offender, he may search for and seize and take into custody the subject of the crime, or the thing or instrument by which it was committed, or which might aid the prisoner in escaping, and bring before a magistrate or convey to the jail, the per-

son arrested and the thing or things so seized. See also *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459; *Holker v. Hennessey*, 141 Mo. 527, 39 L.R.A. 165, 64 Am. St. Rep. 524, 42 S. W. 1090. Section 1830, Rev. Stat. 1908, authorizes such arrest without a warrant in certain cases for carrying concealed weapons. A sheriff, however, has no authority, and it is no part of his official duty, to search and take from a prisoner whom he has even lawfully arrested, any other property. Neither has he this power of search or seizure, unless he has lawfully made an arrest.

There is no allegation in the complaint showing that the deputy ever arrested the prisoner, or one which sets out the charge, if any, on which the prisoner was arrested, or that he had committed any crime with the revolver or otherwise, or that the weapon was loaded when in his possession, or that it was necessary for the officer to take the same from him as furnishing any evidence of his guilt of an offense, if any, with which he was charged, or that the taking of the weapon was a necessary or reasonable precaution for the officer in the discharge of some supposed official duty. The case is not brought either within the common-law or statutory requirements. It is not enough, in an action of this kind, for the pleader generally to state that the officer is acting "by virtue of or under color of his office," or that the acts are of such a character as are authorized by law, or that the same constitute his official duty. These are merely conclusions of the pleader, and not statements of fact at all. *People use of Howard v. Cobb*, 10 Colo. App. 478, 51 Pac. 523. It is not enough merely to allege that the revolver was one which the deputy took from the person of a prisoner, without additional averments of facts showing that the circumstances were such that the taking was justified, in law, as part of the official duty he was then performing; that is, the pleader must, by proper allegations, bring his case within the rule which requires a statement of facts, not a conclusion of the pleader, so that the court may, for itself, determine whether the act for which the officer is said to be liable constitutes an official act, or an act done by virtue of or under color of his office. This was expressly held by us in the case of *People use of Purdy v. Pacific Surety Co.* supra. As further showing the insufficiency of the complaint to bring the case within the requirements of these decisions, it may be pointed out that the complaint does not show that the deputy ever made the arrest himself, or that in making it he did so under a valid warrant, or that the arrest was made under circumstances, if such there be, which justify an arrest without

warrant. If the arrest of the prisoner was not a lawful one, if made under a void warrant, or without warrant in a case where a warrant is required, or if not made in such circumstances as justify the arrest without warrant, the officer was not acting in his official capacity, either by virtue of or under color of office, and the taking from the prisoner of a revolver, in such circumstances, and carrying it with him, on the car, were acts clearly outside of, and beyond the duties of, his office,—merely private or personal acts, for which the surety upon the official bond of his principal could not be held liable. These defects in the complaint are not technical; they are substantial. Strictness in a pleading of this sort is necessary in the particulars mentioned. *Allison v. People*, 6 Colo. App. 80, 39 Pac. 903.

We must not be understood as holding that for an unlawful act, or one in excess of his legitimate authority, a surety on an official bond may not be held liable in damages for resulting injuries, when the act is done by his principal on the bond, or by the deputy of the principal, by virtue of his office, or under color of his office. We are not engaged in laying down universal rules. We confine our decision to the facts of the case as made by the complaint.

It is necessary here merely to say that the complaint is not sufficient, in that it significantly fails to show by proper averment of facts, although conclusions of law may be pleaded, that the acts charged against the deputy sheriff were done by virtue of or under color of his office.

The judgment of the District Court being in accordance with this view, it is affirmed.

Gabbert and Hill, JJ., concur.

#### IOWA SUPREME COURT.

RE ESTATE OF CHARLES A. JOHNSON,  
Deceased.

ELIZA JOHNSON

v.

ALBERT P. JOHNSON, Exr., etc., of  
Charles A. Johnson, Deceased, Appt.

(— Iowa, — 134 N. W. 553.)

Husband and wife — antenuptial agreement — year's support.

An antenuptial agreement by which a wife relinquishes all claims and demands of whatever manner, sort, or description

Note. — As to waiver of right to widow's allowance by antenuptial agreement, see note to *Re Deller*, 25 L.R.A. (N.S.) 751.

which she may at any future time have against her husband's estate, including claims for dower, support, or maintenance, does not include the year's support which is allowed her by law out of his estate after his death.

(February 14, 1912.)

**A**PPEAL by the executor of the estate of Charles A. Johnson, deceased, from an order of the District Court for Keokuk County, allowing the claim of plaintiff for support out of the estate of her deceased husband. Affirmed.

Statement by McClain, Ch. J.:

Proceedings in the lower court with reference to the allowance of a claim of Eliza Johnson, widow of deceased, of \$300 for support during the year following the death of deceased, resulted in an order for such an allowance in the sum of \$250. The executor appeals.

Messrs. Stockman & Baker, for appellant:

Antenuptial contracts freely and voluntarily entered into without fraud or imposition, including those making provision as to disposition of property after death, are legal and valid, and the terms thereof will be enforced.

2 Kent, Com. 12th ed. § 173; *Jacobs v. Jacobs*, 42 Iowa, 600; *Peet v. Peet*, 81 Iowa, 172, 46 N. W. 1051; *Re Devoe*, 113 Iowa, 4, 84 N. W. 923; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702; *Ditson v. Ditson*, 85 Iowa, 276, 52 N. W. 203.

Messrs. C. M. Brown and D. W. Hamilton, for appellee:

The terms of the antenuptial contract do not bar plaintiff from her support.

*Mahaffy v. Mahaffy*, 63 Iowa, 55, 18 N. W. 685; *Miller v. Collins*, 143 Iowa, 120, 121 N. W. 700; *Hamilton v. Hamilton*, 148 Iowa, 127, 128 N. W. 776; *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149; *Pulling v. Durfee*, 85 Mich. 34, 48 N. W. 48.

McClain, Ch. J., delivered the opinion of the court:

Prior to the intermarriage of Charles A. Johnson, now deceased, whose estate is under administration, and Eliza Roberts, who survives decedent as his widow, they entered into an antenuptial contract, in which each agreed to relinquish all rights that either might have in the property, both real and personal, of the other; the recital of relinquishment on the part of the intended wife being as follows: "In consideration of which and the said marriage the second

party agrees to, and does in like manner, relinquish any and all claims and demands of whatsoever manner, sort, or description which she may at any future time have by reason of the said marriage and her being the wife of the first party, against the said first party, his property or his estate, except only as in contract hereinafter specifically set out; the above agreement to include and cover all claims for dower, support, or maintenance out of the estate of the first party. In the event that the first party shall die during the continuance of the said marriage relation between the parties hereto, and the second party survive him, then the second party shall be entitled to the one third part of the net value of the estate left by first party, provided that the said net value of the estate shall not exceed the sum of \$2,100. In the event that the net value of the said estate shall exceed \$2,100, then and in that case second party shall become entitled to the sum of \$700 out of the same, and no more. The above exception, that is to say, the portion of the first party's property that the second party shall be entitled to out of his estate, is given under the express condition that the second party will in no wise interfere with the first party selling or mortgaging his property, and that she will sign all deeds and mortgages said first party may ask to be signed, and first party will likewise agree to sign deeds or mortgages for second party."

It is conceded for appellant that in a case recently decided in this court—*Re Miller*, 143 Iowa, 120, 121 N. W. 700—it was held that an antenuptial contract cutting off all rights of the wife surviving her husband in his estate does not defeat her right to the allowance authorized by Code, § 3314, provided the court shall find such allowance to be proper under the circumstances. Counsel for appellant seek to distinguish the present case from the one just cited on the ground that in the antenuptial contract now before us the intended wife specifically relinquished all claims against her prospective husband's property or estate, with the specification that such relinquishment should include and cover "all claims for dower, support, and maintenance out of the estate" of her husband. We think no such distinction can properly be made. In that case it was held that the allowance provided for by statute was not to be made out of the estate of the husband, but out of property of which he died seised, and that the amount of his estate for distribution could only be determined after costs of administration had been deducted

from his property, and that the allowance to the widow is one of the expenses of administration. It is there said that the allowance authorized to be made to widow and children does not relate in any sense to an interest in the property of the husband; and by quotation from *Re Peet*, 79 Iowa, 185, 44 N. W. 354, it is said that the provisions of the statute in this respect embrace interests of the public as well as of the wife and children. In the case of *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149, cited with approval in the *Miller Case*, this language is used: "The right of the wife [and minor children] to support during marriage is not an interest, strictly speaking, in the property of her husband. It is a benefit arising out of the marital relation by implication of law. . . . It comes within no definition of property. It is a benefit created in their favor by positive law, and adopted for reasons deemed wise and politic. . . . We are at a loss to understand how this humane provision of law for the family of a deceased party can be affected by an antenuptial contract, however broad and comprehensive its terms. . . . It is undeniable law that a party may waive the advantage of a statute intended for his sole benefit, but there are grave reasons why a law enacted from public considerations should not be abrogated by mere private agreement. The statute we are considering is of this character. It was intended to throw around the persons named that protection they are unable, in their helplessness, to procure for themselves. This is not a matter of mere private concern. It would be in contravention of the policy of this enactment to permit a party, by an antenuptial contract, to relieve his estate altogether from the maintenance of his widow and his children, when they could no longer sustain themselves."

We now reach the conclusion that by no revision in an antenuptial contract, no matter how fair and reasonable it may be in itself, in view of circumstances of the parties, can the prospective wife relinquish or cut herself off from the right to an allowance for support under the statute, provided the court finds such allowance to be a proper one when applied for. Of course, the circumstances, including the provisions of the contract itself, may be taken into account in determining whether an allowance should be made; but if, in the particular case, the court finds an allowance to be proper, no relinquishment or waiver in the antenuptial contract can be relied upon to defeat the right to it.

The order of the trial court is affirmed.  
37 L.R.A. (N.S.)

## KANSAS SUPREME COURT.

H. W. SCHAAKE et al.

v.

JOSEPH N. DOLLEY et al.

(85 Kan. 598, 118 Pac. 80.)

### Bank — regulation — police power.

1. The business of banking is so intimately related to the public welfare that it properly falls within the scope of the police power of the state, exercisable by the legislature.

### Same — denial of charter — validity.

2. Section 2, chap. 125, Laws 1911, relating to the formation of private corporations, and providing that the charter board shall refuse a bank charter if, upon examination, it shall make a determination against the public necessity of the business in the community in which it is sought to establish the bank, is a valid enactment under the police power of the state.

### Same — priority.

3. Where equally meritorious applications for charters for several banks in the same community are pending before the charter board at the same time, and the charter board determines against the necessity for more than one bank, the application first presented should be granted.

(October 7, 1911.)

**A**PPPLICATION for a writ of mandamus to compel defendant the State Charter Board to grant to plaintiffs a charter for a banking corporation in the city of Abilene. Writ denied.

The facts are stated in the opinion.

Messrs. C. S. Crawford and Frank Doster; for plaintiffs:

At common law the business of banking was of common right.

Headnotes by BURCH, J.

**Note.**—A search has failed to disclose the existence of any other case in which the question whether a charter or license for a bank may be refused upon general considerations of public policy has been considered.

As to the power to prohibit or impose conditions upon the right of individuals to engage in the banking business, see *State v. Richcreek*, 5 L.R.A. (N.S.) 874, and note; *Weed v. Bergh*, 25 L.R.A. (N.S.) 1217, and note; *Marymont v. Nevada State Bkg. Board*, 32 L.R.A. (N.S.) 477.

Mention may also be made in this connection of *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, which upholds the constitutionality of a statute requiring the licensing of private bankers, and in which the possibility that the comptroller may refuse a license to a private banker upon his arbitrary whim was held not to render the statute obnoxious to the 14th Amendment to the Federal Constitution.



*State v. Richcreek*, 167 Ind. 217, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; *Ex parte Pittman*, 31 Nev. 43, 22 L.R.A.(N.S.) 266, 99 Pac. 700, 20 Ann. Cas. 1319; *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664.

The statute vests arbitrary power in the charter board.

*Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Conlon*, 65 Conn. 478, 31 L.R.A. 55, 48 Am. St. Rep. 227, 33 Atl. 519; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Cosgrove v. Augusta*, 103 Ga. 835, 42 L.R.A. 711, 68 Am. St. Rep. 149, 31 S. E. 445; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431.

The statute is a delegation of legislative power, and therefore void.

*Merchants' Exch. v. Knott*, 212 Mo. 616, 111 S. W. 565; *Noel v. People*, 187 Ill. 587, 52 L.R.A. 287, 79 Am. St. Rep. 238, 58 N. E. 616.

Messrs. J. W. Gleed and J. L. Hunt, for defendants:

The banking business is impressed with a public interest.

*Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487; *Blaker v. Hood*, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115; *American Nat. Bank v. Morey*, 113 Ky. 857, 58 L.R.A. 956, 101 Am. St. Rep. 379, 69 S. W. 759.

The power to create corporations belongs to the legislature unless expressly taken away by the Constitution, and is incidental to the general power of making laws for the welfare of the state.

*Morawetz, Priv. Corp.* § 8; *M'Culloch v. Maryland*, 4 Wheat. 316, 411, 4 L. ed. 579, 602; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 317, 9 L. ed. 709, 732.

The statute confers no arbitrary power.

*Coleman v. Newby*, 7 Kan. 82; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State ex rel. Taylor v. Missouri P. R. Co.* 76 Kan. 467, 92 Pac. 606; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; *Wayman v. Southard*, 10 Wheat. 1, 42, 6 L. ed. 253, 262; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Marsh. all Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge* 37 L.R.A.(N.S.)

*Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Oregon R. & Nav. Co. v. Campbell*, 173 Fed. 975; *Brady v. Mat- tern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358.

*Burch, J.*, delivered the opinion of the court:

In May, 1911, there were three banks in the city of Abilene, two national banks and one state bank, all actively engaged in business. On May 20th an application was made to the state charter board for the incorporation of a fourth bank, to be known as the Commercial State Bank, and on May 25th an application was made for the incorporation of still another bank, to be known as the Central State Bank. The application first presented was approved, and the second one was rejected. The incorporators of the Central State Bank ask for a writ of mandamus to compel the charter board to approve its application and allow it a charter.

Section 2, chapter 125, Laws of 1911, relating to the formation of private corporations, provides as follows: "The charter board shall make a careful investigation of each application, and shall inquire especially with reference to the character of the business in which the proposed incorporation is to engage, and if the board shall determine that the business or undertaking is one for which a corporation may lawfully be formed, and that the applicants are acting in good faith, the application shall be granted, and a certificate setting forth that the application has been approved shall be indorsed upon the application and signed by the members of the charter board approving the same; provided, that when the application is for a bank charter the charter board shall also make a careful examination as to the financial standing and character of the incorporators, also of the public necessity of the business in the community in which it is sought to establish the same, and shall determine whether the capital for which said company is sought to be capitalized is commensurate with the requirements of law, and if the board shall determine either of said questions unfavorably to said corporation, it shall refuse the charter."

Pursuant to this statute, the charter board made a careful examination of the public necessity for a fifth bank at Abilene, and found that there was not more than enough business in that community to support four banks, and that the public necessity did not justify the establishment of a fifth bank. Having so determined, the charter board regarded the statute as mandatory.

The plaintiffs say that the right to en-

gage in banking is a common-law right pertaining equally to every citizen, which the legislature cannot, under the state Constitution, take away, and that they have been denied the equal protection of the laws guaranteed by the Federal Constitution, and have been deprived of property without due process of law, in violation of that instrument. What the common-law rights of the plaintiffs may have been is not very material. That body of legal principles has been adopted in this state only so far as it is compatible with the wants and conditions of the people, and it is one of the functions of the legislature to ordain and establish, from time to time, such new rules and ordinances subversive of the common law as it may deem to be for the welfare of society under the changed and continually changing states of its composition, organization, development, and progress.

The law in question does not contravene the 14th Amendment to the Constitution of the United States, if it was enacted pursuant to the police power of the state; and it is justifiable as an exercise of that power, if it responds directly to some demand of the public welfare, and does not fall within some limitation upon legislative action expressed in the state Constitution.

The article of the state Constitution devoted to the subject of banking relates to banks of issue, and the only provision of that instrument pertinent to the present discussion is § 1 of the Bill of Rights, which reads as follows: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." The right to liberty and the pursuit of happiness includes the right to employ one's faculties and property in a gainful occupation of his own choosing. This right, however, has never been regarded as absolute by either the English or the American law. While it is properly spoken of as fundamental and inalienable, it is nevertheless qualified to the extent that the sovereign power may interfere with its enjoyment through regulations necessary or proper for the mutual good of all the members of the social whole. One of the highest ends of civil government is the protection of the individual in the enjoyment of the fundamental rights enumerated in the Bill of Rights. The idea of those rights should be pervasive in civil institutions, or government is likely to become a nuisance and a scourge. But if the individual insists upon them to the detriment of other individuals possessing the same rights, or to the detriment of the security, good order, common good, and general welfare of the entire social body of which he is a member, he is likely to become a nuisance. Therefore, it is a prin-

ciple of undisputed validity that a person's right to devote his property to a selected employment must be subordinated to such reasonable restrictions and limitations as are necessary to prevent the exercise of the right from becoming harmful to others. If the benefits of organized society are to be enjoyed at all, authority must reside somewhere to consider the conflicting claims and interests of the individual and of the community to which he belongs, and prescribe the rules of good neighborhood. The power to do this is legislative power, and it must necessarily be adequate to meet the need for which it is instituted. The result is that the declaration of the Bill of Rights, quoted above, is not a prohibition against just restrictions upon the enjoyment of liberty and the pursuit of happiness, in the interest of the public good. It is a political maxim addressed to the wisdom of the legislature, and not a limitation upon its power. It is not a mere "glittering generality," and cannot be entirely disregarded in any valid enactment (see *Atchison Street R. Co. v. Missouri P. R. Co.* 31 Kan. 660, 665, 3 Pac. 284), but it lacks the definiteness, certainty, and precision of a rule, like the command of the Bill of Rights respecting slavery, or religious freedom, or bail, or trial by jury, and consequently cannot, as those provisions do, furnish a basis for the judicial determination of specific controversies. "Many things, indeed, which are contained in the Bills of Rights, to be found in the American Constitutions, are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment, than as marking an absolute limitation of power. The nature of the declaration will generally enable us to determine without difficulty whether it is the one thing or the other. If it is declared that all men are free, and no man can be slave to another, a definite and certain rule of action is laid down, which the courts can administer; but, if it be said that 'the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue,' we should not be likely to commit the mistake of supposing that this declaration would authorize the courts to substitute their own view of justice for that which may have impelled the legislature to pass a particular law, or to inquire into the moderation, temperance, frugality, and virtue of its members, with a view to set aside their action, if it should appear to have been influenced by the opposite qualities. It is plain that what in the one case is a rule, in the other is an admonition addressed to the judgment and the conscience of all per-

sons in authority, as well as of the people themselves." Cooley, Const. Lim. 7th ed. p. 245. To decide that the act in question violates the quoted section of the Bill of Rights would be merely to substitute the court's opinion as to the manner in which a recognized doctrine of political science should be given practical effect for the deliberate judgment of the legislature upon the subject. This the court is not authorized to do.

Ordinarily a court is not at liberty to declare a statute unconstitutional, on the ground that it violates natural, social, or political rights, unless it can be shown that such rights are withdrawn from legislative interference by the Constitution. If we go outside the Constitution and appeal to any of the maxims of free government relating to the sacredness of the rights of liberty and property, we merely raise the question, What is the scope of legislative power? Legislative power is the power to prescribe the rules of civil conduct, and the statement by Chief Justice Shaw of the supremacy of that power in the field now under consideration has never been surpassed in clearness and cogency: "It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Con-

stitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same." Com. v. Alger, 7 Cush. 53, 84.

All well-informed persons are now fully and keenly alive to the marvelous economic changes which the rapid industrial and commercial development of the nation in recent times has produced. New economic forces have been evolved, and the social relations of men have become complex and interdependent to a degree previously inconceivable. Numerous subjects which formerly were chiefly private, with only an incidental public aspect, have become social subjects, demanding regulation of a kind and to an extent which former conditions did not warrant. The business of banking is now clearly discriminated as belonging to the latter class.

Banks are indispensable agencies, through which the industry, trade, and commerce of all civilized countries and communities are now carried on. The banker is the universal broker over whose counter the exchanges of supply and demand are, in the final analysis, effected. The capital which he has invested and the returns which he receives upon it are insignificant in importance to the advantages which society at large derives from the conduct of the banking business, and the evil consequences of unsound banking are distributed between the banker and the general public in like proportion. Banking is not a business "affected with a public interest" in the sense in which Lord Hale first used that expression in the treatise, "*De Portibus Maris*." But banking has ceased to be, if it ever was, a matter of private concern only, like the business of the merchant; and for all purposes of legislative regulation and control it may be said to be "affected with a public interest." The public patronage which the banker invites and receives is of such a character that he becomes in a just sense a trustee of the fiscal affairs of the people and of the state. If a merchant cannot meet his bills promptly, the general public is not disturbed. He is not ruined at once, and if he should fail the effects are limited to comparatively a few persons. If a bank is unable to meet a check drawn upon it, the refusal to pay is an act of insolvency. Its doors are closed, its business is arrested, its affairs go into liquidation, and the mischief takes a wide range. Those who have been accommodated with loans must pay, whatever their readiness or ability to do so. Further advances cannot be obtained. Other banks must call in their loans, and refuse to extend credit, in order to fortify themselves against the uncasiness and even terror of their own depositors. Confidence is destroyed. Enterprises are stopped. Busi-

ness is brought to a standstill. Securities are enforced. Property is sacrificed, and disaster spreads from locality to locality. All these incidents of the banking business are matters of common knowledge and experience. They clearly distinguish banking from the ordinary private business, illustrate its public nature, and show that it is properly subject to the police power of the state, vested in its legislature.

When once a subject is found to be within the scope of the state's police power, the only limitations upon the exercise of the power are that regulations must have reference in fact to the welfare of society, and must be fairly designed to protect the public against evils which might otherwise occur. Within these limits, the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose. It may even go so far as to establish a monopoly. *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Re Lowe*, 54 Kan. 757, 762, 27 L. R. A. 545, 39 Pac. 710. It may be conceded that under the English and American law monopolies of the ordinary occupations of life are odious and illegal. But whenever, through changed social conditions, or otherwise, a business becomes essentially public in character, and assumes proportions, takes on features, or is attended by consequences which make free participation in it destructive of the ends for which it is pursued and a menace to the welfare of society, society through its duly constituted authorities, may, in the absence of constitutional prohibitions protect itself by limiting the right to engage in such business, as far as may be necessary to attain the desired security. Banks are incorporated in part for the beneficial purpose of providing safe depositories for the people's money and credits. It would be paradoxical indeed if the right of individual liberty and property should require the state to go on incorporating banks in a given community until, through the certain operation of known economic forces, deposited money and credits would no longer be safe. The power to suppress monopoly and restore competition has never been doubted. The power is exercised for the public good, and so is justified. If the results of unrestricted competition become as pernicious as those of monopoly, the same suppressing power may be exercised to the same end,—the public welfare,—and so be justified.

Tested by the foregoing principles, the act assailed is the product of a valid exercise of the police power. It does not prohibit persons from engaging in the business of banking. The plaintiffs may, if they choose to forego the advantages of corporate organization, open a private bank. The stat-  
3; L.R.A.(N.S.)

ute merely says that the establishment of banking corporations in a given community will not be permitted beyond the public necessity of the business in that community. The mischief to be remedied is well understood. It is stated by the charter board, in its return to the alternative writ allowed in this case, as follows: "The establishment of additional banks in a town where the business is not such as to demand or justify the establishment of such banks has a tendency to weaken and make unsafe all of the banks in said town. The division of the business is such that it is difficult for the banks to obtain the amount of deposits necessary in order to earn a return sufficient to pay expenses and a dividend on the capital, and creates a temptation to pay high and unsafe rates of interest on the deposits, and further makes it difficult for banks to loan their moneys to safe borrowers, and creates a tendency to lend money to unsafe borrowers, the result of all of which is to cause unsafe banking." Perhaps the return to the writ does not specify all the elements of public danger consequent upon free banking beyond the business necessities of a particular community, but those stated are enough to justify the legislature in interfering. The remedy proposed is neither new nor untried. It has the approval of expert economists, and is constantly employed by the Comptroller of the Currency of the United States in regulating the business of banking under the Federal law.

Banking is prohibited, except upon a minimum capital, and unless a certain reserve is maintained. The legality of these and other prohibitions is not questioned anywhere. The one under consideration is but another means to the same general end, and the court has no doubt of its constitutionality. If authority be needed upon the subject, it may be found in the case of *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487. In that case the court considered the question of the constitutional validity of a statute of Oklahoma compelling state banks to make contributions to a depositor's guaranty fund. The opinion reads: "It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare. Among matters of that sort, probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful

commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited, of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the costs thrown on the bank. See *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633. So far is that from being the case, that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now, . . . There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition, except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described co-operation are necessary safeguards, this court certainly cannot say that it is wrong."

The plaintiffs build up an argument like this: The statute does not profess negatively to guard against any public evil, and does not profess affirmatively to promote

any public advantage. It denies a privilege, not because it would be harmful, but because it would not be beneficial. The power given to the charter board is to judge of the public necessity of the business in the community. This means to judge if the public welfare would be promoted, which is a vastly different thing from judging if the public welfare would be harmed. The court cannot read into the statute a prohibition against something harmful; to do so would be to distort the phraseology. No statute can be upheld under the police power, which prohibits a thing merely because it is useless and unnecessary, and so this statute is unconstitutional and void. Statutes seldom extend themselves to include an express profession of purpose. Sometimes they do so in preambles reciting the conditions giving rise to them, and stating the objects to be attained, but generally they merely promulgate a regulation, and the mischief sought to be remedied must be judged from the state of affairs with which the statute deals. A remedial statute will not be restrained by interpretation from accomplishing beneficial results which naturally flow from the operation of its provisions. On the other hand, such a statute will be given the force and effect which the measures adopted naturally indicate, and any public evil which inheres in the state of affairs dealt with by the statute, and which the statute eradicates, will be held to be within the purview of the legislature. Such an interpretation neither reads anything into the statute, nor distorts its phraseology, and, besides being reasonable and sensible, and according to the accepted canons of interpretation, would be adopted, if necessary, to prevent the statute from conflicting with the Constitution. An unnecessary bank in a community is not a thing of passive uselessness only, and so merely of no benefit. It is an active disturber of the financial peace, to the detriment of the public welfare; and it is not very material whether we say that public harm will be prevented, or that public good will be promoted, by its suppression.

The plaintiffs say that the statute does not tend to prevent undue competition, because private banks may be established without regard to the public necessity of the business. Competition by banks holding charters under the corporation act is certainly forestalled, and doubtless in the judgment of the legislature serious danger from the opening of private banks throughout the state is not to be feared, because they must operate under all the restrictions and handicaps of incorporated institutions, without

possessing any of the privileges and advantages which those institutions enjoy.

The plaintiffs argue that the statute vests power in the charter board to grant or refuse applications to incorporate banks at will, without regard to any rule or fixed standard, and, should the board be so inclined, through caprice and partiality. The statute belongs to the well-known class in which the legislature prescribes a rule to be applied according to the existence or non-existence of some fact which the officer or board called upon to administer the law is required to ascertain. The question for the charter board, in any case arising under this law, is, Are the banking facilities of the community adequate to the public needs? This question is to be determined, like any other question of fact, from a consideration of the conditions existing in the community concerned. The board has no discretion over these conditions. It does not create them, and cannot modify them. It merely finds out and declares what they are, and the statute then dictates what shall be done. It is conceivable that any public trust may be abused. The courts, however, are bound to take for granted the honesty and right-mindedness of public officers chosen directly or indirectly by the people to administer the laws.

It is not necessary to review the authorities bearing upon this subject. It will be sufficient to consider the case made most prominent in the brief of the plaintiffs, that of *Sioux Falls v. Kirby*, 6 S. D. 62, 67, 25 L.R.A. 621, 60 N. W. 157. In that case, § 100 of a city ordinance provided as follows: "Any person desiring to erect, alter, or repair any building to be used exclusively not for business purposes, shall apply to said building inspector for a permit for such purpose, and furnish him a written statement showing the location, dimensions, and manner of construction of the proposed building, stating the material to be used, the manner of construction of chimneys and stove-pipe connections, and exhibit to said inspector any plans or specifications of the same which he may have. If satisfied that such building, alteration, or repair is in compliance with the provisions of this chapter, the building inspector shall give his permit for such proposed building or structure on payment of the fees prescribed in the next section."

In holding this ordinance to be invalid, the court said: "Section 100 of the ordinance does not contain any regulations to guide the landowner in the construction or alteration of a building upon his land, but requires of such landowner, before any such building can be constructed or alteration made, that he must apply to the inspector

for a permit, which he is required to give when he is satisfied that such building or alteration is in compliance with the ordinance. It does not merely forbid the erection of any building that is hazardous, or which exposes property or persons to danger from fire, but it requires of the landowner that he obtain a permit from the inspector, and pay the prescribed fee therefor, which may be granted or withheld by such inspector, as he may or may not be satisfied that the building complies with the requirements of the ordinance, which, as we have seen, makes no provisions as to what shall be deemed necessary to constitute a safe construction. It is clear that the ordinance in controversy, upon its face, attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the city inspector, and therefore makes the right of the citizen to use his property subject to the will of such inspector, from whose decision no appeal is given. Such an ordinance cannot be sustained."

A dissenting opinion was filed, which reads, in part, as follows: "The majority of the court is of the opinion that this particular ordinance is invalid because it subordinates the right of the individual landowner to improve his property, by building thereon, to the arbitrary will of a building inspector, in that it requires the landowner, as a condition precedent to the erection of such building, to make a statement to such inspector of the character and location of the building he proposes to erect, the material to be used, and how the chimneys are to be constructed, and then that such inspector may refuse a permit for such building, and thus prevent its erection, unless he is satisfied that such building is to be 'constructed in compliance with the provisions of this chapter.' I think the mistake of the opinion is in considering the power thus conferred upon the inspector an arbitrary one. The language of this section plainly implies that this particular provision is supplementary to other sections of this 'chapter,' which prescribe general regulations concerning material to be used, and manner of construction, and with them the statement of the landowner as to his proposed building is to be compared, and, 'if satisfied that such building is [will be] in compliance' with the requirements of such chapter, 'the inspector shall give his permit for such proposed building, on payment of the fees prescribed in the next section.' It cannot be contemplated that this decision will be arbitrary or wilful or capricious. It is

to be the exercise of a quasi judicial function by a sworn and bonded public officer. In this respect he is put upon the same footing as many other ministerial or executive officers, who are required to pass upon acts or instruments, and govern their conduct accordingly."

The majority opinion contains no discussion whatever of building regulations not contained in § 100, but appearing elsewhere in the same chapter. Whether these regulations were deemed insufficient to amount to a definite guide, or whether § 100 was regarded as not supplementary to other parts of the same chapter, cannot be known. But the clear purport of the decision is that the ordinance did not provide a standard of safe construction by which a property owner might prepare his building plans, and by which the inspector should judge such plans, and that consequently the property owner was wholly at the inspector's mercy. Viewed in this light, the decision is supported by the prevailing authorities. If, however, § 100 was an integral part of a chapter which elsewhere did provide a general and uniform standard of safe construction, as the dissenting opinion claims, then the decision is wrong. In that event, the inspector possessed no discretion and no arbitrary power; his function being confined to satisfying himself that plans submitted to him conformed to the standard.

The plaintiffs claim that legislative power is delegated to the charter board. The argument in support of the claim is that the standard prescribed—the business necessities of the community—is no standard; what those necessities are cannot be demonstrated; all the charter board can do is to express an opinion on the subject; and consequently what the legislature does is to say to the charter board, "Use your judgment about granting bank charters." It has been well said that to deny to the legislature the right to delegate the power to determine some fact or state of things upon which the enforcement of an enactment depends would stop the wheels of government, and bring about confusion, if not paralysis, in the conduct of the public business. *Union Bridge Co. v. United States*, 204 U. S. 364, 383, 51 L. ed. 523, 532, 27 Sup. Ct. Rep. 367. The same result would follow if it were essential that the required fact or state of things should first be capable of demonstration to a certainty admitting no difference of opinion. The statute books are full of enactments leaving to administrative officers the determination of facts depending upon elements fully as complex and intangible as those which make up the need of a community for additional

banking facilities; and when such enactments have been considered by the courts they have generally been upheld against the claim that legislative power has been delegated.

"It is further contended, however, that the statute is open to the objection that it improperly confers legislative power upon the executive council and the auditor of state. Here, again, we find no authorities which hold that the legislature cannot give to executive officers a discretion in determining the conditions to be imposed on the conduct of a business which is subject to legislative control. The legislature can only pass general statutes. It cannot provide for their application to particular conditions. Discretion may be conferred upon a railroad commission to fix rates of fare or freight. *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694. The board of supervisors of a county may be given the authority to fix the fees of compensation of officers. *Ryan v. Outagamie County*, 80 Wis. 336, 50 N. W. 340. We see no reason why the legislature cannot authorize the executive council to determine whether the plan and method in accordance with which the building and loan business is to be conducted by any particular association are fair, reasonable, and in accordance with public policy, or why the state auditor cannot be authorized to fix the amount of securities which an unincorporated association desiring to conduct such business in the state shall deposit for the security of its members. It must be assumed that state officers will act fairly and impartially, and in accordance with their best judgment; and statutory provisions allowing them to exercise a discretion in such action are not to be condemned as unconstitutional." *Brady v. Mattern*, 125 Iowa, 158, 169, 106 Am. St. Rep. 291, 100 N. W. 358, 362.

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, chap. 1244, 26 Stat. at L. 567, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United

States, which the President deemed—that is, which he found to be—reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words 'he may deem,' in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises, except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *Marshall Field & Co. v. Clark*, 143 U. S. 649, 692, 36 L. ed. 294, 309, 12 Sup. Ct. Rep. 495, 504.

These cases are sufficient to illustrate the principle involved. Many others are cited in the opinion, in the case of *State ex rel. Taylor v. Missouri P. R. Co.* 76 Kan. 480, 92 Pac. 606.

The plaintiffs extend some of their arguments until they reach the wisdom and policy of the law. With these the court is not concerned.

Two equally deserving applications were pending before the charter board at the same time. The statute makes no provision for a choice in such cases, and the charter board did right in granting the one first

filed. If several applications of equal merit should be presented at the same instant, no one could claim a preference, and no injury could follow the granting of one and the rejection of the others.

The writ is denied.

All the Justices concur.

#### KENTUCKY COURT OF APPEALS.

ABRELIA MARCUM, Admr., etc. of  
James B. Marcum, Deceased, Appt.,

v.

CHARLES TERRY.

(146 Ky. 145, 142 S. W. 209.)

#### Limitation of action — offer of compromise — effect as new promise.

An unaccepted offer to turn over a tax receipt against the property of claimant in full satisfaction of a debt is not a sufficient promise to toll the running of the statute of limitations.

(January 9, 1912.)

#### Note. — Limitations of actions: unaccepted offer of compromise as tolling statute.

The term "offer of compromise" as used in this note means offers to compromise disputes as to the existence or the amount of a claim, or an offer of a smaller amount or anything other than money in settlement, as distinguished from a mere conditional promise not involving any of the above elements.

The great weight of authority is to the effect that an unaccepted offer to compromise a claim does not constitute such an acknowledgment of an indebtedness as will imply a promise to pay it, at least where the offer to compromise does not contain an unqualified admission of a subsisting indebtedness. Thus, in the following cases it is held that an unaccepted offer of compromise, standing alone, is not sufficient to toll the statute of limitations: *Neil v. Abbott*, 2 Cranch, C. C. 193, Fed. Cas. No. 10,088; *Ash v. Hayman*, 2 Cranch, C. C. 452, Fed. Cas. No. 572; *Bank of Columbia v. Sweeney*, 3 Cranch, C. C. 293, Fed. Cas. No. 882; *Edwards v. Bates County*, 55 Fed. 436, reversed on other grounds in 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. Rep. 967; *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40; *Morehead v. Gallinger*, 9 Iowa, 519; *Brennenman v. Edwards*, 55 Iowa, 374, 7 N. W. 621; *Gardner v. Tudor*, 8 Pick. 206; *Smith v. Eastman*, 3 Cush. 355; *Weston v. Hodgkins*, 136 Mass. 326; *Chambers v. Rubey*, 47 Mo. 99, 4 Am. Rep. 318 (liability does not accrue until the offer is accepted); *Atwood v. Coburn*, 4 N. H. 315; *Batchelder v. Batchelder*, 48 N. H. 23, 97 Am. Dec. 569; *Rossiter v. Colby*, 71 N. H. 386, 52 Atl. 929 (not binding until



**A** PPEAL by plaintiff from a judgment of the Circuit Court for Breathitt County in defendant's favor in an action brought to recover a balance alleged to be due for legal services rendered by plaintiff's deceased husband. Affirmed.

The facts are stated in the opinion.

Messrs. **Kash & Kash**, for appellant:

Any acknowledgment by the defendant which implies a promise to pay, or from which it can be inferred that he "ought to promise to pay," will take the case out of the operation of the statute.

Ditto v. Ditto, 4 Dana, 502.

Messrs. **Redwine & Patton** for appellee.

Clay, C., filed the following opinion:

In 1902 appellee, Charles Terry, employed J. B. Marcum, an attorney at law, to institute contest proceedings against Ed. Callahan for the office of sheriff of Breathitt county. Marcum conducted the contest. The election was declared void, and neither Terry nor Callahan was given the office. Marcum died during the year 1903. His widow, Abrelia Marcum, qualified as his administratrix. After setting out the employment and the agreement of Terry to pay her husband a reasonable fee for his services, and stating that \$500 was a reasonable fee, appellant, as administratrix of her hus-

accepted); *Heaton v. Leonard*, 69 Hun, 423, 23 N. Y. Supp. 469; *Creuse v. Desganiere*, 10 Bosw. 122; *Bush v. Barnard*, 8 Johns. 407; *McGlensey v. Fleming*, 20 N. C. 263 (4 Dev. & B. L. 129) *Wolfe v. Fleming*, 23 N. C. (1 Ired. L.) 290; *Simonton v. Clark*, 65 N. C. 525, 6 Am. Rep. 752; *Andrew v. Kennedy*, 4 Okla. 625, 46 Pac. 485; *Huff v. Richardson*, 19 Pa. 388; *Verrier v. Guil-lou*, 97 Pa. 63; *Cohen v. Aubin*, 2 Bail. L. 283; *Allcock v. Ewen*, 2 Hill, L. 326; *Goldstein v. Gans*, — Tex. Civ. App. —, 32 S. W. 185; *Cross v. Connor*, 14 Vt. 394; *Barnes v. Metcalf*, 17 U. C. Q. B. 388; *Francis v. Hawkesley*, 1 El. & El. 1052, 28 L. J. Q. B. N. S. 370, 5 Jur. N. S. 1391, 7 Week. Rep. 509, 25 Cyc. 1341.

And in *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174, in holding that an unaccepted offer of a specific sum in full settlement of an account of undetermined amount would not take the debt out of the statute, Mr. Justice Story said that an offer must be deemed to be in the nature of a promise to pay the sum for a complete discharge of the claim, and that "it may therefore be fairly deemed a conditional offer to pay a conjectural, not a known, balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer then, upon the clear text of the Kentucky, as well as the English, and of other American, decisions, the case would not be taken out of the statute, unless the plaintiff had performed the condition." And in *Exeter Bank v. Sullivan*, 6 N. H. 124, where offers of compromise made after the declaration of present inability to pay were rejected, it was said to be absurd to hold that after a party has declared his inability to pay, a promise to pay may be inferred from offers which the other party has wholly rejected. And in *Connecticut Trust & S. D. Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261, affirming 58 App. Div. 493, 69 N. Y. Supp. 518, which reversed 33 Misc. 374, 67 N. Y. Supp. 466, it was held that a letter stating in substance that the writer was not yet able to take up an outlawed note, and had no definite prospects of being able to do so, but offering to buy it if the holder would take some small sum which, in justice to other interests, he could pay, did not revive the debt, the court saying that "the letter plainly

contains no promise to pay the note, nor does it seem to us to be the acknowledgment of an existing debt. At most it is an admission that at one time there existed a liability from the defendant to the plaintiff. But this liability was then barred by the lapse of time. There is no promise to pay the claim, but on the contrary an assertion that the writer was not then able to take up the note, and that he had no prospect of being able to do so. He then made a qualified offer to buy the note if the holder was willing to sell it for some small sum, and he, the debtor, could do so in justice to other interests."

So, in *Pool v. Relfe*, 23 Ala. 701, in holding that an unaccepted offer by way of compromise, to pay the principal if the debtor would forego the interest, was not sufficient to remove the bar of the statute, the court said that such an offer was no more than an admission of the correctness of the original debt, and did not indicate a willingness or an existing liability to pay the claim.

But in *Hannah v. Hawkins*, 5 Lea, 240, where the maker of a note payable in specie had made payments in currency, and after the debt had become outlawed proposed to pay the balance, without making any deduction from the payments he had made for the difference between specie and currency, which proposition was not accepted, it was held that the offer revived the remedy on the original cause of action to the extent of the unaccepted offer.

In *Sands v. Gelston*, 15 Johns. 511, an offer to compromise, accompanied by denial of liability, was held insufficient to take the case out of the statute.

And it has been held that an unaccepted offer of land in payment of a debt discharged in bankruptcy did not revive the debt. *Riggs v. Roberts*, 85 N. C. 151, 39 Am. Rep. 692.

And in the following cases, it was held that conditional promises to pay, which in fact amounted to offers of compromise, would not toll the statute in the absence of proof of compliance with the condition: *Bates v. Bates*, 33 Ala. 102, where the debtor offered to settle the indebtedness in lands; *Parsons v. Northern Illinois Coal & I. Co.* 38 Ill. 430, where the offer was to pay provided the creditor allowed certain deductions for commissions, and made certain

band, after admitting several credits, among them an item of \$42.15, for taxes paid by Terry for the year 1901, brought this action to recover an alleged balance due of \$381.85. Among other defenses, Terry pleaded the statute of limitations. By amended petition, appellant declared on a new promise, made December 6, 1909, and within five years before the institution of the action. At the conclusion of appellant's evidence, the court directed a verdict in favor of appellee. To review the propriety of this ruling, this appeal is prosecuted.

The only evidence of the alleged promise of December 6, 1909, is that of appellant

and R. A. Hurst. This evidence we quote in full. Mrs. Marcum testified as follows:

"The last payment that was made to me by defendant on this fee was made on January 7, 1905. Afterwards, and on December 6, 1909, I had a conversation with the defendant, Charles Terry, in Jackson, about this fee for services. He said he would give me the tax receipt on what he owed, which was for the year 1901, which was \$42.15. He had been the sheriff of Breathitt county for that year, and held the tax receipt against the estate for that year, and had never given us the receipt. He told me on that day (December 6, 1909) he

other deductions on disputed items of the account; *Jewell's Succession*, 11 La. Ann. 83, where the offer was to settle, provided certain claims were allowed; *Pearson v. Harper*, 11 La. Ann. 184, where the offer was to give certain lands in payment; *Gardner v. McDaniel*, 26 La. Ann. 472, where the offer was to pay on condition that creditor withdraw an attachment suit, pay the costs, and restore the attached goods in their original condition; *Mumford v. Freeman*, 8 Met. 432, 41 Am. Dec. 532, where debtor offered to renew notes if creditor would forego interest on certain ones; and *Mitchell v. Clay*, 8 Tex. 443, where the debtor offered to transfer certain lands in payment.

In Georgia a distinction has been drawn between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned, it being held that an offer of the latter character would toll the statute, whereas admission made in an offer of the former character would not. This rule was announced in *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782, where an offer to settle an unquestioned claim upon certain terms proposed by the debtor was made upon the creditor's demand for a settlement, it being said that in such case the offer impliedly acknowledged the right to demand settlement; and in *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280, wherein an offer to compromise a doubtful or disputed claim was held not to toll the statute. And in *Hicks v. Thomas, Dudley* (Ga.) 218, it was held that evidence of an offer of compromise made to avoid a suit or buy one's peace, would not defeat the statute, but that if such offer was made before the statutory period had run, from the consciousness of the truth of the indebtedness, evidence thereof would toll the statute.

In a few instances writings containing offers of compromise have been held sufficient, but these conclusions were undoubtedly due to the fact that the writings contained other elements sufficient to take the case out of the statute. Thus, in *Cudd v. Jones*, 63 Hun, 142, 17 N. Y. Supp. 582, a letter written to the payee of a note against which the statute of limitations had run, in which the writer stated that he was sorry he was

unable to pay the note, that the money was loaned on his credit, that it was difficult for him to pay, and in conclusion asked how much the payee would take for the note, and made an offer of a specific sum, was a recognition of the debt sufficient to take the case out of the statute; but the court said that had the offer of the compromise stood alone, there would be force in the suggestion that it would not be a sufficient acknowledgment, but that the letter must be taken as a whole. And in *Rumsey v. Settle*, 120 Mich. 372, 79 N. W. 579, a letter from the debtor to the creditor, written while the debt was still alive, admitting that the former owed the latter, and stating that he wished to fix the matter up by giving a note, or if the creditor thought a note worthless, asking what the creditor would take in cash to balance all the debtor owed, was held to toll the statute, but the decision evidently turned upon the ground that the letter taken as a whole recognized the debt as a present obligation, which fact was sufficient to prevent the running of the statute. And in *Will v. Marker*, 122 Iowa, 627, 78 N. W. 487, letters, one of which stated that the writer supposed a note had been paid, and asked the sendee to reduce the interest, another asked that a certain sum be accepted in full, the writer adding, "I want to get it [the debt] off my hands now," and the third stated that he could not pay the claim and that a judgment could be taken if that would satisfy, and asking to be spared the humiliation of being sued,—taken together, were held an admission that the note was a present obligation, sufficient to avoid the statute. Here again it is probable that the mere offer of compromise taken alone would have been held insufficient to toll the statute. So, in *Rhodes v. Hadfield*, 2 Cranch, C. C. 566, Fed. Cas. No. 11,748, evidence that a note had upon presentation been acknowledged as unpaid, but was said to be of long standing, and that payment would be resisted, but that terms of compromise had been offered, which were not accepted, was held to show an acknowledgment sufficient to take the debt out of the statute. It does not appear, however, that this decision was based upon the offer of compromise, and indeed it is probable that the acknowledgment formed the real basis of the decision. And

would give me receipt. I got a blank receipt from Sheriff Crawford, and he wanted me to give him a receipt in full, and I told him I would law him, and he said: 'Law; and I will bring in enough to beat you;' that he would give me this tax receipt on what he owed. He said that he had no blank receipts, and I went to Mr. Crawford, who was then sheriff, and got a blank tax receipt, and took it to Mr. Terry, and he started to write the receipt, and dated it. He then stated to me that I must accept the receipt in full for services rendered by my husband, and I told him I would not do this. He then refused to write the receipt, and still holds the tax receipt against the estate."

Mr. R. A. Hurst, an attorney at law, testified as follows: "I was present in Jackson, Kentucky, and heard a conversation between Mrs. Marcum, the plaintiff, and the defendant, Charles Terry. The defendant agreed to give Mrs. Marcum a tax receipt on what he owed, and Mrs. Marcum went to get a blank receipt, and I went away. I don't know whether or not the receipt was written. This was on December 6, 1909. This was on the day Mrs. Marcum executed a bond as guardian."

It will be seen from the evidence above quoted that appellee did not promise to pay the debt, but it is insisted by counsel for appellant that there was such an acknowledgment as to imply a promise to pay. In the early case of *Bell v. Rowland*, Hardin (Ky.) 301, 3 Am. Dec. 729, decided in 1808, after criticizing the English courts for going too far in holding "the slightest acknowledgment" sufficient, the court said:

"Upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable degree of certainty, is that, in order to take the case out of the statute of limitations, an express acknowledgment of the debt as a debt due at that time (coupled with the original consid-

eration), or an express promise to pay it, must be proven to have been made within the time prescribed by the statute. And we are of opinion that the acknowledgments of David Rowland, deceased, proved upon the trial, as stated in the bill of exceptions, were not such express acknowledgments or promise as could by law take the case out of the operation of the statute. The utmost extent of his acknowledgment was 'that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia (the place where the original transaction took place in the year 1785); and if his brother had not paid it, he owed it yet.' This was far from an acknowledgment of a debt due or subsisting at that time, when he insisted the debt had been paid by his brother.

"But it has been contended that if his brother had in fact paid it, he could and ought to have proved the payment. As well might it be contended that if he had paid the debt himself, he could and ought to prove it. In either case, it would be requiring of him what the statute clearly intends shall not be required,—that he shall make proof of the payment. The statute goes upon the presumption that payment has been made; and that after the lapse of time proof cannot be reasonably required.

"To have bound him, he ought either to have made a promise to pay (which is not here pretended), or such an acknowledgment of the debt, from which the law could imply a promise. Now the law implies a promise where the party ought to promise; but can we say he ought to have promised, under the circumstances of the present case, the payment of a debt which he supposed had been already paid? We think we cannot."

And in the case of *Ditto v. Ditto*, 4 Dana, 502, the court, after referring to the case of *Bell v. Rowland*, supra, announced the following rule: "The reasonable deduction from the case is that, if, from the express acknowledgment, it appear

in *Loomis v. Decker*, 1 Daly, 186, a letter from a debtor to his creditor, stating that he did not recollect when the bill was made, but that if it was right he would make it satisfactory, and that he had certain railroad bonds which he hoped would be accepted in payment, as money was out of the question, was held sufficient to take the debt out of the statute; but here, too, stress seems to have been laid upon the acknowledgment rather than the offer of mode of payment.

But even where the writing contains both an acknowledgment and an offer of compromise, if payment is dependent upon acceptance of the offer of compromise, the acknowledgment is insufficient. Thus, in *Creuse v. Defiganieri*, 10 Bosw. 122, it was held that a letter which in effect acknowledged the existence of an indebtedness, but 87 L.R.A. (N.S.)

distinctly indicated an unwillingness to pay, and a determination to pay nothing if an offer of compromise was rejected, was not such a recognition of the debt as would take it out of the statute. And in *McGlensey v. Fleming*, 20 N. C. 263 (4 Dev. & B. L. 129) it was held that if, at the time an acknowledgment is made, the debtor offers to pay a smaller sum, saying that if the offer is not accepted, he will plead the statute of limitations, there is nothing from which the law can imply a promise to pay the debt so as to take it out of the statute. And the same conclusion was reached in *Slack v. Norwich*, 32 Vt. 818, where an offer of compromise fixed a definite time for its acceptance, and provided that if not accepted within that time it should go for nothing.

G. J. C.

clearly that the party ought to pay, the law will imply a promise to pay, and the case will be taken out of the statute by such acknowledgment and promise within five years."

And in the case of *Harrison v. Handley*, 1 Bibb, 445, the court used the following language: "Be that as it may, mere loose expressions, or vague acknowledgments, will not suffice; the acknowledgment from which the law is to raise a promise contrary to the provisions of the statute must be clear and express, where the mind is brought directly to the point,—debt or no debt at the present time; not whether the debt was once an existing demand."

The doctrine of the foregoing cases has never been departed from, but has been uniformly adhered to. *Gray v. Lawridge*, 2 Bibb, 285; *Lansdale v. Brashear*, 3 T. B. Mon. 332; *Hord v. Lee*, 4 T. B. Mon. 37; *Rochester v. Buford*, 5 J. J. Marsh. 33; *Head v. Mannors*, 5 J. J. Marsh. 259; *French v. Frazier*, 7 J. J. Marsh. 431; *Fischer v. Hess*, 9 B. Mon. 617; *Smith v. Dawson*, 10 B. Mon. 112.

Applying this doctrine to the case before us, was the language a sufficient acknowledgment? We think not. Appellee was sheriff of Breathitt county during the year 1901. Appellant admits that he paid J. B. Marcum's taxes for that year, amounting to \$42.15. All that can be claimed from appellee's statement is that, in order to settle the matter, he was willing to turn over to appellant the tax bill, properly receipted, provided she would give him a receipt in full for the legal services rendered. His proposition was simply an offer of compromise. It did not constitute a clear and express acknowledgment of a then existing debt. On the contrary, his offer would indicate that he regarded the indebtedness as paid. We therefore conclude that the trial court properly instructed the jury to find for the appellee.

Judgment affirmed.

#### MICHIGAN SUPREME COURT.

CHARLES JOHNSON et al., Appts.,  
v.

PHILIP J. HOGAN.

CLEVELAND-CLIFFS IRON COMPANY,  
Appt.,  
v.

LOUISE T. HULL et al.

(158 Mich. 635, 123 N. W. 891.)

**Partnership — real estate — title in individual — evidence.**

1. It is not necessary that the circum-

stances and dealings of partners, relied on to show that real estate standing in the name of one of them was partnership property, should be the equivalent of an express agreement, it being sufficient if an agreement that effect be implied from them.

**Same — partnership funds — contribution to assets.**

2. To establish partnership title to real estate standing in the name of one of the partners it is not necessary to show that it was purchased with partnership funds, since it may have been intended as a contribution by him to the firm assets.

**Same — intention.**

3. Whether or not real estate standing in the name of a member of a partner-

**Note. — When real estate will be considered partnership property.**

- I. General doctrine, 889.
- II. The question of intention, 891.
- III. The question of the legal title.
  - a. Immaterial to whom legal title is conveyed, 892.
  - b. Legal title in one partner, 892.
  - c. Legal title in all the partners as individuals.
    1. Common-law doctrine, 894.
    2. When common-law doctrine not applicable, 895.
    3. Pennsylvania doctrine, 896.
  - d. Where title is taken in the firm name, 897.
  - e. Legal title in an outside party, 898.
- IV. Parol evidence, 898.
- V. Trusts, 899.
- VI. Equitable conversion, 900.
- VII. Statute of frauds, 902.
- VIII. Form of conveyance, 902.
- IX. The question of notice, 903.
- X. Partnership formed for the purchase and sale of real estate, 903.
- XI. Real estate acquired in payment of debts, 903.
- XII. The effect of improvements, 904.
- XIII. Position of incoming partner, 904.
- XIV. Particular facts held sufficient to constitute real estate partnership property, 904.
- XV. Particular facts held insufficient to constitute real estate partnership property, 905.

#### I. General doctrine.

This is a continuation of the same subject found in the note to *Robinson Bank v. Miller*, 27 L.R.A. 449.

As to what constitutes a partnership to deal in real estate, see note in 5 L.R.A. (N.S.) 503; as to validity of parol contract to enter into a partnership to deal in real estate, see notes in 16 L.R.A. 745, 4 L.R.A. (N.S.) 427, and 33 L.R.A. (N.S.) 883; as to reformation of deeds naming a partnership as grantee, see note in 1 L.R.A. (N.S.) 157; as to effect of agreement to share profits from use of real estate as creating a partnership, see note in 18 L.R.A. (N.S.)

ship is, as between the partners, to be treated as partnership property, must be determined by ascertaining from their conduct the course of dealings their understanding and intention.

**Same — evidence.**

4. That lands standing in the name of a member of a partnership were partnership property may be shown by the fact that he permitted them to be dealt with as partnership property, and failed to list them as belonging to him in his will.

**Estoppel — transfer of real property.**

5. Estoppel may, in equity, be relied on to work a transfer of title to real estate from a member of a partnership in whose name it stands, to grantees of the firm.

(December 10, 1909.)

1042; as to effect of agreement for community of interest in speculative purchases of real estate, as creating a partnership, see note in 18 L.R.A.(N.S.) 1089; as to location of mining claim by agents and partners, see note in 7 L.R.A.(N.S.) 817.

Parol evidence is always admissible as between partners themselves to prove that a partnership exists in real estate as well as in personal property. *Hardin v. Hardin*, — S. D. —, 129 S. W. 108.

It is now well settled that real estate contributed by one of the partners or purchased by the firm may constitute the substratum, either in whole or in part, of a partnership. 30 Cyc. 427, and cases cited.

Although a partnership may not initiate a right to a tract of unsurveyed public land, not being a qualified citizen, it may, nevertheless, be a grantee of such rights after they have been properly initiated by another. *Neal v. Kayser*, 12 Ariz. 118, 100 Pac. 439.

A parol agreement to put lands into a firm, made before the firm exists, and acted upon afterwards, may be proved by a surviving partner after he has proved the existence of the partnership by written evidence. *McKinnon v. McKinnon*, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409.

Real estate may properly be partnership property even though apparently not useful in the firm business. *Re Strang*, 166 Fed. 779.

The general doctrine, as drawn from the cases, with regard to the ownership of real estate by a partnership, is that where real estate is purchased with partnership funds, for partnership purposes, and is appropriated to partnership uses, or taken and treated as partnership property, or entered and carried upon the books of the firm as partnership assets, equity regards it as partnership property, no matter in whose name the legal title is taken; and it is regarded as personal estate so far as it is required for the payment of the debts and liabilities of the partnership and the settlement of the claims of the partners, as between themselves.

The following cases illustrate this doctrine. 37 L.R.A.(N.S.)

**A** PPEAL by complainants from decrees of the Circuit Court for Marquette county in defendants' favor in consolidated suits to establish and quiet title to certain lands. Reversed.

The facts are stated in the opinion.

Mr. Horace Andrews, with Mr. William P. Belden, for appellants:

It is not the law that, in order to make real property taken in the name of a partner firm property, an express agreement must be established, or that, in the absence of such an agreement, and where circumstances are relied upon, these circumstances and dealings should, in convincing weight, be the equivalent of an express agreement.

*Lindsay v. Race*, 103 Mich. 28, 61 N. W.

trine: *Goldthwaite v. Janney*, 102 Ala. 431, 28 L.R.A. 161, 48 Am. St. Rep. 56, 15 So. 560; *Long v. Slade*, 121 Ala. 267, 26 So. 31; *Whisenant v. Hybart*, 160 Ala. 578, 49 So. 760; *Walton v. Atkinson*, 165 Ala. 644, 51 So. 826; *Lewis v. Buford*, 93 Ark. 57, 124 S. W. 244; *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034; *Ferris v. VanIngen*, 110 Ga. 102, 35 S. E. 347; *Taylor v. McLaughlin*, 120 Ga. 703, 48 S. E. 203; *Bank of Southwestern Georgia v. McGarrar*, 120 Ga. 944, 48 S. E. 393; *Galbraith v. Tracy*, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; *Crone v. Crone*, 180 Ill. 599, 54 N. E. 605, same case in 170 Ill. 494, 49 N. E. 217, which affirmed 70 Ill. App. 294, but decided upon another point; *People v. Sholem*, 244 Ill. 502, 91 N. E. 704; *Joplin v. Cordrey*, 4 Ky. L. Rep. 56 (abstract); *Archer v. Barry*, 23 Ky. L. Rep. 12, 62 S. W. 485; *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824; *Quinn v. Quinn*, 22 Mont. 403, 56 Pac. 824; *Rockefeller v. Dellinger*, 22 Mont. 418, 74 Am. St. Rep. 613, 56 Pac. 822; *Dawson v. Parsons*, 10 Misc. 428, 31 N. Y. Supp. 78; *Moore v. Wood*, 171 Pa. 365, 33 Atl. 63; *Hayes v. Treat*, 178 Pa. 310, 35 Atl. 987; *Wilson v. Wilson*, 74 S. C. 30, 54 S. E. 227; *Johnson v. Rankin*, — Tenn. —, 59 S. W. 638; *Deming v. Moss*, — Utah, —, 121 Pac. 971; *McKinnon v. McKinnon*, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409.

Real estate acquired as a result of a partnership transaction, paid for with partnership funds, maintained at firm expense, the profits coming to the partnership, becomes partnership property, even though used by the firm in a way not contemplated by the original purposes of said partnership, its operations having been legally extended. *Bank of Southwestern Georgia v. McGarrar*, 120 Ga. 944, 48 S. E. 393.

Where one partner, in his own name, with the knowledge and consent of his copartner, purchases real estate with partnership funds, the property belongs to the partnership. *Deming v. Moss*, — Utah, —, 121 Pac. 971.

Where a partnership obtains a mechanics' lien upon real estate for material and labor

271; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Richards v. Manson, 101 Mass. 482; 22 Am. & Eng. Enc. Law, 88; 30 Cyc. 432; Arnold v. Wainwright, 6 Minn. 358, Gil. 241, 88 Am. Dec. 448; Parsons, Partn. 1st ed. 1867; Ames v. Ames, 37 Fed. 30; 1 Lindley, Partn. 2d Am. ed. Ewell, p. 750; Morrison v. Mendenhall, 18 Minn. 232, Gil. 212; Tidd v. Rines, 26 Minn. 201, 2 N. W. 497; Re Swift, 118 Fed. 348; Waterer v. Waterer, L. R. 15 Eq. 402, 21 Week. Rep. 508.

A purchase with partnership funds is not necessary to constitute the purchased property partnership property.

Merritt v. Dickey, 38 Mich. 44; Way v. Stebbins, 47 Mich. 296, 11 N. W. 166; Lind-

furnished in building thereupon, the legal title to the lien vests in the individual partners and the equitable title in the partnership as such. Soule v. Borelli, 80 Conn. 392, 68 Atl. 979.

Real estate which is not necessary for partnership purposes may still be partnership property, and it will generally be treated as such by the courts when it has been bought for the firm with firm funds, and its profits have been enjoyed by the firm. Bank of Southwestern Georgia v. McGarrah, supra; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423.

If it appears, however, that the real estate was acquired by a partner as his individual property, and the firm funds used by him in purchasing it were charged to his individual account, with the consent of his copartners, such real estate will not be regarded as partnership assets. Louisville Trust Co. v. Columbia Finance & T. Co. 22 Ky. L. Rep. 1086, 59 S. W. 867, dissenting opinion, 22 Ky. L. Rep. 1385, 60 S. W. 1; Higgins v. Higgins, 218 Pa. 397, 65 Atl. 804.

## II. The question of intention.

Whether real estate purchased with partnership funds was purchased as partnership or individual property generally depends upon the intention of the parties, as manifested by all the surrounding circumstances and the use to be made of it; and whenever the real intention of the parties can be ascertained, that intention will be held to control. Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685; Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 Pac. 1014; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Winans v. Winans, 99 Mich. 74, 57 N. W. 1088; Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Bennett v. Hough, 141 Mich. 162, 104 N. W. 414; JOHNSON v. HOGAN; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 503, 59 N. W. 1010; Thompson v. Holden, 117 Mo. 118, 22 S. W. 905; Spur-

lock v. Race, 103 Mich. 33, 61 N. W. 271; 30 Cyc. 427.

If the firm has or exercises the right of using the property up in the ordinary course of the partnership, or of disposing of it and using its proceeds, there is ample evidence of an intent that it shall become firm property.

30 Cyc. 427; Waterer v. Waterer, L. R. 15 Eq. 402, 21 Week. Rep. 508.

Where lands are partnership property, the sale by one partner to his copartners of his interest in the business and property of the firm carries with it his entire interest in the partnership lands. This is true although the transfer of interest is simply by parol.

Way v. Stebbins, 47 Mich. 296, 11 N. W.

lock v. Wilson, 160 Mo. App. 14, 142 S. W. 363; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Jones v. Beekman, — N. J. Eq. —, 47 Atl. 71; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. Supp. 869; Barney v. Pike, 94 App. Div. 199, 87 N. Y. Supp. 1038; Starr v. Starr, 67 Misc. 305, 122 N. Y. Supp. 414; Church v. Adams, 37 Or. 355, 61 Pac. 639; Hardin v. Hardin, — S. D. —, 129 N. W. 108; Spencer v. Jones, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014; Clark v. Lyster, 84 C. C. A. 27, 155 Fed. 513.

And this rule will be applied to overcome the presumption arising from the fact that the property was used for partnership purposes. Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221; Robinson Bank v. Miller, 153 Ill. 244, 27 L.R.A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078; Frey v. Eisenhardt, 116 Mich. 160, 74 N. W. 501; Starr v. Starr, 67 Misc. 305, 122 N. Y. Supp. 414; Clark v. Lyster, 84 C. C. A. 27, 155 Fed. 513.

Or from the fact that taxes, insurance, and repairs were paid by the firm. Robinson Bank v. Miller and Taber-Prang Art Co. v. Durant, supra; Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

Or from the fact that it was purchased in the names of the individual partners, and paid for by individual notes. Lindsay v. Race, 103 Mich. 28, 61 N. W. 271.

Or from the fact that the property stands in the name of one or more partners individually. Archer v. Barry, 23 Ky. L. Rep. 12, 62 S. W. 485; JOHNSON v. HOGAN; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Jones v. Beekman, — N. J. Eq. —, 47 Atl. 71; Barney v. Pike, 94 App. Div. 199, 87 N. Y. Supp. 1038; Hardin v. Hardin, — S. D. —, 129 N. W. 108; Spencer v. Jones, 92 Tex. 516, 71 Am. St. Rep. 870, 50 S. W. 118.

Or from the fact that property is purchased under an agreement between two parties to purchase in common, and the

166; *Marah v. Davis*, 33 Kan. 326, 6 Pac. 612; *Van Aken v. Clark*, 82 Iowa, 256, 48 N. W. 73.

For the purpose of adjusting the partnership affairs lands must be regarded by a court of equity as though they were personal property.

*Dunlap v. Byers*, 100 Mich. 116, 67 N. W. 1067; *Godfrey v. White*, 43 Mich. 171, 5 N. W. 243, 11 Mor. Min. Rep. 562.

The interest of partners in the firm property is that of *sui generis*.

22 Am. & Eng. Enc. Law, 95; *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254; *Michigan Trust Co. v. Chapin*, 106 Mich. 386, 58 Am. St. Rep. 490, 64 N. W. 334.

*Alfred Hull* should be estopped to deny his intention that the lands were entered

for partnership purposes and were to be firm property.

*Thayer v. Humphrey*, 91 Wis. 276, 30 L.R.A. 549, 51 Am. St. Rep. 887, 64 N. W. 1007; *Elliot v. Stevens*, 38 N. H. 311; 16 Cyc. 791, 801; 2 Pom. Eq. Jur. § 818; *Truesdail v. Ward*, 24 Mich. 134; *Peake v. Thomas*, 39 Mich. 584; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618.

In a suit in equity the doctrine of estoppel is applicable where it is necessary, to work out justice.

*Truesdail v. Ward*, 24 Mich. 117; *Peake v. Thomas*, 39 Mich. 584; *Faxton v. Faxon*, 28 Mich. 159; *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520; *Cleland v. Casgrain*, 92 Mich. 139, 52 N. W. 460; *Dean v. Crall*, 98 Mich. 593, 39 Am. St. Rep. 571, 57 N.

further fact that they use it for the purpose of making gains, and agree as to the management and use of the same. *Spurlock v. Wilson*, 160 Mo. App. 14, 142 S. W. 363.

Or from the fact that it is never used in any way in the partnership business, but is rented to others. *Foster v. Sargent*, 72 N. H. 170, 55 Atl. 423.

Upon the other hand, this rule as to the controlling effect of the intention of the parties will be applied even where their intention clearly is to effect an "out and out" conversion of the real estate into personalty for all purposes, and that intention will be enforced. *Buckley v. Doig*, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. Supp. 869; *Barney v. Pike*, 94 App. Div. 199, 87 N. Y. Supp. 1038. There is also a very strong *dictum* to the same effect in *Darrow v. Calkins*, 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61, affirming 6 App. Div. 28, 39 N. Y. Supp. 527.

But the mere fact that a partnership business is carried on upon premises owned by the partners does not disclose an intent to make it firm property. *Humes v. Higman*, 145 Ala. 215, 40 So. 128; *Robinson Bank v. Miller*, 153 Ill. 244, 27 L.R.A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078; *Dexter v. Dexter*, 43 App. Div. 268, 60 N. Y. Supp. 371.

When real estate is not purchased with partnership funds nor for partnership purposes, but is, so far as the public records, show, the separate property of the individual members, and is not incident to the business of the firm, the fact that the partners enter it on the firm books and treat it as firm property is not sufficient evidence of intention to change it into partnership property. *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913.

### III. The question of the legal title.

#### a. Immaterial to whom legal title is conveyed.

Generally, in equity, it is immaterial in 37 L.R.A. (N.S.)

whose name the purchase may have been made or the conveyance taken; if in fact purchased with partnership funds and for partnership purposes, it will be treated as belonging to the firm. *Galbraith v. Tracy*, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; *Hardin v. Hardin*, — S. D. —, 129 N. W. 108.

Real estate acquired with partnership funds or on partnership credit, and for partnership purposes, in a court of equity, is esteemed partnership property; and it is not material whether the legal title resides in the partnership or in the several partners as tenants in common, or in the name of one partner only. *Walton v. Atkinson*, 165 Ala. 644, 51 So. 826.

And the question whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken. *Bernheimer v. Schmid*, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

#### b. Legal title in one partner.

When real estate is purchased for or on behalf of the firm, paid for entirely or largely by firm funds, and is used or occupied by the firm in the conduct of its business, such real estate will, in equity, be deemed partnership property, even though the legal title be taken in the name of one partner individually; and this rule holds whether the title is so taken by mutual agreement between the partners, or without the knowledge of the other.

The following cases support this rule: *Goldthwaite v. Janney*, 102 Ala. 431, 28 L.R.A. 161, 48 Am. St. Rep. 56, 15 So. 560; *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034; *Payne v. Martin*, 39 Colo. 265, 89 Pac. 46; *Stone v. Fowkes*, 29 App. D. C. 379; *Nasholds v. McDonell*, 6 Idaho, 377, 55 Pac. 894; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Crone v. Crone*, 180 Ill. 599, 54 N. E. 605, same case in 170 Ill. 494, 49 N. E. 217, which affirmed 70 Ill. App. 294, but decided upon another

W. 813; Meisel v. Welles, 107 Mich. 453, 65 N. W. 289; Moran v. Palmer, 13 Mich. 367; Beatty v. Sweeney, 26 Mich. 217; Bigelow, Estoppel, 5th ed. p. 713; Wendell v. Van Rensselaer, 1 Johns. Ch. 354.

It is the presumption of law that, in entering the land, Hull would act for the partnership, and not for himself. Even in case he had attempted to claim that he took title for himself, a court of equity would charge him as trustee for the partnership.

Pom. Eq. Jur. § 1077; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; Shumaker, Partn. § 87; Bloom v. Lofgren, 64 Minn. 1, 65 N. W. 980; Densmore Oil Co. v. Densmore, 64 Pa. 43, 3 Mor. Min. Rep. 569.

The intentions and understanding of the

parties must be derived from the circumstances and surrounding conditions and the uses to which the land was put, taken altogether, under the ordinary rule.

Ames v. Ames, 37 Fed. 30; Tidd v. Rines, 26 Minn. 202, 2 N. W. 497; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271.

The acts, declarations, and conduct of Baldwin and Connolly, and the subsequent firms, are competent, in connection with their possession, to characterize the same, and to show what was claimed; namely, what title they were asserting under the possession which they held.

Wigmore, Ev. § 1779; Ricard v. Williams, 7 Wheat. 59, 5 L. ed. 398; Avery v. Clemons, 18 Conn. 306, 46 Am. Dec. 323; Roebke v. Andrews, 26 Wis. 312; Cuddy v. Foreman,

point; People v. Sholem, 244 Ill. 502, 91 N. E. 704; Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115; Jones v. Davies, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484; Lucas v. Cooper, 15 Ky. L. Rep. 642, 23 S. W. 959; Archer v. Barry, 23 Ky. L. Rep. 12, 62 S. W. 485; Calder & Co. v. Their Creditors, 47 La. Ann. 346, 16 So. 852; Bennett v. Hough, 141 Mich. 162, 104 N. W. 414; Chase v. Angell, 148 Mich. 1, 118 Am. St. Rep. 568, 108 N. W. 1105; JOHNSON v. HOGAN; Yorks v. Tozer, 59 Minn. 78, 28 L.R.A. 86, 50 Am. St. Rep. 395, 60 N. W. 846; Hardin v. Jamison, 60 Minn. 348, 62 N. W. 394; Stitt v. Rat Portage Lumber Co. 98 Minn. 52, 107 N. W. 824; Hardin v. Dolge, 46 App. Div. 416, 61 N. Y. Supp. 753; Burkardt v. Walsh, 49 App. Div. 634, 64 N. Y. Supp. 779; Barney v. Pike, 94 App. Div. 199, 87 N. Y. Supp. 1038; Hardin v. Hardin, — S. D. —, 129 N. W. 108; Johnson v. Rankin, — Tenn. —, 59 S. W. 638; Deming v. Moss, — Utah, —, 121 Pac. 971; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195; McKinnon v. McKinnon, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409; Re Groetzinger, 62 C. C. A. 494, 127 Fed. 814, affirming 110 Fed. 366; Whitney v. Dewey, 86 C. C. A. 21, 158 Fed. 385; Re Strang, 166 Fed. 779.

And this rule holds even though they engage in but a single joint business undertaking. Jones v. Davies, 60 Kan. 309, 72 Am. St. Rep. 354, 56 Pac. 484.

And even though the one taking title pays most of the purchase money. Bennett v. Hough, 141 Mich. 162, 104 N. W. 414.

And even though the one taking title advances the purchase money and pays the taxes, the other agreeing to sell the land and repay his share of the price thus advanced, and divide the balance, if any, equally. Yorks v. Tozer, 59 Minn. 78, 28 L.R.A. 86, 50 Am. St. Rep. 395, 60 N. W. 846.

Where, in pursuance of a partnership agreement to buy, hold, and sell certain land, one partner purchases the land in question and takes title in himself, he will be considered as acting for the firm; it 37 L.R.A.(N.S.)

will not be a resulting trust, for the other paid nothing; but a constructive trust; especially where both had co-operated in other similar dealings, and in getting information concerning this land, and in getting an option upon it. Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135.

But property purchased with partnership funds, the amount being charged on the books of the firm to one partner alone, and the conveyance being made to him, and the other partner recognizing it as a purchase for individual use by agreeing to pay rent for its occupancy, will not be considered partnership property. Jenkins v. Jenkins, 81 Ark. 68, 98 S. W. 685.

And where several persons joined in the purchase of real estate, took title in one, in trust for all, and formed a partnership, but never carried on the business for which it was formed, they were deemed to hold the land as tenants in common, and not as a partnership. Jones v. Way, 78 Kan. 535, 18 L.R.A.(N.S.) 1180, 97 Pac. 437.

Also, land purchased by one partner individually, with funds withdrawn from the firm, and charged to his individual account, title being taken to him alone, and never used for partnership purposes, cannot be regarded as partnership property. Louisville Trust Co. v. Columbia Finance & T. Co. 22 Ky. L. Rep. 1086, 59 S. W. 867, dissenting opinion in 22 Ky. L. Rep. 1385, 60 S. W. 1.

Nor does land bought with individual funds, title taken in one partner alone, become partnership property, when both members of the firm had purchased land as individuals before. Lamb v. Rowan, 83 Miss. 45, 35 So. 690.

But when, under a partnership agreement to buy, hold, and sell certain land, one partner purchases the land in question and takes title in himself, he must be considered as acting for the firm, even though he pays for the land alone. Koyer v. Willmon, supra.

And where property was purchased in the name of one partner, the first payment being made by him with money or assets withdrawn by him on account of the firm's in-



107 Wis. 519, 83 N. W. 1103; Jacobs v. Callaghan, 57 Mich. 11, 23 N. W. 454.

The recitals in the ancient contract from Hartman and Connolly to Isaac Johnson, and in the deed from Hartman to Isaac Johnson, standing uncontradicted, raise a conclusive presumption of the existence of the conveyance from Baldwin and wife, recited in the contract and deed.

17 Cyc. 444, 445; Fuller v. Den, 20 N. J. L. 61; Havens v. Sea Shore Land Co. 47 N. J. Eq. 365, 20 Atl. 497; Chandler v. Wilson, 77 Me. 76; Carver v. Jackson, 4 Pet. 1, 7 L. ed. 761; Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; Davis v. Gaines, 104 U. S. 398, 26 L. ed. 761.

debtedness to him, this purchase money became his individual property and consequently no part of the consideration for the purchase of the property was paid out of the assets of the firm, and it did not become partnership property. Higgins v. Higgins, 216 Pa. 397, 65 Atl. 804.

Also, in Pennsylvania, when land is purchased by two jointly, in the name of one alone, the creditors of the one named in the deed have a right to consider it his individual property. Gwinner v. Union Trust Co. 226 Pa. 614, 75 Atl. 856. And no parol evidence is admissible to show that it is actually partnership property, as against the judgment creditor of the grantee named in the deed. Gunnison v. Erie Dime Sav. & L. Co. 157 Pa. 303, 27 Atl. 747. For further discussion of the Pennsylvania doctrine, see III. c, 3, *infra*.

In one case where the owner of land refused to sell to a partnership, but later sold to an outsider, who was really a dummy, and who reconveyed to certain members of the firm, they paying the purchase price individually, and other partners making no objection, claiming no interest in the land at the time, and paying no part of the purchase price, it was held that the land could not be held to have become partnership property. McKnight v. Drake, 143 Ill. App. 10.

### *c. Legal title in all the partners as individuals.*

#### *1. Common-law doctrine.*

When real estate is conveyed to partners individually, without reference to their partnership relation, the presumption is that the common-law rule prevails, and that they take the property as tenants in common.

Under various conditions this presumption is held to operate, and accordingly the property is considered as held in common, and not as partnership property.

It has been so held in several cases where the purchase price was paid out of individual funds. Humes v. Higman, 145 Ala. 37 L.R.A. (N.S.)

Mr. Benton Hanchett, with Messrs. A. B. Eldredge and A. E. Miller, for appellees:

When the intention of the partners to convert the land into firm property is to be inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation.

Parsons, Partn. § 267; 22 Am. & Eng. Enc. Law, 2d ed. 90; Hake v. Coach, 107 Mich. 197, 65 N. W. 209; National Union Bank v. National Mechanics' Bank, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913; Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559; Shelburne v. Inchiquin, 1 Bro. Ch. 339.

Where the articles of partnership and the

215, 40 So. 128 (partnership formed after the purchase, and property used later for partnership purposes); Robinson Bank v. Miller, 153 Ill. 244, 27 L.R.A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078 (partnership formed after the purchase, property used for partnership purposes, repairs and improvements made at expense of firm, and no agreement that it should be regarded as firm property); Willite v. Boulware, 88 Ky. 169, 10 S. W. 629 (each partner held his undivided interest in the property by a separate conveyance, and after the partnership business ceased, used and enjoyed his undivided interest for his exclusive benefit, mortgaging it as security for his individual liabilities); National Union Bank v. National Mechanics' Bank, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913 (not used for partnership purposes, but entered on firm books and generally treated as firm property); Harris v. De-Raismes, — N. J. Eq. —, 38 Atl. 637 (not used in firm business, improvements paid for by firm, but no entries in regard to the property on the firm books); Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138 (partnership paid rent to individual owners, property entered on firm books under lease account, improvements and taxes paid for by the firm); Jones v. De Camp, 2 Ohio N. P. N. S. 133, 15 Ohio S. & C. P. Dec. 169 (income from the land immediately divided as individual funds, though used in firm business).

But in one case where land was deeded to three persons individually, one of them making the entire cash payment and all becoming jointly bound for the unpaid portion of the purchase price, and where they intended to form a partnership for the purpose of using this property, and to be equal in interest, it was held that they must have intended to purchase it as partnership property, and that it became such. Jones v. Beekman, — N. J. Eq. —, 47 Atl. 71.

And in another case, where property was purchased in the names of the individual partners, paid for by individual notes, but entered upon the firm books, and the notes

books of account fail to show the necessary facts, the inference that lands held individually, or by partners as tenants in common, were in fact partnership property, can only be drawn from facts capable by no possibility of any other reasonable construction than that the land was purchased with partnership funds, for partnership purposes. And if, from the facts, the inference may reasonably be against partnership ownership, that inference must be adopted.

Parsons, Partn. 3d ed. 395; Hatchett v. Blanton, 72 Ala. 423; Thompson v. Bowman, 6 Wall. 316, 18 L. ed. 736; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271.

The mere use by a partnership of lands does not raise even a presumption that the lands are partnership property.

actually paid by firm checks and charged on the firm books, it was held to have been intended by them to be partnership property. Lindsay v. Race, 103 Mich. 28, 61 N. W. 271.

And when property was taken in the names of the partners individually, the deed not disclosing that it was purchased with firm funds, though actually it was so purchased, and when it was sold after the death of one partner to an innocent purchaser, without notice of the secret equities, it was held that such purchaser would acquire a good title as against the surviving partner. In this case, however, the purchaser was the surviving partner himself, so that he was charged with knowledge of the nature of the title. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

So, real property conveyed to the partners individually has been held not to be partnership property when it was clearly not so considered by the partners themselves. Grant v. Bannister, 100 Cal. 774, 118 Pac. 253; Taber-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221 (partnership formed by those already tenants in common, but not conveying the property to the partnership, and it not being entered on the firm books, but used for firm purposes); Frey v. Eisenhardt, 116 Mich. 100, 74 N. W. 501 (purchased with partnership funds clearly for the homes of individual partners, but used to some degree for partnership purposes); Starr v. Starr, 67 Misc. 305, 122 N. Y. Supp. 414 (not used in partnership business, but proceeds deposited with firm moneys or used in partnership business, but no evidence as to what funds were used in its purchase).

Land was conveyed to several parties in undivided portions, and later, by writing, the land was partitioned among them and a partnership formed for the purpose of farming the land, which was done; under those conditions their interests were not technically partnership interests, but merely interests in common. Richards v. Fraser, 136 Cal. 460, 69 Pac. 83.

Where the title to realty stands in the name of the individual partners and the

Wheatley v. Calhoun, 12 Leigh, 264, 37 Am. Dec. 654; Reynolds v. Ruckman, 35 Mich. 80; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; Ruppe v. Steinbach, 48 Mich. 465, 12 N. W. 658; Gordon v. Gordon, 49 Mich. 501, 13 N. W. 834; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271.

The payment of taxes by Hull indicated that he claimed title to the whole tract. It likewise tended to explain the character and extent of his possessions.

Davis v. Easley, 13 Ill. 200; St. Louis Public Schools v. Risley, 40 Mo. 370.

Title to lands cannot be established by estoppel.

Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533; Nims v. Sherman, 43 Mich. 52, 4 N. W. 434; DeMill v. Moffat, 49 Mich.

business of the partnership is not disclosed, it will not be assumed that the business consisted of buying and selling real estate, so that, in the absence of any agreement between the partners, such realty does not become partnership property. Schleissner v. Goldsticker, 135 App. Div. 435, 120 N. Y. Supp. 333.

## 2. When common-law doctrine not applicable.

But this presumption that the common-law rule applies when property is conveyed to partners as individuals, and that they take it as tenants in common, may be rebutted.

Thus, where it is shown that real estate was purchased with partnership funds and for partnership purposes, equity will treat it as held in trust for the use of the firm, or as partnership property, even though it was conveyed to the partners as individuals.

The following cases support this rule: Lewis v. Buford, 93 Ark. 57, 124 S. W. 244; McKee v. Covalt, 71 Kan. 772, 81 Pac. 475; Quinn v. Quinn, 22 Mont. 403, 56 Pac. 824; Rockefeller v. Dellinger, 22 Mont. 418, 74 Am. St. Rep. 613, 56 Pac. 822; Dawson v. Parsons, 10 Misc. 428, 31 N. Y. Supp. 78 (property was also entered on firm books as firm assets and expenses were borne by the firm); Hayes v. Treat, 178 Pa. 310, 35 Atl. 987 (for Pennsylvania doctrine generally, see III. c. 3, *infra*).

And when a deceased partner's interest in such property is sold to an innocent purchaser without notice of the secret equities, such purchaser acquires a good title to that interest, unencumbered by the secret equity of the partnership. The surviving partner himself, however, is not an innocent purchaser without notice, and is estopped from claiming the proceeds of the sale as partnership property, and must look to the land itself as assets of the partnership, subject to the payment of its debts. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

Also the presumption will be overcome and it will be held to be partnership property when it is purchased with partnership

125, 13 N. W. 387; *Wood v. Michigan Air Line R. Co.* 90 Mich. 334, 51 N. W. 263; *Huyck v. Bailey*, 100 Mich. 224, 58 N. W. 1002; *Cleveland-Cliffs Iron Co. v. Gauthier*, 143 Mich. 296, 106 N. W. 862.

The utmost certainty of proof is required to establish an estoppel.

16 Cyc. 748; *Maxwell v. Bay City Bridge Co.* 41 Mich. 467, 2 N. W. 639; *Fredenburgh v. Lyon Lake M. E. Church*, 37 Mich. 476; 11 Am. & Eng. Enc. Law, 2d ed. 424.

Hull was under no obligation to warn Johnson of his ownership. Unless he actively deceived Johnson, under the circumstances in this case there could be no estoppel.

funds, and regarded or treated by the partners themselves as such. *Lindsay v. Race*, 103 Mich. 28, 61 N. W. 271 (individual notes given at the time of purchase, but paid by firm checks); *Foster v. Sargent*, 72 N. H. 170, 55 Atl. 423 (although never used in partnership business, but leased to others); *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221 (expenses borne by the firm).

The mere fact that the property was clearly regarded by the members of the firm as partnership property will sometimes be taken as sufficient to determine its character as such. *Galbraith v. Tracy*, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937 (used in conduct of firm business); *Booher v. Perrill*, 140 Ind. 529, 40 N. E. 36 (taxes assessed in firm name, expenses borne equally, used for firm business, repairs and improvements made at firm expense); *National Union Bank v. National Mechanic's Bank*, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913 (put into the firm business).

But when property is purchased by partners and others, all being named and called copartners and joint owners of unequal, undivided shares, and their liabilities stated to be in proportion to their interests, and no firm money is used in payment, but entries are made later upon the firm books, it is not sufficiently proved to be partnership property. *Lindsay v. Race*, supra.

Where land was deeded to three persons individually, all becoming jointly bound for the purchase price, and where they intended to form a partnership for the purpose of using this property, and to be equal in interest, their intention to hold it as partnership property was held to be clear. *Jones v. Beekman*, — N. J. Eq. —, 47 Atl. 71.

Where a partnership was engaged in buying with partnership funds vacant lots, erecting thereon buildings, also from partnership funds, and then selling, real estate thus conveyed to them as tenants in common will be considered stock in trade or personality. *Patrick v. Patrick*, 71 N. J. Eq. 347, 63 Atl. 848.

Property conveyed to partners individually, but for improvement and resale, will be deemed personality for all purposes; and 37 L.R.A. (N.S.)

16 Cyc. 738, note, 26; 11 Am. & Eng. Enc. Law, 434-436.

No evidence is competent, or should be considered, of any talk or negotiation between the parties to the partnership which took place prior to the agreement of November 1st, 1866, for the purpose of showing that it was part of the partnership agreement or understanding that the lands should be purchased for the use of the partnership, either in the names of the individuals, or otherwise, or that the lands thereafter purchased were to be partnership lands.

*Cohen v. Jackaboice*, 101 Mich. 409, 59 N.

even if not purchased for resale, it will be deemed partnership property for the purpose of adjusting the rights of partners and the payment of partnership debts. *Rosenbaum v. New York*, 59 Misc. 30, 109 N. Y. Supp. 775, affirmed in 129 App. Div. 351, 113 N. Y. Supp. 364.

Land conveyed to three persons by name, the deed reciting that they are partners, but also reciting that each is to have an undivided equal interest, becomes partnership property. *Alabama Marble & Stone Co. v. Chattanooga Marble & Stone Co.* — Tenn. —, 37 S. W. 1004.

But where real estate is purchased and title taken in the partners individually, they giving a mortgage and paying the balance in cash out of partnership funds, and where the transaction is entered in the firm books, the property not used in partnership business, and no agreement to buy as partnership property, but bought simply as an investment, and when it appears that the surviving partner has sufficient personal property in his hands to settle all debts of the firm, there is no necessity to resort to this property in the payment of such debts, but the share of the deceased partner must descend to his heirs. *Smith v. Cowles*, 81 App. Div. 328, 81 N. Y. Supp. 524.

Where the legal title to real estate is in the partner as tenants in common, the representative of the estate of a deceased partner is a necessary party to a proceeding to set aside a mortgage upon such real estate, signed not only by the partnership, but by the deceased partner as well. *Emmett v. Dekle*, 132 Ga. 593, 64 S. E. 682.

### 3. Pennsylvania doctrine.

In Pennsylvania, when real estate is purchased by a partnership and title is taken in the partners individually, the common-law doctrine is strictly adhered to whenever the question of partnership is raised by purchasers or by creditors of the firm or of the individual partners; and accordingly such property is then considered as held in common, and not as partnership property. Purchasers and creditors may rely upon the record title, and as against them no parol evidence is admissible to stamp the prop-

W. 665; *Dunham v. W. Steele Packing & Provision Co.* 100 Mich. 75, 58 N. W. 627; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380.

The fact of the use of the lands by the partnership is as consistent with the fact that the ownership of the land itself was in Hull, as it is that the land is partnership property.

*Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321; *Reynolds v. Ruckman*, 35 Mich. 80.

The court will take notice that, in the lumbering business, timber lands and the timber on the lands are treated as different properties.

erty with a quality other than that expressed in the deed. *Stover v. Stover*, 180 Pa. 425, 57 Am. St. Rep. 654, 36 Atl. 921; *Cundey v. Hall*, 208 Pa. 335, 101 Am. St. Rep. 938, 57 Atl. 761.

As between the partners themselves, however, the deed is not conclusive, but they hold in accordance with the facts. *Stover v. Stover*, supra; unless they mutually agree to hold it as tenants in common, in which case it seems that they will be considered as such, even as between themselves. *Harris v. Rosenberg*, 161 Pa. 367, 29 Atl. 44.

Also where the question of partnership was raised by the heirs at law of one of the partners as against the executors of their ancestor, the deceased partner, and where there was therefore no question of priority or of notice to be considered, but simply one of ownership, it was held that the presumption arising from the deed to the partners as tenants in common was fully rebutted by proof that the property was bought with partnership funds, and treated as partnership property, and that it became such. *Hayes v. Treat*, 178 Pa. 310, 35 Atl. 987.

The record, so far as it may affect purchasers and creditors without notice, must be considered as a declaration by the owners of the character in which they intend to hold the property. *Cundey v. Hall*, supra.

The same principle holds in Pennsylvania when title is in only one partner; the creditors of the one named in the deed have a right to consider it his individual property (*Gwinner v. Union Trust Co.* 226 Pa. 614, 75 Atl. 856); and no parol evidence is admissible to show that it is partnership property, as against such creditor. *Gunnison v. Erie Dime Sav. & L. Co.* 157 Pa. 303, 27 Atl. 747.

**d. Where title is taken in the firm name.**

Property purchased with partnership funds and title taken in the partnership name becomes partnership property as far as the equitable title is concerned. *Cooper v. Newton*, 68 Ark. 150, 56 S. W. 867; *Carpenter v. Zarbuck*, 74 Ark. 474, 86 S. W. 299; *La Fayette Land Co. v. Caswell*, 59 Fla. 544, 138 Am. St. Rep. 166, 52 So. 37 L.R.A. (N.S.)

*White v. King*, 87 Mich. 107, 49 N. W. 518; *Greeley v. Stilson*, 27 Mich. 153; *Haskell v. Ayres*, 35 Mich. 89; *Spalding v. Archibald*, 52 Mich. 365, 50 Am. Rep. 253, 17 N. W. 940.

The acts and declarations of Connolly and Baldwin, after Hull ceased to be a partner, and without his knowledge, are not competent evidence against Hull or the defendants, who claim title under Hull.

*Van Fleet v. Van Fleet*, 50 Mich. 1, 14 N. W. 671; *Ward v. Ward*, 37 Mich. 253; *Poorman v. Miller*, 44 Cal. 269; *Harcourt v. Harcourt*, 89 Ind. 104; *Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 283; *Scribner v. Ad-*

140; *Cawthon v. Stearns Culver Lumber Co.* 60 Fla. 313, 53 So. 738; *McRae v. Stillwell*, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604; *Taylor v. McLaughlin*, 120 Ga. 703, 48 S. E. 203; *Hartnett v. Stillwell*, 121 Ga. 386, 49 S. E. 276; *Sutton v. Kelliher*, 115 Iowa, 632, 89 N. W. 26; *Close v. O'Brien & Co.* 135 Iowa, 305, 112 N. W. 800; *Taylor v. Danley*, 83 Kan. 646, 112 Pac. 595, 21 Ann. Cas. 1241; *Hardin v. Hardin*, — S. D. —, 129 N. W. 108; *Harris v. Bryson*, 34 Tex. Civ. App. 532, 80 S. W. 105 (implied); *Schlichter Jute Cordage Co. v. Mulqueen*, 142 Fed. 583.

When land is conveyed to a partnership in the firm name for a consideration, and is subjected to partnership uses, it becomes partnership property, the legal title being held by the constituent members of the partnership as tenants in common for the use and benefit of the partnership. *Cole v. Meete*, 65 Ark. 503, 67 Am. St. Rep. 945, 47 S. W. 407; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Adams v. Church*, 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037; *Mann v. Paddock*, 108 Va. 827, 62 S. E. 951.

A conveyance to one in trust for a partnership, in the partnership name, is insufficient to convey the legal title, and is valid only as a contract to convey, and vests only an equitable title in the partnership, the legal title remaining in the trustee for the benefit of the indefinite and undetermined grantees. *Silverman v. Kristufek*, 162 Ill. 222, 44 N. E. 430.

A deed to a partnership by the firm name, which includes the surnames of part, but not all, the members of the firm, vests title in those members who are thus designated in the firm name, and they will hold the same for the benefit of the partnership. *A. J. Dwyer Pine Land Co. v. Whiteman*, 92 Minn. 55, 99 N. W. 362; *Dunlap v. Green*, 8 C. C. A. 600, 23 U. S. App. 154, 60 Fed. 242.

But where land was deeded to a partnership as "Ames Iron Works of Oswego County, New York," and reconveyed by one Ames and other persons, all of whom, the instrument recited, composed the partnership known as "Ames Iron Works of Oswego County, New York," there was held to be such a failure to establish the identity of

ams, 73 Me. 541; Ware v. Brookhouse, 7 Gray, 454; Jilsun v. Stebbins, 41 Wis. 235; Fischer v. Bergson, 49 Cal. 294; Wilson v. Patrick, 34 Iowa, 362; Baxter v. Knowles, 12 Allen, 114; Fellows v. Smith, 130 Mass. 378; League v. Williamson, 33 Tex. Civ. App. 647, 77 S. W. 435; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; O'Hara v. Chicago, M. & N. R. Co. 139 Ill. 151, 28 N. E. 923; Seefeld v. Chicago, M. & St. P. R. Co. 67 Wis. 96, 29 N. W. 904.

To overcome the presumption of ownership which arises from a conveyance absolute in its terms, it is not sufficient that there is a preponderance of evidence as in ordinary civil cases, but it is requisite that the evidence should be clear, certain, and

so conclusive as to remove all reasonable doubt.

Moore v. Crawford, 130 U. S. 122, 32 L. ed. 878, 9 Sup. Ct. Rep. 447; Lindsay v. Race, 103 Mich. 28, 61 N. W. 271; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458; Dewey v. Spring Valley Land Co. 98 Wis. 83, 73 N. W. 565; Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 963; Miller v. Stokely, 5 Ohio St. 195; Case v. Peters, 20 Mich. 298; Reynolds v. Campbell, 45 Mich. 532, 8 N. W. 581; Doane v. Dunham, 64 Neb. 135, 89 N. W. 640.

Brooke, J., delivered the opinion of the court:

The foregoing are companion cases; the determination in either being controlling of

the Ames mentioned in the deed as to render both deeds inadmissible as evidence, and accordingly title claimed through them failed. Riffel v. Ozark Land & Lumber Co. 81 Mo. App. 177.

A conveyance to a partnership by its firm name which does not include the name of any of the partners, but is merely fictitious, does not vest in it any legal title, because a partnership is not recognized in law as a person, but generally in equity this defect may be corrected by inserting the true names of the grantees. Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 29 L.R.A. (N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; Walker v. Miller, 139 N. C. 448, 1 L.R.A. (N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 Ann. Cas. 601; Trexler v. Africa, 42 Pa. Super. Ct. 542; Wray v. Wray, 93 L. T. N. S. 304, [1905] 2 Ch. 349, 74 L. J. Ch. N. S. 687, 54 Week. Rep. 136.

And where a deed named as grantee a partnership by its firm name, which contained the name of no individual member, and even though the firm name as given was defective, it was held that this fact did not vitiate the deed. Where the partnership paid the consideration, the partnership had at least the equitable title. Stith v. v. Moore, 42 Tex. Civ. App. 528, 95 S. W. 587.

#### *e. Legal title in an outside party.*

Where one member of a partnership, without the knowledge of his copartner, uses partnership funds with which to purchase real estate, and takes title in an outside party (*e. g.*, in the name of his wife), such property becomes an asset of the partnership and will be treated as such. Claffin v. Ambrose, 37 Fla. 78, 19 S. E. 628; American Nat. Bank v. Thornburrow, 109 Mo. App. 639, 83 S. W. 771; Daniels v. McCormick, 87 Wis. 255, 58 N. W. 406.

But this result may be changed by statute providing that in such a case the title shall vest in the person named as grantee in the conveyance. Winans v. Winans, 99 Mich. 74, 57 N. W. 1088.  
87 L.R.A. (N.S.)

#### *IV. Parol evidence.*

The question whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took, or the name in which the title was taken. Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

The extent of each partner's interest in partnership lands which are held not as land, but as partnership stock in trade, and for profit, may be shown by parol, whether the legal title thereto is in one or all of the partners. Van Housen v. Copeland, 180 Ill. 74, 54 N. E. 169.

A resulting trust in partnership land may be shown by parol evidence. Van-Buskirk v. VanBuskirk, 148 Ill. 9, 35 N. E. 383.

Parol evidence is always admissible as between partners themselves, to prove that a partnership exists in real estate as well as in personal property. Hardin v. Hardin, — S. D. —, 129 N. W. 108.

Where a copartnership agreement states that the use of certain land should be delivered into the partnership business, parol evidence may be admitted to show that the real intention was that the land itself should go in. Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465.

Where title to real estate purchased in a partnership transaction is taken in the name of one of the partners, parol evidence is admissible to show that it is actually partnership property, and to charge it as such. Hodgson v. Fowler, 24 Colo. 278, 50 Pac. 1034; Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115; Foster v. Sargent, 72 N. H. 170, 55 Atl. 423; Hubbard v. Moore, 67 Vt. 532, 32 Atl. 465; Re Groetzinger, 62 C. C. A. 494, 127 Fed. 814, affirming 110 Fed. 366.

But in Pennsylvania, it is the general rule that parol evidence is inadmissible, except as between copartners themselves, to stamp real property with a quality other than that expressed in the deed, so that when two or more persons who are partners

the other. We will consider the first of the two cases.

The amended and supplemental bill of complaint avers: That the complainant, the Cleveland Cliffs Iron Company, is the owner in fee simple of lots 7, 8, and 9 of section 36, township 45 north, range 25 west, Marquette county, Michigan, and is in constructive possession of said premises, and no one is in actual possession thereof. That it had on November 25, 1905, acquired title thereto by a proper deed from complainant Charles Johnson and his wife, Louise Johnson. That said Charles Johnson had on the same day acquired title thereto by a proper conveyance from the widow and heirs of Isaac Johnson, deceased, who were at that time the owners in fee simple of said prem-

ises. Further, that the defendant Hogan had acquired certain tax title covering said lands which the complainant had on September 30, 1905, sought to redeem by tendering to said Hogan the sum of \$288.32; that being the amount required to redeem from said tax purchasers. That the original bill of complaint was filed to compel redemption from Hogan, and to acquire title.

To which original bill defendant Hogan answered denying, in substance, the title of complainants to said lands, and alleging, on the contrary: That one Henry Hull was, at the time specified in the bill, the grantee under the last recorded deed of the lands described in said bill of complaint, and claiming that he (said defendant) had caused due notice of his tax deeds to be served and pub-

take title to land as tenants in common or individually, as to purchasers and creditors they hold in accordance with the recorded title. *Gunnison v. Erie Dime Sav. & L. Co.* 157 Pa. 303, 27 Atl. 747; *Stover v. Stover*, 180 Pa. 425, 57 Am. St. Rep. 654, 36 Atl. 921; *Cundey v. Hall*, 208 Pa. 335, 101 Am. St. Rep. 938, 57 Atl. 761; *Gwinner v. Union Trust Co.* 226 Pa. 614, 75 Atl. 856.

But even in this jurisdiction, the presumption that they are tenants in common may be rebutted by proof that the land was bought for the use of the firm, was paid for with firm moneys, and treated by them as partnership property, when the question of ownership comes up between the partners themselves, or between the heirs at law of one of the partners and the executors of their ancestor, the deceased partner. *Hayes v. Treat*, 178 Pa. 310, 35 Atl. 987.

The weight and sufficiency of evidence offered to show that particular property is owned by the firm or by a partner or partners as individuals is to be determined by the general rules on the subject. 30 Cyc. 436, and cases cited.

### V. Trusts.

In general, the theory of trusts underlies the whole subject of partnership real estate, each partner being considered a trustee for the others to the extent of his proportionate interest in the firm. But for the purposes of this note, it may be stated that when real estate is purchased with partnership funds and title is taken in the name of one partner, equity will look upon it as held in trust by that partner for the use and benefit of the partnership. For cases upon this point, see III. b, supra.

So, also, when title is taken in the name of the firm (see cases under III. d, supra); also when one member of a partnership, without the consent of his copartners, uses firm funds with which to purchase real estate, and takes title in the name of his wife. (See cases under III. e, supra.)

But see III. c, 1, *infra*, for cases holding that when real estate is conveyed to part-

ners individually, without reference to their partnership relation, the presumption is that they take the property as tenants in common, unimpressed with any trust in favor of the partnership; for conditions under which this presumption may be rebutted, see III. c, 2, *supra*; and for the general conclusiveness of the record title in Pennsylvania, see III. c, 3, *supra*.

Where land was conveyed to several parties in undivided portions, and later by writing was partitioned among them and a partnership organized for the purpose of farming the land, their relations were held to be mutually fiduciary, and under the Code each became trustee for the others to the extent of their respective shares. *Richards v. Fraser*, 136 Cal. 460, 69 Pac. 83.

When one partner buys in common property put up at a trust-deed sale, under an express agreement to hold the legal title for the joint benefit of himself and copartner, he holds the legal title charged with a constructive trust in favor of the other, and equity will compel its fulfillment. *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034.

Where land is purchased for the stock in trade of a partnership, the partners are trustees for each other. *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76.

But when real estate is not purchased with partnership funds, but with individual funds, or where the one seeking to establish a trust in his favor did not furnish any of the purchase money, such property cannot be held to have been impressed with a resulting trust. *Butts v. Cooper*, 152 Ala. 375, 44 So. 616; *Goldstein v. Nathan*, 158 Ill. 641, 42 N. E. 72; *McKnight v. Drake*, 143 Ill. App. 10; *Wilhite v. Boulware*, 88 Ky. 169, 10 S. W. 629.

And when partners have an understanding that either may withdraw moneys from the common treasury for private uses without encroaching upon the capital, and one of them accordingly purchases land without concealment, with moneys in good faith withdrawn and charged to him upon the books of the firm, the transaction is not

lished according to the statute in such case provided, and claiming to be the absolute owner of said land. That after the filing of the original bill and the answer thereto, the complainant learned that Mrs. Louise T. Hull, widow of Henry Hull, claimed to be the owner of said lands, and that about March 1, 1906, said Louise T. Hull executed and delivered a quitclaim deed of said lands to one John R. Gordon of Marquette, Michigan, reserving to herself a one-eighth interest in the ores and minerals in and under said land, and all the timber thereon, with the right to remove the same within three years, which deed was, on March 15, 1906, recorded in the office of the register of deeds in Marquette county. That on, to wit, March 15, 1906, said John R. Gordon

claimed title under said deed, and caused to be deposited with the register in chancery of Marquette county the sum of \$233.02 for the purpose of redeeming from the tax sales to Hogan. That said John R. Gordon and Mrs. Louise Hull now claim to be the owners of said lands in the proportion stated in the deed last above mentioned. That said Louise T. Hull claims title to the premises under and by virtue of the terms of the will of one Alfred Hull, who died at Escanaba December 1, 1874, and by the terms of which will all of his property was devised and bequeathed to his two brothers, Thomas Hull of Chicago, Illinois, and said Henry Hull of Fond du Lac, Wisconsin. That Thomas Hull died December 31, 1885, leaving a will, by the terms of which said

to be considered fraudulent, but rightful; and he may hold the land for his own benefit, and it will not be impressed with any trust for the firm. *Bosworth v. Hopkins*, 85 Wis. 50, 55 N. W. 424.

After making a parol agreement to form a partnership and purchase certain specified real estate as partners, one of the parties repudiated the agreement, and in association with others purchased the same property. It was held that the parol agreement was void, and the parties excluded from the purchase had no legal or equitable interest in the property so purchased. *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769.

A statute providing that when a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but that the title shall vest in the person named as the alienee in such conveyance, applies to land purchased with partnership funds, and by consent of one partner conveyed to his wife and his copartner. To hold that a trust results and that it is firm property in such a case would be to reverse the acts of the parties themselves and their intention. *Winans v. Winans*, 99 Mich. 74, 57 N. W. 1088.

#### VI. *Equitable conversion.*

In England, partnership realty is generally considered as converted into personality for all purposes, and this doctrine has been enacted into statute (British partnership act 1890, § 22), and has been approved in Canada. *Re Fulton*, 7 Ont. L. Rep. 445.

The rule prevailing in this country, however, is that, to the extent that partnership real estate may be required to pay partnership obligations or to pay any balance due from one partner to another in the settlement of its affairs, and only to that extent, the share of each partner is embraced in a trust implied by law which equity, in enforcing, treats as converted into personality.

37 L.R.A. (N.S.)

The following cases support the above rule; *Whisenant v. Hybart*, 160 Ala. 578, 49 So. 760; *Walton v. Atkinson*, 165 Ala. 644, 51 So. 826; *Carpenter v. Zarbuck*, 74 Ark. 474, 86 S. W. 299; *Tutt v. Davis*, 13 Cal. App. 715, 110 Pac. 690; *Galbraith v. Tracy*, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; *Van Housen v. Copeland*, 180 Ill. 74, 54 N. E. 169; *Null v. Parsons*, 145 Ill. App. 436; *Sternberg v. Larkin*, 58 Kan. 201, 37 L.R.A. 193, 48 Pac. 861; *Davidson v. Richmond*, 24 Ky. L. Rep. 699, 69 S. W. 794; *Comstock v. McDonald*, 126 Mich. 142, 85 N. W. 579, modifying 113 Mich. 626, 71 N. W. 1087; *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 503, 59 N. W. 1010; *Molineaux v. Reynolds*, 54 N. J. Eq. 559, 35 Atl. 536; *Patrick v. Patrick*, 71 N. J. Eq. 347, 63 Atl. 848; *Darrow v. Calkins*, 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61, affirming 6 App. Div. 28, 39 N. Y. Supp. 527; *Buckley v. Doig*, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. Supp. 869; *Hauptmann v. Hauptmann*, 91 App. Div. 197, 86 N. Y. Supp. 427; *Huber v. Case*, 93 App. Div. 479, 87 N. Y. Supp. 663; *Barney v. Pike*, 94 App. Div. 199, 87 N. Y. Supp. 1038; *Rosenbaum v. New York*, 59 Misc. 30, 109 N. Y. Supp. 775, affirmed in 129 App. Div. 351, 113 N. Y. Supp. 364; *Moore v. Wood*, 171 Pa. 365, 33 Atl. 63; *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76; *Schlichter Jute Cordage Co. v. Mulqueen*, 142 Fed. 583; *Story, Partn.* § 93.

But it has been said that, in order to transform real estate from its usual character to that of personality, the intention to do so should be made very clearly to appear. Unless the contract under which a partnership interest is claimed in land fairly excludes every consideration under which the property can retain its usual characteristics of real estate, it should be held not to have created a partnership in the land. *Spurlock v. Wilson*, 160 Mo. App. 14, 142 S. W. 363.

Although, in adjusting partnership relations, partnership real estate is to be

Louise T. Hull claims that said Henry Hull became entitled to the right, title, and interest of the said Thomas Hull, and, as she claims, the entire estate in said property, by reason of which she, at the time of the execution of said deed to John R. Gordon, asserted and claimed to be the owner of the premises hereinbefore described.

Complainant avers further: That said Louise T. Hull and her grantee, Gordon, have no right to the title or interest in said premises, and set out as reasons for said claim that on or about the 1st day of November, 1866, Alfred Hull of Escanaba, Michigan, Robert A. Connolly of Waukegan, Illinois, and S. C. Baldwin of Escanaba, Michigan, formed a copartnership, under the name of R. A. Connolly & Company, for

the purpose of carrying on the business of manufacturing, sawing, and selling lumber, and of obtaining timber lands, and of operating a steam sawmill at or near Little Lake station on the Peninsula division of the Chicago & Northwestern Railway. That said Hull, Connolly, and Baldwin, for the uses and purposes of said partnership, and as a part of the property of the same, and for the purpose of supplying said mill with lumber and timber, agreed to, and thereupon did proceed to, enter certain descriptions of government land in township 45 north, range 25 west in Marquette county, Michigan, adjacent to or in the vicinity of said mill, and obtained the patents therefor in the names of said individual partners; some being taken in the name of Hull, some in

treated as personalty, still the individual partner, being a cotenant in common, may encumber his individual interest to secure his individual debt; subject, however, to the superior claim of the partnership creditors to be paid first; especially when the partnership is solvent and the land in question is no longer used in the firm business. Taylor v. McLaughlin, 120 Ga. 703, 48 S. E. 203.

When timber land is purchased by several persons jointly, they to be tenants in common, and at the same time a partnership is formed for the purpose of cutting and selling all the timber upon said land, the title to the land itself is said to vest in them as tenants in common, and not as partners, but the timber is converted into partnership property and becomes personalty. Harris v. Rosenberg, 161 Pa. 367, 29 Atl. 44.

But even in this country, the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the parties themselves; and where, by such agreement, it appears that it was the intention of the partners that the land should be treated and administered as personalty for all purposes, effect will be given thereto. Darrow v. Calkins, 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61 affirming 6 App. Div. 28, 39 N. Y. Supp. 527; Buckley v. Doig, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. Supp. 869; Barney v. Pike, 94 App. Div. 199, 87 N. Y. Supp. 1038; Rosenbaum v. New York, 59 Misc. 30, 109 N. Y. Supp. 775, affirmed in 129 App. Div. 351, 113 N. Y. Supp. 364.

In this country, however, partnership real estate, unless it is otherwise expressly or impliedly agreed, retains its character as realty, with all the incidents of that species of property as between the partners themselves, and also between a surviving partner and the personal representatives of a deceased partner, except when required in 37 L.R.A. (N.S.)

settling partnership obligations or obligations between partners.

This rule is upheld in the following cases: Butts v. Cooper, 152 Ala. 375, 44 So. 616; Whisenant v. Hybart, 160 Ala. 578, 49 So. 760; Galbraith v. Tracy, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579, modifying 113 Mich. 628, 71 N. W. 1087; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 503, 59 N. W. 1010; Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536; Darrow v. Calkins, 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61, affirming 6 App. Div. 28, 39 N. Y. Supp. 527; Hauptmann v. Hauptmann, 91 App. Div. 197, 80 N. Y. Supp. 427; Schleissner v. Goldaticker, 135 App. Div. 435, 120 N. Y. Supp. 333; Bernheimer v. Schmid, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138; Adams v. Church, 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037; Brown v. Gray, 68 W. Va. 555, 70 S. E. 276.

It is not considered personalty for the purpose of conveyance to others except when so conveyed for the payment of firm debts. Butts v. Cooper, 152 Ala. 375, 44 So. 616 and Brown v. Gray, 68 W. Va. 555, 70 S. E. 276.

After a partnership is dissolved and its affairs wound up and completely ended and all its obligations discharged, if any real estate remains *in specie* unconverted, it will be deemed no longer a part of copartnership stock, but individual real estate. Whisenant v. Hybart, 160 Ala. 578, 49 So. 760; Galbraith v. Tracy, 153 Ill. 54, 28 L.R.A. 129, 46 Am. St. Rep. 867, 38 N. E. 937; Comstock v. McDonald, 126 Mich. 142, 85 N. W. 579; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 503, 59 N. W. 1010; Darrow v. Calkins, 154 N. Y. 503, 48 L.R.A. 299, 61 Am. St. Rep. 637, 49 N. E. 61, affirming 6 App. Div. 28, 39 N. Y. Supp. 527.

Until all firm creditors have been paid, no partner has a right to demand a division of the firm property. Molineaux v. Raynolds, 54 N. J. Eq. 559, 35 Atl. 536.



the name of Baldwin, and others in the name of Connolly, but that all so entered were taken and patented in trust for the uses and purposes of the partnership, which thereupon was the real and equitable owner of all the lands. That among the lands so entered, patented, and purchased for the purposes of said partnership were the lands in controversy in this suit, which were entered on the 13th day of December, 1866, in the name of Alfred Hull. That, after carrying on the affairs of the partnership for some time, Hull entered into an agreement with Baldwin, by which he contracted to convey and sell to Baldwin all his interest in said partnership property, including said lands. That, after being paid the consideration to be received by

him, Hull turned over to Baldwin his entire interest in said partnership property, and that said instrument of conveyance from Hull to Baldwin has been mislaid and lost. That after said sale Baldwin and Connolly continued to carry on the business of the partnership, taking the timber as well off the Hull lands as the other lands, until 1871, when Baldwin retired from said partnership and conveyed all his right, title, and interest to said partnership, and the lands operated in connection therewith, including the Hull lands, to Samuel H. Hartman and Theodore W. Hartman. That this deed from Baldwin to the Hartmans has likewise been lost. That the Hartmans paid Baldwin the full purchase price, and the Hartmans and Connolly continued thereafter

The rule of equitable conversion is applied only where it is necessary to adjust obligations of the firm; and there is no reason to apply it in the absence of partnership liabilities to creditors or to members of the firm. *Bernheimer v. Schmid*, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

Partnership realty is regarded as partnership property only so far as may be necessary for the payment of the debts and the adjustment of the partnership assets. But it still retains all its characteristics as real estate, and must be owned and conveyed as such. The legal title is at all times held by the copartners as tenants in common, and when no longer needed for partnership purposes it is released from all trusts growing out of the partnership relation. *Adams v. Church*, 42 Or. 270, 59 L.R.A. 782, 95 Am. St. Rep. 740, 70 Pac. 1037.

#### VII. Statute of frauds.

The statute of frauds does not apply to cases where real estate is purchased in connection with the firm's business, and paid for with partnership funds, even though title is taken in the name of one partner alone. *Hodgson v. Fowler*, 24 Colo. 278, 50 Pac. 1034; *Lucas v. Cooper*, 15 Ky. L. Rep. 642, 23 S. W. 959; *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824.

Also, a distinction is made in cases where a contract for the purchase of land by a partnership, void by the statute, has been fully executed, and one party seeks to retain the fruits of the dealing, in defiance of his promises. Such a situation is not within the purpose of the statute, and consequently not sheltered by it. *Smith v. Putnam*, 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288.

And even when such a contract is only partially performed, the statute of frauds is not an insuperable objection. *Chase v. Angell*, 148 Mich. 1, 118 Am. St. Rep. 508, 108 N. W. 1105; *McKinnon v. McKinnon*, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409.

And a contract for the sale of land to a partnership is so far executed or performed

as to satisfy the statute of frauds when a part of the property is taken possession of by the partnership. *Tillis v. Folmar*, 145 Ala. 176, 117 Am. St. Rep. 31, 39 So. 913, 8 Ann. Cas. 78.

Persons who come in by a parol agreement that they shall become partners in realty held as an incident to the partnership business cannot obtain any title to or interest in the realty when they pay no consideration and there is no part performance. *Dodson v. Dodson*, 26 Or. 349, 37 Pac. 542.

And since the statute expressly excepts from its provisions transfers of land by operation of law, an incoming partner, recognized and treated by all as a partner, and the business being connected with him under the original partnership agreement, has an interest in all the partnership property regardless of the statute, for he takes by operation of law and without any formal assignment. *Fred Gorder & Son v. Pan-konin*, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449.

And it seems that real estate may be so entered on the books of the firm as to comply with the statute. *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913.

#### VIII. Form of conveyance.

The question whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took. *Bernheimer v. Schmid*, 36 Misc. 456, 72 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

Where an interest in real estate was conveyed to a partnership, and the partnership later conveyed the same interest to another partnership, signing the conveyance only by the firm name, this conveyance may have been defective, but when the second partnership consisted of all the partners in the first one, together with another person, and this latter partnership subsequently reconveyed the same interest and signed the deed, both by the firm name and by all the

to operate the property until the 16th day of November, 1874, when it was sold to Isaac Johnson. Prior to this date said Johnson had been operating the mill for Hartman, Connolly, & Company. In the course of said operation, the firm had become indebted to Johnson in the sum of \$5,000. On the said 16th day of November the two Hartmans entered into a contract with Johnson, agreeing to convey to him a two-thirds interest in said business and lands, including and describing the Hull land, for the sum of \$11,222.34, and on the 23d day of November, 1874, Connolly contracted to sell his one-third interest to Johnson at the same rate; the Hull lands being likewise included therein and specifically described. That thereafter

said Johnson took possession of said property, paid the consideration mentioned in said contracts, and lumbered said tract for a period of upwards of ten years. That on the 3d day of January, 1876, Connolly executed a quitclaim deed to Johnson in pursuance of said contract; said deed specifically describing the Hull and Baldwin lands, as well as those entered in Connolly's name, which deed was duly recorded. That said Johnson continued in full possession and control of the property, including the lands in question, until his death, in November, 1883. That neither the Hartmans nor their heirs have executed a conveyance in accordance with the contract, of their two-thirds interest.

The prayer of the complainant is: (1)

individual members, this last conveyance passed all the title originally held by the first partnership or the members thereof. *McRae v. Stillwell*, 111 Ga. 65, 55 L.R.A. 513, 36 S. E. 604.

In order to transform real estate from its usual character to that of personality, the intention to do so should appear very clear in the conveyance. *Spurlock v. Wilson*, 160 Mo. App. 14, 142 S. W. 363.

#### IX. The question of notice.

It is generally held that when property is purchased by partners individually, and title is taken and recorded in them as tenants in common, innocent purchasers without notice of the secret equities in favor of the other partners will acquire good title as against those other partners and against the partnership. The legal presumption is that the possession or interest of the partnership is subordinate to, and not inconsistent with, the record title. As between themselves, however, the partners hold in accordance with the facts. *Hartnett v. Stillwell*, 121 Ga. 386, 49 S. E. 276; *National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 27 L.R.A. 476, 45 Am. St. Rep. 350, 30 Atl. 913; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753; *Stover v. Stover*, 180 Pa. 425, 57 Am. St. Rep. 654, 36 Atl. 921; *Cundey v. Hall*, 208 Pa. 335, 101 Am. St. Rep. 938, 57 Atl. 761; *Gwinner v. Union Trust Co.* 226 Pa. 614, 75 Atl. 856.

But when land is purchased by a partnership in a partnership transaction, and paid for with partnership property, title being taken in the individual partners, the partners hold the land jointly in trust for the firm, and neither one can convey an undivided half interest, so that one who takes a quitclaim deed to such an interest with notice of the real character of the ownership takes it subject to the rights of the partners and of the firm creditors. *McKee v. Covalt*, 71 Kan. 772, 81 Pac. 475.  
37 L.R.A. (N.S.)

#### X. Partnership formed for the purchase and sale of real estate.

Where a partnership exists for the purpose of dealing in real estate, as between the copartners themselves the land so purchased will be considered as stock in trade; that is, firm assets or personality. *Tutt v. Davis*, 13 Cal. App. 716, 110 Pac. 690; *McPherson v. Swift*, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76.

And this is true even though title to the land be taken in one partner alone. *Stitt v. Rat Portage Lumber Co.* 98 Minn. 52, 107 N. W. 824.

Or although one member buys property with firm money, without the knowledge of his copartner, and takes title in the name of his wife. *Daniels v. McCormick*, 87 Wis. 255, 58 N. W. 406.

Also, where land is conveyed to partners individually, as tenants in common, but is paid for with firm money and treated by them as firm property. *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *Patrick v. Patrick*, 71 N. J. Eq. 347, 63 Atl. 848.

When the intention is clear, it may even be held to be converted into personality for all purposes. *Buckley v. Doig*, 188 N. Y. 238, 80 N. E. 913, 11 Ann. Cas. 263, affirming 115 App. Div. 413, 100 N. Y. Supp. 869.

But when title to real estate stands in the name of the individual partners, and the business of the partnership is not disclosed by the records, it will not be assumed that the business consisted of buying and selling real estate, so that, in the absence of any agreement, express or implied, between the partners to the contrary, such realty retains its character as realty, subject only to liquidation of partnership obligations. *Schleissner v. Goldsticker*, 135 App. Div. 435, 120 N. Y. Supp. 333.

#### XI. Real estate acquired in payment of debts.

In *Fretwell v. Branyon*, 67 S. C. 95, 45 S. E. 157, it is implied that land conveyed

That said complainant, the Cleveland Cliffs Iron Company, be decreed to be the owner in fee simple of the lands hereinbefore described, and that its title thereto be quieted, confirmed, and established. (2) That said Louise T. Hull and John R. Gordon be permanently restrained from interfering with said complainants in the possession of said premises and from claiming to own the same. (3) That the unknown heirs of each said Samuel H. Hartman, Theodore W. Hartman, and C. G. Hartman be required to specifically perform the terms of said contract, and that they be decreed to release and quitclaim to said complainants all their right, title, and interest in and to said premises.

To this bill of complaint defendants John R. Gordon and Louise T. Hull Morehouse, formerly Louise T. Hull, filed separate answers in the nature of cross bills, averring: That Alfred Hull, the original patentee of the lands in question, died without having parted with the title to said lands and disposing of them by will to the two brothers Thomas and Henry; that Thomas had not parted with his interest in said lands, leav-

ing the property to his brother Henry; and that Henry died intestate, leaving defendant Louise T. Hull his sole heir; praying that defendants' title may be quieted by the decree of the court, and that defendant Hogan be decreed to reconvey his title acquired by the tax deeds. Hogan answered setting up absolute title to the lands in question under his tax conveyances. The record shows, however, that he has accepted redemption from one or the other of the parties litigant, and has now no interest in the controversy.

But one question is involved in this case, viz., whether or not the lands in controversy became in fact, or should now be treated as, the property of the firm of R. A. Connolly & Company. It is apparent that the complainant, by virtue of the conveyances from Johnson, has acquired the interest in the partnership of Baldwin and Connolly. By virtue of the same conveyances, it has likewise acquired title to the Hull lands, if those lands were in fact partnership property, although entered in the individual name of Hull. After a full hearing the learned circuit judge reached the conclusion that the complainants were not entitled to

to a partnership in payment of a debt becomes partnership property.

#### *XII. The effect of improvements.*

In several cases, the fact that improvements were made upon property at joint expense or at the expense of the firm was considered as one factor in determining that the property should be deemed partnership property; but in none of these cases can that fact be called the dominant factor. *Nasholds v. McDonell*, 6 Idaho, 377, 55 Pac. 894; *Booher v. Perrill*, 140 Ind. 529, 40 N. E. 36; *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *McKinnon v. McKinnon*, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 409.

And in two cases, where land was purchased with individual funds and conveyed to partners individually, the fact that improvements were made upon the property at the expense of the firm was held insufficient to render it partnership property. *Robinson Bank v. Miller*, 153 Ill. 244, 27 L.R.A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078; *Bernheimer v. Schmid*, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

#### *XIII. Position of incoming partner.*

Upon forming a partnership, the original owner of real estate gave the incoming partner the deed to an undivided one half of the same, and later another partner was admitted, each of the former two deeding to him one sixth, leaving title to an undivided one third in each. The land was used in connection with the firm business, and was understood by the partners to be partnership property. Each will be considered 37 L.R.A. (N.S.)

to have held his portion for the benefit of the partnership; that is, it was all partnership property. *Childs v. Pellett*, 102 Mich. 558, 61 N. W. 54.

Where a partnership, with the consent of all its members, admits a new member, who is recognized and treated by all as a partner, and the business is continued with him under the original partnership agreement, the new member has an interest in all the partnership property by operation of law, and without any formal assignment. *Fred Gorder & Son v. Pankonin*, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449.

But, where persons have been let into a partnership by a parol agreement that they should become partners in the realty held as an incident to the business, they cannot obtain any title to or interest in the realty when they pay no consideration, and when there is no part performance. *Dodson v. Dodson*, 26 Or. 349, 37 Pac. 542.

#### *XIV. Particular facts held sufficient to constitute real estate partnership property.*

A building put up by the firm upon land owned as tenants in common and used jointly, the building apparently put up for partnership business and paid for out of partnership funds, will be considered partnership property. *Taber-Prang Art Co. v. Durant*, 189 Mass. 173, 75 N. E. 221.

Where a firm consisting of father and sons purchases a building for partnership purposes, and uses it for such purposes, although paid for by capital furnished by the father, and although conveyed to the sons by separate conveyances, it must be considered partnership property for the pur-

the relief sought, and entered a decree giving the title to the lands in question in defendants Gordon and Hull. From this decree complainants appeal.

The record is of great length and contains many exhibits. For the purpose of showing the intent of the parties as to the character of the interest of the partnership in the lands in question, complainants rely, in part, upon the following written items of evidence:

(1) The original partnership agreement is as follows:

Memo. of agreement made this 1st day of November, 1866, by and between R. A. Connolly, of Waukegan, Lake county, Illinois, S. C. Baldwin of Escanaba, Delta county, Michigan, and Alfred Hull of said Escanaba: Said parties have formed a co-partnership for the purpose of carrying on the business of sawing and selling lumber, and put into operation a steam sawmill, at Little Lake station on the Peninsula Division of the Chicago & North Western Railway. It is understood and agreed that each party interested in said mill and business is

one third. Each is to pay one third of the whole cost and losses, if any, and to receive one third of the profits, if any. Said Connolly is to render at once a statement of the cost of said mill, with the vouchers. The proceeds of lumber sold after reserving the cost of sawing and furnishing are to be applied first to the payment of all bills for labor and material, now unpaid. When these are paid in full, then the profits, if any, are to be divided equally between said partners, each and every month. Said Hull is to keep accounts of the sales of lumber, and said Connolly or Baldwin are to collect said bills as rendered by said Hull, and each party is to use all proper exertion for the success of said undertaking, and to give such portion of his time to such purpose, as he may be required by the other parties, reasonably, to do. All notes or evidences of indebtedness against said property shall be signed by all three partners, and neither of the partners shall assign or sell his interest without the consent of at least one of the other partners, in writing. The term of this partnership is to be for

pose of paying partnership debts. *Hill v. Cornwall*, 95 Ky. 512, 26 S. W. 540.

***XV. Particular facts held insufficient to constitute real estate partnership property.***

Property purchased by a partner individually with his own funds, assuming mortgage notes held by his firm against it, although these were debited on the books of the firm and taxes and insurance and other expenses on the property were charged to the firm, should be considered as that of the individual partner. The debt against it, and not the property itself, is the asset of the firm. *Calder & Co. v. Their Creditors*, 47 La. Ann. 346, 16 So. 852.

Also, property acquired in the name of an individual member, although the firm pays the taxes upon it, if no other entry appears on the partnership books with reference to it, must be considered individual property. *Ibid*.

When one partner, without authority from his copartners, purchases land openly and without concealment, and in so doing acts outside the scope of the partnership business, and pays for the land with his individual funds and credit, he will be deemed to have acted for his sole benefit, and the property will not be considered as belonging to the firm. *Hake v. Coach*, 107 Mich. 197, 65 N. W. 209.

Where land was purchased by a partnership, not out of general funds, but on credit, and paid for later from the proceeds of crops grown on the land itself, and title was taken in one partner alone, because the other was surety on a bank note, and the land was managed by both together, 37 L.R.A. (N.S.)

it was held that it was not proven to have been intended as partnership property, and did not become such. *Reemsnyder v. Reemsnyder*, 75 Kan. 565, 89 Pac. 1014.

Where a written contract conveyed to a person "a full partnership of one-half interest in the proceeds arising or in any way accruing from the sale of" certain land, and both parties agreed to try to arrange a sale and to pay all expenses jointly, and further, that "said partnership is to continue in full force and effect until all said partnership land is sold," and the first party agreed, in case of default by him, to pay a certain sum to the second party "for his interest in the said partnership tract," it was held that the parties did not contemplate holding the land in that community of ownership which is essential in order to create partnership assets, but rather their intention seemed to be to employ the second party as agent for the sale of the land, and to pay him out of the profits derived therefrom. *Thompson v. Holden*, 117 Mo. 118, 22 S. W. 905.

Where, upon the death of the father, two sons formed a partnership, one of them conveying to the other fractional parts of his own property, so that, with their inheritances, they became equal owners in the lands in question, they cannot be considered copartners in the undivided real estate thus owned by them, it not being purchased with partnership funds nor used in partnership business, except to occupy it jointly, and there being no agreement between them that their real estate should be held and owned by them as copartners. *Dexter v. Dexter*, 43 App. Div. 268, 60 N. Y. Supp. 371.

Where land is conveyed to partners individually, and not to the firm, paid for out of individual funds, the partnership pay-

three years from this date, unless sooner terminated by the consent of the parties.

S. C. Baldwin. [Seal.]  
R. A. Connolly. [Seal.]  
A. Hull. [Seal.]

In presence of:—

(2) Correspondence antedating the co-partnership agreement between Hull and Connolly, as follows:

EsCANABA, June 30th, '66.

R. A. Connolly, Esq.,

My Dear Sir:

Mr. Baldwin handed me a letter last evening which he had just received from you, in which you state that you have purchased engine and mill fixings, at a cost of sixty-three hundred dollars, cash down. The capital that it will require to start and stock the mill will be so large that my proportion of the same would exceed my cash fund, and therefore would be but a weak limb in the concern. It won't do for me to undertake what I can't fulfil. At the same time I will act in the same manner as though I was a partner. I have but a moment to write you. When I see you will explain to your satisfaction. There are plenty who will gladly take the chance. The timber land has been secured by Mr. Baldwin. I have not said a word to him as to how I was situated, as he might want, with you, I can reason and will go as far as able, say \$1,500. (I think Clarke like would join.) Wait completed drawing piles on the 16. Hope to complete the merchant dock bef. Tuesday night. One word more. Now Mr. Connolly don't judge me harshly in this case. I want to see you and talk the whole matter over with you quietly. With kind regards, I remain respectfully yours,

A. Hull.

R. A. Connolly, Esq.,

Dear Sir:—

I had a long conversation with Mr. Baldwin on yesterday in regard to sawmill. He still thinks it a good investment, and I rather infer that he may think that. I have been boyish in the premises. At any rate I told him, as I told you, that I would still, if necessary, put in fifteen hundred dollars, but still I don't change my mind in regard to the results. We digested the matter I think carefully. His proposals are generous indeed, but are they sure he says so and so will be wanted, granted they will be? Will it be certain that they will be wanted from our mill. That is a point we want to be very certain about. For without the constant patronage of the company the mill would be a certain loss and a very small margin at best—but it is useless for me to repeat what we talked carefully over, when at Escanaba. I merely write you confidentially knowing that he has recently written you about the mill. If you say build the mill, why I am with you.

Yours respectfully,

A. Hull.

P. S. We have had splendid weather for driving. I think they will about complete the driving for main dock this week. I think it will look bad as an improvement that is the location.

(C. E.)

Peninsula Division (F. 125), Chicago & North Western Railway Co., Land Office.  
Escanaba, August 30, 1866.

R. A. Connolly, Esq.,

Dear Sir:—

I have been so very busy since you left that I have not had the time to write you sooner. Have been urging the work along at lake for mill. Gourlay will be able to

ing rent to the individual members for the undivided half of the property of which each was the owner, the property being entered on the books of the firm under the lease account, it is to be deemed as held by them as tenants in common, and not as partnership property, even though the firm paid for certain improvements and for taxes, assessments, insurance, and water rents. *Bernheimer v. Schmid*, 36 Misc. 456, 73 N. Y. Supp. 767, affirmed in 73 App. Div. 434, 77 N. Y. Supp. 138.

Where a widow holding under a will the "use and occupation" of certain property during widowhood, entered into a partnership to continue about fourteen months, and put into the partnership business the "use and occupation" of the property, she was held to have put in only an estate for years, and her life estate could not be considered partnership property. *Hart v. Hart*, 117 Wis. 639, 94 N. W. 890.

Where a retiring partner remained as 37 L.R.A.(N.S.)

silent partner, left his share of the capital in the business, loaned the remaining partner money, and paid him a certain sum annually in lieu of personal services to the firm, and conveyed by quitclaim deed certain real estate to give the other commercial standing, taking a bond for reconveyance of the same at the end of five years, the intention clearly was that the real estate was not to become partnership assets, but was to remain the individual property of the retiring partner, and to be reconveyed to him without regard to any liability which might then exist against him, arising out of the partnership business. Here the intent must control. The property was not purchased with partnership funds, and, in the absence of any agreement to the contrary, such property does not become partnership property, even though used for the partnership purposes. *Clark v. Lyster*, 84 C. C. A. 27, 155 Fed. 513. H. C. Sh.

commence the frame on Wednesday and wishes me to say to you that he would like a drawing showing the position of the machinery, when at work. Thinks it would enable him to get along with the work faster. The side track will be completed during the week. Have urged that part as far as I dare. In fact thus far the work has gone very satisfactorily, but at the same time I hope it will be convenient for you to be at Escanaba soon, as it is all important that the mill should be at work as soon as the 20<sup>th</sup> of September. You of course understand that part. I shall keep the work moving in your absence. There is one point that is plain to be seen, if the concern is made to pay for itself, we have got to put our shoulders to the wheel. I can see (a doubt) but I don't consider this the time to look back. We can and will make the mill pay. Mr. Baldwin has been very ready to do anything that he could to forward the work. We are looking very anxiously for the Home and will keep Chapman and men employed until it comes. He will have the house about completed by Tuesday night. In fact if he should remain there the balance of the week, he would be very useful, to the work generally. Lynnman will commence hauling long piles at once. As soon as he get enough on hand, will have them brought down. Mr. Baldwin is very much opposed to working on Sunday, and it can also be avoided, so soon as the side track is completed, which I think will be done in time. Hoping to see you soon at Escanaba, I remain, dear sir,

Respectfully,

A. Hull.

(3) Letter from Hartman to Connolly:

Negaunee, Nov. 19, '74.

R. A. Connolly, Esq.:—

Yours of 16th duly to hand, and am sorry it did not come sooner, as I consummated sale to Isaac on Monday last (as I led you to anticipate would be unless I heard from you by return mail or telegraph). But I rather think he will take your interest on the same terms and figures that he took ours (details of which you will observe in mine of 5th inst., i. e. approximately). And so I think Isaac will still do. As he uniformly has done just as we agreed upon, and his proposition was really based on including your interest (less of course the \$700 you owe him). As to conferring with your attorneys, Ball & Black. If there is any particular or special point you wish me to ask, advise, and I will do so with pleasure, but as to this sale I see nothing to ask them, as we merely agree to give Isaac the mill property and the Negaunee

yard free of encumbrances, and same title as S. C. Baldwin gave us, and we don't have to give that until he pays the notes, as we reserve that as collateral. So, if that is satisfactory to you advise at once and I will try and close you out before I leave. Isaac will be here next Monday, or Tuesday.

[Signed] T. W. Hartman.

(4) Contracts between the Hartmans, Connolly, and Johnson, already referred to in statement of complainants' claims in their bill of complaint.

(5) Memorandum of effects attached to will of Alfred Hull:

"Memo. of effects and will of A. Hull, made at Chicago, Ill., February 22, 1871:

"Memorandum of bonds, mortgage, etc., belonging to A. Hull, with their Nos. for a memorandum in case they should be lost or stolen after this 21st day of February, 1871:

"Nos. of U. S. Gov. 5-20 bonds, viz.:

130986 for 1,000 dols.

130985 for 1,000 dols.

"Mem. & Nos. of stock by him in the First National Bank of Marquette, viz.:

5 shares of \$100 Ea. Nos. 236.

5 shares of \$100 Ea. Nos. 200.

4 shares of \$100 Ea. Nos. 226.

"The premium on the above is worth 2-100 dols.

"\$321 dols. deposited in the First National Bank of Marquette.

"A note against S. C. Baldwin and R. A. Connolly, dated Escanaba, June 1, 1867, for 560 38/100 dols.

"Also note against C. C. Elliott, dated Escanaba, May 9, 1867, for 900 dols.

"Also Amt. paid Emory per his order, dated Aug. 29, '67, for 50 dols.

"Also \$25 paid for filing caveat on scrapers.

"Also a note from A. I. Smiley dated Escanaba, Nov. 18, '68, for 80 dols.

"Also a note from O. C. Hill, dated Escanaba, Sept. 1, 1870, for 3,000 dols.

"Also a due bill, dated Escanaba, March 1, '70 from O. D. Sloat for 40 dols.

"Amount deposited with Thos. Hull for safekeeping this 22d day of February 1871, is 5,000 dols.

"I have expressed to Judson Bank Ogdensburg to-day, Feby. 22, '71 7,000 dols. which will remain in the express office until my arrival.

"I have mortgages in T. B. Tate's possession, Ogdensburg, amounting to 4,000 dols.

"I hold a mortgage against T. B. Tate, Ogdensburg, for \$5,000.

"Also I have the fol. amt. of real estate in Ogdensburg, viz., as per will of Chas. Hull, valued at 7,000 dols.

"I have 4 lots in Escanaba as per deeds recorded, worth 3,000 dolls.

"I have also an undivided one half of 6 lots in the town of Ishpeming, worth 400 dolls. each, amounting to 2,400 dolls.

"Also with R. A. Connolly I have an undivided one-third interest in 540 acres of Land in Delta Co., Mich., as per deeds recorded.

"Also I have an undivided one-half interest with S. H. Selden in 280 acres of land situated in Delta Co., Mich.

"Also 250 acres of land situated near Days River, Delta Co., Mich. valued at 5,000 dolls."

(6) Extracts from letter of Dodge, manager of sawmill, to Connolly, August, 1867, as follows:

"The company will have to buy more land, as there are no more white pine trees on the place where O'Brien has been cutting all summer."

Letter of Dodge to Connolly, dated September 2, 1867:

"I think Mr. Baldwin & Hull will go up to the mill to-morrow and go down to the camp and on the lines of the land to see what amount of trees you have there."

Hull never recorded patents to any of this land. The patent to the land involved in the case under consideration (the Gordon Case) was not recorded until November 2, 1876, two years after Hull's death, and nearly two years after the purchase by Johnson. The patent for the land involved in the Drake Case has never been recorded, and was not found among the papers of Alfred Hull when produced by the defendants. At the time of the purchase by Isaac Johnson, there were no instruments of any character recorded in the office of the register of deeds for Marquette county touching these lands, and the Johnson contracts were the first instruments of record in that office. The record shows: That Baldwin, Connolly, and Hull all occupied official relations to the Chicago & Northwestern Railway Company; that that company was using in constructing bridges, ore docks, etc., a considerable amount of timber; and that they believed a profitable lumber and timber business might be done with the railway and the public generally. It shows that prior to the formation of the partnership, Baldwin and Connolly had purchased an engine and mill fixtures to the amount of \$6,300, and that Hull's available capital at the time that the partnership was entered into was only \$1,500. The partnership contract itself shows Hull to have had a one-third interest. This partnership continued only until June, 1867, and it was dissolved by reason of the criticism visited upon Hull by his railway superiors by reason of the fact that he had purchased timber for the use of the company from himself. It shows, further, that Baldwin was familiar with the method of entering government lands on military land warrants. Further, that, after Hull's retirement from the firm, he continued to purchase the timber manufactured by R. A. Connolly & Company, taken in part from the lands standing in his own name on behalf of the railway, upon one occasion going upon the lands and selecting the particular timber to be cut for the railway needs. Further, that he himself took one Hopkins, who was contemplating purchasing an interest in the concern, to one of the logging camps then in operation upon the lands, and introduced him to O'Brien as the one who would come there in charge, and Hopkins thereafter bought an interest in the firm; that later, when the Hartmans bought in, Hull had knowledge of the sale and continued to deal with the concern. The record further discloses that at this time the entire known value of the land in question consisted in its timber, and that Hull stood by and saw the land gradually divested of its value, purchasing the product for the railroad company without asserting any rights thereto. The contract between the Hartmans and Connolly and Johnson which in terms described and dealt with the lands in question was likewise made in his lifetime and recorded in the county of Marquette.

The defendants rely: (1). Upon the fact that the record title stands in Hull's name; (2) upon the tax receipt dated January 10, 1871, for the taxes of 1870, which was made out in the name of Alfred Hull and produced by the defendant; (3) the payment of certain taxes upon the lands by the estate of Alfred Hull, all made prior to the year 1888; and (4) declarations made by Hull in his lifetime which the defendants claim tend to show that Hull during his lifetime, and after his disposition of his interest in the copartnership, still claimed to be the owner of the lands in question.

It was the theory of the defendants that, by an agreement between Baldwin, Connolly, and Hull (as to which agreement there is no evidence in the record), the legal title to the lands entered in their individual names should be and remain in them as individuals, while the partnership had the right to remove the timber therefrom, and this theory seems to have been accepted by the learned circuit judge. His opinion is, in part, as follows: "The complainants cannot claim that they have by direct proof shown any express agreement that the lands in question were partnership property. They seem to rely upon circumstances, dealings, and acts of the parties. In order to establish the fact, these circumstances, dealings, and

chased timber for the use of the company from himself. It shows, further, that Baldwin was familiar with the method of entering government lands on military land warrants. Further, that, after Hull's retirement from the firm, he continued to purchase the timber manufactured by R. A. Connolly & Company, taken in part from the lands standing in his own name on behalf of the railway, upon one occasion going upon the lands and selecting the particular timber to be cut for the railway needs. Further, that he himself took one Hopkins, who was contemplating purchasing an interest in the concern, to one of the logging camps then in operation upon the lands, and introduced him to O'Brien as the one who would come there in charge, and Hopkins thereafter bought an interest in the firm; that later, when the Hartmans bought in, Hull had knowledge of the sale and continued to deal with the concern. The record further discloses that at this time the entire known value of the land in question consisted in its timber, and that Hull stood by and saw the land gradually divested of its value, purchasing the product for the railroad company without asserting any rights thereto. The contract between the Hartmans and Connolly and Johnson which in terms described and dealt with the lands in question was likewise made in his lifetime and recorded in the county of Marquette.

The defendants rely: (1). Upon the fact that the record title stands in Hull's name; (2) upon the tax receipt dated January 10, 1871, for the taxes of 1870, which was made out in the name of Alfred Hull and produced by the defendant; (3) the payment of certain taxes upon the lands by the estate of Alfred Hull, all made prior to the year 1888; and (4) declarations made by Hull in his lifetime which the defendants claim tend to show that Hull during his lifetime, and after his disposition of his interest in the copartnership, still claimed to be the owner of the lands in question.

It was the theory of the defendants that, by an agreement between Baldwin, Connolly, and Hull (as to which agreement there is no evidence in the record), the legal title to the lands entered in their individual names should be and remain in them as individuals, while the partnership had the right to remove the timber therefrom, and this theory seems to have been accepted by the learned circuit judge. His opinion is, in part, as follows: "The complainants cannot claim that they have by direct proof shown any express agreement that the lands in question were partnership property. They seem to rely upon circumstances, dealings, and acts of the parties. In order to establish the fact, these circumstances, dealings, and

acts should in convincing weight be the equivalent of an express agreement. In other words, they should be so clear and unequivocal that they would amount to proof of the fact. . . . It seems to us that, in order for the complainants to prevail here, it ought to appear: (1) That the property was purchased with partnership funds for partnership purposes; and (2) that it was used by the partnership for its purposes. Both of these propositions should appear, and they should concur. Where the articles of partnership and the books of account fail to show the necessary facts, the inference that the lands held individually, or by partners as tenants in common, were in fact partnership property, can only be drawn from facts capable by no possibility of any other reasonable construction than that the land was purchased with partnership funds for partnership purposes; and if from the facts the inference may be reasonably against partnership ownership, that inference must be adopted. . . . By the record title these lands were the individual property of Alfred Hull. That the title could only pass from him by an agreement or contract of some kind. The complainants have failed to show such an agreement. No witness has been produced who testifies to any such understanding. The partnership agreement does not show any such understanding. It is silent as to any lands. The books of account do not show any such understanding. They are silent as to these lands. No dealing of the firm while Hull was a member shows such an understanding. No statement of any member of the firm to any third person of such an understanding is produced. It is not shown that this land was purchased with the firm's money, nor that the firm paid the taxes at any time."

In his conclusions and his application of the facts to the law, we believe that the learned circuit judge was in error. It is clear that no express agreement is necessary; but we are of opinion that it is not necessary that "these circumstances and dealings should in convincing weight be the equivalent of an express agreement." This is not the law. Whether or not land taken in the name of one or more partners is in fact partnership property always depends upon the intent of the parties and the understanding and design under which they acted. It is clear that an express agreement may show this intent; but it may also be established by an implied agreement. This implied agreement may be gathered by considering the general purpose of the parties, the nature of their business, and the manner in which they have dealt with the property in question. See *Lindsay v. Race*, 103 Mich. 28, 37 L.R.A. (N.S.)

61 N. W. 271, where this court said: "Whether lands held in the name of one partner or of both are to be deemed co-partnership property is generally a question of intent, to be gathered from the manner in which the members of the firm have dealt with them." In *Way v. Stebbins*, 47 Mich. 296, 11 N. W. 166, this court said: "The rule in this state has been well settled that property purchased with a design that it should become partnership property, and actually used in accordance with that design, must be regarded as firm assets." See also: *Richards v. Manson*, 101 Mass. 482; *Arnold v. Wainwright*, 6 Minn. 358, Gil. 241, 80 Am. Dec. 448.

In *Ames v. Ames* (C. C.) 37 Fed. 30, the court said: "And following the suggestions there made, it may be affirmed that no written agreement is necessary, that no parol express agreement even is necessary, for a court of equity to hold that real estate standing in the names of individual partners is partnership property, and it is enough if, from all the acts and conduct of the parties, the court can be satisfied that it was the thought and intent of the partners to treat it as partnership property. . . . But it is said by counsel for defendants that the legal title was taken in the names of the individual partners; that the fact that the conveyances were so made indicates the intent to make the property individual rather than partnership property; and that, in the absence of an express agreement, in order to establish an implied agreement that this property, whose title was thus located in the individual partners, was to be partnership property, the fact shown must be such as to be necessarily inconsistent with the intent to leave the ownership where the title deeds put it. I cannot agree with counsel's view of the significance of the conveyances and the location of the legal title." In the same case the court quoted with approval the following from *Morrison v. Mendenhall*, 18 Minn. 232, Gil. 212: "A conveyance of real estate, or of an interest therein, must run to some person (a corporation being regarded in law as a person), and a partnership, as such, not being a person, conveyances of real estate for the use and benefit of a partnership have usually and aptly been made to the individual partners jointly, as tenants in common,"—citing cases.

In *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497, the court said: "As the legal title to real property can only be held by a person, or a corporate entity, which is deemed such in law, it follows that the conveyance in question vested no legal title or estate in the grantee therein named, because of partnership, as such, is not recognized in law



as a person." As therefore, under the laws of Minnesota, a conveyance to the partnership was not the proper mode of transferring title, it would be strange if the conveyance to the individual partners carried with it that significance and potency which counsel for defendants claim. On the contrary, it seems to me the rule is, as heretofore indicated, that, in the absence of express agreement, no one matter is conclusive upon the question of intention; and that, from all the facts, the court is to deduce and determine the real intent of the partners. See also *Waterer v. Waterer*, L. R. 15 Eq. 402, 21 Week. Rep. 508.

The court below said that it should appear: (1) That the property was purchased with partnership funds; and (2) that it was used by the partnership for its purposes. Both of these propositions should appear, and they should concur. "Where the articles of partnership and the book of account fail to show the necessary facts, the inference that the lands held individually, or by partners as tenants in common, were in fact partnership property, can only be drawn from facts capable by no possibility of any other reasonable construction than that the land was purchased with partnership funds for partnership purposes." In *Merritt v. Dickey*, 38 Mich. 41, Chief Justice Campbell, at page 44, said: "The law has always been settled in this state that real property which actually was designed to be, and which was in fact treated during the existence of the firm, as partnership assets, must be so regarded in equity, and the legal estate must be held by the heirs of a deceased partner as trustees for the equitable purposes of the firm."

We are of opinion that it is not necessary to show that the partnership property was purchased with partnership funds. Land standing in the name of an individual partner may have been contributed by him as his portion or a part of his portion to the firm assets. The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property, is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control. What was the understanding of the partners? They needed land with timber upon it for the success of their enterprises. They were met at the outset with the fact that they could not enter those lands in the name of the copartnership. The lands selected had at the time no known value except the timber standing thereon. As to Baldwin and Connolly, there can be no doubt that they considered all the lands

so entered as partnership assets. They purchased, or believed they purchased, from Hull his interest not alone in the mill, but in the lands. When they sold thereafter, they sold not alone an interest in the mill and the lands standing in their individual names, but likewise an interest in the lands standing in Hull's name, and finally, when Connolly and the Hartmans, who had purchased from Baldwin, sold to Johnson,—still in the lifetime of Hull,—they warranted title not alone to the lands held by themselves, but likewise to the lands standing in the name of Hull. We do not think it can be said that "the books of account fail to show the necessary facts." The books themselves at this late date could not be produced, and it is no more possible to say that they fail to disclose the necessary facts than it is to assert that they contain the necessary entries. That Hull's understanding and intention was the same as that of his partners—about which there can be no doubt—we think sufficiently appears. He was the least able of any of the three financially to sustain his proportion of the burden. The partnership contract shows that "the proceeds of lumber sold, after reserving the cost of sawing and furnishing, are to be applied, first, to the payment of bills," etc. His letter of August 30, 1886, to A. R. Connolly, contains the following: "I shall keep the work moving in your absence. There is one fact that is plain to be seen: If the concern is made to pay for itself, we have got to put our shoulders to the wheel."

He (Hull), as before noticed, stood by and saw the lands to which he had legal title divested of their value, and purchased the product thereof. He knew of the conveyance of Baldwin to Oliver, and of Baldwin to the Hartmans, which dealt not alone with the timber, but with the lands themselves, to which he had title. In 1871, four years after he had left the copartnership, in appending a list of his assets to his will, he did not include the lands in question, although he did include 540 acres of land in Delta county, an undivided one-third interest in which he owned with R. A. Connolly, and he did include a note of Baldwin and Connolly for \$500.38, which he had received for his interest in the copartnership. The fact that he omitted to include these lands is conclusive in the mind of the court as to his understanding. It cannot be said that it was an oversight, because he included other lands which he owned with Connolly at the time. His attention thereby being directed to his relations with Connolly and their joint holdings, and by the mention of the note received from Connolly and Baldwin for the purchase of his interest in the co-

partnership, his attention was particularly drawn to the partnership enterprise. His failure to include the lands in question in this suit therefore is equivalent to a declaration on his part that he had no interest therein.

A further significant fact is that, in the final account of his estate, the lands are not included, although the schedule attached to the final account contains twenty nine descriptions, and recites that it is a schedule of the real estate belonging to the estate of Alfred Hull, deceased, remaining undisposed of and subject to the order of the court. Opposed to this mass of evidence is the fact that the legal title stands in the name of Alfred Hull, and that the defendants produced a tax receipt for the year 1870 in his name. No testimony is introduced tending to show under what circumstances Hull paid the taxes, or whether in fact he did pay them. His business relations with Baldwin and Connolly appear to have continued to be of an intimate character even after the dissolution of the partnership, and, as shown by his will, he was interested with Connolly in other lands. His estate continued to pay taxes on the lands for some years, but discontinued payment prior to 1888. His declarations, made after the dissolution of the partnership, relied upon by the defendants, as to his continued ownership of the lands, when carefully examined, do not necessarily refer to the lands in question. He owned other lands in the vicinity referred to, and in making the statements relied upon may have had those in mind. In any event, they must be regarded as self-serving in character, and as such are entitled to little consideration from the court.

We think the case at bar should be considered, on the one hand, as if Baldwin and Connolly were the complainants, and, upon the other, as if Alfred Hull were the defendant. The complainants hold the title of Baldwin and Connolly, and the defendants rest upon the title of Alfred Hull. This being true, we are of opinion that the learned circuit judge, in relying upon the cases of *Reynolds v. Ruckman*, 35 Mich. 80, and *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321, was in error. In each of those cases the rights of third parties, strangers to the copartnership, were involved; whereas, in the case at bar, as above intimated, it is the rights of the partners themselves as between each other we are called upon to determine. It is clear to the court that, if Alfred Hull himself were standing as the defendant here, asking affirmative relief at the hands of the court against these complainants as the defendants at bar do, he would, under the state of facts set forth, be held to be estopped. While it is true that

in this state title to real estate cannot be passed by estoppel (see *Hayes v. Livingston*, 34 Mich. 384, 22 Am. Rep. 533), and such a defense cannot be relied upon in an action at law, nevertheless in equity the rule is different. In *Hayes v. Livingston*, supra, Chief Judge Cooley said: "Equity may always compel the owner of the title to release it where that is the proper redress for a fraud committed by him in respect to the title. . . . And when one asserts that the owner of land ought to surrender it to him because of the owner's fraudulent acts and conduct, it is manifest that his claim is only an equitable claim, set up and asserted against the legal claim. The one has the legal title, and the other seeks to overthrow it by providing a superior equity. This he may be able to do in a court of equity; but we cannot admit that at law the legal title is not entitled to prevail." Again, in *Moran v. Palmer*, 13 Mich. 367, the same judge said: "It is a well-settled principle of equity that if a man, having a title to an estate which is offered for sale, knowingly allows another to sell it to a purchaser who supposes the title to be good, without, at the time, asserting his title, he shall be bound by the sale, and neither he nor his privies shall be allowed to dispute its validity,"—citing many authorities.

After a careful examination of all the evidence in the record, we are of opinion: That the complainants show by a fair preponderance of the evidence that the lands in question, although entered in the name of Alfred Hull, were in fact always considered by him and his partners as partnership property; that they were dealt with during the lifetime of Hull with his knowledge as partnership property; that they were regarded by him, when he was engaged in so solemn an act as preparing his last will and testament, as belonging to his associates, and not to himself; and that they should now be so treated.

The decree of the court will be reversed, and a decree will be entered in this court in accordance with the prayer of the bill of complaint. A decree will likewise be entered in this court in the second case upon the footings of this opinion, in accordance with the prayer of the bill of complaint.

**Grant, Montgomery, Hooker, Moore, and McAlvay, JJ., concur.**

**Ostrander, J., concurring:**

I concur in the conclusions announced in the opinion of Mr. Justice Brooke. I base concurrence, mainly, upon the terms of the articles of partnership and the nature of the business contemplated. The busi-

ness was sawing and selling lumber. Logs were required for sawing. They had to be, and were, acquired after the articles were executed. Whether they were bought from individuals, or were cut from lands, they had to be in some way paid for just as the sawmill and fixtures had to be paid for. I can refer that provision in the articles which requires that each partner shall "pay one third of the whole cost" to no particular item of expenditure. It was operative during the existence of the partnership, and, used as it is in connection with "losses," cannot be said to mean merely the cost of the mill. Presumptively, in equity, as at law, the holder of the legal title owns the land. It is established that these partners made separate entries or purchases of land, and it may be safely assumed that the lands entered by each were not of equal value,—did not involve the expenditure of the same amount of money. There was, however, but one purpose in buying them, and it is not easy to understand how the cost of the principal adventure could be shared equally and the profits divided equally, pursuant to the agreement, unless each paid one third of the cost of the lands. I think it must be presumed that the cost of the land in question was paid by the partnership.

The cases of Reynolds v. Ruckman, 35 Mich. 80, and Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321, are not controlling, for the reason that defendants did not acquire title in reliance upon the records of title.

Blair, Ch. J., concurs.

Petition for rehearing denied.

#### NORTH CAROLINA SUPREME COURT.

JOSEPH L. MAY and Wife  
v.  
WESTERN UNION TELEGRAPH COMPANY, Appt.

(157 N. C. 416, 72 S. E. 1059.)

#### Trespass — fright — liability.

1. One having a right to enter upon an-

*Note. — Personal wrong as aggravation of damages for trespass on realty.*

This note is supplemental to notes in 53 L.R.A. 631, and 19 L.R.A.(N.S.) 1034.

The point is also incidentally touched upon in the note in 3 L.R.A.(N.S.) 66, covering the general subject of the right to recover for physical injury resulting from fright caused by a wrongful act.

An allegation of trespass to person may 37 L.R.A.(N.S.)

other's property to remove telegraph poles is liable for injury to the wife of the one in possession thereof, frightened because of the loud, profane, boisterous, and lewd language employed by his servants upon the premises and towards her while in the execution of the work, and their entry of the dwelling without right.

#### Same — injury to wife — recovery by husband.

2. A man may recover damages from one who trespasses upon his property and frightens his wife to her injury, for the expenses imposed upon him and the deprivation of society and services of the wife because of the trespass.

#### Damages — punitive — wantonness.

3. Punitive damages may be allowed against persons who, after rightfully entering upon property to remove poles therefrom, use loud, profane, and lewd language in the presence of the wife of the occupant, and enter his dwelling without authority, frightening her to her injury.

(December 6, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for Guilford County in plaintiffs' favor in an action brought to recover damages for an unlawful trespass on plaintiffs' property. Affirmed.

The facts are stated in the opinion.

Messrs. King & Kimball, for appellant: Plaintiffs were not entitled to recover punitive damages.

Warren v. Coharie Lumber Co. 154 N. C. 39, 69 S. E. 685; Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180; Western U. Tele. Co. v. Dickens, 148 Ala. 480, 41 So. 469; Bradshaw v. Buchanan, 50 Tex. 492; Holmes v. Carolina C. R. Co. 94 N. C. 318; Ammons v. Southern R. Co. 140 N. C. 200, 52 S. E. 731; Stanford v. A. F. Messick Grocery Co. 143 N. C. 419, 55 S. E. 815; 2 Sutherland, Damages, 3d ed. §§ 391-403; Hale, Damages, 207.

There is no liability resting upon defendant. No rights of the plaintiffs, or either of them, were invaded by the defendant; the wrong if any, was done to John May, and this wrong has been righted by settlement and release, and it cannot be that each and every one of his guests and boarders at the time in question can maintain separate suits.

be inserted in declaration in trespass *q. c. f.*, as matter of aggravation. Waldo v. Waldo, 52 Mich. 94, 17 N. W. 710; Gilbert v. Pritchard, 41 Hun, 46; Russell v. Corn, 6 Mod. 127 (dictum).

Abusive conduct of a trespasser which causes one to become frightened and sick may be considered in aggravation of damages. Mitchell v. Mitchell, 54 Minn. 301, 55 N. W. 1134.

And in Gusdorff v. Duncan, 94 Md. 160.

*White v. Sander*, 168 Mass. 296, 47 N. E. 90; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740; *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; *Bucknam v. Great Northern R. Co.* 76 Minn. 373, 79 N. W. 98.

If the servant, after doing that which he is employed to do, does something else which he is not employed to do at all, the master is not responsible for what he does.

*Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 523, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718; *Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 353, 70 L.R.A. 738, 51 S. E. 1015; *Marlowe v.*

*Bland*, 154 N. C. 140, — L.R.A.(N.S.) —, 69 S. E. 752; *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440; *Roberts v. Southern R. Co.* 143 N. C. 180, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375; *Stewart v. Cary Lumber Co.* 146 N. C. 47, 59 S. E. 545; *Hunter v. Southern R. Co.* 152 N. C. 682, 29 L.R.A.(N.S.) 851, 136 Am. St. Rep. 854, 68 S. E. 237; *Redditt v. Singer Mfg. Co.* 124 N. C. 100, 32 S. E. 392; *Moore v. Cohen*, 128 N. C. 345, 38 S. E. 919; *Willis v. Atlantic & D. R. Co.* 120 N. C. 508, 26 S. E. 784.

Messrs. R. C. Strudwick and F. P. Hobgood, Jr., for appellees:

The defendant is liable.

*Jackson v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E.

50 Atl. 574, it was held that in trespass *q. c. f.* the jury might award punitive damages, where defendants conducted themselves in such a violent and angry manner, and used such abusive and insulting language, that plaintiff was put in bodily fright and alarm.

In estimating damages for unlawful eviction in cold weather, unnecessary suffering occasioned may be considered. *Raynor v. Nims*, 37 Mich. 34, 26 Am. Rep. 493.

In *Newman v. St. Louis & I. M. R. Co.* 2 Mo. App. 402, where a trespass was persisted in after remonstrance, and with threats of arrest if interfered with, and occupants of the land were terrified and disturbed and their lives endangered by blasting with gunpowder, it was held that these circumstances could be considered aggravation of damages.

And in *Koester v. Cowan*, 37 Ill. App. 252, where an altercation arose between an owner of land and one committing trespass, and the latter called a police officer and had the former arrested, the court held that the jury were warranted in assessing more than the actual damages to the land.

In *Stevens v. Stevens*, 96 Ga. 374, 23 S. E. 312, it was held that damages for wrongful expulsion of a widow from a house occupied by the husband at the time of his death, and held by her until assignment of dower, should include damages to her health and those referable to pain and suffering such as were the natural and probable result of the wrongful act of the trespasser.

Where trespass is wilful, malicious, and reckless, and characterized by acts of indignity and humiliation, "it is a proper case for exemplary damages, and one in which the law should afford substantial protection against such outrages in the way of liberal damages, that the public tranquillity may be preserved by saving the necessity of a resort to violence as the only means of redress." *West Chicago Street R. Co. v. Morrison, A. & A. Co.* 160 Ill. 288, 43 N. E. 393.

Where one enters upon the close of another, and affixes to the house a malicious 37 L.R.A.(N.S.)

and insulting handbill, calculated to bring reproach, contempt, and infamy upon him, and to disgrace him in the eyes of his own family, such circumstances may be taken into consideration in aggravation of damages in an action of trespass. *Ogden v. Gibbons*, 5 N. J. L. 518.

And in *Bonsall v. McKay*, 1 Houst. (Del.) 520, which was an action of trespass against a landlord for breaking and entering the close, and unlawfully turning the tenant out of possession, and there was evidence that defendant had taken hold of plaintiff to put him off, which attempt was resisted, and a scuffle ensued, the court, in its charge to the jury, said that where there are circumstances of aggravation attending the trespass on the part of defendant, the jury may in their discretion award exemplary damages.

Compensatory damages in an action of trespass for breaking and entering a house to remove a gas meter may embrace damages for injury, insult, and invasion of privacy. *Reed v. New York & R. Gas Co.* 93 App. Div. 453, 87 N. Y. Supp. 810.

And so, in *Bouillon v. Laclede Gaslight Co.* 148 Mo. App. 462, 129 S. W. 401, where an agent of defendant gas company wrongfully entered a flat to read the gas meter, and used such violent language that it frightened the occupant and caused her to have a miscarriage, it was held that in an action for trespass recovery could be had for the miscarriage resulting from the fright, and the mental anguish caused by the trespass, though agent did not know that plaintiff was confined because of pregnancy.

In *Ford v. Schliessman*, 107 Wis. 479, 83 N. W. 761, where the evidence showed that defendant, without plaintiff's consent and against her protest, entered the house in the nighttime, during the absence of plaintiff's husband, and made indecent demonstrations, putting plaintiff in great fear and frightening her, it was held that plaintiff might recover for such damages as she sustained by reason of such invasion of her possession and rights, even though the evi-

1015; *Stewart v. Cary Lumber Co.* 146 N. C. 47, 59 S. E. 545; *Hayes v. Southern R. Co.* 141 N. C. 195, 53 S. E. 847; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Tiffany, Agency*, 270-273; *Waalor v. Great Northern R. Co.* 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097; *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925; *Sawyer v. Norfolk & S. R. Co.* 142 N. C. 1, 115 Am. St. Rep. 716, 54 S. E. 793, 9 Ann. Cas. 440; *Rosecranes v. Iowa & M. Teleph. Co.* 65 Iowa, 444, 21 N. W. 769; *Marlowe v. Bland*, 154 N. C. 140, — L.R.A.(N.S.) —, 69 S. E. 752; *Baltimore & O. R. Co. v. Deck*, 102 Md. 669, 62 Atl. 958; *Collins v. Wise*, 190 Mass. 206, 76 N. E. 657; *Magar v. Hammond*, 183 N. Y. 387, 3 L.R.A.(N.S.) 1038, 76 N. E. 474; *DeHaven v. Hennessey Bros. & E. Co.* 69 C. C. A. 620, 137 Fed. 472; *Postal Telegr. Cable Co. v. Brantley*, 107 Ala. 683, 18 So. 321; *Reed v. New York & R. Gas Co.* 93 App. Div. 453, 87 N. Y. Supp. 810; *Birmingham Waterworks Co. v. Hubbard*, 85 Ala. 179, 7 Am. St. Rep. 35, 4 So. 607; *Smith v. Webster*, 23 Mich. 298; *Luttrell v. Hazen*, 3 Sneed, 20; *Lesch v. Great Northern R. Co.* 93 Minn. 435, 101 N. W. 965; *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680; *Western U. Telegr. Co. v. Satterfield*, 34 Ill. App. 386; *Van Sieten v. Jamaica Electric Light Co.* 45 App. Div. 1, 61 N. Y. Supp. 210; 26 Cyc. 1532, note, 93; *Barden v. Felch*, 109 Mass. 154; *McClung v. Dearborne*, 134 Pa. 396, 8 L.R.A.

204, 19 Am. St. Rep. 708, 19 Atl. 698; *Grant v. Singer Mfg. Co.* 190 Mass. 489, 6 L.R.A.(N.S.) 567, 77 N. E. 480; *Moore v. Camden & T. R. Co.* 74 N. J. L. 498, 122 Am. St. Rep. 399, 65 Atl. 1021.

Punitive damages may be recovered.

*Duncan v. Stalcup*, 18 N. C. (1 Dev. & B. L.) 441; *Wylie v. Smitherman*, 30 N. C. (8 Ired. L.) 239; *Gilreath v. Allen*, 32 N. C. (10 Ired. L.) 69; *Sowers v. Sowers*, 87 N. C. 307; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Waters v. Greenleaf-Johnson Lumber Co.* 115 N. C. 656, 20 S. E. 718; *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A.(N.S.) 485, 23 S. E. 327; *Hansley v. Jamesville & W. R. Co.* 117 N. C. 565, 32 L.R.A. 551, 53 Am. St. Rep. 600, 23 S. E. 443; *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917; *Strother v. Aberdeen & A. R. Co.* 123 N. C. 197, 31 S. E. 386; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; *Redditt v. Singer Mfg. Co.* 124 N. C. 100, 32 S. E. 392; *Brendle v. Spencer*, 125 N. C. 474, 34 S. E. 634; *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925; *Jackson v. American Teleph. & Telegr. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015; *Hayes v. Southern R. Co.* 141 N. C. 195, 53 S. E. 847; *Brame v. Clark*, 148 N. C. 364, 19 L.R.A.(N.S.) 1033, 62 S. E. 418, 16 Ann. Cas. 73; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Tiffany, Agency*,

dence was insufficient to show any direct assault upon the plaintiff, or any attempt to have carnal intercourse with her.

And in *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272, where there was a forcible entry of a house in the absence of the husband, it was held that a charge to the jury that "if the manner of defendants, or either of them, in the taking, was by threats, or in an insolent, overbearing, and insulting manner, done in such a way as would naturally outrage the feelings of plaintiffs, then you will find for plaintiffs, for such an amount as you may deem proper and adequate; for if you so find the facts, the law allows the jury to affix such an amount as in the opinion of the jury such wrongful acts call for," was correct.

In *Weyer v. Wegner*, 58 Tex. 539, where there was an entry upon premises without warrant of law, and with no probable cause to believe that stolen property was secreted thereon, and over the protest of the plaintiff, with avowed purpose of searching for stolen property, it was held that it was proper to return a verdict for exemplary damages. The court said: "There is perhaps no man, unless it be one wanting in all honorable feeling, who would not feel that such an entry upon his premises, for such a purpose, was an insult most grievous in its character, and, in the absence of cause

therefor, most vexatious and wanton. No greater indignity could be heaped upon a man than to enter his premises with a charge that thereon was property acquired by crime, and that the presence of the intruder was for the purpose of keeping guard over the owner of the premises, to prevent him from concealing it; thus bearing the accusation that the owner was the criminal, or ready to assist some other person who was."

But in *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56, it was said that while, in an action for trespass, such circumstances of aggravation as would entitle to punitive damages might be alleged, yet they must be pleaded in such a manner that there may be no ambiguity or uncertainty that they are set forth solely for the purpose of establishing such claim. If they are pleaded in such a manner as would be proper in an action brought to recover damages other than those for trespass, the complaint will be subject to demurrer for misjoinder of causes of action.

And in *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683, 77 S. W. 829, it was held that vexation, humiliation, and annoyance cannot be taken as elements of damages against a city for trespassing upon the lands of another.

J. H. B.

270, 273; *Fell v. Northern P. R. Co.* 44 Fed. 248.

Walker, J., delivered the opinion of the court:

This action was brought to recover damages for a trespass on land. The plaintiffs, husband and wife, alleged that the servants of the defendant entered upon the land of John May, where they were living, for the purpose of removing telegraph poles, and, while so engaged in their employer's business, unlawfully and wrongfully violated the rights of the plaintiffs, as occupants of the land, by entering their home, and accompanied their act of trespass by menaces of violence and the use of profane and vulgar words, and by other conduct and acts, which were unprovoked and nothing less than inexcusable, if not wanton. The defendants justify upon the ground that they had the right to enter in order to remove certain telegraph poles within the right of way of the North Carolina Railroad Company, or its lessee, the Southern Railway Company, and that John May, the owner of the land, licensed them to enter, and that, if they did not enter lawfully by his permission, they had the lawful right to enter and remove the poles by reason of the permission of the railway company to the telegraph company to do so, the *locus in quo* being within the right of way of the railway company.

We will assume, for the sake of the discussion, that the defendant by its servants entered lawfully upon the land, and yet this did not excuse them for what was done after their entry was made. The servants of the defendant were about their master's business when they committed the act of trespass, and they apparently did it for the purpose of advancing his interests, while doing the work assigned to them by him, in the prosecution of that work, and within the scope of their authority. There were many exceptions taken to matters of evidence, and others were addressed to collateral questions, and all of them subsidiary to the main point. (1) Was the defendant, by its servants, guilty of a trespass upon the plaintiffs' premises? (2) If so, were the plaintiffs entitled to recover punitive damages in addition to those which are compensatory?

The defendant's lawful right of entry upon the land did not authorize it or its servants to do so in a violent and insulting manner, regardless of the rights of others. We do not think that we venture anything in asserting this to be a general statement of the law. There was evidence in the case to the following effect: That the servants of the defendant during the day in

question, and while on the premises of John May engaged in the work already described, indulged in loud, profane, and boisterous language, and sang lewd and vulgar songs, to the terror of the *feme* plaintiff and others; that they yelled at the *feme* plaintiff and others in the house; that they invaded the house, and at one time seized a guitar which was there, and played on it, and sang ribald songs; that Stern, defendant's principal foreman in charge of said crews, went to the well near by, and, facing the open door of the *feme* plaintiff's bedroom, yelled at her and sang lewd and vulgar songs in her immediate presence and hearing; and that the noise and tumult, the profanity and vulgar songs of defendant's servants throughout the day, and while engaged in moving the poles in question, were so great, loud, and boisterous as to be heard by many people in the neighborhood; that in the morning, standing on the railroad tracks, Joseph L. May, one of the plaintiffs, told Stern and May, the two foremen of defendant in charge of said crews, of the bad and precarious health of his wife, and that she was in the house, and asked them not to go upon the property of his father; that Stern replied that he had orders from the defendant to set the poles on John May's land, and that he would set them there regardless of witness's or any other man's wife, and that he did not "give a damn." There was further evidence as to the injury suffered by the *feme* plaintiff, resulting in a state of unconsciousness followed by great suffering and permanently impaired health, and as to the damages suffered by the male plaintiff in consequence of the defendants' wrong. The defendants entered at first lawfully, but afterwards abused their right of entry while in the prosecution of their work, by acts and conduct which were plainly in violation of the rights of the plaintiffs, who were then in the lawful and peaceable possession of the premises. Conduct more reprehensible, under the circumstances, could not well be imagined. The *feme* plaintiff was in a delicate condition, and, in consequence of the violent and insulting manner in which the defendants invaded her home, and even her private apartments, her health was greatly impaired. Defendant answers that its servants did not know of her physical condition, but this is no excuse. Their tortious acts were the immediate, natural, and proximate cause of her injuries. So far as the liability of the defendant for this wrong is concerned, it is not necessary that it should have contemplated the particular injury which the wrongful act produced, but it is liable if the wrong was of such a character as to be injurious in its natural and proximate

consequences. It can make no difference in the view of the law whether it hurts one part or another of the person who is injured. The law will not excuse a defendant if, in committing the wrongful act, he aimed at the foot to wound, and killed by striking the head or the heart. His wrong is the same in law, and is actionable, though he may have missed his mark. He is in such a case presumed to have intended the natural and probable consequences of his act. *Drum v. Miller*, 135 N. C. 204, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421. In that case, distinguishing negligent from wilful torts, we said: "In the case of wilful or intentional wrongdoing, we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter under the general rule of liability, and, assuming that no just cause of exception to it is present, 'it is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and, having begun an act of wrongful mischief, he cannot stop the risk at his pleasure, nor confine it to the precise objects he laid out, but must abide it fully and to the end.' The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts." It will be seen from this quotation that in the case of a wilful tort the wrongdoer is responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury. But the matter is made clearer, and the ruling in that case more pertinent to the question now under consideration, by what the court said later, at page 214 of 135 N. C.: "It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences."

But it seems to us that this case in all of its essential features is like that of *Jack-*  
37 L.R.A. (N.S.)

*son v. American Teleph. & Teleg. Co.* 139 N. C. 347, 70 L.R.A. 738, 51 S. E. 1015, and must be governed by it. The language there used is so directly applicable to the facts disclosed by the evidence in this case, that we cannot more clearly state the law which we think should determine the question now presented, than by repeating what we then said: "The jury have found that the defendant by its servant caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment, and in furtherance of the master's business for his benefit and advantage, it would be hard to conceive of one which would come under that class. The case is in principle like that of *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286, which has at least twice been approved by this court. *Hussey v. Norfolk Southern R. Co.* 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; *Redditt v. Singer Mfg. Co.* 124 N. C. 100, 32 S. E. 392. In *Harris's* Case the defendants by their servants committed, it is true, a direct and violent trespass upon lands in order to carry on their master's work, and in doing so shot and injured the plaintiff; but is there any difference in law between the two cases? It is not the quality of the act that determines a master's liability, but the fact that it is done by his implied direction; that is, within the scope of the servant's authority, in the course of his employment, and in furtherance of his master's interests. *Daniel v. Atlantic Coast Line R. Co.* 136 N. C. 517, 67 L.R.A. 455, 48 S. E. 816, 1 Ann. Cas. 718; *Daniel v. Petersburg R. Co.* 117 N. C. 592, 4 L.R.A. (N.S.) 485, 23 S. E. 327; *Kelly v. Durham Traction Co.* 133 N. C. 418, 45 S. E. 826; *Lovick v. Atlantic Coast Line R. Co.* 129 N. C. 427, 40 S. E. 191; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L.R.A. 316, 32 S. E. 399; and *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925. It was in this case a question for the jury under proper instructions from the court, whether *McManus* in arresting the plaintiff was performing his master's business, or was engaged in some pursuit of his own. *Hussey v. Norfolk Southern R. Co.* and *Daniel v. Atlantic Coast Line R. Co.* supra; *Tiffany, Agency*, 271. The court charged fully and correctly in respect to this matter." And so in the case at bar the court instructed the jury fully upon the facts and the law, in a clear and able charge, which surely could have left no doubt in the minds of the jurors as to what the rights of the par-

ties were under the law and upon the facts as they might find them to be.

The fact that the defendant's servants did not commit an assault or a battery upon the plaintiffs cannot change the result. They unlawfully trespassed upon their property, and, if their other acts did not, by themselves, constitute an actionable wrong, the jury could at least consider them in aggravation of damages. We held in *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A. (N.S.) 545, 55 S. E. 778, that the general principles of the law of torts support a right of action for physical injuries resulting from either a wilful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter. Approving what is said in the text-books, Justice Brown, who wrote an able and learned opinion for the court in that leading case, thus summarized the result of our investigations: "A recent writer on the subject trenchantly says: 'To deny recovery against one whose wilful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results instead in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent, indeed, if it shall be entitled to respect.' Case and Comment, August, 1906. A text writer of repute says: 'The preferable rule on this subject is, in our opinion, that if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries result directly from the mental disturbance, there should be a recovery for the anguish of mind and its consequent physical ills, irrespective of contemporaneous bodily hurt.' Watson, Damages for Personal Injuries, § 405." This is a sufficient answer to the contention that there must have been some direct physical injury to the plaintiffs, in order to render the acts of the defendant's servants tortious in a legal sense, and consequently actionable.

The *Howland* Case also answers another position of the defendant, that the husband of the *feme* plaintiff cannot recover for the wrong done to his wife, and in these words: "It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense or is deprived of the society or the services of his wife, he is

entitled to recover therefor, and he may sue in his own name. 15 Am. & Eng. Enc. Law, 2d ed. 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the court so charged the jury, and directed them to allow nothing on that account. His Honor correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife, and that the injury inflicted was of such a character as to deprive the husband of her society, services, aid, and comfort. The court further charged that, if the injuries are permanent, the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction we think is correct and supported by authority. 6 Thomp. Neg. §§ 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor, under all the circumstances of the case." It may be added that in this case defendant's servants trespassed upon the husband's property,—his home. He had possession, and they entered after being forbidden to do so.

As to punitive damages, the rule is well settled that when the wrong is wilful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, exemplary damages may be added by the jury, to punish the offender as an example to others, and to vindicate justice. Hale, Damages, p. 209. The subject is fully considered in the recent case of *Saunders v. Gilbert*, 156 N. C. 463, — L.R.A. (N.S.) —, 72 S. E. 610; the facts being substantially like those in this case, and we refer to that decision without further discussion of this exception as to the correctness of the court's ruling that the jury could in their discretion allow punitive damages.

We have considered the case as if the defendant's right to enter upon the land as part of the right of way of the North Carolina Railroad Company, by its permission, was clear, though the concession was made only for the sake of argument. It had no right, by itself or its servants, to abuse the license or privilege by grossly violating the rights of others in peaceable possession of the land, and especially it may be said the defendant by its servants did not have the lawful right to enter the home of plaintiffs in the manner adopted by them. Their entry upon the premises had been forbidden



and was opposed, though not forcibly, by the owner and occupants of the land. The acts complained of were committed in an effort to overcome this opposition, by over-awing the plaintiffs, in order that defendant's servants might proceed unmolested in the prosecution of their master's business. The other exceptions require no special consideration.

No error.

#### NORTH DAKOTA SUPREME COURT.

ALEXANDER McKENZIE, Resp.,

v.

STEVEN GUSSNER et al., Appts.

(— N. D. —, 134 N. W. 33.)

**Party — equitable interest — quieting title — omission — effect.**

1. It is not ground for nonsuit that persons having equitable interests, other than

Headnotes by Goss, J.

**Note. — Occupying claimants act; right to allowance for improvements made before acquiring color of title.**

This note is confined to cases directly involving and passing upon the right of an occupant of land to compensation, after his title has been declared invalid, for improvements made upon the land, as affected by the fact that they were made before the acquiring of the color of title under which he claims,—which question has arisen only, as in *McKENZIE v. GUSSNER*, under various so-called "occupying claimant" or "betterment" or "improvement" acts.

As to rights in respect to compensation for improvements on land, made in good faith, under an oral contract or gift, see note to *Luton v. Badham*, 53 L.R.A. 337.

As to the right of one holding under an invalid tax deed to be reimbursed for improvements, see note to *Parker v. Daly*, 34 L.R.A. (N.S.) 549.

Occupying claimant laws, being in derogation of the common law must be strictly construed. 22 Cyc. 13.

Under the Arkansas betterment act, requiring that the occupant must have had peaceable possession at the time the improvements were made, under color of title and under belief that he was the owner of the land, he cannot recover for improvements made before he acquired his color of title. *Anderson v. Williams*, 59 Ark. 144, 26 S. W. 818.

And under a section of the Minnesota occupying claimants act, providing that "where any person, under color of title in fee, and in good faith, has peacefully taken possession of any land for which he has given a valuable consideration. . . . neither such person, nor his heirs, represen-

ownership, in real property, title to which is sought to be quieted, are not made parties plaintiff, when such persons participate in the action, through the plaintiff, to an extent that the decree will bind them, equally with the parties to the action, when the action is maintained by the record owner as the real party in interest.

**Betterments — made before color of title — effect.**

2. A claim for betterments to realty by permanent improvements made thereon is not established by proof of the placing of permanent improvements on the real property of another under no claim, right, or title thereto; nor can the purchase, several years thereafter, of a void but purported title, under which to claim color of title to such realty, permit the allowance of such a claim for betterments, under the provisions of § 7526 of the Code. The good-faith claim of title to the realty must precede the making of such improvements; otherwise the claimant for betterments is not holding realty under color of title, and adversely to the plaintiff from whom he seeks recovery for such improvements made.

(December 11, 1912.)

tatives, or assigns, shall be ejected . . . until compensation is tendered him or them for all improvements," an occupant must have been in possession under color of title in fee, at the time of making the improvements, and an occupying claimant is not entitled, under the statute, to compensation for improvements made before he had acquired color of title. *Wheeler v. Merriman*, 30 Minn. 372, 15 N. W. 665.

A mere squatter or trespasser who has made improvements without any color of title cannot recover for them upon the ground that he afterward acquired such color of title. *Ibid*.

Likewise, under a section of the same act providing that when permanent improvements have been made by a defendant or those under whom he claims, "holding under color of title adversely to the plaintiff, in good faith," the value thereof shall be allowed against the damages of the plaintiff for the use of the property,—it must appear that the improvements were made in good faith while holding under color of title, and if made without color of title, the fact that the occupant afterwards acquired color of title will not be sufficient. *McLellan v. Omodt*, 37 Minn. 157, 33 N. W. 326.

So, under the Kentucky occupying claimant law, an occupant who has seated and improved land without any claim thereto, either in law or equity, founded upon any public record, is not entitled to compensation for the improvements by reason of his having purchased a claim, or identified his possession with a claim of record, since the commencement of an ejectment action against him. *Chiles v. Patterson*, 1 A. K. Marsh. 444; *Young v. Murray*, 3 A. K. Marsh. 58.

**A** PPEAL by defendants from a judgment of the District Court for Morton County in plaintiff's favor in an action brought to quiet title to certain real estate. Modified and affirmed.

The facts are stated in the opinion.

Mr. Melvin A. Hildreth, for appellants: Simpson, McDonald, and the Todd Land Company, or either of them, are not bound by this action. To insert their names or the names of any of them as parties plaintiff would have been erroneous.

Liebmann v. McGraw, 3 Wash. 520, 28 Pac. 1107; Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488; Wood v. Metropolitan L. Ins. Co. 96 Mich. 437, 56 N. W. 8.

On petition for rehearing.

Plaintiff is in no position to question the value of the improvements, because he is guilty of unmistakable laches which defeats his rights to the premises.

Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507; 2 Pom. Eq. Jur. 890; McQuiddy v. Ware, 20 Wall. 14, 22 L. ed. 311; School Dist. No. 8 v. Lynch, 33 Conn. 334; Turpin v. Saunders, 32 Gratt. 27; Samuels v. Bor-

rowscale, 104 Mass. 210; Kentucky Coal & Timber Development Co. v. Kentucky Union Co. 101 C. C. A. 93, 187 Fed. 945; Godden v. Kimmell, 99 U. S. 201, 25 L. ed. 431; Young v. Engdahl, 18 N. D. 167, 119 N. W. 169; Brown v. Comonow, 17 N. D. 84, 114 N. W. 728; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722."

Messrs. George P. Flannery and W. H. Stutsman, for respondent:

The measure of the sum to be allowed for improvements is the increased value of the premises to the landowner, not the cost of the improvements.

Cleland v. Clark, 123 Mich. 179, 81 Am. St. Rep. 161, 81 N. W. 1080; Haymond v. Camden, 48 W. Va. 463, 37 S. E. 642; Glass v. Abbott, 6 Bush, 622; Dunn v. Dunn, — Tenn. —, 51 S. W. 119.

Goss, J., delivered the opinion of the court:

Plaintiff brings this action to determine adverse claims and quiet title to several hundred lots in additions to Mandan. Defendants Gussner assert an interest to cer-

And under the Tennessee statute providing that a person claiming land under a lawful entry shall be entitled to compensation for improvements which he has made thereon, if he is subsequently dispossessed by due process of law, or otherwise put out of possession without his consent, such a claimant is not entitled to compensation for improvements made previous to his entry. *Townsend v. Shipp*, Cooke (Tenn.) 294.

On the other hand, under the Ohio statute providing that "any occupying claimant, being in quiet possession of land from which he can show a plain and connected title in law or equity," must be paid the value of all lasting and valuable improvements made by him or the person under whom he holds, before he can be evicted by any person setting up and proving an adverse and better title, the court said, in *Shaler v. Magin*, 2 Ohio, 235: "We discover nothing in the statute that limits the claim of the occupying claimant to a compensation for such improvements as were made after the commencement of his title. . . . There is nothing in the law that excludes a right to receive pay for improvements made by the tenant, or the person under whom he claims, at any time before the commencement of the suit."

This statement, however, seems to have been largely *obiter*, having been made "independent of this consideration," that it appeared that an entry had been made on the land in dispute, under which the defendant took possession and made the improvements in question, but which, after the improvements had been made, was withdrawn; and that about the same time another entry was made on the same land by the person under whom the defendant claimed in this 37 L.R.A. (N.S.)

action,—upon which facts, the court said: "The defendant had an equitable title of record at the time he commenced his improvements, which continued till the improvements were completed. His possession was not interrupted by the withdrawal and re-entry of the warrant, nor were the rights of the plaintiff in any manner affected by that circumstance." And further: "It is not necessary now to decide that an unsuccessful claimant must in all cases be entitled to pay for improvements made before the commencement of his title, although the statute does not contain anything expressly prohibiting it, yet a case might arise accompanied by such circumstances as would take it without both the letter and equity of the statute. All we mean to say is that this is not a case of that character." *Ibid*.

But in *Davis v. Powell*, 13 Ohio, 308, citing *Shaler v. Magin*, supra, it was distinctly held that a person who has taken possession of property in good faith, though under no color of title whatever, and who subsequently acquires such title as brings him within the statute, is, upon eviction by superior title, entitled to compensation for such valuable improvements as he may have made upon the land while in possession, before as well as after acquiring color of title, the court saying: "The equity of the statute embraces all improvements made in the honest belief of ownership, if at the time of rendition of judgment the occupant is in possession under such title as brings him within the meaning of the statute."

And under the Kansas occupying claimant act, adopted from that of Ohio, the provisions of which are expressly for the benefit of any person in possession of and holding any land under any sale for taxes su-

tain lots, and counterclaim, under § 7520, Revised Codes 1905, for permanent improvements placed thereon by them. The trial court allowed defendants a recovery, aggregating \$1,637.99, consisting of taxes paid and \$500 for a stone foundation on lots 7 and 8, \$450 for the value of a dwelling house on lots 14 and 15, and \$400 for a barn upon lots 1 and 2, of the tracts in dispute. The amount of recovery was adjudged a lien upon the premises, and, subject thereto, title was quieted in plaintiff, conditional upon the payment within a limited time of such allowance for betterments. From this judgment, defendants appeal, demanding a retrial of all issues of law and fact, and assigning as error "that portion of the third finding of fact, wherein the value of dwelling house on lots 14 and 15 is fixed at \$450, and the value of the barns and fences on lots 1 and 2 is fixed at the value of \$400." To this respondent contends that nothing should be allowed for the stone foundation in question, nor for the improvements of lots 1 and 2, nor for taxes. We are satisfied, however, that these allowances as to foundation and taxes were proper, and not excessive, and eliminate them from further consideration. The inquiry remaining concerns improvements, consisting of a barn on lots 1 and 2 and a dwelling house and appurtenances on lots 14 and 15, with an additional question of law involved in the court's re-

fusal to dismiss the action, on motion made at the close of the case, for nonjoinder of parties plaintiff.

We will first consider this last question. Plaintiff derains title from the patentee, and has had record title since 1882 to an undivided two-thirds interest in said property. Prior to the commencement of this action, through various channels, the remaining undivided one-third interest was vested by deed of record in plaintiff. Charles McDonald and William Simpson have a joint unrecorded interest with plaintiff in all this property, by reason of advancements for taxes paid and expenses incurred and work done by them, aggregating \$2,500 or \$3,000. Plaintiff, McDonald, and Simpson have an understanding, whereby, at the termination of these proceedings, and dependent on final judgment, a division of the property or adjustment of interests therein will be had. And to evidence the same, and to secure the advancements made, McKenzie executed and delivered an instrument, in form a deed of a one-third interest in the property, to Simpson, prior to the commencement of this action, and pending trial said deed was returned for correction, and other such deed to Simpson and McDonald, in lieu thereof, issued by a land company in whose hands McKenzie had placed these property matters, but such deed is subject to correction after adjustment of expenses of the liti-

thorized by the laws of the state, if his possession has been obtained without fraud or collusion, an occupant not guilty of fraud in taking possession of and improving land, and who, at the time of the trial of the action in which his title is declared defective, is in possession under a tax deed, is entitled to the benefit of the statute, and may recover for the improvements made before he obtained this deed. *Stebbins v. Guthrie*, 4 Kan. 353.

Under the Iowa occupying claimant statute, providing that "where an occupant of land has color to title thereto, and in good faith has made any valuable improvements thereon, and is afterwards found not to be the rightful owner," he shall be entitled to pay for such improvements, it is not necessary that color of title concur and coexist with good faith at the time of making the improvements, but if color of title exists when the suit of the rightful owner is brought against the occupant, the latter is entitled to compensation for any valuable improvements made in good faith, though made before he acquired color of title. *Litchfield v. Johnson*, 4 Dill. 551; *Fed. Cas. No. 8,387*.

But while "it is possible that the good faith required by the statute may exist when the improvements are made, and that color of title subsequently acquired will authorize a recovery for them," an occupying claimant who took possession of unimproved

prairie land as a mere trespasser, without any claim of right or title, merely hoping some day to buy the land, and has subsequently acquired color of title by remaining in possession of the land a sufficient length of time, cannot recover for improvements made before he had color of title, as they were not made in good faith; and the permanent improvements made under such circumstances became at once the property of the rightful owner of the land, whose title was not divested by the occupant's subsequently acquiring color of title. *Snell v. Mehan*, 80 Iowa, 53, 45 N. W. 398.

Under the Wisconsin improvement act, which allows only claims for improvements made by a party in possession while holding adversely by color of title, asserted in good faith, founded on descent or any written instrument, a person who took possession of real estate under a contract of purchase and in pursuance of its terms, and who afterwards duly received the deed of the vendor, which is subsequently declared void, is entitled to claim for improvements made from the date he entered possession of the premises under his contract, as he entered claiming ownership under a written instrument, and the deed, when made, related back to the date of the contract, making it sufficient color of title under the statute. *Dorer v. Hood*, 113 Wis. 607, 88 N. W. 1009.

A. C. W.

gation and final determination is had of the property recovered. Simpson, in behalf of himself and McDonald, has actively participated in the prosecution of this action, talking with plaintiff about it, procuring witnesses and evidence, and he and McDonald, pursuant to an understanding had, intend to pay their share of the expenses of this litigation, including attorneys' fees. Simpson testifies to these matters and to his interest to the above extent in the outcome of the suit.

The action is brought in the name of the record owner, the plaintiff. Under any phase of the testimony, he is the real owner thereof, and any deed to an undivided portion thereof is but security against loss for advancements made plaintiff, and for a future adjustment of equities. The deed evidences a security transaction, and is but a mortgage. *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *O'Toole v. Omlie*, 8 N. D. 444, 79 N. W. 849; *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289; *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; *Smith v. Jensen*, 16 N. D. 408, 114 N. W. 306; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499. And the interests of Simpson and McDonald under the record are bound by the judgment rendered herein, and are as fully litigated as though they were parties to this action. *Boyd v. Wallace*, 10 N. D. 78, 84 N. W. 760; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570; *Hart v. Wyndmere*, 21 N. D. 383, 131 N. W. 271, at page 277, and authorities there cited. We quote from the opinion in *Boyd v. Wallace*: "One who is not a party defendant on the record in an action, but who participates in the defense, and has an interest in the matter in controversy in the action, and participates in the defense for the protection of such interest, . . . and where it is known to the plaintiff that such party so participates for the protection of his own interest, he is bound by the decree rendered in the action." The converse of the proposition is equally true, and a party so acting through another as plaintiff is, under the same circumstances, himself bound by the judgment. Plaintiff's interest makes him a proper and necessary party plaintiff. Simpson's and McDonald's equitable interests appearing, had they been proper parties to the action, had they been made such; but no application therefor was made, and, they not being necessary parties, and being bound by the judgment rendered under the record, neither the interests of plaintiff nor defendants are prejudiced by their omission as parties to the action. The motion to dismiss for failure to join Simpson and McDonald as parties plaintiff, and because the action

is not brought in the names of the real parties in interest, is without merit.

Defendants counterclaim for improvements under § 7526 of the Code, providing: "In such case he may also set forth a counterclaim, and recover from plaintiff or a codefendant for permanent improvements made by him or those under whom he claims, holding under color of title in good faith adversely to the plaintiff or codefendant against whom he seeks a recovery." Based on this statute, defendant claims to recover the value of the dwelling house on lots 14 and 15, fixed by the trial court at \$450, and claimed by appellant to be worth \$1,800. An examination of the record discloses a purchase of lots 14 and 15 in 1906 for \$800, with the lots of the value of \$500. From other testimony, including a description of the house at the time of suit, we are satisfied with the trial court's findings as to this item. And the evidence sustains the findings as to the right of defendants' recovery; defendants claiming title to lots 14 and 15 based upon a deed, it a part of a purported chain of title reaching back many years; color of title having its inception in a void tax deed issued in 1891.

But as to defendants' claim for betterments for the barn placed upon lots 1 and 2, a different question is presented. This barn is claimed to be owned jointly by Stevens and George Gussner. It was placed upon these lots in 1903 and 1904, having been built elsewhere and moved thereon. In May, 1908, before the commencement of this action in September of that year, the original owner of the land, who years before had transferred by warranty deed his interest therein to plaintiff and others, quitclaimed to Steven Gussner, for an alleged consideration of \$800, lots 1 and 2, and other lots. Steven Gussner transferred in the same month part of said lots to his wife, and lots 1 and 2, with other tracts, for a consideration of \$500, to George Gussner. This deed to Steven Gussner constitutes defendants' first color of title to lots 1 and 2, and it appears to be the first time defendants ever asserted ownership to these two lots.

Steven Gussner's testimony on this is as follows:

Q. You knew at the time [1904] you didn't own anything down there except lot 21?

A. That's the first lot I bought.

Q. And these other lots belonged to —

A. I understand they belong to Helmsworth.

Q. Then you, in 1904, paid \$48.95 taxes for 1903 on all these lots, didn't you?

A. Yes.

Q. At that time you had absolutely no claim to these lots at all?

A. No.

Q. How did you come to pay these taxes?

A. I was up to the courthouse and listening, and there was a lot of lots for sale, and I went to work and bought some tax title to it.

Q. You mean in 1904 you bought these lots at a tax sale?

A. Yes.

Q. Got certificates for them?

A. Yes, sir.

Q. Now you were using these lots at that time, weren't you?

A. I never used them.

Q. You had fences around them?

A. I put a fence around to keep the cattle out.

Q. You put a big barn on them?

A. Yes, sir; I put a big barn on.

Q. That was six or seven years ago?

A. Yes.

Q. That was put on the time you paid the taxes?

A. Paid the taxes before.

Q. You have been using these lots all these years?

A. They was always laying idle most of the time; the barn is on there now.

Q. Now, when you paid these taxes for 1904, you simply paid it to get the use of the lots?

A. No; I came up there; I had to pay some taxes anyway, and I bought them.

Q. Now in 1907 you bought in these lots for the 1906 taxes, and paid \$17.46 at the tax sale, didn't you?

A. Yes, sir.

Q. Now, what was your idea in doing that? to get title of your lots?

A. Well, I got a fence down there, and so I kept the fence around there.

Q. You wanted to keep other people from moving on these lots?

A. Yes, sir.

The reason for the defendants' failure to claim ownership until the obtaining of the quitclaim deed in 1908 is further shown by the uncontradicted testimony of William Simpson, who testifies to a conversation had with Steven Gussner on or about the 3d day of December, 1907, two or three days after the tax sale that year, in which the witness told Gussner that McKenzie was going to redeem from the tax sales, and that if he (Steven) intended to get a tax deed he would never get it; Steven replying: "I am not; I only want to use the lots. I am paying those taxes in order to get the use of the lots." And nowhere in the record do the defendants claim ownership prior to the ob-

taining of the quitclaim deed in 1908. And the only claim in the answer of defendants as to the improvements to lots 1 and 2 is: "That on or about the 1st day of July, 1908, the said defendant George Gussner, together with defendant Steven Gussner, placed on said lots 1 and 2 a large frame barn, the reasonable value of which is \$1,500, in good faith, and in the belief that the defendants, George Gussner and Steven Gussner, had good title to said lots 1 and 2; and the defendant George Gussner claims a lien on said lots 1 and 2 for the sum of \$1,500, with legal interest thereon from the 1st day of July, 1908."

It is plain that neither in the pleadings nor the proof is there any pretense or claim whatever of ownership of these lots 1 and 2, until five or six years after the barn in question was moved thereon. At the time the improvements were made, therefore, they could assert no claim whatever to lots 1 and 2. Defendants knowingly affixed these permanent improvements upon the property of others, without leave or license or semblance of title. They were mere trespassers, and as such it is elementary that they are not entitled to compensation for improvements made thereon under the circumstances. See *Nesbitt v. Walters*, 38 Tex. 576; *Stille v. Shull*, 41 La. Ann. 816, 6 So. 634; *New Orleans & S. R. & Immigration Asso. v. Jones*, 68 Ala. 48; *Stamper v. Bradley*, 21 Ky. L. Rep. 806, 53 S. W. 16; *Carpentier v. Mitchell*, 29 Cal. 330; *Fischer v. Johnson*, 106 Iowa, 181, 76 N. W. 658; *Hawke v. Defebach*, 4 Dak. 20, 22 N. W. 480; *Wood v. Conrad*, 2 S. D. 334, 50 N. W. 95; *Seymour v. Cleveland*, 9 S. D. 94, 68 N. W. 171; *Skelly v. Warren*, 17 S. D. 25, 94 N. W. 408; 22 Cyc. 16, under note 72; 27 Cent. Dig. Improvements, § 7. "A mere trespasser who makes no claim of right or title, and merely hopes some day to purchase the land, cannot burden it with charges for improvements." 16 Am. & Eng. Enc. Law, 2d ed. 86.

The claim of the defendants Gussner for compensation for these improvements under the statute (§ 7526) cannot be allowed, and the contention of the respondent as to this item is sustained. The \$400 allowed by the trial court for the improvements of lots 1 and 2 was erroneous, and the judgment appealed from is modified by a reduction in said amount (\$400) as of the date of entry of judgment, and as so modified the judgment of the trial court is affirmed. Neither party is to recover costs of this court on this appeal.

Petition for rehearing denied.

VIRGINIA SUPREME COURT OF  
APPEALS.

A. HECKSCHER et al.  
v.  
JAMES W. BLANTON et al.  
—  
SAME  
v.  
J. THOMPSON BROWN et al.

(111 Va. 648, 69 S. E. 1045.)

**Election of remedies — contract by trustee to sell real estate — compelling accounting for benefit — return of brokers' commissions.**

1. Owners of real estate who have put the title in one of them for sale are estopped from suing the brokers for the

commission retained by them for effecting the sale, on the theory that the contract with them was illegal because they agreed to divide their commission with the trustee, by instituting an action against the latter to compel an accounting of the share of commission received by him, since they thereby confirmed the contract.

**Trust — profit of trustee — duty to account.**

2. One of several joint owners of real estate, in whose name the title is placed for sale, cannot be compelled to account to his co-owners for a bonus paid him by the brokers who effected the sale, for assistance rendered them, where he was guilty of no fraud or concealment, and no agreement for the bonus was made until after the sale was effected, since, by receiving the bonus, he diverts from his associates no

**Note. — Right of trustee to retain bonus or gratuity received from third person.**

The question whether a trustee is entitled to an allowance for legal services performed for the trust by himself as attorney is not within the scope of the note.

The purpose of the present note is not to discuss the cases or the general question of the right of a trustee to reap advantage from the trust estate, but is rather concerned with the precise question in *HECKSCHER v. BLANTON*, whether a gratuity or bonus received from a third person is such a profit as is embraced within the general rule that the trustee cannot be permitted to receive unto himself any profit from handling the trust estate. The rule referred to is thus laid down in 39 Cyc. 206: "In administering the trust, the trustee must act for the beneficiaries, and not for himself in antagonism to the interests of the beneficiaries; he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the *cestuis que trustent*, and from placing himself in any position where his self-interest will or may conflict with his duties as trustee. And so it is the rule that, except his lawful compensation, a trustee will not be permitted to derive any profit out of the trust, and that the *cestuis que trustent* may successfully claim any profits made out of the office of trustee or the use of trust funds, or, in case the act from which the profits arose was a breach of trust, they may, at their option, repudiate the transaction and claim interest on the money employed, instead of profits. While the rule giving the profits made by the trustee to the beneficiaries extends only to profits diverted from them, its operation and applicability are not affected by the fact that, in the particular transaction, the trustee incurred a possibility of loss, or, where there are several improper transactions, by the fact that a loss did occur on some of them."

Where a trustee of corporate stock sold the stock in pursuance of authority, as well as stock owned by himself, and as a part of

the transaction received from the purchaser a sum of money ostensibly given for an interest in a worthless patent right, but actually given as a bonus to induce the sale, he must account *pro rata* for the amount of the bonus to the person whose stock he holds in trust. *Levi v. Evans*, 6 C. C. A. 500, 18 U. S. App. 293, 57 Fed. 677. But it was further held in this case that the fact that the stockholder also held the legal title to the stock of other holders, for the purpose of sale and for a limited time, did not prevent him from selling his own stock upon such terms as he saw fit.

A trustee who joins an underwriters' association for the purpose of receiving a commission upon premiums paid for the insurance of the trust property must account for the commissions so received, less the amount of fees paid for the maintenance of the membership in the association. *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, 48 N. E. 128.

As said in the last case, it is immaterial whether the transaction is beneficial or injurious to the estate, for it is not essential that the estate suffer a loss, it being sufficient that the trustee gain a profit.

So, a trustee is accountable to the estate for gratuities and presents received by him from a tenant of the trust property, and from workmen engaged to repair the same, although they appear to have been by voluntary offerings, and were given to him in nowise at the expense of the estate, and it appears that he made no concealment of the fact that he received them, and was not aware that in accepting them, he was doing anything incompatible with his strict duty. *Jacobus v. Munn*, 37 N. J. Eq. 48, affirmed as to this point in 38 N. J. Eq. 622, but modified so as to reduce the amount of commissions awarded to the trustee for his services, and to impose costs upon him.

It was declared in *Sherman v. Lanier*, 39 N. J. Eq. 249, that the receipt by a trustee of a large bonus for lending the trust funds does not afford any evidence that she knew she was making a bad investment for the estate, and especially where she also loaned money of her own in larger amount than

fund to which they would otherwise be entitled.

On Rehearing.

**Bankruptcy — action against bankrupt — who should appeal.**

3. One of several property owners in whose name property is placed by his co-owners for sale, who is sought to be held liable to his co-owners for the broker's commission, because the contract between the parties was illegal, has a right to be heard on appeal from a decree in his favor, although a trustee in bankruptcy was appointed for him before the decree was entered, where he is made a party to the appeal, and his trustee did not become a party to the proceedings or seek a hearing.

(January 13, 1910.)

**C**ROSS APPEALS from a decree of the Law and Equity court of the City of Richmond in a suit to compel an accounting of commission for the sale of real estate; complainants appealing from so much of the decree as denied them a portion of the relief asked; defendants Brown et al. appealing from the overruling of their demurrer, and defendant Blanton appealing from so much as required him to account for a portion of the commission received by him. Reversed in part.

The facts are stated in the opinion.

Mr. Samuel A. Anderson, for complainants:

Blanton's agreement with Brown & Com-

pany was illegal as against public policy, in its inception.

pany was illegal as against public policy, in its inception.

Beury v. Davis, 111 Va. 581, 69 S. E. 1050; Ferguson v. Gooch, 94 Va. 1, 40 L.R.A. 234, 26 S. E. 397.

Mr. Hill Montague also for complainants.

Messrs. Montague & Montague and S. S. P. Patteson, for respondents:

Blanton was not such a fiduciary as to preclude him from obtaining his discharge in bankruptcy.

Chapman v. Forsyth, 2 How. 202, 11 L. ed. 236; Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576; Upshur v. Briscoe, 138 U. S. 365, 34 L. ed. 931, 11 Sup. Ct. Rep. 313; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9; Tindle v. Birkett, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493; Morse & Rogers v. Kaufman, 100 Va. 218, 40 S. E. 916; Bracken v. Milner, 3 N. B. N. Rep. 714, 104 Fed. 522; Barrett v. Prince, 74 C. C. A. 440, 143 Fed. 302; Re Adler, 81 C. C. A. 564, 152 Fed. 422; Loveland, Bankr. 3d ed. § 294, p. 845; Collier, Bankr. 6th ed. 229-231; Brandenburg, Bankr. 3d ed. 279; 5 Cyc. 398.

Brown & Company had the right to dispose of their commissions in any way they deemed proper, and Blanton could accept them, either as a gratuity or as having been justly earned, because his action in so do-

the sum belonging to the estate; but it was intimated that she would be accountable to the estate for the amount received, at least to the extent of the net sum realized by her.

But where a beneficiary in a trust estate gives an order upon the trustee for a sum of money representing a claim against her, which is not an obligation payable by the trustee, nor a matter with which he has any legal connection, and the claimant for his own convenience, and upon a sufficient consideration, sells the order to, or settles it with, the trustee for a lesser sum than the amount named, he is not responsible for the residue to the beneficiary, since in such transaction he is not dealing with the trust estate. Bush v. Webster, 24 Ky. L. Rep. 1894, 72 S. W. 364.

And the account of a trustee who is also an attorney should not be surcharged with the amount of fees collected from borrowers for services in extending mortgages held by the estate, since in this country, in the absence of an express agreement to the contrary, the expense incident to a loan on bond and mortgage, for searches and for the preparation of instruments, etc., is borne by the mortgagor, and therefore services rendered in the premises are not services in the affairs of the trust, in the sense that a trustee is required, as an incident to his trust duties, to make searches and to prepare the instruments when the trust estate

is the mortgaged. Young v. Barker, 141 App. Div. 801, 127 N. Y. Supp. 211.

And certainly the fact that one of the trustees has, through a law firm of which he is a member, profited to some extent by charges made against third persons dealing with the estate, even if a proper matter for consideration in an application to remove him on that ground, furnishes no reason whatever for the appointment of an additional trustee. Re Leavitt, 135 App. Div. 7, 119 N. Y. Supp. 769.

As to the right of the principal to recover from the broker or other agent, commissions which the latter received from the other party to the contract, see the note in 28 L.R.A.(N.S.) 952.

On the right of real estate broker who acts for both parties, to commissions, see the note in 24 L.R.A.(N.S.) 659.

As to whether the custom among real estate brokers to take rebates or commissions from other party affects their right to compensation from the employer, see the note in 34 L.R.A.(N.S.) 1047.

As to fraud and secret dealings of a real estate broker as affecting commissions, see the note in 45 L.R.A. 33.

As to the right to have trust property wrongfully pledged by a trustee for his individual benefit redeemed by money belonging to his insolvent estate, see the note in 6 L.R.A.(N.S.) 487.

L. A. W.

ing in no respect placed him in antagonistic relations with Heckscher or any party in interest.

*Jackson v. Pleasanton*, 101 Va. 288, 43 S. E. 573; *Ætna Ins. Co. v. Church*, 21 Ohio St. 498; *Gay v. Paige*, 150 Mich. 463, 114 N. W. 217; *Bristol v. Scranton*, 11 C. C. A. 144, 28 U. S. App. 29, 63 Fed. 218; 1 Am. & Eng. Enc. Law, 2d ed. 1073; *Lamb Knit-Goods Co. v. Lamb*, 119 Mich. 568, 78 N. W. 646.

Blanton had the right to act in every particular as if he had never been adjudicated a bankrupt.

1 *Remington*, Bankr. § 1644, pp. 1011, 1012; *Hahlo v. Cole*, 112 App. Div. 636, 98 N. Y. Supp. 1049; *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. ed. 949; *Reed v. Paul*, 131 Mass. 329; *Herring v. Downing*, 146 Mass. 10, 15 N. E. 116; *Griffin v. Mutual L. Ins. Co.* 119 Ga. 664, 46 S. E. 870; *Evans v. Brown*, 1 Esp. 170; *Chippendale v. Tomlinson*, 7 East, 57, note, 4 Dougl. K. B. 318; *Temple v. London & B. R. Co.* 2 Jur. 296; *Re Stafford*, 18 Week. Rep. 959; *Herbert v. Sayer*, 5 Q. B. 965, 2 Dowl. & L. 49, 13 L. J. Q. B. N. S. 209, 8 Jur. 812; *Fyson v. Chambers*, 9 Mees. & W. 460, 11 L. J. Exch. N. S. 190; *Smith v. Gordon*, 6 Law Rep. 313, Fed. Cas. No. 13,052; *Amory v. Lawrence*, 3 Cliff. 523, Fed. Cas. No. 336; *Taylor v. Irwin*, 20 Fed. 615; *American File Co. v. Garrett*, 110 U. S. 288, 28 L. ed. 149, 4 Sup. Ct. Rep. 90; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Laughlin v. Calumet & C. Canal & Dock Co.* 13 C. C. A. 1, 24 U. S. App. 573, 65 Fed. 447; *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46; *Sparkhawk v. Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; *Sessions v. Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *King v. Remington*, 36 Minn. 15, 29 N. W. 352; *Sawtelle v. Rollins*, 23 Me. 196; *Foster v. Wylie*, 60 Me. 109; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53.

Mr. Wallace F. Brown also for respondents.

#### Per Curiam:

These cases, heard together, have been most elaborately and ably argued upon the printed briefs, as well as orally, and a great number of authorities cited; but in our view the issues involved lie within a rather narrow compass.

The pleadings, original, amended, and supplemental, put in issue whether or not the complainants have the right to require J. W. Blanton and J. Thompson Brown & Company (hereinafter spoken of for convenience as Brown & Company) to account

to complainants for a certain commission—\$10,000—received by Brown & Company, and afterwards divided with Blanton, for services in procuring a purchaser and consummating a sale to him of certain pyrites property situated in Louisa county, owned by complainants and Blanton in unequal shares, as members of a syndicate or as partners; Heckscher holding the much largest share, amounting in fact to about four fifths of the whole.

The case here as to Blanton is a sequel to that of *Blanton v. Heckscher*, decided by this court, and reported in 101 Va. 42, 42 S. E. 915, in which the complainants sought only to recover of Blanton that part of the commissions paid Brown and Company for making sale of the pyrites property theretofore, which Brown & Company voluntarily donated to Blanton in consideration of valuable aid rendered by him to Brown & Company in effecting the sale. By the amended pleadings it was sought to require both Blanton and Brown & Company to account to complainants for the \$10,000 of commissions received by Brown & Company for making the said sale, which was consummated nearly three years before.

The learned judge of the law and equity court filed with, and as a part of, the decree now under review his reasons for the conclusions reached, and in so far as the opinion deals with and disposes of the question whether or not Brown & Company are liable to the demands of complainants for the commissions received by the former, we approve and adopt it as a part of the opinion of this court.

So much of the opinion as relates to the liability of Brown & Company to complainants is as follows:

"The facts, so far as the solution of this case is concerned, are as follows: Jos. W. Blanton was the trustee,—i. e., held the legal title to certain mining property in Louisa county, Virginia; but the title he held was for the benefit of himself and certain others, Heckscher, Mann, Shuman, Smoot, Gill, and others, according to their respective interests, and they were to try and bring about a sale of this property, or rather Heckscher, Blanton, Mann, and Shuman were to do so. Blanton retained, shortly after the title was conveyed to him, J. T. Brown & Company to sell this property as his and his associates' agent. It is conceded that Brown & Company knew that Blanton held for the benefit of said associates or syndicate. After Brown secures an option from Crenshaw, which was completed by a purchase by Crenshaw and his associates, Brown writes a letter and agrees to give Blanton one half of his commissions of 10 per cent. It is claimed that this was



in pursuance of a secret agreement to this effect at or about the time this property was put in the hands of J. T. Brown & Company for sale. This is denied by Brown & Company, and Mr. Leroy Brown, of this firm, who did most of the negotiations, testifies that prior to the writing of the letter of July 1, 1899, to J. W. Blanton, there was no agreement for a division of any portion of his commissions with Blanton. To the same effect is the testimony of J. T. Brown, and Blanton testifies that no such agreement existed prior to the letter of July 1, 1899.

"The firm of J. T. Brown & Company secured an option from Crenshaw and his associates in February, 1899, which was availed of on July 15th or 14th for \$100,000; but, before the facts are further adverted to, it is well for me to state the proceedings in the two suits which are being heard together.

"The first suit was instituted by Heckscher, whose interest was about a four-fifths interest, G. N. Shuman, W. H. Mann, and D. B. Cox, against J. W. Blanton, on June 15, 1900, alleging the sale and division of commissions claiming that the division was in pursuance of a secret agreement between defendant and the brokers, who negotiated the sale under the firm name of J. Thompson Brown & Company, in fraud of plaintiffs' rights, and praying for a discovery and an accounting from defendant Blanton for the amount of money received by him thereunder, as well as for other money alleged to have been collected by said defendant for syndicate. On October 19, 1900, Blanton answered, denying all fraud and collusion, and admitting said division and the amount received by him thereunder, but claiming that it had been voluntarily given him after the said sale was negotiated, in the absence of any agreement or understanding, and that therefore he had a right to receive and retain it. He also admitted that he had on hand a small balance belonging to the syndicate, which he was retaining in anticipation of a settlement of a claim he had preferred against the syndicate, but which he deposited in bank to the credit of the court in said cause, asking that his answer be treated as a cross-bill.

"On July 16, 1901, this suit was heard on bill, answer, general replication thereto, and on certain affidavits alleging and denying that Blanton had disposed of his real estate in order to defeat plaintiffs' recovery, and a decree was entered requiring Blanton to deposit his share of said commissions in bank to credit of court in said cause. This decree was reversed upon appeal to the supreme court of appeals, December 11, 1902.

37 L.R.A. (N.S.)

"On January 7, 1903, the second of these suits was instituted by the same plaintiffs against said brokers, J. Thompson Brown & Company, as defendants. The bill was filed January 22, 1903, alleging the same facts, but praying that said contract with the Browns for commissions be rescinded, and that they be required to pay to plaintiffs the entire amount of commissions retained by them out of proceeds of sale, less any amount plaintiffs might hereafter recover from Blanton in the first suit. On February 4, 1903, the Browns demurred, and on April 23d following they answered, denying all fraud and collusion, admitting said division of commissions, but claiming it was a gratuity. In their answer they pleaded also that plaintiffs were estopped from proceeding against them by laches, acquiescence, and waiver, and were barred by the statute of limitations. On August 4, 1903, plaintiffs tendered amended and supplemental bills in both suits, attempting to make the Browns parties in the first, and Blanton in the second, and enlarging the amount sued for in first suit to \$10,000.

"On December 18, 1903, decrees were entered permitting this in first suit, but denying it in second suit, and hearing the amended first suit and the second suit together. The Browns thereupon demurred to said amended and supplemental bill in the first suit; but on July 30, 1904, this demurrer and their said demurrer to the bill in the second suit were both overruled. The depositions have been taken pro and con, and the case is now for decision.

"The statute of limitations is relied on by the Browns, and a strong and forceful argument is made that the one-year limit of the statute applies; but this court is of opinion that the plea of the statute of limitations is not a good plea in this case, and the same will be considered as overruled. And yet, in view of the court's opinion on other branches of the defense, this will not be necessary.

"In the first place, we should bear in mind as to the Browns, that the suit against them for rescission on the ground of fraud was not brought until more than three years and a few months after, according to their own pleadings (*i. e.*, the plaintiffs'), they knew of the fraud on them and their rights; in other words, they sue one of the joint tortfeasors for the recovery of the commissions he received and for an accounting, and two years and six months after instituting this suit against him, and more than three years after knowledge of the plaintiffs of the wrong done them by the other joint tortfeasors, they institute a suit against those others for a rescission and reclamation. This court is not unmindful of the fact that

the position now taken after all the depositions and proofs are in is not the same taken on the demurrer; but upon an analysis of the letter of January 30, 1899, which is in evidence, in which the Browns agreed on certain conditions to accept a commission of 5 per cent in case a sale was made by the parties themselves at \$75,000, when read in connection with the other evidence showing that the complainants, or the chief one among them, Mr. Heckscher, knew of the division of the commissions of the Browns with Blanton, in the court's opinion it does not relieve the estoppel as against the Browns. The plaintiffs, with a knowledge of the facts entitling them to a rescission, elect to sue Blanton only. It is true it is claimed that the exact amount of the division was not known to them; but, if it was a fraud to divide equally the commissions, it was a fraud to divide the commissions by giving Blanton only a small part thereof.

"Upon the facts as developed in the evidence before this court, and upon the pleadings as they are, the court is of opinion that there can be no relief against J. Thompson Brown & Company, on account of plaintiffs' election made to sue Blanton only, on account of confirmation and acquiescence as shown by the evidence and pleadings; and the court cites as authorities for this proposition *Pom. Eq. Jur.* 817, 820, 917, 965; *Armstead v. Hundley*, 7 Gratt. 52; *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387; *Max Meadows Land & Improv. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Campbell v. Eastern Bldg. & L. Asso.* 98 Va. 729, 37 S. E. 350; *Adams v. Guerrard*, 29 Ga. 651, 76 Am. Dec. 624; *Slothower v. Oak Ridge Land Co.* 2 Va. Dec. 506, 27 S. E. 466.

"In the court's opinion so far, as to the Browns, the case has been treated as if the allegations as to the secret agreement existing about or at the time the property was put into the hands of Brown & Company had been sustained by the proof, under the well-known rules of courts of law and equity as to the proof of fraud. Has this been done? I think not. It may or not be true; but it has not been proven with that clearness and satisfaction that should or could warrant a court of equity in so holding.

"For these reasons the relief sought against the Browns will be denied."

With respect to the liability of Blanton to account to the complainants for the \$5,000 donated to him by Brown & Company out of the commissions received by the latter on the sale to Crenshaw, while holding that there was no sufficient proof of the allegations in the bills as to a secret

agreement existing about or at the time the property was put in the hands of Brown & Company, between the latter and Blanton, whereby Blanton was to receive a part of the commissions which Brown & Company were to get if they effected a sale of the property, the decree entered upon the view that "Blanton stood in the most confidential relations with his associates, and should not receive any part of those commissions, except his proportion thereof according to his interest in the syndicate as against his associates," required Blanton to pay into bank to the credit of the court in this cause the sum of \$5,000, less the proportion that would come to him according to his interest, with interest from the time of the payment to complainants of their proportion of the proceeds of the sale of the property to Crenshaw. This ruling is assigned as cross error by Blanton's counsel, under rule 8 of this court.

To review the voluminous evidence, documentary and oral, as to Blanton's conduct in connection with the sale of the pyrites property by Brown & Company, and the receipt by him of a part of the latter's commissions on the sale, would serve no purpose other than to bring out, perhaps, more prominently, facts which are not denied, but in fact admitted, by Heckscher and his co-complainants, *viz.*, that Blanton's aid to Brown & Company, was valuable, and without it the sale to Crenshaw would probably not have been effected; that Blanton received no part of the proceeds of the sale which belonged to these complainants, or in any way reduced the amounts that they would or should have received had Blanton received no part of Brown & Company's commissions; that the efforts and persistency of Brown & Company, aided by Blanton, brought to complainants in the result thousands of dollars that they would not otherwise have gotten, and especially was this so as to Heckscher, the chief complainant, who was the largest holder in the property, and who had been urging a sale of it at a price much less than was finally obtained; that not only was the putting of the property for sale in the hands of Brown & Company by Blanton acquiesced in by Heckscher and his associates, but approved, and the course and conduct of Blanton in connection with the whole transaction commended; that neither Blanton nor Brown & Company got one dollar out of the transaction that the complainants were entitled to, or *ex æquo et bono* they could have demanded; and that neither Brown & Company nor Blanton did anything that in the least misled the complainants to their loss or injury.

We are well aware of the established and

salutary principle, under a long line of decisions by this court coming down to *Tenant v. Dunlop*, 97 Va. 235, 33 S. E. 620, and some later, that trustees, partners, or agents cannot, by fraud, deceit, or concealment of facts, make and retain profits out of their *cestui que trust*, associate, or principal; but that is not this case. We have searched the record in vain for some proof of conduct on the part of Blanton in connection with this transaction which resulted, or might have resulted, in the injury of his associates. It may be that in some of his interviews with Heckscher, after the sale of the property had been consummated, he should have, as a matter of propriety, told Heckscher that Brown & Company had donated to him a part of their commissions; but his failure to do this resulted, and could have resulted, in no injury to Heckscher or others who had been interested in the sale of the property.

It is also well established by the authorities cited for complainants, that if an agent, trustee, or other fiduciary makes, by fraud, deceit, or concealment, a profit out of a sale of the trust subject, "such profit belongs exclusively to the principal;" but, again, that is not this case. There is not the slightest proof that Blanton, by fraud, deceit, or concealment, made a profit in this transaction. On the contrary, the proof is conclusive, as is recognized in the opinion of the lower court, that there was nothing hurtful to Blanton's associates concealed; that Blanton did not know of the purpose of Brown & Company to divide their commissions with him until after the option had been given to Crenshaw, which was binding upon Blanton and his associates. Throughout there is not a fact relied on going to show fraud, deceit, or concealment on the part of either Brown & Company or Blanton, resulting in loss or injury to complainants or either of them. Blanton was a mere naked or dry trustee, holding only the legal title to the property, with no authority to make sale of it, or to receive the proceeds of a sale thereof made by authority of the parties in interest. He received no part of the proceeds of the sale that was made, but the whole went to and was received by the parties in interest, less only the commissions they had agreed to pay Brown & Company; and the fidelity of Blanton is evidenced by the fact that Heckscher offered Blanton handsome commissions if he could sell the property for more than \$60,000, provided the Crenshaw option was not taken up, yet Blanton continued his efforts, and was largely instrumental in having the Crenshaw option taken up.

The principle upon which the numerous decisions relied on for complainants turned 37 L.R.A. (N.S.)

was where the wrongdoer had profits or gain which belonged of right to his principal, partner, or associates; but that principle is not carried, in those cases or others, so far as we are able to find, to the extent that one charged merely with wrongdoing should give up what, *ex aquo et bono*, the party making the charge could not on any other ground have demanded or been entitled to. Unquestionably one cannot receive and hold from another that which he has acquired by fraud, deceit, or concealment; but if that other was never entitled to that which the alleged wrongdoer has, there is no principle of justice or equity that would entitle the party making the claim to a recovery.

In *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620, the dealings charged to have been fraudulent, deceitful, or misleading on the part of a surviving partner, and hurtful to the legatees of the deceased partner, and which were set aside as void, so far as the legatees were concerned, were between the surviving partner and the executrix of the deceased partner. There the fraud, by concealment practised by the surviving partner, damaging to the complaining legatees, was clearly and conclusively proven, and, upon the established principle to which we have adverted, the wrongdoer, the surviving partner, was required to make good to the legatees of the deceased partner the losses they had sustained by reason of the fraud.

Here the complainants have lost nothing by fraud, deceit, or concealment of Blanton, but are seeking to recover of him that to which they were at no time entitled, and therefore could not have demanded. What Blanton got came from Brown & Company, and only out of money belonging to Brown & Company, and in no event to complainants, as is conceded; so that upon a supposed technicality only, and not upon any principle of right in law or equity, is their demand rested. This technical rule cannot, either upon reason or authority, be carried to the extent to which the complainants invoked it.

The learned author of *Pom. Eq. Jur.* Vol. 2, 3d ed. § 956, says, of the general principle governing dealings of a person who is placed in such a fiduciary relation towards another that the duty rests upon him to disclose, that, if he intentionally conceals a material fact, with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is void without the aid of any presumption; but the conclusion is there stated to be that the question whether or not such a fiduciary should be held to have by concealment been guilty of fraud, and be re-

quired to account for any profits he may have received out of the transaction, turns upon whether he has or has not gained by his concealment an advantage over his *cestui que trust*, principal, or partner. In the first instance he will be held to an accounting, and in the other not.

Blanton, as the record shows, became at no time interested in Brown & Company's commissions on the sale to Crenshaw,—certainly at no time when to do so was forbidden by law, or when he did or could have obtained an advantage over Heckscher and others interested with him in the property. On the contrary, the advantages arising out of Blanton's dealings with the property inured to the benefit of all parties interested, and more especially to the advantage of Heckscher, as he has frankly admitted.

It is not strictly true that all profits made by agents or trustees, such as was Blanton in this case, belong to their principals, but only such profits as are thereby diverted from, and therefore made out of, funds belonging to their principals. They cannot keep as their own what rightly belongs to their principals, but, in order for such result to follow, the agency must be the proximate or direct, not the remote or indirect, cause of the profit,—i. e., the profit must be traceable to the agency as its efficient cause, and not as its mere incidental occasion. This principle is clearly recognized by this court in *Blanton v. Heckscher*, 101 Va. 42, 42 S. E. 915, where it was held that Blanton could not be required to bring into court the \$5,000 received by him of Brown & Company until proof sufficient to overcome Blanton's denial of liability to Heckscher and his co-complainants for this money was adduced. See also *Mechem, Agency*, § 472; *Etna Ins. Co. v. Church*, 21 Ohio St. 492; *Lamb Knit-Goods Co. v. Lamb*, 119 Mich. 568, 78 N. W. 646; *Lewis v. Loper* (C. C.) 54 Fed. 237; *Gay v. Paige*, 150 Mich. 463, 114 N. W. 217.

The line of cases relied on by complainants here, beginning with *Carter v. Horne*, 1 Eq. Cas. Abr. 7 (decided in 1728), do not militate against the doctrine above enunciated, viz., that it is necessary in a case like this to show that the profit or gain sought to be recovered was made at complainant's expense, that it was a part of their property, or that they could have claimed or would have gained it, had the recipient thereof not done so. *Jackson v. Pleasanton*, 101 Va. 282, 43 S. E. 573, where the principle is fully recognized. See also 1 Am. & Eng. Enc. Law, 1073; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 370; *Alexander v. North Western Christian University*, 57 Ind. 466.

This case, upon the facts proved, is simply  
37 L.R.A. (N.S.)

this: Blanton was in no sense a trustee, except for the purpose of holding the dry or naked legal title to the trust property, not even having the power of sale. The property was placed with Brown & Company, with the approval of the complainants, to find a buyer willing to buy, ready and able to pay for the property at a price fixed. The commissions of the selling agents were agreed upon, and a binding option given, and there was no way in which Blanton's conduct could have been antagonistic to the complainants, except by agreeing to a secret division with Brown & Company of the commissions, before or at the time the property was placed in the hands of Brown & Company, or before the option was given, which secret agreement was advantageous to Blanton, and to the disadvantage of others interested with him in the property, and Brown & Company would have consummated the sale at less than a 10 per cent commission, the usual and fixed commissions to the selling agent for the sale of such property. Of such conduct on the part of Blanton there is no proof whatever in the record.

We are of opinion that the cross error assigned by Blanton to the decree appealed from is well taken, and that said decree should in this respect be reversed and annulled; and this court will enter the decree the lower court should have entered, dismissing the original and amended bills of complainants in these causes as to Brown & Company, remanding the causes for such further proceedings therein as may be deemed necessary or proper.

Reversed in part.

A petition for rehearing having been filed, *Buchanan, J.*, handed down the following additional opinion (January 12, 1911):

In the petition for rehearing it is insisted that J. W. Blanton, one of the appellees, had no right to be heard upon this appeal, because he had been adjudicated a bankrupt and his trustee appointed before the decree appealed from was entered, and that he therefore had no further rights or interest in the litigation.

The trustee was not made, and did not become, a party to the suit, either in the trial court or in this court. Blanton was made one of the appellees in this court, and process served upon him. Under the bankrupt act of 1898 (act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418), the trustee has the right to intervene and become a party to a suit prosecuted by or against a bankrupt at the time of his adjudication, but he is not bound to do so. Upon the failure of the trustee to apply

to be substituted in place of the bankrupt, or to become a party to the suit, it seems that it may be prosecuted or defended by the bankrupt, whether the result of the litigation inures to his own benefit or the benefit of his creditors, and the trustee, although he does not become a party to the suit, will be bound by the judgment or decree entered in the cause. See 1 Remington, Bankr. §§ 1640, 1644; Griffin v. Mutual L. Ins. Co. 11 Am. Bankr. Rep. 622, 623, 119 Ga. 664, 46 S. E. 870, Herring v. Downing, 146 Mass. 10, 15 N. E. 116; Thatcher v. Rockwell, 105 U. S. 469, 470, 26 L. ed. 950; Brown v. Wygant, 163 U. S. 623, 624, 41 L. ed. 286, 287, 16 Sup. Ct. Rep. 1159; First Nat. Bank v. Lasater, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. Rep. 206.

We are of opinion that Blanton had the right to assign cross error under rule 8 of the court.

The other grounds relied on for a rehearing were fully considered before entering the decree complained of. Upon a reconsideration of those grounds, we see no reason to change the conclusion reached. The opinion filed with the record upon the original hearing contains some slight inaccuracies of statement, which have been corrected, and that opinion, as corrected, will be filed with the record.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

ELLEN A. GOOCH

v.

JOSEPHINE L. ALLEN, Exrx., etc., of J. A. GOOCH, Appt.

(— W. Va. —, 73 S. E. 56.)

**Executor — right of action — exclusiveness.**

1. Is a personal representative given exclusive right over creditors, for six months after qualification, to bring the suit provided for by § 7, chap. 86, Code 1906, to subject real estate of a decedent to payment of debts?

Headnotes by BRANNON, J.

**Note.** — The general subject of moral obligation as a consideration for an express promise is treated in the notes to Trimble v. Rudy, 53 L.R.A. 353, and Muir v. Kane, 26 L.R.A.(N.S.) 520; and certain specific aspects of the general question are treated in other notes there referred to.

The question whether one may make his own check or note the subject of a gift so that in the absence of payment it may be enforced against him or his representatives is treated in the note to Foxworthy v. Adams, 27 L.R.A.(N.S.) 308, 37 L.R.A.(N.S.)

**Pleading — collection of decedent's debts — allegations.**

2. Must a bill in equity under § 7, chap. 86, Code 1906, to subject real estate of a decedent to debts, allege the insufficiency of his personal estate to pay his debts?

**Contract — promise without consideration — effect.**

3. When there is by law no enforceable obligation to pay, a promise made afterwards to pay wants legal consideration, and is not enforceable.

**Note — repayment to parent — consideration.**

4. A promissory note given by a son to his widowed mother for money paid by her for his board while at college and his college education, after such expenditure, without promise or expectation of repayment on the part of either, at the time of such expenditure, wants legal consideration, and is not enforceable.

**Contract — moral obligation — sufficiency.**

5. A merely moral obligation, though not illegal, is not a consideration for a promise to make that promise enforceable.

**Subrogation — codebtor paying.**

6. A codebtor, not principal debtor, paying a debt secured by a deed of trust executed by both on their land, may have subrogation to the right of the creditor for contribution against his codebtor.

**Contribution — preserving security.**

7. A deed of trust binding land of several debtors for a debt paid by one not principal debtor, and released by the creditor, is kept alive in equity to give contribution to the debtor paying against a codebtor, notwithstanding such release, and though action at law for contribution is barred by the statute of limitations. Laches, not statutory limitation, may bar such subrogation.

**Judgment — interest — date of beginning.**

8. It is error to give interest on the sum of principal and interest computed to a date prior to decree. Interest on the sum of principal and interest at date of decree should be given from date of decree.

(November 28, 1911.)

**A** PPEAL by the executrix from a decree of the Circuit Court for Summers County in plaintiff's favor in a suit to compel a settlement of the accounts of the executrix and for the sale of real estate owned by plaintiff's deceased son for the payment of debts alleged to be due her. Reversed.

The facts are stated in the opinion.

Messrs. McGinnis & Hatcher, for appellant:

The note to plaintiff having been designed as a gift (and a conditional gift at that) cannot be enforced against the estate of its maker.

14 Am. & Eng. Enc. Law, 1016, 1017; Dan. Neg. Inst. § 179; Fink v. Cox, 18 Johns. 145, 9 Am. Dec. 191; Voorhees v. Combs, 33 N. J. L. 494; Starr v. Starr, 9 Ohio St. 74; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463; Kirkpatrick v. Taylor, 43 Ill. 207; Phelps v. Phelps, 28 Barb. 121.

More than five years having passed since the payment of the note, and at the time of bringing her suit, plaintiff's right of subrogation against the estate of J. A. Gooch was barred by the statute of limitations.

21 Am. & Eng. Enc. Law, 272; Scott v. Nichols, 27 Miss. 94, 61 Am. Dec. 503; Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680; Junker v. Rush, 136 Ill. 179, 11 L.R.A. 183, 26 N. E. 409; Saddler v. Kennedy, 26 W. Va. 636; Jackson v. Hull, 21 W. Va. 601; Thayer v. Daniels, 110 Mass. 346.

Messrs. Brown, Jackson, & Knight, and O. P. Fitzgerald, Jr., also for appellant:

While the paying co-obligor may have "contribution," he can in no event have "subrogation," except where the security has been kept alive for his benefit.

Greiner's Estate, 2 Watts, 414; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; Clark v. Warren, 55 Ga. 575; Engles v. Engles, 4 Ark. 286, 38 Am. Dec. 37; Benton v. Bailey, 50 Vt. 137; Stanley v. Nutter, 16 N. H. 24; Pratt v. Law, 9 Cranch, 456, 3 L. ed. 791; Baily v. Brownfield, 20 Pa. 44.

Messrs. T. N. Read and R. F. Dunlap, for appellee:

The doctrine of contribution is not founded on contract, but is the result of general principles of justice and equity on the ground of equality of burden and benefit.

Rosenbaum v. Goodman, 78 Va. 127; M' Mahon v. Fawcett, 2 Rand. (Va.) 514, 14 Am. Dec. 796; Turner v. Thom, 89 Va. 745, 17 S. E. 323; Thweatt v. Jones, 1 Rand. (Va.) 328, 10 Am. Dec. 538; Neff v. Baker, 82 Va. 401; Wayland v. Tucker, 4 Gratt. 267, 50 Am. Dec. 76.

One of several joint debtors will, as against his codebtors, be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from codebtors, by means thereof, their proportional shares of their indebtedness which he has discharged.

Sheldon, Subrogation, § 169; Morrow v. Peyton, 8 Leigh, 54; Sands v. Durham, 99 Va. 263, 54 L.R.A. 622, 86 Am. St. Rep. 884, 38 S. E. 145; Thompkins v. Mitchell, 2 Rand. (Va.) 428; Willis v. Willis, 42 W. Va. 522, 26 S. E. 515; Schilb v. Moon, 50 W. Va. 47, 40 S. E. 329; Wheatley v. Calhoun, 12 Leigh, 264, 37 Am. Dec. 654; Blair v. Mounts, 41 W. Va. 706, 24 S. E. 620. 37 L.R.A. (N.S.)

Brannon, J., delivered the opinion of the court:

Ellen A. Gooch brought a chancery suit against the executrix and other representatives of the estate of her dead son, J. A. Gooch, to compel a settlement of the accounts of said executrix, and sell the real estate owned by her son to pay debts due her. A decree was entered in favor of the plaintiff for her demands against the estate, and subjecting certain real estate of the dead son to sale. Josephine L. Allen, the widow, executrix, and devisee of J. A. Gooch, appeals.

There was a demurrer to the bill. One ground of demurrer is that § 7, chap. 86, Code, gives six months' preference after qualification to the personal representative to bring a suit to administer the real assets of a decedent before a creditor can do so, and that this bill does not say whether a suit had or had not been brought by the executrix, or when she qualified. Is a creditor thus compelled to wait for six months after the qualification of a personal representative before he can bring a suit to subject the realty of a dead man to his debts? As we hold this to be a suit to enforce subrogation, we do not decide this point. Speaking only for myself, it does seem that the statute gives the personal representative preference for six months, and delays the creditor. The creditor could always sue the personal estate in equity. Then, when the statute made land liable for the debts of the dead man, he could sue the land for the same reason that he could sue the personality,—that is, that he has a debt for which the land is liable,—but the lawmakers saw proper to give a time to the administrator to see whether the personality would pay debts, without recourse to the land, as he would know best as to this. This is given as a reason for this preference in the Underwood Case, 22 W. Va. 306. It was not intended that any creditor should sue the realty until a reasonable time had been given the administrator to ascertain as to sufficiency of the personal assets, and gives him exclusive right of suit for six months. It was further intended to protect the estate from loss by numerous suits, and give the personal representative power, for a time, to bring suit for all creditors. I incidentally express this opinion in Rowan v. Chenoweth, 49 W. Va. 290, 87 Am. St. Rep. 796, 38 S. E. 544. I submit that Judges Snyder and Woods so construed § 7. Reinhardt v. Reinhardt, 21 W. Va. 76; Broderick v. Broderick, 28 W. Va. 385. Judge Dent so construed those cases in Poling v. Huffman, 39 W. Va. 320, 19 S. E. 421. The last case and Hale v. White, 47 W. Va. 700, 35 S. E. 884, seem *contra*. But are they? Judge

Dent admits the rule above stated, but seems to place those cases on special facts taking them out of the rule. What is the plain import of § 7? So, I would say that a bill filed under § 7 should show that six months had elapsed after the qualification of the personal representative, and that no suit had been brought by him.

It is also urged that the bill does not state that the personal assets are not sufficient to pay debts, and that it is therefore bad on demurrer. Section 7, chap. 86, gives a suit to charge lands with debts "when the personal estate of a decedent is insufficient for the payments of his debts." Remember that this statute recognizes the rule that land shall not be made liable to debts of a dead man except when the personality is inadequate. Therefore I would say without hesitation that a bill under § 7 must aver that the personality is inadequate. Such inadequacy is a condition precedent to such suit. But we do not so decide, because this is a suit for subrogation, not one resting on § 7.

Another ground of demurrer is that the qualified personal representative must be before the court. That is so; but she is. This point is made on the fact that the bill named as a defendant "Josephine L. Gooch, executrix." The bill alleges that she was nominated as executrix by the will, "and in pursuance of said nomination has been acting as such." It is claimed that the bill ought to say that she qualified by giving bond and taking the oath prescribed by law. We do not think this point substantial. It is technical. True, the statute says that an executor shall not have powers as such until he qualify by taking oath and giving bond; but we think the presumption would be that the executrix has so qualified, as it is averred that she was acting as such.

Next subject. Has equity jurisdiction of this case? We answer that it has. The bill says that J. A. Gooch, C. H. Gooch, and the plaintiff, Ellen A. Gooch, made to Fox a note of \$850 to raise money to pay off debts owing by B. P. Gooch, husband of Ellen A. Gooch, and father of J. A. Gooch and Charles Gooch, and secured it by deed of trust on the real estate left by B. P. Gooch, which deed of trust was on the real estate sought to be subjected in this suit, which deed of trust is an exhibit of the bill; and that the plaintiff as one of the makers of the note paid the note, and that J. A. Gooch never paid the plaintiff his part of the note, and that the plaintiff was entitled to have contribution from his estate of one third of the sum paid by her, and claimed the right to subject the real estate covered by the trust deed, the third descending to J. A. Gooch from his father, for his portion of 37 L.R.A.(N.S.)

the debt. It is claimed that the bill does not sufficiently aver the facts authorizing subrogation. We think, as the bill alleges the execution of the deed of trust and exhibits it, that it is sufficient in this respect.

It is claimed that there is no right of subrogation or subrogation in favor of a debtor against a codebtor, as this deed of trust was released. We believe it is not claimed that a surety may not have contribution against a cosurety. That he has is well established. *Sheldon, Subrogation*, § 140; *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654; 27 Am. & Eng. Enc. Law, 223; opinion in *Sands v. Durham*, 99 Va. 263, 54 L.R.A. 614, 36 Am. St. Rep. 884, 38 S. E. 145, and note. But the claim is that, as the deed of trust was released, the deed of trust was dead, and there could be no subrogation, that the release reverted the title to the maker of the trust, and, until that release should be set aside by a legal adjudication, there could be no subrogation. Some authorities support this position; but it is untenable under our law and a great weight of authority. A release does not prevent subrogation. 27 Am. & Eng. Enc. Law, 213; *Sheldon, Subrogation*, § 14. When payment is made, or release is made, the debt is dead in a court of law; but equity keeps it alive for the benefit of the surety or cosurety. A judgment paid is ended at law, but equity keeps it alive for the benefit of the surety. What is the difference between a receipt in full and a release? A multitude of authorities say that payment does not satisfy the judgment or other lien as between the debtor and surety. Therefore we hold that the plaintiff is entitled to subrogation under the deed of the trust.

But it is said that, though there was once a right to subrogation, it is lost by the statute of limitation of five years, the period applicable to the case of a surety demanding payment or contribution of his principal or cosurety. True, action at law would be barred; but this case is governed by the principle of subrogation. The party claims the right in equity under a deed of trust. A deed of trust has no limitation by statute. It is only subject to laches. Presumption of payment in twenty years bars it, unless repelled by evidence. The creditor has that limitation. He is not sooner barred. The surety takes the creditor's shoes, and can avail himself of the creditor's rights. So can the codebtor. The statute of five years does not apply. We are referred to *Thayer v. Daniels*, 110 Mass. 346. That is no authority, as it was an action at law, and I have said above that a law five years would bar; but we have a suit in equity for subrogation. The other case referred to is *Junker v. Rush*, 136 Ill. 179, 11 L.R.A. 183,

26 N. E. 499. That does support the contention, but contrary to a great volume of authority. It is a well-known principle that a note secured by a deed of trust may be barred, but that fact does not bar the lien of that deed, the note being one thing, the mortgage another; the one dead, the other yet alive. The creditor could not maintain action on the note, but could resort to his mortgage, though his note is barred. The surety takes the shoes of the creditor, and, as long as the creditor's right would not be barred, neither would the right of the surety. *Criss v. Criss*, 28 W. Va. 388; *Evans v. Johnson*, 39 W. Va. 299, 23 L.R.A. 737, 45 Am. St. Rep. 912, 19 S. E. 623. It is claimed that the trustee and creditor under the deed of trust should be parties, but are not. Why so? The deed of trust has been paid so that the creditor has no right. The deed of trust has been released, and the title has been devested from the trustee and reverted to the vendor or his heirs. What right has either involved in this suit? So we conclude that the plaintiff is entitled to contribution under the deed of trust for the Fox debt.

Another subject. Another demand of the plaintiff against the estate of J. A. Gooch is based on a promissory note made by J. A. Gooch to his mother for \$2,000. This has been to me the only serious aspect of the case. It is claimed that this note rests on no binding consideration. The plaintiff herself states under oath that she paid out money for the education at college of her son J. A. Gooch, without any contract or understanding that he would repay her, and that she did not expect any repayment. Years afterwards, in consideration of money which she had so paid, he voluntarily gave her this note. That is really the consideration. Is that binding to make the note enforceable? We have several times decided in effect that, where a son claims for service rendered the father, he cannot recover, unless he proves an express contract, or the facts clearly show an expectation or intention on the part of the father to pay for the service. *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910; *Riley v. Riley*, 38 W. Va. 283, 18 S. E. 569; *Harris v. Orr*, 46 W. Va. 261, 76 Am. St. Rep. 815, 33 S. E. 257. I cite here the many cases found in 7 Enc. Dig. Va. & W. Va. Reports, 304, for the proposition that the law does not raise or imply a promise to pay for services or maintenance or education of a son by a parent on which an action can be based. There was not even a moral obligation on the part of the son to pay the mother for money paid for his education. There was no promise made at the time.

"A mere moral obligation, though coupled with an express promise, will not constitute  
37 L.R.A. (N.S.)

a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is a precedent consideration, that an express promise will create or revive a cause of action." Dan. Neg. Inst. § 182.

I lay down the proposition that, to support an action on a contract, there must be a consideration enforceable at law, and that an express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute. 39 Am. St. Rep. 735. In that great work, *Page on Contracts*, § 319, p. 484, we read as follows: "Past services when rendered under such circumstances as to create no legal liability are not a consideration for a subsequent promise. Illustrations of such services are those rendered by father to son; past services rendered to a father by his daughters without any agreement for compensation; services rendered by a niece living in the family; support furnished a minor daughter by her mother, or medical attendance rendered to an adult." The same work, in § 310, page 460, says that, "if the promise which is invoked as a consideration is itself unenforceable for some reason outside of the form of the promise," it cannot be enforced. Where a father made an advancement to a child, and later the child gave the father his note for its repayment, the note was held not good. *Page, Contr.* § 310. There we find that past consideration is no consideration under circumstances not creating liability. I would cite for these principles 9 Cyc. 356; *Stoneburner v. Motley*, 95 Va. 788, 30 S. E. 364; *Bailey v. Devine*, 123 Ga. 653, 107 Am. St. Rep. 153, 51 S. E. 603; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. Rep. 779, 76 S. W. 821; *Ogden*, Neg. Inst. 60. As will be seen in the notes in 39 Am. St. Rep. 735, there has been conflict of authority on this subject, older English decisions holding such promises valid; but later English decisions, and the great current of American authority, holding such consideration as is present in this case is not good for a subsequent promise. This note was given years after the mother had spent money for her son's education without any promise or expectation, at the time, on the part of either of payment. The mother states, also, that she was distressed about not being able to dispose of a house, and the son said to her to sell it, and he would give



her the note. It is not distinct what this meant. But this constitutes no shadow of consideration. So we must conclude that this note is not enforceable, and it was error to decree it against the estate of J. A. Gooch.

Josephine Gooch cannot complain that it was not ascertained whether the personal estate would pay indebtedness. She refused to present her accounts as executrix as demanded by decree, and would not reveal the personalty, and, being sole devisee and the only appellant, cannot complain of this.

It is complained that sale was decreed subject to the dower of Ellen A. Gooch, widow of B. P. Gooch. This is error. Provision as to it should have been made. *Sommerville v. Sommerville*, 26 W. Va. 484. Nor was any provision made as to dower of Josephine Gooch.

There is error in decreeing interest from 1st day of October, 1907. Interest on principal should have been brought down to date of decree, and interest given on total from that date.

Too much was decreed for taxes paid by Ellen A. Gooch; but this was not excepted to.

We reverse the decree, and remand the case for further proceeding.

#### CALIFORNIA SUPREME COURT. (In Banc.)

PEOPLE OF THE STATE OF CALIFORNIA, by U. S. Webb, Attorney General,  
v.  
BANK OF SAN LUIS OBISPO et al.,  
Appts.

(159 Cal. 65, 112 Pac. 866.)

**Statute — repeal pending action — effect.**

1. The repeal of a statute authorizing the

*Note. — Effect of repeal of civil statute pending motion for new trial or appeal from judgment based thereon.*

The effect of a repeal, without a saving clause, of a penalty statute or ordinance upon a prior conviction or recovery of penalty thereunder, is treated in the note to *Wichita v. Murphy*, 23 L.R.A. (N.S.) 243.

The scope of the present note as indicated by its title does not require the inclusion of cases which the repeal of a statute during the pendency of an appeal has had the effect to convert into moot questions,—as where an injunction is sought against the enforcement of the repealed enactment,—or of cases in which the repeal has the effect to deprive the appellate court of jurisdiction; but is limited to the question whether the rule that the repeal of a stat-

liquidation of an insolvent bank and the placing of its affairs in possession of a receiver, pending appeal from an order denying a motion for a new trial after judgment against the bank in such proceeding had been affirmed on direct appeal, which motion did not operate to stay execution of the judgment, does not, in case the order is affirmed, affect any proceeding which had been taken under the statute, or judgment entered.

**Same — repeal pending appeal — effect.**

2. The repeal of a statute authorizing the liquidation of an insolvent bank and placing its affairs in the hands of a receiver, after a judgment against the bank in proceedings taken in accordance with its terms had been affirmed on appeal, and a subsequent motion for a new trial had been denied, does not affect the right of the bank to prosecute an appeal from the order, where the procedure governing such actions is that which applies to civil actions generally.

(December 28, 1910.)

**A** PPEAL by defendants from a judgment of the Superior Court for San Luis Obispo County in plaintiff's favor, authorizing the liquidation of an insolvent bank and placing its affairs in the hands of a receiver, and from an order denying a motion for a new trial. Affirmed.

The facts are stated in the opinion.

Mr. James L. Crittenden for appellants.

Messrs. U. S. Webb, Attorney General, and R. C. Van Fleet, for the People.

Henshaw, J., delivered the opinion of the court:

Under the banking act of 1903 (Stat. 1903, chap. 266), action was begun in the name of the people of the state of California by the attorney general, as contemplated by the provisions of the act, for a decree declaring the defendant, Bank of San Luis Obispo, insolvent, ordering it into involuntary liqui-

ute will destroy all rights of action based thereon which are not so perfected that a subsequent repeal of the statute will not affect them, and which have not proceeded to final judgment, is applicable where the statute is repealed during the pendency of a motion for a new trial or of an appeal.

That it is so applicable where the pendency of the appeal has the effect of preventing the judgment of the court below from becoming final seems to be well settled.

Thus in *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, it is said: "That the repeal of a statute conferring jurisdiction or creating a right of action without a saving clause takes away all right to proceed, and that the repealed act will be considered as if it never existed, except for the purposes of those actions or suits which have been prosecuted and con-

dation, and restraining it from the transaction of a banking business. This action proceeded to judgment in accordance with the complaint of the people, and a receiver was appointed by the court to administer its affairs in liquidation. On appeal to this court the judgment of the trial court was in all respects affirmed (*People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306), and this judgment became final in September, 1908. On June 19, 1908, the trial court denied the defendant banks motion for a new trial, and from this order an appeal was taken to this court. Pending the decision on this appeal from the trial court's order refusing to grant the motion for a new trial, the banking act of 1903 (Stat. 1903, chap. 266), under the authority of which this

action was prosecuted and these proceedings had, was repealed by the banking act of 1909 (Stat. 1909, chap. 76), which latter act made no provision for continuing in force any pending proceedings or litigation under the repealed act.

The Bank of San Luis Obispo now moves this court to vacate and set aside the judgment given against it, and to direct the trial court to dismiss this action upon the ground that the repeal of the banking act of 1903 put an end to all litigation pending under it, and that within the meaning of the law, the action of the people of the state of California against the Bank of San Luis Obispo was litigation pending and undetermined. The principle which appellant invokes has thus been stated: "When a cause of action

cluded which it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment but before entry of judgment works a discontinuance of the suit, and that a repeal pending an appeal to the higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution."

As long as the other party has a right of exception to any judgment which may have been rendered in an action based upon statute, such judgment is not final, and the repeal of the statute deprives the courts of any further jurisdiction of the case. *Western U. Teleg. Co. v. Lumpkin*, 99 Ga. 647, 28 S. E. 74.

The repeal of a statute providing for the alteration of the boundary between two school districts upon the petition of a majority of their citizens was held, in *School Dist. No. 11 v. School Dist. No. 20*, 63 Ark. 543, 39 S. W. 850, to affect a proceeding pending upon appeal; although, in view of the fact that for the purposes of the case there was no essential difference between the statute repealed and the one repealing it, the proceeding did not abate.

Where a judgment awarding a writ of mandamus to compel a village to pass an ordinance disconnecting territory did not so far perfect the rights of the plaintiffs to have their lands disconnected that such disconnection could be carried into effect independently of the statute, and solely and by virtue of the judgment, the repeal of the statute under which it was sought to compel such disconnection during the pendency of the appeal compels a reversal of the judgment. *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807; *Burchett v. People*, 197 Ill. 593, 64 N. E. 543; *Bradley v. Martin*, 100 Ill. App. 668.

An appellate court will affirm the decree granting an injunction against the opening of a road, where the act under which the proceedings to open the road were taken has been repealed, without any saving clause. *Wade v. St. Mary's Industrial School*, 43 Md. 178.  
37 L.R.A. (N.S.)

The repeal of a statute allowing the auditor of public accounts to assess a tax under certain circumstances, to pay a county subscription for railroad stock, although after rendition of a judgment and pending an appeal, puts an end to proceedings to compel the levy. *Musgrove v. Vicksburg & N. R. Co.* 50 Miss. 677.

The repeal of a statute requiring a bridge to be built, during the pendency of an appeal from a judgment for the plaintiff in an action for mandamus to compel the county commissioners to build the bridge, abates the action; but the judgment below as to the costs will stand. *Wikel v. Jackson County*, 120 N. C. 451, 27 S. E. 117.

The action of the court below in declining to decree the forfeiture of a slave in a proceeding under a statute providing for the forfeiture of a slave illegally imported will not, even if erroneous, be reversed by an appellate court, where the law on which such proceeding was based has been repealed pending the appeal. *State v. Edward*, 5 Mart. (La.) 474.

Conversely, where the enactment of a statute operates to enlarge the rights of a party, the appellate court must render its decision in conformity thereto. Thus, in *Price v. Nesbitt*, 29 Md. 263, it was held that a judgment denying an application for the removal of a suit to another court in order to obtain an impartial trial, although right and proper under the law then in force, would be reversed where subsequent legislation enlarging such right rendered proper the granting of the application.

Error in rendering judgment for the plaintiff, where the defense was established at the trial that, by reason of the failure of plaintiff, a banking corporation, to comply with certain statutory requirements, it was precluded from maintaining any action in the courts of the state, is released by the repeal, pending an appeal of the case, of the statute on which such defense is based. *First Nat. Bank v. Henderson*, 101 Cal. 307, 35 Pac. 899.

A decision will not be reversed because of error in receiving an unstamped note in

is founded on a statute, a repeal of the statute before final judgment destroys the right, and a judgment is not final in this sense so long as the right of exception thereto remains." 1 Lewis's Sutherland, Stat. Constr. 2d ed. § 285. And, says Cyc. (vol. 36, p. 1228): "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute, and defeats all actions pending under it at the time of its repeal. The rule is especially applicable to the repeal of statute creating a cause of action, providing a remedy not known to the common law, or conferring jurisdiction where it did not exist before, and is carried to such extent as to abate proceedings pending upon appeal after verdict in favor of plaintiff. A suit, the continuance of which is dependent upon the statute repealed, stops where the repeal finds it." But a consideration of the leading adjudications becomes necessary to determine

the precise meaning of the language thus employed,—how broad may be its scope and to what extent the principle is carried.

In *Surtees v. Ellison*, 9 Barn. & C. 752, the question was whether the evidence of trading which was sufficient to have supported the judgment of bankruptcy under the act of 5th George II. would support a commission in bankruptcy issued, if all previous statutes had been repealed, and the controlling statute was that of 6th George IV. The court of King's bench held that the acts must be those contemplated by the existing statute; in this connection Lord Tenterden saying: "It has been long established that, when an act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." And to the same effect is *Key v. Goodwin*, 4 Moore & P. 341, where, the question being similar, Lord Chief Justice Tindal declared: "I take the effect of repeal-

evidence, where the statute by which the note was rendered inadmissible has been repealed. *Atwell v. Grant*, 11 Md. 104.

The appellate court will not reverse a decree refusing an injunction against the erection of a rival telephone system, however erroneous, when, pending appeal, the exclusive franchise upon which the plaintiff's claim is founded has been rendered nugatory and void. *Muskogee Nat. Teleph. Co. v. Hall*, 4 Ind. Terr. 18, 64 S. W. 600.

Where, after a verdict in favor of the plaintiff in an action brought under a statute authorizing the recovery of six times the value of timber converted or obstructed in its passage down a river, and while the action was pending for review, the statute upon which the action was founded was repealed, the suit must be dismissed. *Sumner v. Cummings*, 23 Vt. 427.

A proceeding for the establishment of a drainage ditch is terminated with the repeal of the statute under which it was established, after the proceeding has been remanded to the lower court, and before further steps have been taken. *Taylor v. Strayer*, 167 Ind. 23, 119 Am. St. Rep. 469, 78 N. E. 236.

In *Springfield v. Worcester*, 2 Cush. 52, which was an action brought by one town against another for the expense of caring for a sick pauper, and where a verdict had been rendered and questions of law reserved before the repeal of the statute on which the action was founded had become effective, it was held that the court had power, in order to prevent failure of justice, both at common law and under a statute providing that "whenever any motion for a new trial shall be overruled, the court shall render judgment as of the term when the verdict was rendered, whenever it shall be necessary or expedient so to do in order to secure the rights of the prevailing party, or prevent any loss by reason of the death of either party, or otherwise," to cause judgment to be entered *nunc pro tunc* as of a day previous to that when the repeal became effective.

ment to be entered *nunc pro tunc* as of a day previous to that when the repeal became effective.

In *Curran v. Owens*, 15 W. Va. 208, the court, in stating the rule that if, pending an action depending solely upon statute, before there is a judgment, the law which gives the right to bring the suit is repealed without a saving clause as to suits pending, no further step towards judgment can be taken, raised the question whether, if there has been a final judgment in the inferior court, such judgment may be annulled in the appellate on the ground that after it was rendered the law giving the right to the action has been repealed; but, it not being necessary to decide the question, did not discuss it.

That a final judgment cannot be affected by the repeal of the statute under which it was rendered is held in *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410, in which the repealing act seems to have taken effect during the pendency of the appeal.

Where the writ of error does not vacate the judgment below, which continues in force until reversed, the appellate court cannot send the case back to the court below with instructions to enter a judgment of nonsuit, because, since the judgment below and while the writ of error has been pending, the statute authorizing the action has been repealed. *Kansas P. R. Co. v. Twombly*, 100 U. S. 78, 25 L. ed. 550.

The passage of a statute having the effect to confirm the title of defendants in an action to quiet title and recover possession, after the judgment of the court below has been rendered, and during the pendency of a writ of error, cannot affect the decision of the appellate court, where the writ of error does not vacate the judgment below. *Northern P. R. Co. v. Ely*, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302.

E. S. O.

ing a statute to be to obliterate it as completely from the records of the Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law." *Rex v. Justices of Peace*, 3 Burr. 1456, was an application for mandamus to require the justices to proceed in a matter pending before them after the act regulating the proceeding had been repealed. The matter was regularly before them for consideration, and had by them been adjourned without decision until a day after the repealing act took effect, whereupon they refused further to proceed. The court found the case to be one of great inconvenience and great hardship. "The legislature had the whole affair under their consideration, and they have not thought fit to reserve any jurisdiction to the justices after the 19th of November, 1761." Therefore "Lord Mansfield was very clear, and all the rest of the court concurred with him, 'that no jurisdiction now remained in the sessions.'"

In *United States v. The Peggy*, 1 Cranch, 103, 2 L. ed. 49, the schooner *Peggy* was seized as a prize, and by decree of the circuit court condemned and forfeited. An appeal was taken to the Supreme Court of the United States. While the appeal was pending, a treaty was entered into between the United States and France, whereby property not definitely condemned was to be restored to the original owner. Chief Justice Marshall held that the pending appeal forbade the conclusion that the property had been definitely condemned, since the judgment of condemnation had been appealed from and was undecided at the time when the treaty took effect; that therefore, in contemplation of the treaty, the property was not definitely condemned and should be restored, the chief justice saying: "It is, in the general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." In *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101, the schooner and its cargo had been condemned for violation of an act prohibiting intercourse with certain designated ports on the Island of St. Domingo. Judgment of condemnation was

pronounced by the district court. This condemnation was affirmed upon appeal by the circuit court, and from this judgment, in turn, an appeal was taken to the Supreme Court of the United States. While this appeal was pending, the time limit of the law under which the proceedings were taken expired, and the law's existence ceased. Chief Justice Marshall, delivering the opinion of the court, declared that in admiralty cases an appeal suspends the sentence altogether, and that the judgment is not *res judicata* until the final sentence of the appellate court be pronounced, and that the cause in the appellate court is to be heard *de novo* as if no sentence had ever been passed, and, "if no sentence had been pronounced, it has long been settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." The *Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239, was decided upon the principle governing *Yeaton v. United States*, *supra*. Under the sentence of condemnation the schooner *Rachel* had been sold and the proceeds of the sale paid over to the United States while the act was in force. The Supreme Court made a general order for restitution of the property condemned, leaving it to the district court to say whether that order for restitution would be complied with by order for the payment over of the proceeds of the sale, as prayed for by claimants. In *Maryland v. Baltimore & O. R. Co.* 3 How. 534, 11 L. ed. 714, Chief Justice Taney, in a brief sentence, expounds the reason for the rule as follows: "The repeal of the law imposing a penalty is itself a remission." In *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. ed. 231, Chief Justice Waite declares: "It is equally well settled that if a law conferring jurisdiction is repealed, without any reservation as to pending cases, all such cases fall with the law." But this language was employed under the following state of facts: An act concerning jurisdiction in certain cases upon the Supreme Court of the United States on appeal from the supreme court of the District of Columbia had been repealed. At the time the repeal became operative, the case was pending before the Supreme Court under a writ of error. The court declared that the single question was "whether there is any law now in force which gives us authority to re-examine, reverse, or affirm the judgment in this case," and held that the repeal of the law conferring jurisdiction deprived the court of jurisdiction. And to the argument that the appellants were derived of a remedy secured to them by the earlier

law, and of which they had availed themselves before the repeal of that law, it was answered: "But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and, if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary." Of like import is *Merchants' Ins. Co. v. Ritchie*, 5 Wall. 541, 18 L. ed. 540, where Chief Justice Chase delivered the opinion of the court. The chief justice there says: "It is clear that when the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction." But this was addressed to an action brought when the parties were citizens of the same state, under the act of 1833, contemnancing such actions. It had been repealed before judgment pronounced, and it was held that the action must fall. In *Ex parte McCardle*, 7 Wall. 506, 19 L. ed. 264, the same principle is announced by the chief justice. That case also was one where, when the court came to consider an appeal properly taken, it was confronted with the fact that after the appeal had been taken, the law authorizing it had been repealed. Chief Justice Chase, again delivering the opinion of the court, dismissing the appeal, says: "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle. . . . The general rule, supported by the best elementary writers, is that, 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed as if it never existed.' And the effect of repealing acts upon suits under acts repealed has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*, and more recently in *Merchants' Ins. Co. v. Ritchie*. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted. . . . Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Norris v. Crocker*, 13 How. 429, 14 L. ed. 210, was an action brought under the "fugitive slave act," to recover from defendant a penalty prescribed by that act against one who aided a slave to escape. While the ac-

tion was pending, and before it had passed to judgment, the provisions of the act fixing the penalty were repealed. Addressing itself to this state of facts, the Supreme Court says: "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And, in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law." To like effect, in *Assessors v. Osborne* (*Gates v. Osborne*), 9 Wall. 567, 19 L. ed. 748, where, upon the authority of *Merchants' Ins. Co. v. Ritchie*, *supra*, it is declared that, where jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal. *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153, was a criminal case. Tynen was indicted under the act of 1813. The judges of the circuit court divided upon the question of the sufficiency of the indictment. They certified the case to the Supreme Court. While it was there pending, Congress repealed the act of 1813, and it was held that the prosecution of Tynen fell with the repeal. In *Re Hall*, 167 U. S. 38, 42 L. ed. 69, 17 Sup. Ct. Rep. 723, a judgment given in the court of claims was reversed by the Supreme Court of the United States because interest on the original claim had been improperly allowed. The case was remanded to the court of claims for further proceedings not inconsistent with the opinion of the Supreme Court. The mandate of the Supreme Court was filed in the court of claims, an application was made for judgment in accordance with the opinion of the Supreme Court, and, pending the decision upon this application, the act of Congress authorizing the original judgment was repealed, and the court of claims declined to enter the judgment as prayed for. The plaintiff thereupon made an application to the Supreme Court for mandamus to require the court of claims to enter the judgment. It was held that the effect of the repealing act was to take away the jurisdiction of the court of claims to proceed further in any case founded upon the repealed act. But the Supreme Court distinctly held that its decision was not to be construed as an intimation that the court of claims would not have jurisdiction to entertain and grant a motion on the part of the petitioner to reinstate the original judgment without interest. In *Flanigan v. Sierra County*, 196 U. S. 553, 49 L. ed. 597, 25 Sup. Ct. Rep. 314, the question arose as to the effect of a repeal of an ordinance construed as a revenue ordinance upon proceedings begun before the repeal and pending after it. The action had been commenced in the superior court of the county of Sierra, state of Cali-

fornia, by Sierra county, had been removed to the United States circuit court, where judgment was given against Flanigan, which judgment was affirmed by the circuit court of appeals. He then obtained from the Supreme Court of the United States certiorari to the circuit court of appeals. The suit was brought on the 21st of June, 1900. On March 23, 1901, the ordinance was repealed. The action was at that time pending and undetermined, and the familiar principle is declared "that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon, Abr. 226."

Taking up, in turn, the views embodied in the leading decisions of sister states: In *Com. v. Duane*, 1 Binn. 601, 2 Am. Dec. 497, the defendant was convicted under an indictment for libel against the governor of the state. He moved in arrest of judgment. While his motion in arrest of judgment was pending, the legislature of Pennsylvania passed an act "that from and after the passing of this act, no person shall be subject to prosecution by indictment" for libel as at common law. It was held that the judgment should be arrested, since it had not been pronounced, and that the court cannot "pronounce judgment and inflict punishment when the law declares that the defendant shall not be subject to prosecution." In *Balch v. Detroit*, 109 Mich. 253, 67 N. W. 122, under an existing statute, the city of Detroit had proceeded to condemn land for street purposes, trial was had as to the value of the property sought to be condemned, a verdict and award of the jury given, and judgment entered, from which neither party took appeal. The act under which these proceedings were taken was then repealed, and substituted therefor was another act containing no saving clause as to pending litigation, but providing specifically that all proceedings to take private property on the part of the city of Detroit should be held and prosecuted under the provisions of the later act. The city of Detroit refusing to pay the award, mandamus was sought to compel it to do so. It defended upon the ground that the repeal of the previous act forbade it from levying an assessment and collecting the amount of the award. But it was held that as the proceedings in confirmation had gone to judgment, and that the judgment had become final, the petitioners had the right to insist that the judgment should stand and to enforce payment of the amount awarded them under it. In *Speckert v. Louisville*, 78 Ky. 288, a fine was imposed upon the appellants for violating the provisions of a penal ordinance forbidding the sale of liquor on Sunday or after

half past 11 o'clock at night. The appellants "suspended the judgments in the various actions against them" by appeal. During the pendency of the appeal, the ordinance imposing the penalty was repealed. Before the appellate court this fact was made known, and it was argued that there was no law in existence under which the judgments could be enforced. It is to be noted that the appeal herein and of itself had the effect of suspending the judgments. It is said: "The right of the legislature to repeal such laws cannot be questioned, and the mere fact that a party may be entitled to the benefits resulting from the prosecution of a penal action gives him no vested right to prosecute the action to a recovery, nor does the fact that a judgment has been rendered below vest him with such a right as cannot be divested by legislative action had before execution." *Sedgwick on Statutory Law* is quoted, and *Cooley's Const. Lim.* 4th ed. 477, to the effect that, "if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered."

In *Butler v. Palmer*, 1 Hill, 324, the statute gave a judgment creditor a year from the date of the sale under the mortgage in which to redeem. A subsequent statute, after sale and while the time for redemption was running, shortened the time. After the passage of this act the redemption was attempted within the time limited by the earlier statute, but after the time prescribed by the later act. It was held that the later statute, though operating to shorten the time for the exercise of the previously existing right of redemption, was not unconstitutional; that rights specifically conferred by a statute are lost by its repeal, unless saved by express words in the repealing statute; that where the statute conferred jurisdiction, its repeal takes away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal, which pending proceedings rest for their support upon the jurisdiction conferred by the repealed statute; but that it is otherwise in respect to such civil rights as have been perfected far enough to stand independent of the statute, or, in other words, such as have ceased to become executory, and have become executed. In *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 598, 19 Pac. 673, after judgment obtained, but while the judgment was upon appeal, the statute prescribing a penalty against a railroad company for failure to file with the county clerk notice of the station at which a book should be kept for entering a description of animals killed was repealed, it was held that the repeal put an end to the pro-

ceeding, that the appellee could have "no such thing as a vested interest in an unenforced penalty." It is pointed out that the judgment for the penalty does not enforce the penalty, but the penalty must be enforced by the execution of the judgment, and that the power to enforce it had been suspended by the appeal. In *Church v. Rhodes*, 6 How. Pr. 281, under the law as it existed, a report of referees could be reviewed by rehearing. The provision for a rehearing was repealed, and it was held that the repeal applied to pending and inchoate proceedings; that is to say, to actions commenced before the passage of the repealing act, and in progress for rehearing at the time of the passage, and that the effect was to take away the right to a rehearing. In *Vance v. Rankin*, 194 Ill. 625, 88 Am. St. Rep. 173, 62 N. E. 807, the law required the trustees of a village to pass an ordinance disconnecting certain designated territory. Mandamus was sued out to compel the trustees so to do, and judgment as prayed for awarded. The trustees appealed from the judgment. While the appeal was pending, the legislature amended the law so as to make it discretionary with the trustees, rather than compulsory upon them, so to do. It was held that the new statute controlled, and that, by reason of the change in the law, it would be improper to enforce mandate where the existing law did not countenance it. In *Western U. Teleg. Co. v. Smith*, 96 Ga. 569, 23 S. E. 899, plaintiff had obtained a verdict and judgment against the defendant under an act imposing penalties upon telegraph companies. Within the time allowed by law, defendant filed its motion for a new trial. The motion was overruled, and a bill of exceptions assigning error in the overruling of the motion for a new trial was sued out by the defendant. While the cause was in this condition, the penal statute was repealed. Says the supreme court of Georgia: "At the time the repealing act was passed, the plaintiff was not entitled to an enforcement of his judgment, and the case must be dealt with as one which was pending when the repeal took place." And then the court declares the established rule that when such a statute is repealed, it ends all pending litigation under it.

In this state it is provided by Code that any statute may be repealed at any time, except when it is otherwise provided therein, and persons acting under any statute are deemed to have acted in contemplation of this power of repeal. Section 327, Pol. Code. It is further provided that "the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already 37 L.R.A. (N.S.)

committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." Pol. Code, § 329. In *People ex rel. Thorne v. Hays*, 4 Cal. 127, the language of Lord Tenterden to the effect that, "when an act of Parliament is repealed, it must be considered the same as if it had never existed," is quoted, with the comment that "no one will question the right of Parliament or the legislature to repeal statutes where subsisting rights are not disturbed or the obligations of contracts impaired." In *McMinn v. Bliss*, 31 Cal. 122, appeal from a judgment in an action of forcible detention and detainer had been taken. When the case came to be heard on appeal, a motion was made to dismiss upon the ground that the statute under which the action was brought had been repealed. The principle is recognized that the repeal of a statute under which alone a right of action exists operates as an extinguishment of all actions pending when the repeal takes effect, but it was held, for reasons stated, that the statute had not been repealed. In *Lamb v. Schottler*, 54 Cal. 319, proceedings were taken under an act which contemplated the creation of a board of water commissioners for the purpose of acquiring by condemnation the Spring Valley Waterworks of San Francisco. The supervisors and the board of water commissioners had taken certain steps under the act when the act was repealed. It was declared by this court that the repeal of the statute effectually annulled all proceedings had under it, unless the obligation of a contract would thereby be impaired, or a vested right destroyed, and that, by reason of the repeal, it was impossible for the supervisors and the water commissioners to proceed further. In *Spears v. Modoc County*, 101 Cal. 303, 35 Pac. 869, a fine had been imposed for violation of a municipal ordinance. Pending an appeal from the judgment, the municipal ordinance was repealed. It was held that such repeal operated as a remission of the penalty for the offense and the fine imposed for its violation, and that, notwithstanding a mistaken affirmance of the judgment by the superior court after the repeal of the ordinance, the enforcement of such a mistaken judgment would be restrained by injunction. It is said in this case: "By the appeal to the superior court, the enforcement of the judgment appealed from was stayed until after the determination of the appeal. Penal Code, § 1470. As no undertaking on appeal was required, the appeal itself operated as a supersedeas. *McGarrahan v. Maxwell*, 28 Cal. 75. The effect of the appeal was therefore to preserve the rights of the parties in the same condition as they were prior to the

entry of the judgment (*Dulin v. Pacific Wood & Coal Co.* 98 Cal. 304, 33 Pac. 123); and until the determination of the appeal, the proceeding was a pending action in which the rights of neither party had been conclusively determined." In *First Nat. Bank v. Henderson*, 101 Cal. 307, 35 Pac. 899, an action by the bank against the defendant upon an account stated, judgment was given in favor of the bank. One of the defenses was the failure of the bank to comply with the provisions of the act of April 1, 1876, requiring the bank to file with the county recorder or to publish the statements required by the act. The defense was established at the trial. Pending the appeal the legislature repealed this statute without a saving clause. It was by this court held that, while ordinarily it is the province of an appellate court to review the judgment of an inferior court as of the time when it was rendered, since ordinarily the judgment of a trial court is a determination of the rights of the parties as they existed at the commencement of the action, the rule was subject to exception, and such an exception was presented in this case, and that the modification of the rule is that if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. *Cooley*, Const. Lim. p. 469. It was held that the statute requiring banks to file or publish their statements, under the penalty that a bank so failing could not maintain or prosecute any action, was in its nature penal; that when the legislature had remitted the penalty by repeal of the statute, the appellant was no longer able to avail himself of the privilege and defense which it conferred upon him. In *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821, an act authorizing a stockholder of a domestic mining corporation to recover from its directors a penalty for failure to comply with the provisions of the act was repealed while an appeal was pending in this court from a judgment given under the act. It was held that the repeal absolutely prevented any further prosecution of the litigation, and that, as no person has a vested right in an unenforced penalty, the proceedings must cease. In *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322, the action was brought by the state hospital to secure from defendant provision for the support of his son, an inmate of the asylum. The law countenancing this action had been repealed, and it was by this court held that, if the remedy for a right accorded solely by statute is repealed while the right is still inchoate, and not reduced to possession or judgment, the right is thereby lost, if the repealing statute contains no sav-

ing clause. In *Ball v. Tolman*, 135 Cal. 377, 87 Am. St. Rep. 110, 67 Pac. 339, the action was to recover a penalty under the provisions of an act for the better protection of stockholders. Judgment for plaintiff was entered in the trial court on January 9, 1897. Pending a motion for a new trial, the penal provisions of the act were repealed. The motion for a new trial was denied, and defendant then appealed from the judgment and from the order denying his motion for a new trial. This court affirmed the judgment and order. *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546. The remittitur issued on January 18, 1908. Neither this court nor counsel at the time of the affirmance in this court had actual knowledge of the existence of the repealing statute. Upon subsequent appeal to this court the judgment was vacated and annulled; this court holding, by reason of the repeal, it was without jurisdiction to proceed, and that, "in all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction." In *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674, plaintiff had recovered a judgment in a civil action under one of its ordinances prescribing a license fee to be paid by every attorney at law. By general statute the power to pass such an ordinance was taken away from municipalities. It was held: "The right given the plaintiff in this case being penal in its nature, and the remedy created solely by statute, its enforcement is dependent upon the statute alone. It is still inchoate, and not reduced to possession nor perfected by final judgment. In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

These cases have been cited as fairly typifying the extremes of judicial determination, and as expressing the reasons upon which their rules of decision are based. In the case of penalties and crimes, the repeal operates to defeat all actions pending. In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and imperfect. In the case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls. But the general expressions to this effect employed in the decisions are to be read in each case in the light of the facts which are there disclosed. Here



the wise admonition of Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheat. 399, 5 L. ed. 290, applies with peculiar force: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." In every case where, after judgment, the proceeding has been declared to be "pending," there will be found a direct appeal from the judgment, which direct appeal either suspended the judgment so that it was not final and enforceable, or, as in *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101, worked a removal of the cause to the appellate court, where it was to be tried *de novo*. The reason given why the proceeding must abate under these circumstances is that, because of the suspension of the judgment by appeal, it is without finality; that to give it finality, the court of appeals must itself pronounce its judgment; and that in pronouncing its judgment it must be governed by the existing law. Therefore, when it finds that by the existing law the previous law, under which alone validity could be given to the judgment, has been repealed, the sole prop and foundation for support of the judgment has been removed, and of necessity it must be declared null and void. No case, however, has been found, and we venture to say none can be found, where a judgment which has been affirmed after direct appeal, and has by such affirmation become final during the existence of the statute supporting it, where the judgment itself has been in the process of execution within the law, and where rights have arisen by virtue of this legal execution of the judgment, has ever been held to be destroyed by a repeal of the statute supporting it, because the collateral proceeding of an appeal from an order denying a new trial is pending without supersedeas or stay bond. And to this consideration we now come.

*Western U. Teleg. Co. v. Smith*, 96 Ga. 569, 23 S. E. 899, would seem, at first glance, to be in opposition to the declaration just made. There a judgment under a statute imposing a penalty had been recovered. The defendant had moved for a new trial and had secured its bill of exceptions, 37 L.R.A. (N.S.)

assigning error in the overruling of its motion for a new trial. The supreme court of Georgia held that the situation disclosed was one which brought the case within the accepted rule, that the effect of the repeal is to abate actions for the statutory penalty then pending. But this is based, not alone upon the proposition that the repeal of a statute exacting a penalty is a remission of the penalty, unless at the time the repeal operates the penalty has actually been enforced, but still further the court points out that at the time of the repeal the judgment was in suspension, and could not have been enforced. Here, not only had the judgment itself been affirmed upon direct appeal, but it was not stayed in law or in fact by virtue of the pending proceedings under the motion for a new trial. The Code of Civil Procedure declares (§ 1049) that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." In *Gillmore v. American Cent. Ins. Co.* 65 Cal. 63, 2 Pac. 882, it is said: "While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended; and until litigation on the merits is ended, there is no finality to the judgment, in the sense of final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it." This language is quite appropriate to the consideration then before the court. This court there did not have before it the question of the effect of a repeal of a statute upon a judgment which had become final by affirmation after direct appeal, but it was merely considering and interpreting a stipulation between parties, to the effect that judgment should be entered for plaintiff provided such judgment was given for plaintiff in another action between the parties, the same "to be entered when the judgment had become final." Its language was used solely with reference to the stipulation, holding that, within its terms, the judgment had not become final, by reason of the pendency of a motion for a new trial. In *Sharon v. Hill* (C. C.) 26 Fed. 337, 392, the case of *Gillmore v. American Cent. Ins. Co.* is quoted from and commented upon; the discussion in the Federal case being addressed to the proposition whether a judgment in a state court could be pleaded as *res judicata* while an appeal was pending both from the judgment and from the order denying the motion for a new trial. Upon the authority of *Gillmore v. American Cent. Ins. Co.*, it is intimated, though not necessary to the de-

cision, that the pendency of a motion for a new trial would be sufficient to forbid the reception of the judgment in evidence by way of *res judicata* or estoppel. But, upon the other hand, it is now well settled that where a judgment has been affirmed upon appeal, and has thus become final, or where the time for appeal has expired, the judgment may be pleaded as *res judicata* or in estoppel, notwithstanding the fact that proceedings upon a motion for a new trial are pending, which, if successful, would result in the overthrow of the judgment. In *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589, the matter is discussed, and the conclusions of the court may be summarized as follows: A motion for a new trial, in the absence of an order of the court to that effect, does not stay or suspend the operation of a final judgment. An action under § 1049 of the Code of Civil Procedure is to be deemed pending while an appeal from the judgment is pending, or until the time for such an appeal has expired, but when the judgment upon appeal has been determined by an affirmance of the judgment, or when the time for appeal has expired, the judgment is admissible in evidence as *res judicata*, and to raise an estoppel in bar of the action. The same ruling as to the effect of a pending motion for a new trial upon the finality of a judgment is declared in *Young v. Brehe*, 19 Nev. 379, 3 Am. St. Rep. 892, 12 Pac. 564, and the soundness of the rule is intimated by the Supreme Court of the United States in *Hubbell v. United States*, 171 U. S. 203, 43 L. ed. 136, 18 Sup. Ct. Rep. 828, where it is said: "Indeed, it may well be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel."

In *Spanagel v. Dellinger*, 38 Cal. 284, it is said: "Under our system, from the entry of the verdict or filing of the findings of the court, the motion for new trial is a kind of episode, or, in a certain sense, a collateral proceeding,—a proceeding not in the direct line of the judgment,—for the judgment may be at once entered, and even executed, while a motion for a new trial is pending in an independent line of proceeding, which ends in an order reviewable on an independent appeal. The motion may be heard and decided, and an appeal taken on its own independent record, while the proceedings on and subsequent to the judgment may be still regularly going on, and even an independent appeal taken in that line." And this language is quoted with approval by this court in the later case of *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186; while to the same effect is *Houser & H. Mfg. Co. v. Hargrove*, 129 Cal. 90, 61 Pac. 660, and 37 L.R.A. (N.S.)

*Knowles v. Thompson*, 133 Cal. 247, 65 Pac. 468. A broad difference exists between the operation and legal effect of a direct appeal from a judgment (which, while the appeal is pending, in the generality of cases, operates to stay the judgment absolutely, and in all cases operates to destroy for it any claim of finality), and the "collateral proceedings" of an appeal from an order denying a motion for a new trial, taken after the judgment itself has become an enforceable finality by reason of its affirmance upon direct appeal. In the former case the courts, when the law which alone will support the judgment given has been withdrawn, have felt, and expressed themselves as, unable to proceed further with the litigation, since they themselves must pronounce a judgment, and can pronounce it, only under the authority of existing law. In the case of appeal from an order refusing a new trial, where no stay has been granted, and where, as here, the judgment has become a finality, the decision which the court renders is not upon the judgment appealed from, but upon the order appealed from; and while the effect of its reversal of the order will, of course, be necessarily the setting aside of the judgment, this, after all, is but an incident to the ruling which it makes, which ruling goes not at all to the sufficiency or finality of the judgment, but only as to whether, within familiar rules and limitations, the judgment was fairly given. Herein our motion for a new trial differs essentially from the common-law motion which was always heard and determined before entry of judgment, so that the appeal from the judgment embraced all questions. Under our system, the appeal from an order denying a new trial is a separate and independent appeal, which, if prosecuted in time, may be taken after the judgment has become final. Excepting when ordered by supersedeas or permitted by stay bond, it in no way suspends the judgment nor interferes with its finality. It is in this respect more in the nature of an equitable bill of review, which, while countenanced in proper cases, even after a judgment of affirmance upon appeal, never operated in and of itself to suspend the decree. Indeed, it has been so expressly declared by this court in *Fowden v. Pacific Coast S. S. Co.* 149 Cal. 151, 154, 86 Pac. 178.

We conclude, therefore, that, as the judgment had become final while the statute authorizing the action was in force, its finality is not disturbed by a pending motion for a new trial which does not operate in any way to stay the execution of the judgment; that as the statute authorizes the people upon the relation of the attorney

general, to proceed in equity to have the bank declared insolvent, leaving the proceedings governing the action those which generally obtain in the practice of this state, the repeal of the statute did not destroy the right of the appellant to be heard upon this motion for a new trial; that, if the appeal from the motion for a new trial should be granted, it would necessarily have the effect of vacating the judgment; that, by virtue of the repeal, the action could then no longer be prosecuted; that if, however, the appeal from the order denying the motion for a new trial should be denied, and the order affirmed, the repeal of the statute would not affect any proceeding taken under it and under the judgment heretofore affirmed.

2. To the consideration of the appeal from the order refusing appellant's motion for a new trial, we now proceed. Many of the propositions advanced go to the alleged errors of the court in admitting evidence of the action and reports of the bank commissioners in the sequestration of the bank's property, and of their report that it was unsafe to permit the bank longer to continue business. They are based upon appellant's contention that, for specified reasons, the act itself is unconstitutional. The objections thus advanced have been completely answered in the opinion upon the appeal from the judgment and do not require further discussion. *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 306. See also *State ex rel. Sparks v. State Bank & T. Co.* 31 Nev. 456, 103 Pac. 407, 105 Pac. 567. The evidence was sufficient to justify the finding of the insolvency of the bank. That evidence disclosed that the assets of the bank amounted to \$158,903.70; that the principal items of assets were inventoried as "bills receivable \$133,332.56; profit and loss account of \$5,022.69; and real estate and bank building at \$19,000." The cash on hand was \$367.35. The bills receivable consisted in large part of fifteen notes signed by the San Luis Land & Improvement Company, a note of the Breeze Publishing Company for \$4,000, and \$645.75 accrued interest, a note of James L. Crittenden for \$22,268.13 principal and \$7,779.64 accrued interest, and sundry other notes. The notes of the San Luis Land & Improvement Company were secured by mortgages upon real estate, and there was conflicting evidence as to the value of that real estate. The officers of the Bank of San Luis Obispo likewise constituted the officers of the San Luis Land & Improvement Company. On the debit side of the statement there were certificates of deposit amounting to \$54,433.40. Some of these, with accumulated interest, were due and others coming due. Thus, upon July 24, 1906, there was due 37 L.R.A. (N.S.)

\$400 with accumulated interest upon a certificate of deposit of January 17, 1905, payable six months after date; also \$473 upon a like certificate of July 18, 1905; \$3,040, with accumulated interest, upon like certificate of February 6, 1905; and \$20,000 upon a certificate of September 27, 1902, due and payable twelve months after date. Manifestly, these overdue demands could not be met from cash on hand of \$367.35, and it appears that the answer which the bank officials made to the inquiries of the bank commissioners was that Mr. Crittenden, the president, was in San Francisco endeavoring to borrow money to meet the demands against the bank. Without further elaboration of the evidence, it is apparent that it sustained the finding of the court as to the insolvency of the institution.

Wherefore the motion to vacate and annul the judgment and dismiss the proceedings is denied, and the order denying defendant's motion for a new trial is affirmed.

We concur: Shaw, J.; Lorigan, J.; Melvin, J.; Sloss, J.

Petition for rehearing denied January 27, 1911.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

HENRY M. BAKER, *Exr.*, etc., of Mary Baker G. Eddy, Deceased,

v.

CHARLES F. LIBBIE et al.

(210 Mass. 599, 97 N. E. 109.)

#### Injunction — against publication of letters.

1. An executor may enjoin the publication or multiplication of private letters of his testator, although they are upon commonplace subjects and have no literary merit, but he cannot enjoin the mere sale or trans-

#### Note. — Injunction: against publication or sale of letters.

The question stated in the title is treated in the note to *Press Pub. Co. v. Monroe*, 51 L.R.A. 360, wherein it is shown that the modern cases have universally given equitable relief against the unauthorized publication of all kinds of letters, whether they have a literary quality or not, upon the ground of the writer's property in his manuscripts.

In addition to the cases set out in the earlier note, see *Roberts v. McKee*, 29 Ga. 161, wherein, in holding that one member of a firm, after the dissolution of the partnership, will be restrained from publishing let-

fer of such letters, in the absence of some special limitation imposed either by the subject-matter of the letter, or the circumstances under which it was sent.

**Literary property — private letters — rights of writer and receiver.**

2. The property right in the words of private letters is in the writer, and not in the receiver, except letters written by agents, and those where the conditions indicate that the property in the form or expression is in another than the writer; but the property right in the material on which the letter is written, with the right to transfer it, is in the receiver, in the absence of some special limitations imposed either by the subject-matter, or the circumstances under which it is sent.

(January 4, 1912.)

ters written to him by another member in the course of their business, and pertaining thereto, without the consent of the writer, at least where it did not appear that such a publication was required for purposes of justice, either civil or criminal, the court said: "Conceding that courts of equity act alone upon the principle of protecting the rights of property, and not upon the grounds that such publications tend to wound the feelings, to degrade or injure the author, and to expose him to personal abuse and litigation, or to disturb the peace of society, still we think the jurisdiction can be sustained on one broad and comprehensible ground at least; and one which, when announced, will tend greatly to promote confidence—the only solid foundation upon which society rests—by taking away the temptation to its betrayal; . . . and that is, by sending a letter, the writer has given, for the purpose of reading it, and in some cases of keeping it, a property to the person to whom the letter is addressed, yet that the gift is so restrained that, beyond the purposes for which the letter is sent, the property is in the sender;" and *Cadell v. Stewart*, 1 Bell, Com. 116, note, which is set out in *BAKER v. LIBBIE*, and in which it appeared that the sendee of the letters had given them to a bookseller, and that it was the publication by the bookseller that was interdicted at the suit of the children of the writer. See also *Andrew v. Raeburn*, L. R. 9 Ch. 522, 31 L. T. N. S. 73, 22 Week. Rep. 564, wherein an interlocutory injunction restraining the publication of certain private letters was granted.

The statement quoted in *BAKER v. LIBBIE* from *Bartlett v. Crittenden*, 5 McLean, 32. Fed. Cas. No. 1,076, was purely obiter, having been inserted in the earlier opinion merely by way of argument. As to *Prince Albert v. Strange*, 2 DeG. & S. 652, 1 Macn. & G. 25, 1 Hall & T. 1, 18 L. J. Ch. N. S. 120, 13 Jur. 109, which is also referred to in the *BAKER CASE*, it did not involve the right to prevent the publication of letters, but dealt with an analogous question.

The few cases upon the question under annotation decided subsequently to the de-  
37 L.R.A. (N.S.)

**R**ESERVATION by the Superior Court for Suffolk County for the determination by the Supreme Judicial Court of questions of law arising in an action brought to restrain the publication of private letters. Decree for complainant.

The facts are stated in the opinion.

Messrs. Elder, Whitman, & Barnum and William A. Morse, for plaintiff:

Letters are literary property and entitled to protection.

*Drone*, Copyright, 133; *Woolsey v. Judd*, 4 Duer, 379; *Gee v. Pritchard*, 2 Swanst. 420, 19 Revised Rep. 87; *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901; *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509; *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712.

cision in *Press Pub. Co. v. Monroe*, 51 L.R.A. 357, to which the earlier note is appended, harmonize with the rules therein deduced. Thus in *Labouchere v. Hess*, 77 L. T. N. S. 559, 14 Times L. R. 75, it was held, apparently upon the ground that the writer retained a property right, that equity has jurisdiction to restrain the publication of private letters by the transferee of one to whom the sendee had given them. And the same reasons were adhered to in *Dock v. Dock*, 180 Pa. 14, 57 Am. St. Rep. 617, 30 Atl. 411, it being said that the writer of personal letters has a special property therein to prevent their publication, and that such right is one which can be adequately protected only in equity. And see *Phillip v. Pennell* [1907] 2 Ch. 577, 76 L. J. Ch. N. S. 663, 97 L. T. N. S. 386, 23 Times L. R. 718, wherein, although admitting that the established rules of law would permit the enjoining of the publication or even paraphrasing of private letters written by the artist *Whistler*, relating to his habits of life and his personal opinions on current topics, and political, religious, and social matters, it was held that such rule did not prevent the lawful possessors of such letters, who intended writing a biography of such artist, from giving to the world through the medium of their book such information respecting *Mr. Whistler* personally,—his habits, character, opinions, and doings,—as a study of such letters would afford, so long as they did so without publishing the substance of any letter of which they were not entitled to publish the words.

As to whether injunction will issue to prevent the introduction of letters, etc., in evidence in judicial proceedings, see *Barrett v. Fish*, 51 L.R.A. 754, and note appended thereto.

The general question of equitable protection of personal rights is treated in the notes to *Chappell v. Stewart*, 37 L.R.A. 783, and *Itzkovitch v. Whitaker*, 1 L.R.A. (N.S.) 1147.

As to rights and remedies of author who has parted with property right in work, see note to *Cleveland v. Martin*, 3 L.R.A. (N.S.) 629.

G. J. C.

The defendants have no right to sell or show the letters.

Drone, Copyright, 127; Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901; Werckmeister v. American Lithographic Co. 142 Fed. 830; Pope v. Curl, 2 Atk. 342; Woolsey v. Judd, 4 Duer, 379; Queensbury v. Shebbeare, 2 Eden, 329; Denis v. Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712; Millar v. Taylor, 4 Burr. 2303; Sweetman v. Bentley (1871), Weekly Notes, 162; Rice v. Williams, 32 Fed. 437; Eyre v. Higbee, 22 How. Pr. 198; Dock v. Dock, 180 Pa. 14, 57 Am. St. Rep. 617, 36 Atl. 411; Jefferys v. Boosey, 4 H. L. Cas. 815, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; Lytton v. Devey, 54 L. J. Ch. N. S. 293, 52 L. T. N. S. 121; Palmer v. DeWitt, 47 N. Y. 532, 7 Am. Rep. 480; Parton v. Prang, 3 Cliff. 548, Fed. Cas. No. 10,784; Prince Albert v. Strange, 2 De G. & S. 652, 1 Macn. & G. 25, 1 Hall & T. 1, 18 L. J. Ch. N. S. 120, 13 Jur. 109; Kenrick v. Danube Collieries Co. 39 Week. Rep. 473; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3,441; Gilbert v. Star Newspaper Co. 11 Times L. R. 4; Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Dec. 480; United States v. Tanner, 6 McLean, 128, Fed. Cas. No. 16,430; Macgillivray, Copyright, pp. 221, 222, 225; Drone, Copyright, pp. 127, 131; Copinger, Copyright, 53; 25 Cyc. 1491, 1493 "Literary Property."

Messrs. William M. Prest and Frank B. Livingstone, for defendants:

The plaintiff has no literary property in the letters.

St. Hubert Guild v. Quinn, 64 Misc. 336, 118 N. Y. Supp. 582, 16 Cyc. 854; Curtis, Copyright, 11; M. Steinert & Sons v. Tegen, 207 Mass. 397, 32 L.R.A.(N.S.) 1013, 93 N. E. 584; Knowles v. Knowles, 205 Mass. 294, 91 N. E. 213; Hoyt v. Mackenzie, 3 Barb. Ch. 324, 49 Am. Dec. 178; Perceval v. Phipps, 2 Ves. & B. 19, 13 Revised Rep. 1; Wetmore v. Scovell, 3 Edw. Ch. 515; Dickson v. Marshall, 18 Scot. L. Rep. 651; 2 High, Inj. 4th ed. § 1012 & Note; Article, Prof. Joel Parker, 1 Am. L. Reg. 469; 4 Harvard L. Rev. 193, "The Right to Privacy;" Chappell v. Stewart, 82 Md. 323, 37 L.R.A. 784, 51 Am. St. Rep. 476, 33 Atl. 542; Itzkovitch v. Whitaker, 115 La. 479, 1 L.R.A.(N.S.) 1149, 112 Am. St. Rep. 272, 39 So. 499; Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, 2 Ambl. 737; Denis v. Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712; Gee v. Pritchard, 2 Swanst. 402, 19 Revised Rep. 87; Folsom v. Marsh, 2 Story, 100, Fed. Cas. No. 4,901; Woolsey v. Judd, 4 Duer, 379, 11 How. Pr. 49; Lytton v. Devey, 54 L. J. Ch. N. S. 293, 52 L. T. N. S. 37 L.R.A.(N.S.)

121; Philip v. Pennell [1907] 2 Ch. 577, 76 L. J. Ch. N. S. 663, 97 L. T. N. S. 386, 23 Times L. R. 718; Story, Eq. 13th ed. §§ 946-948; Re Wheatcroft, L. R. 6 Ch. Div. 97, 46 L. J. Ch. N. S. 669, 26 Week. Rep. 69; Oliver v. Oliver, 11 C. B. N. S. 139, 31 L. J. C. P. N. S. 4, 8 Jur. N. S. 512, 5 L. T. N. S. 287, 10 Week. Rep. 18; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509; Pollard v. Photographic Co. L. R. 40 Ch. Div. 345, 58 L. J. Ch. N. S. 251, 60 L. T. N. S. 418, 37 Week. Rep. 266; Merryweather v. Moore [1892] 2 Ch. 518, 61 L. J. Ch. N. S. 505, 66 L. T. N. S. 719, 40 Week. Rep. 540; Prince Albert v. Strange, 1 Macn. & G. 25, 2 De G. & S. 652, 1 Hall & T. 1, 18 L. J. Ch. N. S. 120, 13 Jur. 109; Pavesich v. New England L. Ins. Co. 122 Ga. 190, 69 L.R.A. 101, 108 Am. St. Rep. 104, 50 S. E. 68, 2 Ann. Cas. 561; Foster-Milburn Co. v. Chinn, 134 Ky. 424, 34 L.R.A.(N.S.) 1137, 135 Am. St. Rep. 417, 120 S. W. 364; Vanderbilt v. Mitchell, 72 N. J. Eq. 919, 14 L.R.A.(N.S.) 304, 67 Atl. 97.

Assuming that the plaintiff has a literary property in these letters, the acts alleged against the defendant not only have not interfered, and will not interfere, with that literary property, but are lawful uses by the defendant of his property in the manuscripts.

Millar v. Taylor, 4 Burr. 2305; Stephens v. Cady, 14 How. 528, 530, 14 L. ed. 528, 529; Queensberry v. Shebbeare, 2 Eden, 329; Gee v. Pritchard, 2 Swanst. 402, 19 Revised Rep. 87; Philip v. Pennell [1907] 2 Ch. 577, 76 L. J. Ch. N. S. 663, 97 L. T. N. S. 386, 23 Times L. R. 718; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509; 2 High, Inj. 4th ed. § 1011; Bramwell v. Halcomb, 3 Myl. & C. 738.

Rugg, Ch. J., delivered the opinion of the court:

The plaintiff, as executor of the will of Mary Baker G. Eddy, the founder of "Christian Science" so-called, seeks to restrain an auctioneer of manuscripts from publishing for advertising purposes and from selling certain autograph letters of his testatrix. These letters were written in her own hand by Mrs. Eddy, as is said, "during one of the most interesting periods of her career, that is, just after the first publication of her 'Science and Health with Key to the Scriptures,' in 1875. It is averred in the answer that the letters have no attribute of literature, but are merely friendly letters written to a cousin about domestic and business affairs. Extracts from the letters show that they refer to household matters, to health, and to the work she was doing. The questions raised relate to the existence, extent, and character of the proprietary right

of the writer of private letters upon indifferent subjects not possessing the qualities of literature, and to the degree of protection to be given in equity to such rights as are found to exist. These points have never been presented before for decision in this commonwealth. The nearest approach was in *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480, where the rights of an author of a dramatic composition put upon the stage, but not printed, were protected against a rival presentation made possible by human memory (overruling upon this point the earlier case of *Keene v. Kimball*, 16 Gray, 545, 77 Am. Dec. 426), and *F. W. Dodge Co. v. Construction Information Co.* 183 Mass. 62, 60 L.R.A. 810, 97 Am. St. Rep. 412, 66 N. E. 204, where property rights in valuable commercial information distributed to subscribers in writing, in print, by telegraph or orally, were recognized and protected against use by a rival concern. Neither of these decisions touch at all closely the points involved in the case at bar.

The rights of the authors of letters of a private or business nature have been the subject of judicial determination in courts in England and this country for a period of at least one hundred and seventy years. The first English case was *Pope v. Curl*, 2 Atk. 342, which was in 1741. It was a suit by Alexander Pope to restrain the publication of letters written by him to Swift and others. In continuing an injunction Lord Chancellor Hardwicke, after remarking that no distinction could be drawn between letters and books or other learned works, said: "Another objection has been made . . . that where a man writes a letter, it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver, possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer. . . . It has been insisted . . . that this is a sort of work which does not come within the meaning of the act of Parliament [as to copy-right], because it contains only letters on familiar subjects and inquiries after the health of friends, and cannot properly be called a learned work. It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable."

*Thompson v. Stanhope* (1774) 2 Amb. 737, was a suit by the executors of Lord Chesterfield to restrain the publication of

his now famous letters to his son, which the widow of the latter proposed to print and sell. Some of these possessed literary merit of a higher order. Lord Chancellor Apsley was "very clear" that an injunction should be granted, upon the authority of the foregoing decision and the somewhat kindred cases of *Forrester v. Waller*, 4 Burr. 2331, and *Webb v. Rose*, 4 Burr. 2330, where notes and conveyancer's drafts were held to be the literary property of the writer or his representatives, and *Queensberry v. Shebeare*, 2 Eden, 329, where the publication of a part of Lord Clarendon's History by a possessor of the manuscript was restrained.

*Gee v. Pritchard*, 2 Swanst. 402-426, 10 Revised Rep. 87, was decided by Lord Eldon in 1818. Letters apparently without literary or other special interest, by the plaintiff to the son of her husband, were the subject of the suit, and publication was restrained on the ground of the property right of the writer. In *Lytton v. Devey*, 54 L. J. Ch. N. S. 293, it was said: "The property in the letters remains in the person to whom they are sent. The right to retain them remains in the person to whom the letters are sent; but the sender of the letters has still that kind of interest, if not property, in the letters that he has a right to restrain any use being made of the communication which he has made in the letters so sent by him." See also *Prince Albert v. Strange*, 2 De G. & S. 652, 1 Macn. & G. 25, 43, 1 Hall & T. 1, 18 L. J. Ch. N. S. 120, 13 Jur. 109. This same principle was followed expressly in the Irish case of *Granard v. Dunkin*, 1 Ball & B. 207, 12 Revised Rep. 18, and in *Labouchere v. Hess*, 77 L. T. N. S. 559, 14 Times L. R. 75. There are several *dicta* to the same effect by great English judges. For example Lord Campbell said in *Boosey v. Jefferys*, 6 Exch. 580, at 583: "A court of equity will grant an injunction to prevent the publication of a letter by a correspondent against the will of the writer. That is a recognition of property in the writer, although he has parted with the manuscript, since he wrote to enable his correspondent to know his sentiments, not to give them to the world." Lord Cairns said, respecting correspondence in *Hopkinson v. Burghley*, L. R. 2 Ch. 447, at 448: "The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose." See also *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867, 962, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615. The latest English case on the subject recognizes this as the well-settled rule. *Philip v. Pennell* [1907] 2 Ch. 577, 76 L. J. Ch. N. S. 663, 97 L. T. N. S. 386,

23 Times L. R. 718. In 1804 the Scottish court on the suit of his children interdicted the publication of manuscript letters of Robert Burns. *Cadell v. Stewart*, 1 Bell, Com. 116, note.

The earliest case in this country, *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712, arose in 1811. A single letter of no literary pretension was there in question, and its publication was enjoined, and the writer's property interest in the letter was distinctly upheld.

The question was elaborately discussed by Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901, who held that "the author of any letter or letters (and his representatives), whether they are literary compositions or familiar letters or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed nor other persons, have any right or authority to publish the same upon their own account or for their own benefit." In *Bartlett v. Crittenden*, 5 McLean, 32 at page 42, Fed. Cas. No. 1,076, Mr. Justice McLean said: "Even the publication of private letters by the person to whom they were addressed may be enjoined. This is done upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purposes for which they were written." In *Woolsey v. Judd*, 4 Duer, 379, the question was considered exhaustively, and all the earlier cases were reviewed. The conclusion was reached that the writer of even private letters of no literary value has such a proprietary interest as required a court of equity at his instance to prohibit their publication by the receiver. *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509, decided that "the recipient of a private letter sent without any reservation, express or implied," held "the general property qualified only by the incidental right in the author to publish and prevent publication by the recipient or any other person." In *Barrett v. Fish*, 72 Vt. 18, at page 20, 51 L.R.A. 754, 82 Am. St. Rep. 914, 47 Atl. 174, it was said "that a court of equity will protect the right of property in such [private] letters by enjoining their unauthorized publication." The same doctrine has been held, either expressly or by way of *dictum*, in *Dock v. Dock*, 180 Pa. 14-22, 57 Am. St. Rep. 617, 36 Atl. 411; *Rice v. Williams* (C. C.) 32 Fed. 437; *Eyre v. Higbee*, 22 How. Pr. 198; *Palmer v. DeWitt*, 47 N. Y. 532-536, 7 Am. Rep. 480.

Against these opinions are *Wetmore v. Scovell*, 3 Edw. Ch. 515, and *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178, decided respectively of Vice Chancellor Mc-

Coun and Chancellor Walworth while sitting alone. They were criticized and overruled in *Woolsey v. Judd*, supra, by a court of six judges. There are also certain doubtful *dicta* by a vice chancellor in *Perceval v. Phipps*, 2 Ves. & B. 19, 28, 13 Revised Rep. 1, which are relied upon as asserting a somewhat similar view. But it is not necessary to discuss them in detail, for this review of cases demonstrates that the weight of decisions by courts of great authority, speaking often through judges of high distinction for learning and ability, supports the conclusion that equity will afford injunctive relief to the author against the publication of his private letters upon commonplace subjects, without regard to their literary merit or the popular attention or special curiosity aroused by them.

The same conclusion is reached on principle and apart from authority. It is generally recognized that one has a right to the fruits of his labor. This is equally true, whether the work be muscular or mental or both combined. Property in literary productions, before publication and while they rest in manuscript, is as plain as property in the game of the hunter or in the grain of the husbandman. The labor of composing letters for private and familiar correspondence may be trifling, or it may be severe, but it is none the less the result of an expenditure of thought and time. The market value of such an effort may be measured by the opinions of others, but the fact of property is not created thereby. A canvas upon which an obscure or unskilful painter has toiled does not cease to be property merely because by conventional standards it is valueless as a work of art. Few products of the intellect reveal individual characteristics more surely than familiar correspondence, entries in diaries, or other unambitious writings. No sound distinction in this regard can be made between that which has literary merit and that which is without it. Such a distinction could not be drawn with any certainty. While extremes might be discovered, compositions near the dividing line would be subject to no fixed criterion at any given moment, and scarcely anything is more fluctuating than the literary taste of the general public. Even those counted as experts in literature differ widely in opinion, both in the same and in successive generations, as to the relative merits of different authors. The basic principle on which the right of the author is sustained even as to writings confessedly literature is not their literary quality, but the fact that they are the product of labor.

The existence of a right in the author over his letters, even though private and

without worth as literature, is established on principle and authority. The right is property in its essential features. It is therefore entitled to all the protection which the Constitution and laws give to property. From this general statement are to be excepted special instances, such as letters by an agent to or for his principal and others, where the conditions indicate that the property, in the form or expression, is in another than the writer. The absolute right of the author to prevent publication by the receiver may also be subject to limitations arising from the nature of the letter or the circumstances under which it is written or received. Some of these are pointed out in *Folsom v. Marsh*, 2 Story, 100, Fed. Cas. No. 4,901. But these exceptions are narrow and rare, and do not affect materially the general rule.

The extent of this proprietary right, as between the writer and the recipient of letters, requires a closer analysis. It depends upon implications raised by law from the circumstances. This test is a general one, and has been applied to the public delivery of lectures, the presentation of dramas, and other analogous cases. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209, 1 Hall & T. 28; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Nicols v. Pitman*, L. R. 26 Ch. Div. 374, 380, 53 L. J. Ch. N. S. 552, 50 L. T. N. S. 254, 32 Week. Rep. 631, 48 J. P. 549. The relative rights of the writer and receiver may vary with different conditions. If there be a request for return, or if the correspondence is marked in definite terms, as personal or confidential, such special considerations would need to be regarded. The case at bar presents the ordinary example of friendly correspondence between kinswomen upon topics of mutual private interest. Under such circumstances, what does the writer retain and what does he give to the person to whom the letter is sent? The property right of the author has been described as "an incorporeal right to print [and it should be added to prevent the printing of, if he desires] a set of intellectual ideas or modes of thinking communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever." *Millar v. Taylor*, 4 Burr. 2303, at 2396. It has been called also "the order of words in the . . . composition." *Jefferys v. Boosey*, 4 H. L. Cas. 815, 867, 3 C. L. R. 625, 24 L. J. Exch. N. S. 81, 1 Jur. N. S. 615; *Holmes v. Hurst*, 174 U. S. 82, 86, 43 L. ed. 904, 906, 19 Sup. Ct. Rep. 606; *Kalem Co. v. Harper Bros.* 222 U. S. 55, 63, 56 L. ed. 20, 32 Sup. Ct. Rep. 20. The right of

the author to publish or suppress publication of his correspondence is absolute in the absence of special considerations, and is independent of any desire or intent at the time of writing. It is an interest in the intangible and impalpable thought and the particular verbal garments in which it has been clothed. Although independent of the manuscript, this right involves a right to copy or secure copies. Otherwise, the author's right of publication might be lost. The author parts with the physical and material elements which are conveyed by and in the envelop. These are given to the receiver. The paper upon which the letter is written belongs to the receiver. *Oliver v. Oliver*, 11 C. B. N. S. 139, 31 L. J. C. P. N. S. 4, 8 Jur. N. S. 512, 5 L. T. N. S. 287, 10 Week. Rep. 18; *Grigsby v. Breckinridge*, 2 Bush, 480, 486, 92 Am. Dec. 509; *Pope v. Curl*, 2 Atk. 343; *Werckmeister v. American Lithographic Co. (C. C.)* 142 Fed. 827, 830. A duty of preservation would impose an unreasonable burden in most instances. It is obvious that no such obligation rests upon the receiver, and he may destroy or keep at pleasure. Commonly there must be inferred a right of reading or showing to a more or less limited circle of friends and relatives. But in other instances the very nature of the correspondence may be such as to set the seal of secrecy upon its contents. See *Kenrick v. Danube Collieries Co.* 39 Week. Rep. 473. Letters of extreme affection and other fiduciary communications may come within this class. There may be also a confidential relation existing between the parties, out of which would arise an implied prohibition against any use of the letters, and a breach of such trust might be restrained in equity. On the other hand, the conventional autograph letters by famous persons signify on their face a license to transfer. Equitable rights may exist in the author against one who by fraud, theft, or other illegality obtains possession of letters. The precise inquiry is whether indifferent letters written by one at the time perhaps little known or quite unknown, which subsequently acquire value as holographic manuscripts, may be marketed as such. This case does not involve personal feelings or what has been termed the right to privacy. 4 Harvard L. Rev. 193.

The author has deceased. Moreover, there appears to be nothing about these letters, knowledge of which by strangers would violate even delicate feelings. Although the particular form of the expression of the thought remains the property of the writer, the substance and material on which this thought has been expressed have passed to



the recipient of the letter. The paper has received the impression of the pen, and the two in combination have been given away. The thing which has value as an autograph is not the intactable thought, but the material substance upon which a particular human hand has been placed, and has traced the intelligible symbols. Perhaps the autographic value of letters may fluctuate in accordance with their length or the nature of their subject-matter. But whatever such value may be, in its essence it does not attach to the intellectual but material part of the letter.

This exact question has never been presented for adjudication, so far as we are aware. There are some expressions in opinions, which dissociated from their connection may be laid hold of to support the plaintiff's contention. See *Dock v. Dock*, 180 Pa. 14, 22, 57 Am. St. Rep. 617, 36 Atl. 411; *Eyre v. Higbee*, 22 How. Pr. 198; *Palin v. Gathercole*, 1 Colly. Ch. Cas. 565. It may well be that title such as appears to exist in the recipient may not go to the extent of being assets in the hands of a decedent, a bankrupt, or an insolvent. *Eyre v. Higbee*, 22 How. Pr. 198; *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A. (N.S.) 1173, 124 Am. St. Rep. 520, 81 N. E. 887, 12 Ann. Cas. 938. But on principle it seems to flow from the nature of the right transferred by the author to the receiver, and of that retained by the writer in ordinary correspondence, that the extent of the latter's proprietary power is to make or to restrain a publication, but not to prevent a transfer. The rule applicable to the facts of this case, as we conceive it to be, is that in the absence of some special limitation imposed either by the subject-matter of the letter, or the circumstances under which it is sent, the right in the receiver of an ordinary letter is one of unqualified title in the material on which it is written. He can deal with it as absolute owner subject only to the proprietary right retained by the author, for himself and his representatives, to the publication or nonpublication of ideas in its particular verbal expression. In this opinion, publication has been used in the sense of making public through printing or multiplication of copies.

The result is that an injunction may issue against publication or multiplication in any way, in whole or in part, for advertising or other purposes, of any of the letters described in the bill, and allowing the plaintiff, if he desires, to make copies thereof within a reasonable time, but going no further.

So ordered.

37 L.R.A. (N.S.)

## KENTUCKY COURT OF APPEALS.

ALLEN THOMAS, by Next Friend, Appt.  
v.  
HOUSTON, STANWOOD, & GAMBLE  
COMPANY.

(146 Ky. 156, 142 S. W. 214.)

**Master — discharge of servant — bad conduct — clothing.**

1. Contract authority to discharge an employee for bad conduct includes the right to discharge him for refusal to obey a rule requiring street clothes to be kept in the dressing rooms.

**Trial — master — reasonableness of rule — question for court.**

2. The question of the reasonableness of a rule promulgated by a master for the guidance of his servant is for the court.

**Master — rule — reasonableness.**

3. A rule that employees in a factory must keep their street clothing in the dressing room and away from machinery is reasonable.

**Same — waiver — disregard.**

4. An employee cannot, by habitually disregarding a rule, establish the right to treat it as waived, where he is reprimanded whenever his breach of the rule comes to the notice of the master.

(January 10, 1912.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Kenton County in defendant's favor in an action brought to recover damages for an alleged breach of a contract of employment. Affirmed.

The facts are stated in the opinion.

Mr. B. F. Graziani for appellant.

Messrs. S. D. Rouse and C. B. Thompson, for appellee:

An employee must obey all reasonable rules and orders of an employer. Where there is an admitted violation and the rule or order violated is clearly reasonable, it is the duty of the court so to decide as a matter of law.

*Jerome v. Queen City Cycle Co.* 163 N. Y.

**Note. — Discharge of employee for disobedience of regulations.**

This note includes only cases where the employment was for a specified time, and the servant was discharged before the expiration of term for violation of rules or general orders of master. Cases involving a discharge for refusal to obey a specific order or command limited to the particular occasion have been excluded.

As a general proposition any act of a servant which injures or has a tendency to injure his master's business interests or reputation will justify his dismissal. 26 Cyc. 988.

The rule that an employer may discharge an employee for disobedience of regulation

351, 57 N. E. 485; *Sterling Emery Wheel Co. v. Magee*, 40 Ill. App. 340; *Kendall v. West*, 196 Ill. 221, 89 Am. St. Rep. 317, 63 N. E. 683; *Wood, Mast. & S.* §§ 118, 119; *Standidge v. Lynde*, 120 Ill. App. 418; *Butterick Pub. Co. v. Whitcomb*, 225 Ill. 605, 8 L.R.A. (N.S.) 1004, 80 N. E. 247; *Walker v. Hancock Mut. L. Ins. Co.* 75 N. J. L. 281, 68 Atl. 113.

In the case of a discharge, the entire course of conduct of the employee prior to his discharge may be examined into, the inquiry not being confined to the disobedience occurring at the time of the discharge.

*Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485; *Siselman v. Cohen*, 25 Misc. 529, 54 N. Y. Supp. 991.

seems to have the unanimous support of the authorities. The following are instances which were held to justify the master in discharging a servant for disobedience of regulations:

—overseer's control of slaves against known wishes and positive commands of owner. *Lane v. Phillips*, 51 N. C. (6 Jones, L.) 455.

—disregard by overseer of plantation, of owner's instructions, that overseer himself was not to chastise slaves. *Kessee v. Mayfield*, 14 La. Ann. 90.

—master's disobedience of owner's orders as to length of time vessel should remain in certain port. *Guildford v. Anglo-French S. S. Co.* 9 Can. S. C. 303.

—absence from duty of superintendent of factory, in violation of express orders. *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485.

—failure of traveling salesman to follow route list furnished by employer. *Ball v. Livonia Salt & Min. Co.* 8 Misc. 333, 28 N. Y. Supp. 537.

—failure of traveling salesman to follow instructions with reference to places to be visited and manner of making sales. *Milligan v. Sligh Furniture Co.* 111 Mich. 629, 70 N. W. 133.

—salesman's disobedience of rule that offers for goods made by customers should be submitted to employer, where less than price fixed by employer. *Dunkell v. Simons*, 15 Daly, 352, 7 N. Y. Supp. 655.

—traveling salesman's disobedience of instructions not to sell below certain price. *Sabin v. Kendrick*, 46 App. Div. 90, 61 N. Y. Supp. 336.

—continued violation by salesman of employer's instruction not to sell goods on consignment. *Walsh v. New York & K. Co.* 88 App. Div. 477, 85 N. Y. Supp. 83.

—failure of traveling salesman to obey instructions as to writing to employer daily. *McCain v. Desnoyers*, 64 Mo. App. 66.

—failure and refusal of solicitor for oil company to render daily reports as per instructions. *Kenner v. Southwestern Oil Co.* 113 La. 80, 36 So. 895.  
37 L.R.A. (N.S.)

*Winn, J.*, delivered the opinion of the court:

On April 9, 1907, the appellee company entered into a written contract of employment of appellant, Thomas, whereby the latter was to work in the manufacturing plant of the former for a period of four years from September 24, 1906, at an annually increasing scale of hourly wages. In the contract it was agreed that the appellee would not discharge Thomas "except for neglect of work, inability to perform work in hand, or for bad conduct." On June 12, 1908, the company discharged Thomas, whereupon he brought his action against the company for an alleged breach of its contract. By an amendment he set up his effort and failure to obtain other

—disobedience of instructions as to making out weekly reports. *McEdwards v. Ogilvie Mill. Co.* 5 Manitoba L. Rep. 77.

—use of sand to cut grease from roll of plate machine and to restore friction, after being instructed to cease using sand, and use fire clay. *Matthews v. Park Bros.* 146 Pa. 384, 23 Atl. 208, later appeal, 159 Pa. 579, 28 Atl. 435.

—disobedience of instructions not to sign employee's individual name to letters and correspondence relating to employer's business. *Russell v. Inman*, 79 App. Div. 227, 79 N. Y. Supp. 681.

—violation of rules of shop prohibiting smoking. *Forsyth v. McKinney*, 56 Hun, 1, 29 N. Y. S. R. 125, 8 N. Y. Supp. 561.

—failure of employee, sent to make collections, to transmit amounts collected according to express and explicit instructions. *Voelckee v. Banner Brewing Co.* 9 Ohio C. C. 318, 6 Ohio C. D. 80.

—disobedience by manager of stock farm of owner's orders to make no sales of cattle unless owner was advised and consented. *Von Heyne v. Tompkins*, 89 Minn. 77, 5 L.R.A. (N.S.) 524, 93 N. W. 201.

—violation of rule of insurance company forbidding agents to collect premiums by mail. *Walker v. John Hancock Mut. L. Ins. Co.* 80 N. J. L. 342, 35 L.R.A. (N.S.) 153, 79 Atl. 354, Ann. Cas. 1912 A, 526.

—employee's habitual disregard of employer's instructions to report daily at office at specified hours. *Tullis v. Hassell*, 22 Jones & S. 391.

In *Louisville & N. R. Co. v. Cox*, 145 Ky. 667, 141 S. W. 389, it was said that there was no error in instruction to effect that railroad employee who permitted himself to be garnished in violation of rules of company might be properly discharged.

And in *Hamilton v. Love*, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384, it was held that to justify discharge of servant for violation of rules, the servant must have had notice of such rules.

J. H. B.

work, and by his evidence sustained this part of his case. Upon the principal issue the company answered, admitting the discharge, but justified it by charging that Thomas had for a long time neglected his work, on not less than three occasions had violated its rules and regulations, well-known to him, in force in its factory where he worked, that he was habitually indifferent to his work, and indifferent to and rebellious against those in authority over him,—that for these reasons, and none other, he was discharged. Issue was joined upon these allegations and the case proceeded to a trial. The court placed the burden upon the company.

Upon the trial, it appeared from the company's witnesses that Thomas had sometimes been slow in his work, would slow down the machine he was operating against the direction of his superior, and, according to one of his immediate overseers, was "the contrariest fellow he ever had in the shop." Thomas, upon the other hand, minimizes these instances as casual and of no consequence. He explains that an offensive answer to his superior was joking in spirit, and that he meant no rudeness. It appeared further in the evidence that one of the company's rules governing its operations was a regulation that the men should keep their street clothing in a dressing room maintained by it for that purpose, and away from the machinery at which the men were at work. This rule was persistently broken by Thomas, who was familiar with it, and notwithstanding complaint had been made to him because of his infraction of the rule. He says frankly that he knew the rule; that he had been spoken to about disobedience of it; that he told his superiors that he would discontinue the infraction, but that he did not do as he said he would. In persisting in this, his own, course of action against a rule which he knew, of however little consequence his own judgment may have deemed it, he was undoubtedly guilty of bad conduct, one of the specific grounds upon which he had agreed that the company might discharge him. There is no contradiction of the testimony upon this point; and it need therefore have no further consideration.

Upon the trial the court, among other things, instructed the jury, in substance, that they should find for the defendant company if they should find from the evidence that Thomas "wilfully or repeatedly disobeyed reasonable rules of the defendant adopted by it for the government of the defendant's employees in the performance of the work." To this instruction proper exception was saved by defendant company.

With this instruction and the testimony

above outlined in the record, the jury brought in a verdict of \$500 for Thomas. The company entered its motion, and filed its grounds for a new trial. Upon consideration a new trial was granted. Upon the second trial the evidence introduced was identical with that upon the first trial. The defendant again had the burden; and at the conclusion of all the testimony, upon motion therefor by the defendant, the court instructed the jury to find a verdict for it. From the final order of dismissal following such verdict, this appeal is prosecuted. As above pointed out, there can be no reasonable question that Thomas violated a rule of the defendant company. In the first trial the instructions left it to the jury to say whether that rule was "reasonable;" and we gather from briefs of counsel that the court granted the new trial because the presiding judge had reached the conclusion that the reasonableness of the rule was for the court to determine, not an issue for determination by a jury. Because of the fact of the infraction of the rule, and its view that that rule was reasonable, the trial court directed the verdict for defendant.

The point here for determination, therefore, is whether in contracts of employment the court or the jury is to decide that a given rule promulgated by the master to the servant for his guidance in the discharge of his duties is a reasonable or an unreasonable exercise of the master's authority and province. In our opinion that duty rests upon the court. The several courts of the Union are not in harmony. But in Kentucky the rule has been declared that the question of reasonableness is for the court, though without any elaborate discussion of the principle involved. In the case of Cincinnati, N. O. & T. P. R. Co. v. Lovell, 141 Ky. 249, — L.R.A.(N.S.) —, 132 S. W. 569, it was said; "If a written or printed rule is reasonable, and not against public policy, and it is known to the employee or servant, or should be known by him, and the undisputed facts show it was established and in force and that it is applicable to him, and that his violation of it was the proximate cause of the injury he complains of, then the court should take the case from the jury." This statement carries the necessary deduction that the question of reasonableness is for the court. There is no difference in principle between a rule that is written and one that is not, especially when, as here, the servant's knowledge of the rule is conceded. The case cites as authority for its position the case of Western U. Teleg. Co. v. Crider, 107 Ky. 600, 54 S. W. 963, a case where the telegraph company had put in evidence its rule against night delivery of messages then in

force at Elizabethtown. It was remarked that only the declaration of the courts could fix any permanent understanding of the subject, that, if it were left to the juries, one view would be taken by a jury to-day, and another to-morrow, and that neither party would know his rights or obligations. In the case of *Western U. Teleg. Co. v. Brasher*, 136 Ky. 485, 124 S. W. 788, this court again said that the matter of whether a given rule was reasonable or otherwise was one for the court, and not the jury, to determine. The same idea is found in *Illinois C. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 57 N. E. 485; *Kendall v. West*, 196 Ill. 221, 89 Am. St. Rep. 317, 63 N. E. 683; *Kansas City, Ft. S. & M. R. Co. v. Hammond*, 58 Ark. 324, 24 S. W. 723; *Walker v. Hancock Mut. L. Ins. Co.* 75 N. J. L. 281, 68 Atl. 113, and many other cases.

The propriety, the necessity indeed, of the promulgation of such wise and reasonable rules by the master to the servant for his guidance in a large and complicated manufacturing plant like that of appellee, cannot be questioned; for without them would be neither order nor system, nor could the company's business be expedited save by a compact working entity of its employees under such rules. Upon the other hand, they are just as necessary and desirable to the servant; for in the making of such rules by trained and experienced heads of departments, and in obedience to them by the servant, must in large measure lie the latter's safety of life and limb. It would be impossible for us to outline different demands of the many fields of employment in which such rules are proper, or the specific obligations which should be imposed in the different kinds of service. Each instance must be answered by its facts. But it seems to us that the rule as to clothing in the present case was beyond question reasonable. And while the employer in every case should exercise fair dealing, and kind treatment toward his employee, the latter, as well owes to the former to be faithful and diligent in the performance of his services, and to obey his reasonable rules within the nature of his employment. There is no doubt here that the rule was broken; and it follows that the discharge was justifiable.

It is argued that the testimony showed that Thomas's discharge was not because of the infraction of this specific rule, but because of his general conduct, and that his general conduct was for the jury to pass upon. But the specific instance of disobedience or bad conduct entered into and was a part of his general conduct, and was alone

sufficient to justify the discharge. About it there was no contrariety of evidence; and the court therefore properly took the case from the jury.

Nor is there any merit in the claim that his habitual disregard of the rule warranted him to treat it as waived; for the evidence shows that there was no acquiescence in, but continued complaint at, the breaking of the rule whenever it came under the notice of the master.

The judgment is affirmed.

## NEW HAMPSHIRE SUPREME COURT.

WALTER B. DOUGLASS

v.

BELKNAP SPRINGS LAND COMPANY  
et al.

(76 N. H. 254, 81 Atl. 1086.)

**Dedication — purchase by plat — right to streets.**

1. The purchaser of lots according to a plat is entitled to have the streets shown on the plat maintained only so far as their existence is material to the enjoyment of the lots purchased.

**Same — notice of adverse claim — effect.**

2. One who upon purchasing lots with reference to a plat is informed that a portion of the platted tract belongs to a stranger, and that he will do what he wishes with respect to the streets on that portion, cannot prevent the closing of such streets.

**Same — plat of stranger — adoption.**

3. One selling lots with reference to a plat made and recorded by another is bound to maintain the streets shown on the plat, so far as his grantee is interested in them.

**Same — lack of space — effect.**

4. The existence of a street shown on a plat upon the shore of a lake cannot be defeated as against claims of persons who buy lots with reference to the plat, by the fact that when the requisite number of lots is laid out according to course and distance no space will be left for the street.

**Same — street on lake shore.**

5. A purchaser of a lot in a platted tract on the shore of a lake is entitled to have a street shown on the plat to exist along the

**Note. — Effect of conveyance of lands laid down on plats to prevent a change in the use or form of the property.**

As to right of grantee to claim an easement, implied covenant, or estoppel, as against the grantor, by a call in the deed for a street or alley in which the grantor owns the fee, see the note to *Talbert v. Mason*, 14 L.R.A.(N.S.) 878.

The present note, like the one accompanying *Herold v. Columbia Invest. & Real*

lake shore kept open, and it is immaterial that by reason of the configuration of the ground for a portion or the distance it can be used only as a foot path.

(December 5, 1911.)

**T**RANSFER by the Superior Court for Belknap County for the opinion of the Supreme Court of questions arising in an action brought to enjoin the obstruction of plaintiff's right of way. Case discharged.

In 1889, a tract of land on the lake shore, in Alton, was owned by the Winnepesaukee Land Company, which was divided by them into house lots with adjoining streets, one of which, called Lake Shore avenue, followed the shore line the entire length of the tract. A plat of the tract was recorded and

lots sold by reference to it, several of which are owned by plaintiff. The unsold balance of the land was taken on execution, and in 1897 this land lying north of the railroad and bordering on the lake was owned by defendants Russell, and south of the railroad by the defendant company. Buildings were erected across Lake Shore avenue by the purchasers of certain lots. There was a mistake in the survey, and in one place there is considerably less width of land than is shown on the plan. Some of the inside lots border on the avenue, and buildings have been erected on them. Plaintiff knew of the building that was being done, but made no objection until this proceeding was begun.

Further facts appear in the opinion.

Estate Co. 14 L.R.A.(N.S.) 1067, of which it is a continuation, is limited to the effect of a conveyance as regards the right of the grantee of a lot laid down on a plat to prevent a change in the use or form of the property.

The cases seem to establish three rules, viz.: The strict rule that the rights of the purchaser of a lot laid down on a plat as respects streets, etc., designated thereon, extends only to adjacent streets, etc., and their extensions to the next way; the rule that the purchaser's rights extend to streets, etc., even though remote, the existence of which is material to the enjoyment of his lot; and the broad rule that his rights extend to all the streets, etc., designated on the plat, whether they are continuous to his property or not.

The first class of cases is illustrated by *Stover v. Steffey*, 115 Md. 524, — L.R.A.(N.S.) —, 81 Atl. 33, wherein it was held that the doctrine of implied covenant as to streets, etc., arising from a reference to a plat in a deed, applies only to a way over lands platted as a street which are adjacent or contiguous to the lots sold, and extending only to the next street, and that therefore the purchaser of lots laid down on a plat is not entitled to enjoin the use of a lot designated on the plat as a "park," for other than park purposes, where such "park" lot is not adjacent to plaintiff's lot; and by *Bartlett v. Harmon*, 107 Me. 451, 78 Atl. 842, wherein it was said that in the absence of facts showing a contrary intention, the platting of lands and the sale of lots with reference thereto would constitute a dedication of a portion designated as a "park," sufficient to entitle one holding land on a street abutting on the park to enjoin the sale of such "park" plat for private use; but in this case it was held that the instrument under which the plaintiff held contained provisions which negated as to the plaintiff an intention to dedicate to the public the "park" in question. And in *Messick v. Kincaid*, — Ky. —, 145 S. W. 375, it was held that the purchaser of a lot laid down on a plat thereby acquires an interest in

and a right to use an adjacent street which entitles him to enjoin the dedicator from fencing up such street so as to deprive him of the use thereof.

The second class of cases is illustrated by *Kelly v. Penfield*, 67 Misc. 272, 122 N. Y. Supp. 811, as modified in 128 N. Y. Supp. 1129, wherein the strict rule that the right to use of the streets as shown on the plat extends only to adjacent streets was extended to a street the closing of which would materially injure plaintiff's lot, it being said that it was the lot owner's right to have the conditions as to streets, where it appears they are not too remote, remain the same as when he purchased. It will be noted that this in effect was the rule applied in *DOUGLASS V. BELKNAP SPRINGS LAND CO.*

A case illustrating the third rule is *Freeman v. Island Heights Hotel & Improv. Co.* 75 N. J. Eq. 491, 72 Atl. 974 (which follows *Bridgewater v. Ocean City R. Co.* 62 N. J. Eq. 276, 49 Atl. 801, as affirmed in 63 N. J. Eq. 798, 52 Atl. 1130, and *Lennig v. Ocean City Asso.* 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491, both of which are set out in the note to *Herold v. Columbia Invest. & Real Estate Co.* 14 L.R.A.(N.S.) 1067), in which it was held that a conveyance of lots according to a map upon which a "camp ground" is laid out, implies a covenant that such ground will be used for no other purposes, and that the purchaser may enforce the covenant. The location of the plaintiff's lot does not appear in the report of the case, but the *Bridgewater Case*, upon which most reliance was placed, was said to be a case like the present, and in that case the complainant was the purchaser of a lot at some distance from the "park" property therein involved. See also *Jessop v. Kittanning*, 225 Pa. 583, 74 Atl. 553, wherein it was held that the purchaser of a lot sold according to a recorded plat may restrain the closing and use for private purposes of streets and alleys designated on such plat. From the argument and authorities cited in the opinion it seems that the court would apply this rule to all streets laid down on the plat, whether adjacent to the plaintiff's lot or

Messrs. Stephen S. Jewett and Arthur A. Folsom, for plaintiff:

A deed bounding on a way shown on a plan which is referred to in the deed, and afterward recorded by the grantor in the registry of deeds, estops the grantor and those claiming under him from obstructing the way.

Rodgers v. Parker, 9 Gray, 445; Gawtry v. Leland, 40 N. J. Eq. 323; Thomas v. Poole, 7 Gray, 83; Stetson v. Dow, 16 Gray, 372; Lennig v. Ocean City Asso. 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; White v. Tide Water Oil Co. 50 N. J. Eq. 1, 25 Atl. 199; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.

Where an easement or servitude is an-

not. And see Highland Realty Co. v. Avondale Land Co. — Ala. —, 56 So. 716, wherein, in holding that a sale of lots laid down on a plat vested in a purchaser of such lots the right to have all the streets referred to in the plan remain public, and deprived the owner of the right to pervert any of the platted streets from uses other than public, the court quoted with approval from Elliott, Roads & Streets, § 132, as follows: "Where streets and roads are marked on a plat, and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity; and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as everyone knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways, unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication;" and continuing, said: "This right is not merely a right of personal passageway over the designated streets, or of access to and from the purchased lot, but is a right in the purchaser to have maintained, as against the dedicatory, the designated scheme of public ways and places in its integrity, as it existed at the time of his purchase, and that all persons whatsoever may use them as occasion may require." In connection with this case it should be noted that Code 1890, § 3903, provides in effect that the vacation of a platted street by the adjoining owners shall not abridge or destroy any of the rights or privileges of other proprietors in the plat.

In a number of instances the question under annotation has been decided without reference having been made to the location, with respect to the particular street or park

nexed by grant or covenant or otherwise to a private estate, the due and quiet enjoyment of it will be protected by injunction against encroachment.

Bartlett v. Peaslee, 20 N. H. 547, 51 Am. Dec. 242; Winnipissiogee Lake Co. v. Worcester, 29 N. H. 433; Webber v. Gage, 39 N. H. 182.

Plaintiff has the right to insist that Lake Shore avenue shall be kept open throughout its entire length and breadth as shown on the plan. The defendants cannot deny the plaintiff's right nor do anything to interfere with it.

Goodhart v. Hyett, L. R. 25 Ch. Div. 182, 53 L. J. Ch. N. S. 219, 50 L. T. N. S. 95, 32 Week. Rep. 165, 48 J. P. 293; Lockwood Co. v. Lawrence, 77 Me. 297, 52 Am.

involved, of the complainant's lot or lots. Thus, in White v. Moore, 139 App. Div. 269, 123 N. Y. Supp. 1012, it was held that where owners of urban lands lay out the same into lots, streets, and a "park" they cannot afterward deprive their grantees of the benefit of the portion designed as a "park," by excluding the public therefrom and using such lands for private purposes. In this case it does not appear whether the decision is limited to owners of lands adjacent to such "park," or whether remote owners purchasing with reference to the plat were also entitled to have the "park" maintained as a public ground. See also White v. Moore, 73 Misc. 96, 132 N. Y. Supp. 441, which was a subsequent trial of the same case, in which a similar conclusion was reached.

And in Morrow v. Highland Grove Traction Co. 219 Pa. 619, 123 Am. St. Rep. 677, 69 Atl. 41, it was held that purchasers of land laid down on a plat upon which appeared a space marked "grove," which was represented as set aside as a public park, could enjoy the use of the "grove" for any other purpose. Here, again, no reference is made as to the location of the plaintiff's lot with reference to the grove. And the same conclusion was reached in Shertzer v. Hillman Invest. Co. 52 Wash. 492, 100 Pac. 982, where the facts involved were practically identical with those of the Morrow Case. And see Revard v. Hunt, 29 Okla. 835, — L.R.A.(N.S.) —, 119 Pac. 589, where it was held that the purchaser of a lot sold with reference to a plat could maintain an action to abate the erection of fences and gates which enclosed the streets as laid out on the plat, thereby destroying the purchaser's access to the outside world, under a statute providing that should any part of a plat be vacated, such act will not abridge or destroy any of the rights or privileges of proprietors therein, nor authorize the closing or obstructing of any highway laid out according to law, it being the law that the dedication of streets is accepted by the public whenever anyone purchases a lot on the recorded plat upon which such streets are designated.

G. J. C.

Rep. 763; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Ballou v. Hopkinton*, 4 Gray, 324; *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145, 75 N. E. 85.

Mr. Frank M. Beckford, for defendants: Plaintiff's rights were not being curtailed, or taken away by the defendants, nor was there any threatened invasion of rights, and therefore injunction should not issue as a matter of law.

*Bassett v. Salisbury Mfg. Co.* 47 N. H. 437; *Eastman v. Amoskeag Mfg. Co.* 47 N. H. 71; *Burnham v. Kempton*, 44 N. H. 79; *Harvey v. Harvey*, 73 N. H. 106, 59 Atl. 621; *Davison v. Davison*, 71 N. H. 180, 51 Atl. 905; *Newcastle v. Haywood*, 67 N. H. 178, 37 Atl. 1040; *Wilkins v. Manchester*, 74 N. H. 275, 67 Atl. 560; *Walker v. Manchester*, 58 N. H. 441; *Harvey v. Harvey*, 73 N. H. 106, 59 Atl. 621.

Mr. Charles B. Hibbard for defendant Huse.

Peaslee, J., delivered the opinion of the court:

The proposition that the plaintiff has rights in the streets which the defendants cannot deprive him of is well established. *Walker v. Manchester*, 58 N. H. 438; *Bartlett v. Bangor*, 67 Me. 460; *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *New England Structural Co. v. Everett Distilling Co.* 189 Mass. 145, 75 N. E. 85; *Chapin v. Brown*, 15 R. I. 579, 10 Atl. 639; *Lord v. Atkins*, 138 N. Y. 184, 33 N. E. 1035; *Lennig v. Ocean City Asso.* 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; *Riedinger v. Marquette & W. R. Co.* 62 Mich. 29, 28 N. W. 775. Thus far the authorities are unanimous. As the case is transferred, this entitles the plaintiff to the injunction as prayed for. But it is manifest that other questions are involved in this controversy. They have been argued by counsel, and their consideration is necessary in an equitable determination of the rights involved. These questions are: (1) To what streets do the plaintiff's rights extend? (2) To what lots are they incident? (3) Does a right exist along the shore line, where the land is narrower than is shown upon the plan?

1. The plaintiff insists that as incident to each lot he purchased by the plan he acquired a right to use every street shown upon the entire tract. While cases are to be found which support this hard and fast rule, it cannot be sustained upon principle. The right is not based upon a covenant that the ways exist. *Howe v. Alger*, 4 Allen, 206. It arises merely by way of estoppel. The time came when the grantor could no longer deny that streets existed as 37 L.R.A. (N.S.)

represented on the plan. "That time was when purchasers of lands, upon a consideration enhanced by the inducements held out by the proclamation of these landholders, acquired such rights with reference to their house lots thus purchased, and the convenient and indispensable enjoyment of them, as would render it fraudulent on the part of the vendors to revoke their agreement by changing or abolishing the location of the streets laid down on their recorded plan, with reference to which their sales and conveyances had been made." *Walker v. Manchester*, 58 N. H. 438, 441. Since this is the foundation of the right here involved, it follows that all the elements of an estoppel by conduct must exist. One of these elements is that the representation made must be material to the action about to be taken. If the representation is immaterial, there is no estoppel. *Comings v. Wellman*, 14 N. H. 287, 292; *Stevens v. Dennett*, 51 N. H. 324, 333. The true rule, then, is that there is an estoppel to deny the existence of the ways shown upon the plan so far, and so far only, as the existence of the ways would be material to the owner of the land purchased. "In some other cases it is held that the purchaser of a lot described as bounded on a street or way is entitled to have it kept open for the whole distance shown by the plat or description; but the decision in every case has been based upon substantial equities. It could not have been otherwise; for estoppels arise upon equities, and are enforced for their protection." *Cooley, J., in Bell v. Todd*, 51 Mich. 21, 16 N. W. 304. How far the layout of the whole tract into some 200 lots concerns the purchaser of an individual lot is a question of fact, to be settled in the superior court. In the language above quoted the relation must be such as to create substantial equities before the relief here sought can be granted.

2. As the rights in the streets may extend further for one lot than for another, it is necessary to determine whether the plaintiff can maintain this proceeding as to lands purchased from the defendant company, the deeds to which refer to the *Winnepesaukee Company's plan*. At the time the confirmatory deed to lot 2 was given, the plaintiff was told that the Russells owned all the unsold lots lying between the railroad and the lake, and that they would do with the proposed streets as they saw fit. The parties then understood the deeds of lots 2 and 46 did not affect the title to "the lands below." It is understood that this refers to the land north of the railroad. In view of these facts, it seems plain that as to lots 2 and 46 no case for equitable relief is made out so far as the streets north of the railroad

are involved. What the result might be if the plaintiff conveyed to an innocent third party, who relied upon the representations contained in the deeds from the defendants to the plaintiff, is a question not involved here. The plaintiff could not have relied thereon, and as to him there is no estoppel.

The land south of the railroad was not owned by the Russells; and, unless it appears that they purpose to interfere with the plaintiff's rights therein, no case is made against them as to that tract. This land was, however, owned by the defendant land company. By its reference thereto in its deeds as "shown on the plan of the Winnebago Land Company, recorded in the Belknap county records," it represented that the lands were laid out according to that plan as effectively as though it had also caused the plan to be made and recorded in the first instance. Having made this representation, it is equitably bound to refrain from doing any act in contradiction of the inducements to the contract. As the company denies the right to use the ways as laid out, the plaintiff is entitled to his injunction so far as his interest is established.

The question whether the original laying out of the tract, recording the plan, and selling lots thereby, constituted dedication of the streets to public uses, is not involved in the present proceeding. If an offer of these streets to the public has been made and is still outstanding, it has not as yet been accepted by those who represent the public. P. S. 1901, chap. 67, § 1. The most that could be said would be that an offer is open, and may be accepted or rejected.

3. The plan delineates Lake Shore avenue as following the marginal line of the lake. This line is a definite boundary, and takes precedence over mere courses and distances. *Kent v. Taylor*, 64 N. H. 489, 13 Atl. 419, and cases cited. The lines of the interior lots shown upon the plan are of the latter class. There was no such land as these lines, or a part of them, indicate. The way is not affected by the fact that a mistake was made as to the quantity of land lying between the lake and the railroad. The plaintiff's lots in right of which a decree is to be entered were all sold before there was any attempt to sell by descriptions which conflict with the existence of the avenue. The most casual inspection of the plan shows an intent that there be a continuous way along the lake front. It would so appear to prospective purchasers of lots. Whether this intent might have been abandoned by a sale of the shore before private rights in the avenue had attached is a question not presented in this case.

The fact that a portion or the whole of the avenue can be used only for a footpath 37 L.R.A. (N.S.)

is not necessarily fatal to the plaintiff's claims therein. This tract was laid out for a summer colony, and a footpath along a rugged shore might well be thought to be of value to each cottager. It might even be considered to be of greater value from the fact that it could never be intruded upon by vehicular travel.

It follows from all these considerations that the decree to be entered may not be as broad as the prayer of the bill. It is a question to be settled by a consideration of all the equities of the situation. How far each lot is affected must be determined in the superior court. So far as the plaintiff's lots which were purchased in reliance upon the plan (or any of them) are found to be affected by the general scheme or by particular ways shown upon the plan, he is entitled to be protected by a decree.

Case discharged.

All concur.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

ROBERT B. LUDY

v.

JOHN M. LARSEN et al.

and

RUFUS BOOYE, Appt.

(78 N. J. Eq. 237, 79 Atl. 687.)

**Judgment — mechanics' lien — effect on intervenor.**

Successive stop notices having been served upon the owner of a building under § 3

Headnote by PITNEY, J.

*Note. — Judgment: conclusiveness of as between the plaintiff and one not a party nor privy, who voluntarily conducted the defense.*

The cases in which a person becomes a party to the suit by interpleader or otherwise have been excluded, as have also those in which he merely acts as a witness for the defendant.

The cases relating to the effect of a judgment in ejectment against a tenant upon a landlord not a party, who participates in the defense, have been excluded from this note. As to a discussion of that question, see note to *Ditlinger v. Miller*, 26 L.R.A. (N.S.) 597.

The general statement as to the conclusiveness of a judgment is that it is binding only upon those who are parties or privies thereto. There is, to this general rule, the well-defined exception that where one who has an interest in the subject-matter of the suit, or who may by reason of an adverse decision therein become liable upon some obligation entered into by him, and who



of the mechanics' lien law (P. L. 1898, p. 538), and one of the stop notice claimants having commenced suit against the contractors to establish his claim, a subsequent claimant, who had an interest in defeating the claim in suit, undertook and conducted the defense in the name of the contractors and with their consent, but for its own use and benefit: Held, that the party thus undertaking and managing the defense to the suit was concluded by the resulting judgment so far as it established the claim of the plaintiff against the contractors.

(March 6, 1911.)

**A** PPEAL by the assignee of the claim of John W. R. Maginnis from a decree of Court of Chancery disallowing said claim

in an interpleader suit to determine the right to a fund which Maginnis claimed to be due him for work done and materials furnished. Reversed.

The facts are stated in the opinion.

Messrs. Bourgeois & Sooy for appellant.

Messrs. John C. Reed and U. G. Styron for respondent lumber company.

Pitney, C., delivered the opinion of the court:

This is an appeal from a decree made in an interpleader suit, whereby the fund in court was disposed of. The ground of the appeal is that the claim of one John W. R. Maginnis (assigned to Rufus Booye, the appellant) was disallowed.

It appears that the complainant, Ludy,

openly, and with the knowledge of the opposite party, assumes the defense of the action in such a way that he has the same rights as a party thereto, will be bound by the judgment.

It is a well established rule that a judgment must be binding upon both parties between whom it is attempted to be set up, in order to be binding upon either. In other words, the estoppel of a judgment must be mutual. 23 Cyc. 1238; 2 Black, Judgm. § 548. It will be seen that this rule applies to the conclusiveness of a judgment between the plaintiff and one who assumes the defense of an action.

In *Bennett v. Wilmington Star Min. Co.* 119 Ill. 9, 7 N. E. 498, affirming 18 Ill. App. 17, it was held that a purchaser of land against which it was sought to impose a mechanics' lien, who employed an attorney to prosecute a writ of error to a judgment in such action, and upon the reversal employed an attorney to conduct the defense, and paid all expenses, was bound by the decree. The court states that the binding effect extends not only as to what was actually determined, but also to any other matter properly involved.

In *Lyon v. Stanford*, 42 N. J. Eq. 411, 7 Atl. 869, it was held that a judgment in an action of trespass upon the case was conclusive upon the wife of the nominal defendant, who actually purchased the property with his own money and had control of the same, although the title had been taken in the wife's name, where she attended the trial and was a witness, and the action was defended on her title by the same means, in the same manner, and to the same extent, as if she had been a party on the record. In discussing the relation she sustained to the case, the court says that the defense made was in reality her defense, interposed with her consent by her agent and substantially on her behalf, and that under such circumstances the mere absence of her name would not absolve her from the binding force of the judgment.

In *Lamberton v. Dinsmore*, 75 N. H. 574, 78 Atl. 620, a judgment in an action of 57 L.R.A. (N.S.)

trespass in which the defense of a right of way was set up was held conclusive upon one who filed a formal statement of defense avowing the action of the then defendant as that of a servant, and setting up her own title to the right of way as a defense. It was stated that although there was no formal order that she be made a party, it must be inferred that she was permitted to become one and since there was ample notice to all the parties of her position in the suit, it was determined as between any two of them.

In *Carpenter v. Carpenter*, 126 Mich. 217, 85 N. W. 576, a judgment in an action in ejectment against a tenant and one who put him in possession was held conclusive upon a claimant thereto, who was the wife of the person who so put the tenant in possession, and for whom her husband made a defense, in a subsequent action involving other lands held by the same parties under the same titles and claims as those involved in the former action, and depending upon the identical questions raised there.

In *Carpenter v. Carpenter*, 136 Mich. 362, 99 N. W. 395, a judgment in an action against a tenant and his alleged landlord for recovery of property was held conclusive upon the wife of the alleged landlord, who participated in the defense claiming title in herself.

In *Boyd v. Wallace*, 10 N. D. 78, 84 N. W. 760, an action to determine adverse claims, a judgment in a previous action to foreclose a land contract which had been taken in the name of the wife as a trustee for her husband was held conclusive on the husband, who was the real party in interest, and who employed attorneys to defend, and directed the defense generally, for the protection of his own interests and with the knowledge of the other party.

In *Montgomery v. Vickery*, 110 Ind. 211, 11 N. E. 38, it was held that a judgment in an action in which a plaintiff was seeking to establish his right to an execution against certain lands in which other judgment creditors appeared and defended for their own benefit was binding upon

entered into a contract with the firm of Larsen & Son, whereby they agreed to furnish the materials and do the work of altering and adding to a building owned by the complainant; that the contract was duly placed on file; and that thereafter, while money was in Ludy's hands due under the contract to Larsen & Son, sundry claimants served notices upon Ludy under § 3 of the mechanics' lien law (P. L. 1898, p. 538). Ludy filed his bill of interpleader, and paid into the court of chancery the sum of \$2,314.15 as the amount remaining in his hands owing upon the Larsen contract and payable to the stop notice claimants. A decree was made in due course requiring the defendants to interplead, and after the hearing a decree was made establishing all

the claims with the exception of that of Maginnis. Besides disallowing his claim, the decree settled the order of priority of the other claims, with the result that so much of the fund as would have gone to satisfy the Maginnis claim, if established, was awarded to the Atlantic City Lumber Company, the next claimant in order.

One ground upon which the Maginnis claim was disallowed was failure to prove the fact or date of service of the Maginnis stop notice upon Ludy. Upon this point Ludy's bill of complaint, after setting forth that on or about March 14, 1905, one B. served, or caused to be served, upon the complainant a written notice to the effect that the contractors were indebted to B. in the sum of \$220 for work and labor done

such creditors, so as to preclude the assertion of the priority of their claim in a subsequent action.

In *McNamee v. Moreland*, 26 Iowa, 96, it was held that a judgment in an action between adjoining landowners to determine the true location of a boundary line was conclusive upon a third landowner, who was also interested in the establishment of the disputed line, and who was notified of the pendency of the action, and conducted the defense in the name of the defendant, in a subsequent action involving the right of possession. The claim was made in this case by the person conducting the defense that the defendant was his tenant; this was denied by the other party, who claimed that the defendant was a grantee. The court stated this fact to be immaterial.

In *Wood v. Ensel*, 63 Mo. 193, a judgment in an action against a bailee was held conclusive upon the bailor, who asserted his claim to the property, appeared as a witness, hired attorneys, and assumed control of the case, in a subsequent action for the recovery of the property.

In *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515, an action of trover for the conversion of cotton, it was held that a judgment in a previous action against the bailees of the present defendants, in which the present defendants employed counsel and had the sole management of the case, was conclusive upon them as to the title adjudicated in the former action. It is stated by the court that whether their title could have been properly adjudicated is not material, since, as a matter of fact, it was set up and passed upon.

In *Board of Education v. Cosgrove*, 11 Ohio C. C. 163, 5 Ohio C. D. 343, an action for the salary of a teacher, a judgment in a previous action by the teacher upon the same contract, to compel the treasurer to pay the money called for upon an order issued him by the board of education, was held conclusive upon the board of education, which, subsequent to the issuance of their order, had attempted to revoke it, 37 L.R.A. (N.S.)

and had assumed the defense of the action against the treasurer.

In *Greenwich Ins. Co. v. N. & M. Friedman Co.* 74 C. C. A. 114, 142 Fed. 944, where a number of insurance companies which had insurance on a block which was destroyed by fire denied their liability on the ground that the building fell before the fire began, and not as a result of the fire, and entered into an agreement of which the insured had knowledge, that the defense was to be intrusted to a committee appointed by the companies, and such committee was to supervise the litigation and apportion costs and expenses, a judgment in an action against one company defending under this agreement, which negated the defense on which all were depending, estops each of the members to such agreement from denying liability on the same ground. It was urged in a subsequent action against another of the companies, that the judgment was only a legal precedent, and that the defendant had no interest in the previous case which would make the judgment binding on it by way of estoppel. In answer to this the court says that under the agreement it was represented in the action, and that it was liable for the costs at least, and that it could have taken an appeal, and the contention was overruled. Writ of certiorari denied in 200 U. S. 621, 50 L. ed. 624, 26 Sup. Ct. Rep. 758.

In *Bomar v. Ft. Worth Bldg. Asso.* 20 Tex. Civ. App. 603, 49 S. W. 914, an action to obtain possession of a lot, a judgment in a previous action to foreclose a mortgage, in which a junior mortgagee employed attorneys to defend for the mortgagor in the interest of the junior mortgagee, was held conclusive upon such junior mortgagee and those holding under him, as to the title to the lot, the right of possession, and the amount requisite, and the right to redeem.

On the contrary, in *Falls v. Gamble*, 66 N. C. 455, a judgment in an action of trespass was held not to work an estoppel upon one who commanded the trespass complained

and performed and materials furnished in and about the premises of the complainant; that payment of said sum had been demanded of the contractors and payment refused, and that complainant was notified and required to retain the amount of money so due and claimed by B. out of the money owing by the complainant to the contractors, proceeded to set forth "that on or about the 12th day of May of said year a like notice was served by John W. R. Maginnis, claiming the sum of \$619." The bill of complaint also sets forth that a few days later a like notice was served by the Atlantic City Lumber Company claiming the sum of \$4,400, and that the lumber company had notified the complainant not to pay any persons claiming the fund who had

served notices prior to the notice of the lumber company, upon the ground that the amounts claimed by them were in excess of the true amounts due. To this bill the Atlantic City Lumber Company filed a cross-bill, setting up, among other things, "that this defendant is informed and believes that one John W. R. Maginnis on or about May 12, 1905, served or caused to be served, upon said complainant a notice purporting to be under the authority and in conformity with the provisions of said section of said act, and by virtue of said notice, claims to have a lien upon said fund and to be entitled to receive thereout the sum of \$619, alleged to be due to him and to have been demanded from the said John M. Larsen & Son, contractors, for work done and mater-

of, employed counsel, and paid the costs of the suits, justifying under a deed to himself, in a subsequent action to recover the lands, since this is a matter outside the record, and to hold that a person could be constituted a party or privy so as to work an estoppel of record would be to divest such person of his title by parol evidence.

In *Clark v. Lyman*, 8 Vt. 290, an action to obtain possession of real estate, it was held that a judgment in a previous action in ejectment against the vendor of the real estate, by the creditor of one who was claimed to be one of the vendees, was not conclusive upon another who claimed to be the sole vendee, and who defended the first action and gave a bond to the vendor to indemnify him from costs. The force of this holding is somewhat weakened from the fact that the court states the question to be susceptible of doubt, and the bill was dismissed on other grounds.

In *Bailey v. Sundberg*, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 583, a judgment in a libel suit *in rem* against a steamship for injuries resulting from a collision, in which the master of a steamship took an active part in the defense, was held binding upon the plaintiff, so as to prevent a libel *in personam* against the master. The judgment in dismissing the libel was reversed on other grounds. Writ of certiorari denied in 145 U. S. 628, 36 L. ed. 855, 12 Sup. Ct. Rep. 239.

In *Carey v. Roosevelt*, 83 Fed. 242, s. c. 91 Fed. 567, a judgment in an action on a claim against the administrator of an estate, in which certain trustees and legatees were informed of the claim, and the defense conducted by one of the trustees at their instance and request, they paying the expenses thereof, was held binding upon the interest of such legatees in the estate in the hands of the trustees, in a subsequent action to enforce payment of the judgment. On an appeal of this case, reported in 43 C. C. A. 320, 102 Fed. 569, the court noted the fact that one of the administrators was also a trustee, and the one who defended, and found that there was no evidence that he defended in any other 37 L.R.A.(N.S.)

capacity than administrator, or that any other trustees or legatees assisted in the defense, and the judgment was reversed.

In *Re McCauley*, 49 Misc. 209, 99 N. Y. Supp. 238, a judgment in an action against the surety on the bond of a deceased administrator was held conclusive upon the assignee of a foreign executor of such decedent, which assignee was also an heir of the deceased administrator, and through him of the estate which was being administered, where the foreign executor had notice of the suit against the surety, and was represented by counsel selected by him. This decision seems to be based more on the relationship of the parties than on the fact of assuming the defense.

In *Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 143, 35 S. W. 135, it was held that a judgment in an action against a lessee railroad company, upon the contract of lease, was binding upon another railroad company which had previously purchased the property and franchises of the first company, including the lease in question, of which it assumed the obligations, and employed counsel, and had charge of the defense. A judgment in favor of the defendant was affirmed on other grounds. In the rehearing of this case, in 99 Ky. 156, 36 S. W. 168, it was stated that the binding effect of the previous judgment should have been stated as argument merely, and the opinion was so modified. This case is cited in *Morrison v. Price*, 130 Ky. 139, 112 S. W. 1090, on the point annotated, but the facts there do not clearly appear. It was there held that, to be available as an estoppel, such a judgment must be pleaded.

In *Anderson v. West Chicago Street R. Co.* 200 Ill. 329, 65 N. E. 717, a judgment in an action against the lessor railway company, in which the lessee defended, was held conclusive upon the plaintiff therein in a subsequent action against the lessee on the same cause of action; the greater weight, however, seemed to be placed in this case on the fact that the parties occupied the relation of lessor and lessee.

In *Harvie v. Turner*, 46 Mo. 444, a judgment in an action of forcible entry and

ials furnished in and about the premises of the complainant, in pursuance of said contract; but this defendant avers that the sum claimed by the said Maginnis in his said notice was not due and payable at the date of the service thereof, but, if anything, a much smaller sum; that a part of the labor and material, payment for which is claimed and included in said notice, if performed or furnished at all, were not furnished in pursuance of said contract; that said Maginnis had not at the date of the service of said notice, and has not since, performed said work in such manner as to entitle him to any payment by said contractors, and that said notice is in other respects informal, defective, and invalid as against the lien of this defendant upon said

fund." Maginnis filed an answer to this cross bill, in which he distinctly asserted the service of a proper stop notice upon Ludy on May 12, 1905, for \$619; that afterwards, and within five days thereafter, Larsen & Son served written notice upon said Maginnis to establish his claim by judgment; that, in pursuance thereof, Maginnis instituted suit against Larsen & Son in the Atlantic county circuit court; that the suit was defended; and that the trial resulted in a verdict in favor of Maginnis for the sum of \$619, besides interest to date, and that judgment was entered upon the verdict for the sum of \$647 and costs.

Upon the hearing before the learned vice chancellor, the complainant, Ludy, testified that the Maginnis notice was served upon

detainer against a tenant, of which the landlord's agent was notified he being present at the trial, and actively assisting in the defense, was held conclusive upon the landlord in a subsequent action of forcible entry and detainer against the plaintiff in the former action.

In *Crane v. Cameron*, 71 Kan. 880, 81 Pac. 480, a judgment in an action against tenants to recover possession of real estate, in which the holder of the legal title assumed the defense, was held conclusive upon such person, so as to entitle the plaintiff in the action to an order of ouster against him, he having gone into possession in the meantime.

In *Walsh v. First Nat. Bank*, 139 Mo. App. 641, 123 S. W. 1001, an action to cancel certain tax bills, it developed that the defendant was not the true owner of such tax bills, but that the true owner was conducting the defense. The question arose as to whether or not the plaintiff's action should be dismissed, and, in holding that it should not, the court states that a judgment rendered in the case would be binding upon the real owner, who was thus conducting the defense.

In *Himes v. Jacobs*, 1 Penr. & W. 152, a judgment in an action against the executor of a decedent was held conclusive upon the tenants on the lands of such decedent, who were notified of the action and made defense, as against the purchaser at an execution sale.

In *Tyrell v. Baldwin*, 67 Cal. 1, 6 Pac. 867, it was held that a judgment in an action to recover real estate was conclusive on those who, without being made parties, appeared and filed an answer denying the allegation of the complaint, and claiming right of title and possession to a part of the demanded premises.

In *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177, a judgment in an action by the state to try title to certain lands was held conclusive upon one who held lands under like conditions to the defendant in that action, and who contributed to the defense of such action, and actively assisted in the case, so as to prevent him from basing a  
37 L.R.A. (N.S.)

claim of adverse possession on his holding of such lands.

So, where a person who has an equitable interest in lands employs counsel and files an answer in a suit, in the name of a party thereto, who holds the land as trustee for the person thus assuming the defense, pays his proportion of the expenses, and controls the litigation, so far as he is concerned, the judgment will be binding. *Plumb v. Goodnow* (Plumb v. Crane), 123 U. S. 560, 31 L. ed. 268, 8 Sup. Ct. Rep. 216, reversing 64 Iowa, 672, 21 N. W. 133.

Where the defense is not conducted openly, and with the knowledge of the opposite party, the judgment is not binding. *Cannon River Mfrs. Asso. v. Rogers*, 42 Minn. 123, 18 Am. St. Rep. 497, 43 N. W. 792 (action against a bank for the wrongful delivery of money, in which the person receiving the money assumed the defense without the knowledge of the opposite party); *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801 (action for conversion of certain posts and rails, in which recovery was disputed on the ground that the land from which the timber had been cut belonged to the wife of the defendant, in which action the wife employed the attorney who appeared for the defendant, and was a witness for the defendant, but without knowledge of the plaintiff that she appeared in any other capacity than as a witness).

In *Litchfield v. Goodnow* (*Litchfield v. Crane*), 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210, affirming 63 Iowa, 275, 19 N. W. 226, it was held that a judgment in an action to recover taxes was not conclusive in favor of one whose lands were described in the bill, but who was not made a party with other owners of lands involving like questions as to taxes, and who assisted in the defense, and paid part of the expenses, as her lands were entirely separate and distinct from those of the actual parties. It is stated that the decision might be used as a judicial precedent, but not as a judgment binding on her and conclusive as to her rights.

Nor is one who, being interested merely in the outcome of a suit, employs counsel

him, and identified a copy thereof, which is dated May 12, 1905. Being asked, "Q. Do you remember when that notice was served on you?" he answered: "I don't remember anything, except it says here May 12, 1905." He testified, however, without objection, that at the time of the filing of his bill of complaint, he swore that May 12th was the date on which he received the notice. Being afterwards examined respecting a notice signed by one Gould, dated May 29, 1905, and asked if that notice was served upon him upon the day of its date, he answered: "I don't know any more than what I see here. All these notices were served on the dates they were marked." At this point counsel for the Atlantic City Lumber Company, which was the only party

opposing or interested in opposing the claims referred to, made the following statement to the court: "He has already sworn through the bill, as I understand it. It has been gone through here once. If your Honor please, that these papers were served on the dates as designated therein. That won't be required again. The Court: I put it to counsel to consider whether that is proof. You produce a witness for the purpose of proving the date on which a notice was served, and, in order to prove it, you call his attention to the fact that he has sworn to it in an affidavit. Does that prove it? Mr. Sooy: He afterwards says, refreshing his memory from that affidavit, he can now say it was served on that date. The Court: That escaped me."

to assist in the preparation of briefs and argument of the defendant, entitled to invoke the doctrine of *res judicata* against the plaintiff in the suit. *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 203 Mass. 159, — L.R.A.(N.S.) —, 89 N. E. 93; *Stryker v. Goodnow* (*Stryker v. Crane*), 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203.

Neither is it sufficient that one employed counsel who was present and participated in a trial against its servant, agent, or employee. *Central Baptist Church v. Manchester*, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30.

In *Schribar v. Platt*, 19 Neb. 625, 28 N. W. 289, it was held that a purchaser of the homestead of another was not estopped from claiming title thereto, by the fact that he had paid attorneys to resist the confirmation of an execution sale against his vendor.

In *Hunt v. Haven*, 52 N. H. 162, a judgment in an action to obtain possession of land under a mortgage was held not to bind a junior mortgagee who assisted the mortgagor in making defense, and employed and paid counsel for such mortgagor. The term "parties" is stated to include all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment, and the junior mortgagee was not regarded by the court as coming within this definition of a party.

In *Cockins v. Bank of Alma*, 84 Neb. 624, 133 Am. St. Rep. 642, 122 N. W. 16, it was held that a real estate agent was not bound by a judgment in an action by a rival agent against a landowner for commissions, in which the first agent employed an attorney to assist in the defense, but had not the control of the case nor the right of appeal.

In *Koehring v. Aultman, M. & Co.* 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30, in holding that a senior mortgagee was not bound by a judgment in a replevin suit brought by a junior mortgagee against the owner, in which the senior mortgagee was "present in court," the court states that the point most confidently relied upon by the appellants 87 L.R.A.(N.S.)

was that the senior mortgagee had defended the replevin suit before the justice of the peace, to which he was confessedly not a party, but in which it was urged he acted for the mortgagor and owner of the property. It was stated further that the facts were far from showing that appellee was concluded by that judgment; that there was no issue in that case as to any claim on account of appellee's mortgage, and that the appellants did not even offer to show any arrangement between the defendants in that suit and the appellee, in pursuance of which the appellee conducted the defense.

In *Braithwaite v. Harvey*, 14 Mont. 208, 27 L.R.A. 101, 43 Am. St. Rep. 625, 36 Pac. 38, a judgment in an action against an administrator, in which a foreign administrator of the same estate defended in the name of the first administrator, employed counsel, and produced evidence, was held not binding upon the foreign administrator in the state of his appointment, as he had no authority to act or bind the estate outside of the jurisdiction of his appointment.

In *Williamson v. White*, 101 Ga. 276, 65 Am. St. Rep. 302, 28 S. E. 846, an action to put a purchaser of real estate under a tax deed, in possession thereof, in which the purchaser was the applicant and the sheriff respondent, where there was no provision of law authorizing anyone to appear and to object, it was held that the owner of the lands, who was represented by an attorney who appeared and stated to the court various reasons why such order should not be granted, and also filed an answer which was afterwards withdrawn and placed in the hands of the sheriff, was not bound by the judgment rendered therein, in a subsequent action in the nature of a quiet-title proceeding.

In *Gross v. Whitley County*, 158 Ind. 531, 58 L.R.A. 394, 64 N. E. 25, it was held that the right of a county treasurer who had accepted his salary as provided by an act of the legislature, to compensation under a prior act, did not become *res judicata* by the fact that he contributed to the expenses of an action in which the later statute was declared void.

From the entire record, we think it clear that counsel for the lumber company intended to concede, and was understood by opposing counsel to concede, that sufficient proof had been made as to the dates of serving the notices in question, and that it was to be taken as proving (*inter alia*) that the Maginnis claim was served upon Dr. Ludy on May 12, 1905. Appellant apparently relied upon that concession, and, at any rate, is entitled to the benefit of it, as settling in his favor the fact and date of the service.

The learned vice chancellor also expressed doubt whether the evidence showed that Maginnis completed his contract with Larsen & Son before his stop notice was served upon Ludy, and whether the claim made by him in the stop notice was not for a

larger sum of money than was actually due from Larsen & Son to him. It appeared, however, that, about two months after the service of that notice, he commenced an action at law in the Atlantic county circuit court against Larsen & Son for the recovery of the same sum of money mentioned in the stop notice; that a plea was interposed by the defendants in this action; and that a trial by jury resulted in a verdict and judgment in favor of Maginnis for the entire amount of his claim. The record of this judgment was introduced in evidence upon the hearing before the vice Chancellor, counsel for the Atlantic City Lumber Company making no objection to its admission, but contending that it was not binding upon the lumber company because that company

In *Northern Bank v. Stone*, 88 Fed. 413, an action involving the validity of taxes, it was held that a judgment in an action against a county involving the validity of taxes growing out of the same revenue act, was not binding on the state and all its agencies because of the fact that the attorney general appeared on behalf of the state after the litigation had reached the court of appeals.

In *Turpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615, it is held that a person not a party to an action is not bound by the judgment rendered therein, from the fact that he was present and cross-examined witnesses.

In *Majors v. Cowell*, 51 Cal. 478, it was held that a purchaser in good faith of real estate which was the subject of litigation, before his grantor was served with process or appeared in the action, was not bound by the judgment therein by uniting in an appeal therefrom.

In *State v. King*, 64 W. Va. 546, 63 S. E. 468, a judgment in an action relating to the title to land, in which certain persons participated in the defense on appeal, was held not conclusive upon such persons. It is there stated that they had no opportunity to plead in the court below and set up their claims; that in the appellate court the record was taken as made in the court below, and could not be altered.

Where it is the duty of the person assuming the defense to defend, it was held that he was bound by the judgment.

—where the sureties on a guardian's bond, in an action to set aside a release executed by the ward to the guardian, employed the only counsel who appeared and made a defense throughout the suit. *Parr v. State*, 71 Md. 220, 17 Atl. 1120;

—where certain mortgagees appeared and defended in an action of trover, claiming the defendant had been their servant, and justifying his taking of the property under their mortgage, in a subsequent action brought by those who assumed the defense in the former action, against the plaintiffs therein to recover possession of the property. *Castle v. Noyes*, 14 N. Y. 329, It was stated by 37 L.R.A. (N.S.)

the court that the relation of master and servant is the basis of the estoppel of a judgment in actions of this nature.

And where it is the duty of the one participating in the defense to reveal his interest, it has been held that the judgment will be binding:

—where the wife of a lessee participated in the trial, and defended against the liens which were being asserted in a consolidated action to foreclose certain mechanics' liens, in part of which actions the lessee, and part of which the lessee and wife, had been made defendants, although in the action brought by the appellants in this case, the wife had not been made a party. *Douthitt v. MacClusky*, 11 Wash. 601, 40 Pac. 186;

—where one holding a deed from the defendant in an action of ejectment concealed her title, and participated in and directed the defense apparently as agent of the ostensible owner. *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445, affirming 1 Colo. App. 327, 29 Pac. 181.

Where the one assuming the defense is acting as agent of the defendant.

In *Williams v. Cooper*, 124 Cal. 666, 57 Pac. 577, where a person claiming title under a tax deed brought ejectment, and a mortgagee had charge of the defense as agent of the mortgagor, such mortgagee was held not bound by the judgment rendered in such suit, in a subsequent action by him in ejectment after a foreclosure of his mortgage and purchase thereunder.

In *Brady v. Brady*, 71 Ga. 71, a judgment on the validity of a claim to property filed upon an execution being issued on a judgment of foreclosure, by the wife of the mortgagor, was held not conclusive upon such mortgagor, who employed counsel to prosecute the wife's claim, in a subsequent attempt by him to obtain exemption of the property.

In *Perkins v. Goddin*, 111 Mo. App. 429, 85 S. W. 936, a person who employed counsel for his wife in a partition suit, and was present in the court room when the decree in such suit was read, was held not

was not a party to the action. There is no question that whatever was due to Maginnis when the action at law was commenced was due when his stop notice was served; for the evidence upon the hearing in chancery shows beyond controversy that whatever he did about the performance of his contract was done before the service of his stop notice. As against Larsen & Son, therefore, the judgment conclusively settles in favor of Maginnis both points upon which the learned vice chancellor doubted.

The question is, What is the effect of the judgment upon the Atlantic City Lumber Company? Under the peculiar facts of the present case, we are not called upon to consider whether in ordinary circumstances a judgment at law recovered by stop notice

claimant against contractor is conclusive upon the owner or upon subsequent claimants (see *Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40); for the evidence shows, and it is not disputed, that the lumber company, with the consent of Larsen & Son, undertook and conducted the defense of the Maginnis suit, employing the attorney and paying the expenses of the trial, including the expenses of Maginnis himself, who attended as a witness. In short, it appears, as we think, that the defense of the Maginnis suit, while made in the name of Larsen & Son, was made by the lumber company at its own expense and for its own use and benefit. That company having served upon Ludy a stop notice of its own after the service of Maginnis's notice, and, its claim being sufficient in

to be bound by the judgment therein with reference to the distribution of personal property, in a subsequent action by him as administrator of a person whose heirs were parties to the partition suit. It will be noted also in the case that the husband acted in a different capacity in the second suit.

In *Thrasher v. Haines*, 2 N. H. 443, a judgment in an action in debt, in which a person has charge of the defense as agent of the defendant, was held not to preclude such person from showing that there was in fact nothing due, in a subsequent action against him to obtain possession of land which he had obtained from the original defendant.

In *Parker v. Moore*, 59 N. H. 454, an award in an arbitration proceeding involving the validity of a mortgage was held not to bind a junior mortgagee who acted merely as agent for the mortgagor, and in the course of the opinion the court said:

"When it is said that adjudication binds 'all who have the right to adduce testimony or cross-examine the witnesses introduced by the other side, all who have the right to defend the suit, or control the proceedings, or appeal from the judgment' (*Chamberlain v. Carlisle*, 26 N. H. 551), this is not intended to include one who, as an agent or attorney, adduces testimony, cross-examines witnesses, and controls the suit, but one who, being a party, or in privity with one of the parties, or at any rate legally interested in the event of the suit, thus conducts with reference to it."

In *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, motion for rehearing denied in 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774, it was held that the principal stockholders of a corporation, who controlled it, were not bound by a judgment in a mechanics' lien suit against it, by reason of the fact that they employed counsel to defend such suit. It was stated by the court that there was no suggestion that they assumed the defense of the suit as one in which their own interests were in question, and further that, 57 L.R.A. (N.S.)

in order to work an estoppel, it was necessary that the defense should have been conducted openly, avowedly, and known to the opposite party.

Conclusiveness upon an attorney who has charge of the defense.

In *Champlin v. Butler*, 124 Ill. App. 41, the purchaser of an athletic association ticket, who afterwards was employed as attorney by his vendor to defend an actor brought by one who claimed the ticket as against the vendor, and who neglected the matter until after a default judgment had been entered and thereupon undertook to have the default judgment set aside, without acknowledging any interest in himself, was held bound by the decree, so that he could not thereafter enjoin the enforcement of the judgment and establish his title to the ticket.

A judgment in an action by the city to recover taxes on property which was involved in litigation, in favor of the city, was held binding upon a surety for a party thereto, who was ultimately liable for the taxes, and who was attorney for such party, and conducted the litigation, in a subsequent action brought by the principal and his surety to have the taxes disallowed. *Kaye v. Louisville*, 13 Ky. L. Rep. 114, 14 S. W. 679.

In *Sturdivant Bank v. Wilson*, 87 Mo. App. 534, an attorney who conducted the defense of an action, and testified in support of a claim of title made by himself to the note in suit, was held bound by the judgment rendered therein.

In *Parsons v. Urie*, 104 Md. 238, 8 L.R.A. (N. S.) 559, 64 Atl. 927, 10 Ann. Cas. 278, in an action by certain persons who had paid a mortgage which was released by the mortgagee, to have the mortgage reinstated, and in which the mortgagee was made a party, and the persons who represented him as attorneys and conducted his defense were judgment lienholders, and had full opportunity for making all defenses at their command, a judgment was held binding upon them as fully as if they had been formal parties to the bill.

amount to more than exhaust the moneys remaining in Ludy's hands due to Larsen & Son, it manifestly had a legitimate interest in contesting the Maginnis claim, in order to show, if it could, that either nothing was due to him, or, if anything, a sum less than he had demanded in his stop notice.

Having thus, for reasons affecting its own interest, undertaken and managed the defense to the suit of Maginnis against Larsen, the lumber company is, we think, concluded by the result of that litigation. It is, of course, fundamental that personal judgments conclude only the parties and their privies. But the estoppel is not limited to such as are parties on the record. It includes those who are parties in fact, as Greenleaf well says: "The rules of law

upon this subject are founded upon these evident principles or axioms that it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be held bound. Under the term 'parties,' in this connection,

#### Actions against officers.

In *Baxter v. Myers*, 85 Iowa, 328, 39 Am. St. Rep. 298, 52 N. W. 234, a judgment in an action of replevin against an officer for personal property levied on by him under an execution, and claimed by the plaintiff in the replevin suit, was held conclusive upon the execution creditors who assumed the defense of the officer, and charged that the property was conveyed to the plaintiff in fraud of creditors, in a subsequent action to subject to the payment of their claim certain real property which had been conveyed to the plaintiff in the replevin suit as a part of the same transaction by which the personal property had been conveyed to him.

In *Elliott v. Hayden*, 104 Mass. 180, a judgment in an action against an officer for wrongful conversion of property under a writ, which action was defended by the execution creditors, who had previously made oath to a bill in equity against the persons bringing the suit and the execution defendant, in which it was stated that they were liable to indemnify the officer against all loss on account of the levy, was held competent, but not conclusive, evidence against them in a subsequent action against them for causing the levy to be made.

In *Elder v. Frevert*, 18 Nev. 446, 5 Pac. 69, a judgment in an action against a sheriff to recover property taken under an execution, and damages for its detention, was held conclusive as to the character of the property, upon the execution creditors who controlled the defense of such suit, in a subsequent action against them for damages for such detention.

In *Tate v. Hunter*, 3 Strobb. Eq. 136, a judgment in an action against a sheriff, to compel him to apply certain moneys held by him to the satisfaction of an execution held by the plaintiff, was held conclusive as between the plaintiff therein and another execution creditor who defended the suit, upon his right and title to the money.

In *Tootle v. Coleman*, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41, a judgment in an action against an officer for wrongful levy

and sale of the goods of the plaintiff, in which the attachment creditors who had instigated the action had given bond to the officer to appear and conduct the defense, was held conclusive against such creditors as to the title and value of the property, in a subsequent action against them for conversion. Writ of certiorari denied in 183 U. S. 695, 46 L. ed. 394, 22 Sup. Ct. Rep. 932.

In *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129, a judgment in an action against an officer for trespass, in which the attaching creditors, who had given the officer an indemnity bond, employed counsel who had exclusive control of the defense, was held conclusive against such creditors.

#### Actions upon notes.

In *Estelle v. Peacock*, 48 Mich. 469, 12 N. W. 659, a judgment in an action on a note given as evidence of the purchase price of personal property was held conclusive upon a claimant of such note who conducted the defense.

And so, in *Bachelor v. Brown*, 47 Mich. 366, 11 N. W. 200, a judgment in an action on a promissory note by the executor of a decedent was held binding upon one who assumed the defense of the action, claiming the note as his own.

So, in *Stoddard v. Thompson*, 31 Iowa, 81, a judgment on a promissory note was held conclusive between the plaintiff therein and one who, claiming to be the real owner of the note, employed counsel to defend the action, and paid the costs of the defense, and was a witness upon the trial.

Where, in an action of replevin against one who has a note in his possession for collection, the owner of the note authorizes an attorney to appear and defend, a judgment in such action is binding on the owner, to the same extent as if it had been a party. *Marquardt Sav. Bank v. Sheppelman*, 97 Ill. App. 31. It is stated by the court that the owner was privy to the action.

Conclusiveness as to question of liability.

In *Carter v. Aetna L. Ins. Co.* 76 Kan.



the law includes all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony, and to cross-examine the witnesses adduced on the other side." Greenl. Ev. §§ 522, 523. See also § 535. And see, to the same effect, 1 Freeman, Judgm. 4th ed. § 174; Bigelow, Estoppel, 5th ed. 113, 114; 1 Herman, Estoppel, § 148.

Numerous reported decisions have proceeded upon a recognition of this principle. Lyon v. Stanford, 42 N. J. Eq. 411, 7 Atl. 869; Davenport v. Elizabeth, 43 N. J. L. 149; Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. ed. 129, 134; Robbins v. Chicago, 4 Wall. 667, 672, 18 L. ed. 427, 430; Valentine v. Farnsworth, 21 Pick. 176, 181, 182; Eliott v. Hayden, 104 Mass. 180, 182; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 151, 43 N. E. 422; Stoddard v. Thompson, 31 Iowa, 81; Montgomery v. Vickery, 110 Ind.

211, 11 N. E. 38; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Potter v. Clapp, 203 Ill. 592, 96 Am. St. Rep. 322, 68 N. E. 81; Parr v. State, 71 Md. 220, 17 Atl. 1020; National Marine Bank v. Heller, 94 Md. 213, 50 Atl. 521. See also Hale v. Finch, 104 U. S. 261, 265, 26 L. ed. 732, 733; Boston v. Worthington, 10 Gray, 496, 71 Am. Dec. 678; Andrews v. Gillespie, 47 N. Y. 487, 492; Rochester v. Montgomery, 72 N. Y. 65, 67; Heiser v. Hatch, 86 N. Y. 614.

The decree under review should be reversed, and the record remitted to the Court of Chancery, to the end that a new decree may be made providing for the satisfaction out of the fund in court of the Maginnis claim held by the appellant, together with the appellant's costs in this court and in the Court of Chancery, with priority over the claim of the Atlantic City Lumber Company.

275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178, it was held that the fact that an indemnity insurance company assumed the defense of an action against an employer by an employee did not estop it from denying its liability to such employee for the judgment thus recovered.

So, in Hendricks v. Dean, 105 Minn. 162, 117 N. W. 426, it was held that a grantor of real property who conducted the defense in an action against his tenant to recover possession did not thereby become bound by the judgment to reimburse or pay the plaintiff therein the amount of damages for which the judgment was rendered.

In Leathe v. Thomas, 109 Ill. App. 434, affirmed in 218 Ill. 246, 75 N. E. 810, 4 Ann. Cas. 79, rehearing denied in 233 Ill. 430, 84 N. E. 481, it was held that a judgment in an action against a corporation for debt, which was defended by another for the reason that it was alleged that he was bound to pay the debts of the corporation, was binding upon him in so far as the amount of the debt was concerned, but not as to his liability therefor.

In New Orleans v. Gaines (New Orleans v. Whitney), 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428, a judgment in an action in ejectment, in which the grantor of the owner assumed the defense, was held binding upon such grantor as to the amount of rents, in a subsequent action against the grantor for rents so found due. The defendant in this case was held liable to the plaintiff on the theory that the plaintiff had been subrogated to the rights of the defendant as against the grantor.

In Strong v. Phoenix Ins. Co. 62 Mo. 289, 21 Am. Rep. 417, a judgment in an action against an insurance company was held conclusive upon a reinsurer who agreed with the insurer that he should resist and defend the claim, and for that purpose should retain counsel and manage the defense, and 37 L.R.A.(N.S.)

agreed further for a division of the expense of such litigation and a judgment, in case judgment was rendered against the insurer, in a subsequent action by the insured against such reinsurer; the ground on which this liability was based does not appear farther than that it is stated that the reinsurer was privy to the original suit, and assisted in its management. The rule of liability is stated by the court to be that where parties are each interested in the determination of a suit, the one being bound to protect the other from liability, the former is bound by the result of the litigation to which such other is a party, provided he had notice of the litigation and an opportunity to manage and control it.

#### Patent and trademark cases.

In National Folding-Box & Paper Co. v. Dayton Paper Novelty Co. 95 Fed. 991, a judgment in an action for the infringement of a patent, against a purchaser of the article which was claimed to be an infringement, was held conclusive upon the manufacturer, who paid the expenses of the suit and controlled the litigation and guaranteed the purchasers against loss, as to the part of the profits from the sale of the patented article which were due to the patent of the complainant. Reversed on other grounds in 97 Fed. 331.

In Sacks v. Kupferle, 127 Fed. 569, it was held that a manufacturer who defended a suit against his factor or agent at his own expense, and, in behalf of and in the name of the agent, appealed from the decree, the result being a final judgment that the complainant was not the inventor of the device claimed, was entitled to plead the judgment as conclusive as to any matter that might have been adjudicated, in a subsequent action against him on the same patent, notwithstanding the application by the

court in the previous action of a rule of evidence long recognized and well established which the complainant claimed was a surprise to him.

In *Bryant Electric Co. v. Marshall*, 169 Fed. 426, it was held that where the manufacturer undertook the defense of an infringement suit against a customer, in which a patent of several claims was made the basis of the bill, and no discrimination was made between the claims, and it was entered upon the record that it was stipulated and agreed that the manufacturer was defending the suit, a judgment in such action was conclusive upon the plaintiff therein as to all claims of such patent, so as to entitle such manufacturer to enjoin the prosecution of a subsequent suit against another customer. Affirmed in 107 C. C. A. 599, 185 Fed. 499; writ of certiorari denied in 220 U. S. 622, 55 L. ed. 613, 31 Sup. Ct. Rep. 724.

In *Confectioners' Machinery & Mfg. Co. v. Racine Engine & Mach. Co.* 163 Fed. 914, affirmed in 95 C. C. A. 671, 170 Fed. 1021, it was held that a judgment in an action for infringement of a patent against a purchaser, from the manufacturer, who conducted the defense to the suit under an agreement with such purchaser, was conclusive upon a corporation with succeeded to the rights of such manufacturer, and which paid part of the expenses of the suit, in a subsequent action by a corporation that had acquired the patent rights of complainant in former suit, and this notwithstanding the defendant in the first suit did not produce any affirmative proof.

In *Penfield v. Potts*, 61 C. C. A. 371, 126 Fed. 475, it was held that where a number of defendants in infringement suits agreed to make a mutual and common defense, each paying his proportion of the costs, and a stipulation was entered into that the evidence taken in one case should be used in the others so far as the same was relevant and competent, and all this was done openly and with the knowledge of the opposite party and in defense of their own interests, a judgment in one of the actions was conclusive upon the plaintiff in another, on the issues which were identical to those involved in the first case, and this although the final judgment in the first case was not rendered until after an interlocutory decree on the merits had been rendered in the second.

In *Theller v. Hershey*, 89 Fed. 575, one who enters into an agreement with defendant in an infringement suit and another to stand together in the defense of the action, and each contributes one third of the costs, in accordance with which agreement attorneys are employed and a defense made, will be concluded by the judgment, in a subsequent action for infringement of the same letters patent as were sued upon in the former action.

In *Miller v. Leggett & M. Tobacco Co.* 2 McCrary, 375, 7 Fed. 91, it was held that a manufacturing company that had previously issued a circular promising to protect its

customers against liability, and, in an action against one such customer, contributed money and employed counsel to defend, but in all other respects was entirely independent, would be bound by the judgment thereon if it had the right of appeal. And since this question had not been decided in the court in which the infringement suit was pending, no final judgment was entered.

In *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980, affirming 50 Fed. 193, it was held that a judgment in an action against a branch house of a manufacturing company, in which the manufacturer conducted the defense in the name of such branch house, was conclusive upon such manufacturer as to the infringement and as to all questions that might have been raised and determined in the suit, in a subsequent action against the manufacturer for the infringement. It was urged that the subsequent suit was prosecuted for an infringement not involved in the prior adjudication, and that the demand was not the same, but the court states that the proper test in cases of this kind is whether the right asserted by the party as the foundation of the suit is the same right determined upon in the previous action. Similar facts and holding appear in *Moline Plow Co. v. Eagle Mfg. Co.* 6 C. C. A. 673, 18 U. S. App. 371, 57 Fed. 992. Petition for rehearing denied in 7 C. C. A. 442, 18 U. S. App. 455, 58 Fed. 721.

This rule is recognized in *Eagle Mfg. Co. v. Miller*, 41 Fed. 351, reversed on other grounds in 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310, where, in a suit against an agent to restrain the infringement of a patent, the plaintiff filed an amendment making the manufacturer a party, but no subpoena was issued or served, nor appearance entered; but in which suit the manufacturer, who was bound by contract to protect his agents against the consequences of the infringement, assumed and controlled the management of the defense. The complainant in the case asked that the decree run against the manufacturer, and the court states that such manufacturer was as fully bound by the results of the litigation as though he had been a party to the record; and it is stated that an apt statement might be made in the decree to this effect.

In *Empire State Nail Co. v. American Solid Leather Button Co.* 21 C. C. A. 152, 33 U. S. App. 522, 74 Fed. 864, reversing 71 Fed. 588, it was held that a judgment as to the validity of the patent in an action against a purchaser for infringement of a patent, in which the manufacturer assumed the defense, was binding upon such manufacturer the same as if he were a party, in a subsequent action against the manufacturer for an infringement of the same patent by the manufacturer of articles similar to those involved in the first suit.

So, in *D'Arcy v. Staples & H. Co.* 88 C. C. A. 606, 161 Fed. 733, the court recognizes the general rule, but holds that where the infringement is another infringement than that which constituted the cause of action

in the previous case, the judgment is not binding.

In *Lane v. Welds*, 39 C. C. A. 528, 99 Fed. 286, a judgment in an action for the infringement of a patent fence, against one who purchased a machine and materials with which he made the fence, was held not to estop the patentee of the machine from challenging the validity of the patents, although such patentee promised to defend the suit against his vendee, and did pay a small sum to obtain copies of the patents of the plaintiffs, but thereafter refused to proceed further, when the defense was abandoned and a decree by agreement was rendered. It is stated that the patentee took no interest in the former suit except so far as it limited the use of his machine to fences not covered by the plaintiffs' patent, and further that the plaintiffs knew nothing of the defendants' interference, and hence would not be estopped by the judgment, and therefore the defendants would not be estopped.

In *Australian Knitting Co. v. Gormly*, 138 Fed. 92, it was held that a manufacturer of a patented article, who assumed the defense of a suit against one of his vendees for infringement by the use of the article in question, so as to have the right to control the defense and take an appeal, was not concluded by an interlocutory judgment in a subsequent action against him for making and vending the machine in question so as to preclude him from setting up new defenses therein. There is *dictum* to the effect that if the manufacturer had been a party in the broad sense of that term, the strict doctrine of *res judicata* would have applied, and a final judgment would have been binding not only as to all questions actually decided, but as to all that might have been raised and litigated.

In *Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & P. Co.* 135 Fed. 365, affirmed in 71 C. C. A. 481, 139 Fed. 385, s. c. 128 Fed. 751, it was held that a party who has concealed and denied his connection with the defense of an action for infringement cannot, when such litigation has terminated successfully, claim the benefit of such judgment as *res judicata* in a suit against him for the infringement of a patent.

In *Cramer v. Singer Mfg. Co.* 35 C. C. A. 508, 93 Fed. 636, a judgment in an action against a manufacturing company and its general agent, from which the company was dismissed for want of service, was held not conclusive upon the plaintiff in such action, in a subsequent action against the manufacturing company for an infringement of the same patent, although such manufacturing company took an active part in the defense and paid a part of the expenses of the first action. It is stated that the evidence falls short of showing that the manufacturing company had such relation to the defense as that it could plead the judgment as a bar; that so far as the evidence discloses the fact, the company's connection

with the former litigation was secret, and not known to the plaintiff, that the withdrawal of the company from the case indicated that it did not desire to be bound by a judgment that might be rendered, and this was further evidenced by the fact that, in dismissing the action as to the manufacturing company, it was dismissed without prejudice to commence another suit for the same cause of action. Writ of certiorari denied in 175 U. S. 725, 44 L. ed. 338, 20 Sup. Ct. Rep. 1022.

In *Hanks Dental Asso. v. International Tooth Crown Co.* 58 C. C. A. 180, 122 Fed. 74, a judgment in an action for the infringement of a patent, in which the patent was declared invalid, is not made conclusive upon the plaintiff therein, in a subsequent action against another defendant, by reason of the fact that a protective association which defended the first suit was defending the second, in the absence of a showing that the protective association contributed openly to the defense of the first suit, to the knowledge of the plaintiffs therein. Judgment for plaintiff was reversed on the ground that there was no legal evidence of infringement. 63 C. C. A. 684, 130 Fed. 1022.

In *Lacroix v. Lyons*, 33 Fed. 437, a judgment in an action for infringement of a trademark in a suit against a vendee was held not conclusive in favor of the plaintiff, in a subsequent action against the vendor, in the absence of a showing that such vendor was a party to the previous suit, or that he defended the same openly in his own interest.

In *General Electric Co. v. Morgan-Dardner Electric Co.* 93 C. C. A. 474, 168 Fed. 52, it was held that a judgment in an action for infringement of a patent, in which the manufacturer paid the attorney who appeared for the customer, and a part or all of the court costs, did not bind such manufacturer, in the absence of proof that the attorney was not under the exclusive direction and control of the nominal defendant, or that the manufacturer had any standing except as an interested sympathetic nonparticipant.

In *Saxlehner v. Eisner*, 140 Fed. 938, it was held that the principal stockholders of a corporation, who controlled the corporation, and who participated in acts constituting an infringement, and who aided in the defense of an action for such infringement, were concluded by a judgment in such action, in a subsequent action against them on the theory that they were joint infringers, and for an accounting from them individually on account of the dissipation of the corporate funds. Affirmed in 77 C. C. A. 417, 147 Fed. 189. Writ of certiorari denied to affirming decision in 203 U. S. 591, 51 L. ed. 331, 27 Sup. Ct. Rep. 778.

In *Wilgus v. Germain*, 19 C. C. A. 188, 44 U. S. App. 369, 72 Fed. 773, it was held that judgments in several actions against corporations for infringement of a patent, in one of which an officer of the corporation was present and testified, and in another a

stockholder was present and took a leading part, were not conclusive upon such officers so as to estop them from advancing a defense there advanced, in a subsequent action against a partnership of which they were members, and which had sold the articles which were the subject of the first suits, since, although they appeared in the first, they were not parties so as to entitle them to the right to control the proceedings, or to adduce or cross-examine witnesses, or to appeal from the judgment; and even if it be conceded that they were parties to the former action, that action could not bind the partnership when sued in a subsequent case.

In *American Bell Teleph. Co. v. National Improved Teleph. Co.* 27 Fed. 663, it is stated that a licensor of one who is sued for infringement, and whom the licensor had previously contracted to save harmless in case of suit, is bound by a judgment rendered in such suit, as to the validity of the patent, notwithstanding the licensor withdrew from the defense and dismissed the counsel employed by him before the decree was rendered. In the subsequent suit, however, the court examined the question of the validity of the patent on its merits, and did not rely on the former adjudication in the application for a preliminary injunction.

So, in *Robertson v. Hill*, 6 Fisher, Pat. Cas. 465, Fed. Cas. No. 11,925, a preliminary injunction was granted as against a defendant who had participated in the defense of the previous suits, with full opportunity to test the validity of the patent.

In *United States & F. Salamander Felting Co. v. Asbestos Felting Co.* Fed. Cas. No. 16,787, a judgment in an action for infringement of a patent, in which a person who supplied the device for the use of which the suit had been brought, and who assumed and conducted the defense, was held conclusive upon such person as to the matter there decided.

W. A. E.

#### VIRGINIA SUPREME COURT OF APPEALS.

STONEGA COKE & COAL COMPANY, Plff.  
in Err.,  
v.

C. M. ADDINGTON.

(112 Va. 807, 73 S. E. 257.)

**Damages — breach of contract — duty to minimize.**

1. The damages to be awarded to one who has contracted to drive entries in a mine, because of the failure of the other contracting party to perform his agreement to furnish the pumps, piping, and tools necessary to keep the mine free from water, which might be procured at small cost, is the cost of such appliances, and not the cost of the labor of bailing entailed by failure to provide them.

37 L.R.A. (N.S.)

**Contract — waiver of provisions — furnishing appliances.**

2. One contracting to drive entries in a mine waives his contract right to have the other contracting party furnish pumps, piping, and tools to keep water out of the mine, which might be secured at small cost, by working for several months without procuring them or insisting that they be furnished, but informing the other party that he will bail the water out.

(November 16, 1911.)

**ERROR** to the Circuit Court for Wise County to review a judgment in plaintiff's favor in an action brought to recover damages for failure of defendant to furnish to plaintiff certain appliances, necessary for work, in accordance with his agreement. Reversed.

The facts are stated in the opinion.

Messrs. Bullitt & Chalkley for plaintiff in error.

Messrs. Bond & Bruce for defendant in error.

Keith, P., delivered the opinion of the court:

C. M. Addington brought an action of assumpsit in the circuit court of Wise county against the Stonega Coke & Coal Company, in which he states that, at the request of the defendant, he had agreed to drive two entries into its mines in the county of Wise for a distance of 1,700 feet, to mine out all the "break-throughs," and to do all the temporary timbering, and to remove and clean up all the slate, dirt, and refuse in said entries and break-throughs, except when there was a fall of slate more than 12 inches in thickness; to drive the head-

*Note. — Proceeding with work as waiver by contractor of stipulations by other party to furnish appliances or facilities for the work.*

It will be seen that in *STONEGA COKE & COAL Co. v. ADDINGTON*, the court places the waiver of the defendant's failure to furnish appliances for removing the water, on the ground that the plaintiff informed the defendant that he would bail the water out, as *non constat* if the plaintiff had not made this statement, the defendant would have furnished the appliances.

Few cases have been found where the courts have considered the proceeding with work by the contractor in its relation to a breach of a stipulation by the other party to furnish materials or facilities. Most of the cases upon the subject of waiver are of stipulations as to money or time, and the derelictions considered are usually those of the contractor as distinguished from the owner.

It will be seen that while, on the one hand, the proceeding with work by the con-

ings of the usual width, and take out all of the coal therein to the roof, unless the entry could be driven 6 feet in height, and leave a roof or top of coal at least 12 inches thick, and in that event the entry was to be left 6 feet in height; and to load into mine cars all of the coal taken out of said entries and break-throughs in driving the same as aforesaid; and the defendant then and there undertook and agreed with the plaintiff to furnish and provide at the drift mouth of said entries all props, crossbeams, and other timbers necessary to support the roof of said mine, and all ties, spikes, partings, and switches and other material and appliances necessary to make the said track, and all pumps, pipes, and wrenches, and tools and appliances necessary to pump or

siphon the water out of said mine, and to furnish all cars necessary to load the coal and other material taken from said entries, and to haul all ties, props, rails, and timber into said entries, and haul out all loaded cars as fast as the same were loaded, and to pay the plaintiff \$4 per lineal yard for each yard of entry and break-throughs driven by him as aforesaid, and to pay to him on its regular pay day in each month all amounts due to him for the work done under and in pursuance of said agreement for the preceding month. The plaintiff avers that he always, from the time of making the agreement, performed all things on his part to be performed; that he purchased and provided himself with tools, materials, and supplies necessary to do said work, and did

tractor is not necessarily a waiver of damages for a default by the other party, on the other hand, there are cases where the contractor may not keep the contract alive by doing what the other party has agreed to do, but has omitted.

Cases of the first class fall within the general principle stated in *Starbird v. Barrons*, 38 N. Y. 230, where the court said, in holding that a carrier, notwithstanding the shipper's default in not having the goods ready when agreed, might still, after performing as well as he could, recover damages caused by the delay; "I do not understand that a party is not at liberty, if he thinks he sees a fair prospect, or indeed, but a reasonable hope that he may still perform, notwithstanding the default of the other party, — to go on and complete his engagement, and earn the compensation to which in that event he will be entitled; and if he ultimately fails, despite a strenuous effort to perform, to accomplish the result, that he cannot claim all the damages, and repair the losses he has suffered by the default of the other party. While a party thus situated is at liberty to rescind a contract, he is not obliged to do so, and especially is he under no obligation to do this, when it is not probable that a rescission will afford him a remedy adequate to the damages he has sustained. The principle which should govern such a case as this is no where more clearly stated than by Judge Denio, in the case of *Cross v. Beard*, 26 N. Y. 88; and it is, in my judgment, the true rule applicable here. 'In every contract,' he says, 'between parties where the performance by one of them presupposes some act to be done by the other party prior thereto, or contemporaneously, the neglect or refusal to perform such act not only dispenses with the obligation which the other party was under to perform on his part, but where the circumstances are such that a rescission of the contract will not afford an adequate remedy to the party who was ready to perform, he is entitled to a recompense against the delinquent, equal to the damages which such delinquency has caused him.'"

57 L.R.A. (N.S.)

Thus in *State v. Arkansas Brick & Mfg. Co.* 98 Ark. 125, 33 L.R.A. (N.S.) 376, 135 S. W. 843, where the state agreed to furnish the defendant with a certain number of laborers for a certain price per man per day, and failed to provide the agreed number; but the defendant while from time to time demanding that the state perform its contract and furnish the agreed number, nevertheless paid each month to the state, during most of the contract, the amount per man agreed upon for the laborers actually furnished, it was held that the defendant had not waived this breach on the part of the state, and might recoup its damages therefor in an action by the state for a balance due under the contract.

(It may be here noted that in *F. H. Mills Co. v. State*, 110 App. Div. 843, 97 N. Y. Supp. 676, affirmed in 187 N. Y. 552, 80 N. E. 1109, where the defendant agreed to furnish certain persons to work for the plaintiff in making furniture on the defendant's property, and was to complete a certain kiln, it was held that the plaintiff had waived the matter of the kiln, but it appeared in the case that the contract was modified by an agreement for another kiln.)

In *El Paso & S. W. R. Co. v. Eichel*, — Tex. Civ. App. —, 130 S. W. 922, where the plaintiffs contracted to crush stone for ballast for the defendant railroad, which was to furnish a crusher of a certain capacity and the necessary coal and water, and the crusher was of much smaller capacity than contracted for, the coal unsuitable and had to be screened, and the water impregnated with alkali and other substances and caused foaming in the boiler, the plaintiffs went on with the contract under these conditions for a certain time and then abandoned it. It was claimed by the defendant: (1) That the plaintiffs, having accepted the plant and used it, were estopped from claiming any additional compensation by way of damages for increased cost incurred by them in producing the ballast, over and above the price at which it might have been produced under different circumstances; and (2) that having abandoned their contract

mine and drive a considerable portion of said entries and break-throughs, or the most difficult and expensive part thereof, and did bail and haul out of said mine large quantities of water; and that he was always been ready, able, willing, and anxious to perform and complete the whole of said work in pursuance of his agreement; that the defendant, not regarding its promise, but intending to injure the plaintiff, did not perform the agreement on its part, but failed and refused to furnish and provide the plaintiff with props, crossbeams, and other timbers necessary to support the roof of said mine, and ties, rails, spikes, partings, switches, and other materials and appliances necessary to make the said track, and pumps, pipes, wrenches, tools, and appliances neces-

sary to pump or siphon the water out of said entries and break-throughs, and to furnish cars necessary to load said coal and other material taken from said mine, and to haul the timbers, props, rails, and ties into the said mine, and to haul out the loaded cars; and that in November, 1908, the defendant would not permit or suffer the plaintiff to complete his work, and then and there hindered and prevented him from doing so, and discharged the plaintiff from any further performance or completion of his said agreement, to the damage of the plaintiff \$2,000.

The plaintiff's bill of particulars is for damage by reason of the failure of the defendant to furnish pipes, wrenches, and pumps (\$200), and for profit on contract

and declined to carry it out, they could not lawfully demand of the defendant the profit they would have made upon the performance of the work not in fact performed, and the completion of which they had abandoned. As to the first proposition the court said: "After the plant was accepted, the breach of any condition to be fulfilled by the defendant could be treated by the plaintiffs as a breach of warranty, and not as a ground for rejecting the plant and treating the contract as repudiated; there being no term of the contract, express or implied, to that effect. . . . They were unaware of the plant's defective capacity when they accepted it, and only obtained knowledge of it by demonstration from its use in the work for which it was furnished. Because they had obtained such knowledge in that manner, must they forfeit all the profit they would have reasonably made had the plant been of such capacity as defendant was obligated to furnish, upon the principle they are estoppel from claiming them? If so, why? For what reason?" As to the second proposition the court said: "When the obligation of performance by one party presupposes the doing of some act by the other party thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned him. . . . When these principles are applied to the case under consideration, it seems to us that the obligation of the defendant to furnish the plaintiffs with a crushing plant of the capacity stipulated, while a warranty as well, was a condition precedent, the breach of which discharged the contract (Wald's Pollock, Contr. 3d ed. 655), and justified the plaintiffs in abandoning the performance of their part of it; and that their partial performance did not preclude them from abandoning the performance of their part of it, and recovering damages from defendant by reason of its breach of such condition. Therefore, when it became evident that defendant would not supply

37 L.R.A.(N.S.)

plaintiff with an efficient plant, and suitable coal and water with which to operate it as it agreed to do, they had the right to abandon their contract."

In *Mansfield v. New York C. & H. R. R. Co.* 102 N. Y. 205, 6 N. E. 386, where the plaintiffs had agreed to erect an elevator for the defendant, and to commence such erection within five days after notice from the defendant's engineer that the foundations were ready, they alleged as a breach that the defendant failed to have the foundations ready for the erection of the elevator at the time notice was served upon them and they were required to commence work for its construction, and claimed damages therefor by reason of increased expense in doing the work and supplying materials, and loss of gain or profits, arising from the delay occasioned by the want of readiness on the part of the owner. In reversing a judgment for the defendant the court said: "It is also claimed by the respondent that the act of the contractor in commencing the work within five days after receipt of the notice in question constituted a waiver of the breach complained of. The evidence establishes the fact that, immediately upon receipt of the notice, the contractors protested against it, and claimed that it was given in violation of the true meaning and spirit of the contract, and that the foundations were not only not ready, but were in such a condition that they could not commence or prosecute their work, except at increased expense and great disadvantage. Under the solicitations of the engineer, however, as they offered to prove, and without waiving any rights secured to them under the contract, they in fact commenced the prosecution of the work. There is nothing in the facts upon which an intention to waive the damages arising out of the breach complained of can be predicated. When the breach occurred, the contractors undoubtedly had the option of refusing to commence their work until the foundations were actually ready, or to commence and prosecute it, relying upon the covenants of their contract to recover such damages as the breach occasioned them. (Starbird v.

(\$1,800). The defendant filed a bill of particulars, which is nothing more than an amplification of the plea of nonassumpsit.

The case was submitted to a jury, which found a verdict in favor of the plaintiff for \$800, upon which the court entered judgment, and the case is before us upon a writ of error awarded the defendant.

The first error assigned is that the court erred in giving to the jury a certain instruction asked for by the plaintiff, which is as follows:

"The court instructs the jury that, if they believe from the evidence that the plaintiff and defendant made the agreement as alleged in the declaration, and that the plaintiff has complied with all the requirements of the contract on his part to be performed,

and that there was a material breach of the contract by the defendant, then they must find for the plaintiff.

"The court further tells the jury that if they find for the plaintiff they shall assess such damages as in their opinion he has sustained, and in assessing the damages they shall take into consideration the value of any labor which the plaintiff has done by reason of the failure of the defendant to furnish pipes, wrenches, and pumps, if they believe that defendant was to furnish same, and they shall allow him, also, any profit which, in their opinion, the plaintiff would have made, if he had been permitted to complete the contract."

The defendant, in lieu of this instruction, asked the court to tell the jury that, "al-

Barrons, 38 N. Y. 231; Ruff v. Rinaldo, 55 N. Y. 664; Cross v. Beard, 26 N. Y. 88). After express notice to the defendants of their intention to hold them liable for the damages arising from the omission to complete the foundations, they elected to commence the prosecution of the work. This they were entitled to do, and it constitutes no waiver of their claims."

In *Miller v. Mantik*, — Md. —, 81 Atl. 797, where the plaintiff agreed to furnish certain tomatoes for the defendant, who was to furnish the cans therefor, the action was in assumpsit, not upon the written contract, but upon a *quantum meruit* for a balance due for goods actually delivered but not paid for by the buyer, and it was claimed by the defendant that the plaintiff made some deliveries after the time when the defendant had refused or failed to deliver cans, and that this showed a waiver on the part of the plaintiff of any right he may have had to abandon the further performance of the contract. It was held, in affirming a judgment for the plaintiff, that upon the conflicting testimony the question of waiver was for the jury. It seems to have been the opinion of the court below that there would have been a waiver if the jury found that there had not been a demand by the plaintiff, on the defendant, for the cans.

In *Mill Dam Foundry v. Hovey*, 21 Pick. 417, where the plaintiffs were to furnish certain water power to the defendant, who was to make certain instruments for them, and, owing to the breaking of the dam, the water power was diminished while the plaintiffs were repairing the dam and putting in a steam engine, and the defendant, after proceeding with his contract for a time, finally refused to go on with it some time after the putting up of the steam engine but before the restoration of the dam, the court said: "Whether the failure to furnish the stipulated power, between the time of the breaking of the dam and the completion of the steam engine ready for use, was the failure of a condition precedent or not, warranting the defendant to give up the performance of the contract, is imma- 37 L.R.A.(N.S.)

terial, because in fact, as that evidence shows, he went on with the execution of the contract, until the steam engine was put in motion and ready for use, about the 7th of December. And such continuance was a waiver of the breach of condition to that time." But the court was of the opinion that, if the defendant had suffered loss by the delay in furnishing the power, he would have a remedy by action for the damages he had thereby actually sustained.

#### Where contractor may not waive.

Where one party to a contract was required to furnish certain sketches, etc., for the other party, a publisher, to insert in his advertising paper, and he notified the publisher that he would not go on with the contract, it was held that the publisher had no right to prepare and publish the advertising matter. *Peck v. Kansas City Roofing & Corrugating Co.* 96 Mo. App. 212, 70 S. W. 169.

And in *Savage Mfg. Co. v. Armstrong*, 19 Me. 147, where the defendant agreed to take and pay for certain machines to be made according to a model to be by him furnished, and did not furnish the model, and the plaintiffs purchased a model such as they supposed the defendant should have furnished, and proceeded to make the machines, it was held that if the defendant did not furnish the model the plaintiffs had no right to do so.

So, in *New York Architectural Terra-Cotta Co. v. Williams*, 102 App. Div. 1, 92 N. Y. Supp. 808, affirmed in 184 N. Y. 579, 77 N. E. 1192, where an iron company contracted to do certain work on the materials of a building for the owner, who was to "supply all detail drawings," and the owner did supply certain drawings, but the iron company claimed that the drawings meant by the contract were certain "shop drawings and punching machines," and that it was entitled to charge for such drawings made by it, the court, while holding that the owner had supplied all the drawings intended by the contract, said: "But even if the testimony supported the contention

though they believe from the evidence that the defendant agreed to furnish the plaintiff with pumps, pipes, and wrenches for the purpose of syphoning the water out of the mine, and did not furnish the same, or did not furnish pumps and pipes which would properly do the work, yet, if the plaintiff continued to work for several months after the defendant had failed to furnish the said appliances, and stated to the company that he would bail the water out, he cannot now claim that the said failure to furnish the said pumps, pipes, and wrenches was a violation of the contract on defendant's part, and cannot recover damages on account thereof."

The court refused to give this instruction as asked, and modified the same by insert-

ing therein, after the words "bail the water out," the following words, *viz.*, "and waived his right to have said appliances furnished him, then," and gave said instruction as so modified. To all of which the defendant excepted.

The giving of the first instruction, considered in connection with the facts in this case, presents an interesting question of law. It is shown by the plaintiff's own evidence that, conceding that the defendant was bound to furnish pumps, pipes, and wrenches, and that it failed to comply with its agreement in this respect, they could have been purchased for a very small sum; and the contention of the defendant is that the cost to the plaintiff of such appliances is the true measure of the damages to which

of the Fagan Iron Works, still it is extremely doubtful, in my opinion, whether this charge could be allowed, for then the case would stand thus: The owner was bound to furnish these details as a condition precedent to the performance of the work by the Fagan Iron Works; if he neglected or refused to furnish them, then the remedy of the Fagan Iron Works would have been to refuse to proceed with its contract, and hold the owner liable for damages for the breach. *Parr v. Greenbush*, 112 N. Y. 247, 19 N. E. 684."

In *Parr v. Greenbush*, 112 N. Y. 246, 19 N. E. 684, the plaintiff, who had contracted to do certain paving for the defendant village, which was to furnish the necessary sand and gravel and do the grading, sued for damages for the defendant's default as to the sand, gravel, and grading, and alleged that he could not fulfil on his part until the sand and gravel were furnished and the grading done; that he thereupon proceeded to perform on his part the provisions of the contract, and did the grading and furnished the gravel; and that this was done at the special instance and request of the defendant. It appeared that this request was in a resolution which had already been held invalid, and thus not available to the plaintiff. (See 72 N. Y. 463.) The court, while holding that a judgment for the plaintiff must be reversed on account of the fact that the matters were all compromised and settled between the parties, nevertheless said: "Ordinarily, when one party to a contract refuses to perform, that alone does not authorize the other party to go on with the contract and perform for the defaulting party. If A contracts with B to do the labor requisite for the construction of a house upon A's land, who is to furnish the materials for that purpose, and A refuses to furnish the materials so that B can do the work, B is not thereby authorized to furnish the materials himself, and go on and complete his contract. Without A's consent, B has no authority to enter upon his land, and B's only remedy is an action for damages for breach of the contract by A. So here, if the defendant refused to furnish the sand

and gravel, and do the grading and thus perform its covenants, the plaintiff had no right to enter upon the street, and do the work and furnish the materials at the expense of the defendant. His only remedy was to stop there and bring an action for damages against the defendant for its breach of the contract. There are cases where one party to a contract may furnish the work and the materials which the other party is bound to furnish, and omits, upon request, to furnish, and where he may recover the expenses of furnishing them, as damages for a breach of the contract by such other party. It is difficult, if not impossible, to define those cases by any general rule. It is sufficient to say that this is not one of them. Those cases are, generally, where one party to a contract has entered upon the performance thereof, and the other party omits, upon request, to do something of no great importance, to be thereafter performed before further progress can be made with the contract, and then the party anxious to perform does the work or furnishes the material which the other party ought to have done or furnished; and, in such case, he may recover the expense of the work done and materials furnished, as damages for a breach of the contract by the other party. Where the lessor has covenanted to repair, and the lessee enters into possession, and repairs thereafter become necessary, which the lessor refuses to make, the lessee may make them and recover the expenses of them, as damages for breach of the lessor's contract. But the cases may be very rare, if, indeed, there are any, where one party refuses to perform a condition precedent which stands in the way of any performance by the other party, and the latter party can nevertheless perform the condition and recover the expense of such performance, as damages for a breach of the contract by the other party. The law, in such cases, recognizes the right and power of one party to defeat performance of the contract by the other party, and leaves him responsible for the damages he thus causes the other party, which damages are usually measured by the value to him of the contract thus practically destroyed. In other



he is entitled by reason of the failure of the defendant to furnish them in accordance with its contract, and not the "value of any labor which the plaintiff has done by reason of the failure of the defendant to furnish pipes, wrenches, and pumps." In other words, the defendant invokes the familiar doctrine, that the plaintiff cannot recover for avoidable consequences.

This subject is treated at large in Sedgwick on Damages, 8th ed. §§ 201, 202, and 205, and numerous cases are cited which illustrate the doctrine.

In *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341, [Sedgw. Damages, § 201] it is said that "the delinquent party is holden to make good the loss occasioned by its delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. . . . If the party entitled to

the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions he fails in social duty if he omits to do so. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time, and engages masons and carpenters to go on with the work. The bricks are not delivered. If others bricks, of an equal quality and for the stipulated price, can be at once purchased on the spot, it would be unreasonable, by neglecting to make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built.' So in trespass in Massachusetts, it appearing that the defendant had broken down the plaintiff's fence in November, but that the plaintiff did not repair the breach till May, in consequence of which cattle got in and destroyed the crop of the next year, and

words, a party may repudiate or break a contract, while he cannot deny or destroy its obligations."

Reference may here be made to *Thorpe v. Ross*, 4 Keyes, 546, where the plaintiffs, who were masons, had contracted for the sum of several thousand dollars to do certain mason work for the defendant, including the laying of the drain pipes and connecting them with the sewer, and since, under a city ordinance no connection could be made with the sewer except by a plumber specially licensed for that purpose, who must first obtain a permit and pay a fee of so much for each house, the plaintiffs employed such a plumber, who paid for the permit and was reimbursed by the plaintiffs. It was held in the lower court that at the time of the written agreement there was a collateral parol agreement that the plaintiffs should pay for these permits. The court of appeals, however, in affirming the judgment, said that it could not be sustained on the ground relied on in the lower court, but that if the plaintiffs were bound to pay for the permits by the written agreement, then of course they could not recover it, but that if they were not so bound, then they could not recover it, because they had paid the money without the defendant's request or authority; that it was a mere voluntary payment, and imposed upon him no legal obligation to refund; and that the plaintiffs could not have done this any more than they could have purchased a house upon which they agreed to do certain work when they found that the person with whom they contracted was not its owner. The court said: "And so, generally, where one has contracted to perform work, etc., of the description in question, if he find obstacles in the way which cannot be removed without the payment of money, and it is the duty of the party contracted with to remove such obstacles, and so enable him to perform his contract, he may require such party to

remove them, and if such party refuse he will be excused *pro tanto* from the performance of his contract, and may recover his full profits, but he cannot volunteer to pay the money himself, and then compel the others to repay that which he had refused to pay. It would be strange if a request that the plaintiff pay money could be implied from the refusal of the defendant to pay it."

It may be noted that in *Mill Dam Foundry v. Hovey*, 21 Peck. 417, where by the contract the defendant was to manufacture irons for the plaintiffs, who were to furnish him all materials used in and about the manufacture, as soon and as often as he should reasonably require, the court said: "Furnishing stock and materials to some extent, and even to the whole amount, if that could be reasonably required, before commencing the work, was a condition precedent to any obligation on the defendant to perform, because he was to work on their materials. But if the plaintiffs, on the defendant's first requisition, had furnished a large quantity of materials, which he had accepted and commenced working upon, he was bound to go on, and finish the work on those materials; a subsequent neglect or refusal to furnish further materials would not excuse the defendant from performance, so far as to finish what he had begun, though it would be a breach of contract for which the defendant would have his remedy by action. And it would also excuse the defendant for all damages, arising from his non-performance, so far as it was occasioned by the want of the rest of the materials. For damages occasioned by nonperformance of such part of the contract, the plaintiffs could not recover, because it would be attributable to their own default; but they would be liable in a cross action, because it would result from a breach of their stipulations."

B. B. B.

the claim being for the loss of the subsequent year's crop, as well as the expense of repairing the fence, the supreme court said: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damages. But, if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote." "

And in § 205 (Sedgwick, *supra*), it is said that "the rule applies both in contract and tort, and illustrations may be drawn from every branch of the law."

See also, 13 Cyc. p. 71: "Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase, and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent upon him, however, to use reasonable exertion and reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case." See *Factors' & T. Ins. Co. v. Werlein*, 42 La. Ann. 1046, 11 L.R.A. 361, 8 So. 435; 1 *Sutherland, Damages*, 152.

In *Warren v. Stoddart*, 105 U. S. 224, 28 L. ed. 1117, the rule is thus stated: "Where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent."

Authorities upon this subject might have been multiplied to an almost unlimited extent, but those we have cited are deemed sufficient.

The testimony shows that the pump worked well at first; that it afterwards got stopped up with coal, by reason of not having a nozzle attached to it,  
37 L.R.A. (N.S.)

One of the witnesses for the plaintiff was asked:

Q. How much did a nozzle cost?

A. Don't know how much it would have cost. Man could have took a tin can and made one.

Q. You just preferred to work it along and let it get stopped up with coal?

A. We was working by the day, and had to work according to Mr. Addington's orders.

And then, with reference to the wrench, the witness was asked:

Q. How much would it have cost to have gotten a wrench?

A. Not a great deal.

Q. How much would a pipe wrench have cost?

A. A large one maybe \$1.50 or \$1.75; something like that.

Another complaint was that the cylinder of the pump was not properly packed. The question was asked the witness:

Q. That you could have taken out and packed very easily?

A. Yes, sir; a mechanic could have taken it out and packed it.

Q. How long would it have taken to have done that?

A. Oh, a couple of hours.

We think these facts clearly bring the case within the operation of the principle we have discussed, and that it was error to give the instruction asked for by the plaintiff.

The instruction asked for by the plaintiff in error, defendant in the court below, which was refused as asked for and given with an amendment, is predicated upon the theory that the defendant agreed to furnish the plaintiff with pumps, pipes, and wrenches for the purpose of syphoning the water out of the mine; that it did not furnish the same, and did not furnish appliances which would properly do the work; but that plaintiff continued to work for several months after such failure upon the part of the defendant, and stated to the company that he would bail the water out. Then the instruction, as originally prepared, told the jury that the plaintiff could not afterwards claim damages for a violation of the contract on the part of the defendant to furnish pumps, pipes, and wrenches.

Plaintiff could have furnished pumps, pipes, and wrenches at a trifling cost, or, if that could not be done, he might have insisted upon a compliance by the defendant with its contract to furnish them; but having done neither of these things, and having informed the company that he would bail

the water out, if the jury believed that such was the fact, he must be taken to have waived his right under the contract; for *non constat* plaintiff in error, without this statement on the part of defendant in error, would itself have furnished the needed appliances. If the facts stated in this instruction constitute a waiver, then plainly it was error, after the words, "he would bail the water out," to add the words, "and waived his right to have said appliances furnished him, then," for that was equivalent to telling the jury that the facts stated did not constitute a waiver.

As the case has to be reversed for error in instructions, we shall not consider the motion to set aside the verdict as contrary to the evidence.

The judgment is reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

Petition for rehearing denied.

**UNITED STATES CIRCUIT COURT  
OF APPEALS, EIGHTH CIRCUIT.**

UNITED STATES SMELTING COMPANY,

Plff. in Err.,

v.

JOSEPH H. SISAM.

(112 C. C. A. 37, 191 Fed. 293.)

**Damages — crop — injury and destruction.**

1. The measure of damages to a growing crop by a wrongful act which destroys it is its value at the time and place of its destruction.

The measure of the damage to a growing

Headnotes by SANBORN, Circuit Judge.

**Note. — Measure of damages for injury to, or destruction of, growing crops.**

This note is supplemental to notes on same subject attached to Missouri P. R. Co. v. Sayers, 27 L.R.A. (N.S.) 168, and to Teller v. Bay & River Dredging Co. 12 L.R.A. (N.S.) 267; and also to a note on measure of damages for destruction of perennial crops, attached to Thompson v. Chicago, B. & Q. R. Co. 23 L.R.A. (N.S.) 310.

The rule as stated in the previous notes, that the measure of damages for the destruction of immatured growing crops is the value at the time of their destruction, has found further support in Gulf Pipe Line Co. v. Bryner, — Tex. Civ. App. —, 124 S. W. 1007 (grass and cornstalks destroyed through negligent escape of oil); Boyd v. Lincoln & N. W. R. Co. 89 Neb. 840, 132 N. W. 529; Ft. Worth & D. C. R. Co.; v. 37 L.R.A. (N.S.)

crop injured, but not rendered worthless, is the difference between the value of that crop before and after the injury, at the time and place thereof.

Where a crop is injured from time to time throughout its growing season until its maturity, by sulphurous fumes and their products, but is not destroyed, so that it is cultivated throughout the season, harvested, and marketed, the damage to it may be lawfully measured under these rules by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.

**Evidence — injury to crop — elements of damage.**

2. Evidence of the kind of crop the land will ordinarily yield, of the stage of the crop's growth when injured or destroyed, of the average yield per acre of similar land in the neighborhood, the crop of which was cultivated in the same way, and was not injured, of the market value of the crop injured, and of the market value of the probable crop without the injury, at the time of maturity, of the expense that would have been incurred after the injury in fitting for market the portion of the probable crop the wrongful act prevented from maturing, of the time of the injury, and of the circumstances which conditioned the probability of the maturing of the crop at that time in the absence of the injury, is competent, and may be weighed by the jury to find the damage to a growing crop at the time of its injury.

**Damages — nuisance — injury to residence.**

3. The owner of a residence which is rendered inconvenient, uncomfortable, and unhealthy as a home, by the nuisance of sulphurous fumes and their products thrown upon and into it by another, may prove and recover in an action therefor the damages he suffers himself from the discomfort and

Flynt, — Tex. Civ. App. —, 125 S. W. 347 (crops destroyed by overflowing of lands).

But in Candler v. Washoe Lake Reservoir & G. C. Ditch Co. 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946, the court, while admitting the general rule that the measure of damages for the destruction of growing crop is its value in its condition at the time of the injury, said that where it appears that the crops have been entirely destroyed or nearly so, and where there appears to be a reasonable certainty that they would have matured but for the wrongful act, the proper measure of damages would be to allow for the probable yield when matured and ready for market, deducting therefrom the estimated expense of producing, harvesting, and marketing them, and also deducting the value of any portion of the crops that may have been saved.

And in Freeman v. Field, — Tex. Civ.

sickness thereby inflicted upon his wife and the other members of his family who live with him therein, although he may not, and his wife alone may, maintain the cause for the direct personal injury to her.

(October 21, 1911.)

**E**RROR to the Circuit Court of the United States for the District of Utah to review a judgment in plaintiff's favor in an action brought to recover damages for injury to plaintiff's crops and for discomfort and sickness of his family, alleged to have been caused by the fumes from defendant's smelter. Affirmed.

The facts are stated in the opinion.

Argued before Sanborn and Van Devanter, Circuit Judges, and William H. Munger, District Judge.

App. —, 135 S. W. 1073, it was held that a charge to the jury that damages should be assessed "at such sum as you believe from the evidence would be the market value of his said crop of cotton and cotton seed at the nearest market, had the same matured, less the cost of finishing the cultivation of said crop, and the picking, gathering, preparing for market, hauling to, and marketing said crops of cotton and cotton seed," was correct, where unmatured cotton having no market value was destroyed. The court said: "the testimony showed that the crop was destroyed in June, at which time it was matured, and the testimony shows it had no market value in such condition. Plaintiff, in addition, testified as to how much it would cost to finish making the crop, to pick, weigh, and prepare the same for market, and market the same in the nearest market, what the yield would have been, and the value of the cotton and cotton seed in the nearest market. This being the condition of the record, we think the charge above given was correct."

In *Enright v. Toledo, P. & W. R. Co.* 158 Ill. App. 323, where growing crops were destroyed by being drowned out through the destruction of a tile drain, it was held that the proper measure of damages was the rental value of the ground, together with the reasonable value of the seed and labor expended in bringing the crop to the point at which it was destroyed.

The measure of damages for destruction of turpentine or resin produced, but still on the face of the trees, is its market value. *Atlantic Coast Line R. Co. v. Davis*, 5 Ga. App. 214, 62 S. E. 1022.

#### Perennial crops.

The earlier cases on measure of damages for injuring or destroying perennial crops are gathered in the note to *Thompson v. Chicago, B. & Q. R. Co.* 23 L.R.A.(N.S.) 310.

The measure of damages for destruction 37 L.R.A.(N.S.)

Messrs. Andrew Howat and H. R. Macmillan, for plaintiff in error:

The measure of compensation for damaging growing crops is ascertained by estimating the actual value of the crops in the condition in which they were at the time the injury is alleged to have occurred.

3 Sedgw. Damages, § 937; 3 Sutherland, Damages, § 1023; Field, Damages, § 1742; *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 472, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; *Lommeland v. St. Paul, M. & M. R. Co.* 35 Minn. 412, 29 N. W. 120; *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 524; *Ward v. Chicago, M. & St. P. R. Co.* 61 Minn. 449, 63 N. W. 1105; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 340; *St. Louis, I. M. & S. R. Co. v. Yarbrough*, 56 Ark. 612, 20 S. W.

of a matured crop of alfalfa is its market value standing on the ground. *Adam v. Chicago, B. & Q. R. Co.* 139 Mo. App. 204, 122 S. W. 1136.

Where crops of alfalfa are destroyed and also the stand, and the roots thereof are permanently affected, the owner may recover for the damage to the crops as well as for the permanent injury to the land, by reason of the destruction of the plant itself. *Missouri, K. & T. R. Co. v. Malone*, — Tex. Civ. App. —, 126 S. W. 936. The court said: "We think alfalfa and other perennial grasses may be likened to our native grasses, and where the roots thereof are destroyed by water, fire, or any other agency, that the damage is one to the inheritance, for which the owner is entitled to recover."

In *Hayden v. Missouri, K. & T. R. Co.* 84 Kan. 376, 114 Pac. 384, in an action to recover damages for the destruction of meadow grass by fire, it was held that while an instruction that recovery might be had for the value of growing timothy and clover, in addition to the cost of restoring the field to its original condition, might not be applicable in every case of a similar loss, yet it gave a fair measure of compensation in that case.

The measure of damages for the destruction of a standing but matured crop of timothy is the value of the crop in the market, after allowing for expense in harvesting and marketing (*Mattis v. St. Louis & S. F. R. Co.* 138 Mo. App. 61, 119 S. W. 998); for the destruction of the roots of the grass of a meadow, the cost of restoring the grass, including the loss of rental value while it is being restored (*Ibid*; *Crouch v. Kansas City Southern R. Co.* 141 Mo. App. 256, 124 S. W. 1077). But for destruction by fire of the roots of wild or prairie grass, the measure is the difference in value of land before and after the fire. *Mattis v. St. Louis & S. F. R. Co. supra*.

J. H. B.

516; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. 171; *Little Rock & Ft. S. R. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 392; *Teller v. Bay & River Dredging Co.* 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 944, 12 Ann. Cas. 779; *Dennis v. Crocker-Huffman Land & Water Co.* 6 Cal. App. 58, 91 Pac. 429; *Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1008; *Ducktown Sulphur, Copper, & I. Co. v. Barnes*, — Tenn. —, 60 S. W. 593; *Carter v. Wabaah R. Co.* 128 Mo. App. 57, 106 S. W. 612; *Hunt v. St. Louis, I. M. & S. R. Co.* 126 Mo. App. 261, 103 S. W. 133; *Berard v. Atchison & N. R. Co.* 79 Neb. 830, 113 N. W. 538; *Smith v. Chicago, B. & Q. R. Co.* 81 Neb. 186, 115 N. W. 757; *Gulf, C. & S. F. R. Co. v. Carter*, — Tex. Civ. App. —, 25 S. W. 1023; *Kansas City, M. & O. R. Co. v. Mayfield*, — Tex. Civ. App. —, 107 S. W. 941; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 337; *Colorado Consol. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Hays v. Crist*, 4 Kan. 351; *Gulf, C. & S. F. R. Co. v. Nicholson*, — Tex. Civ. App. —, 25 S. W. 54.

There was no proof of the cost of maturing the crops.

*Candler v. Washoe Lake Reservoir & G. C. Ditch Co.* 28 Nev. 151, 80 Pac. 753, 6 Ann. Cas. 946; *Anderson v. St. Louis, I. M. & S. R. Co.* 129 Mo. App. 384, 108 S. W. 607; *Berard v. Atchison & N. R. Co.* 79 Neb. 830, 113 N. W. 538; *Kansas City, M. & O. R. Co. v. Mayfield*, — Tex. Civ. App. —, 107 S. W. 941; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011; *Galveston, H. & S. A. R. Co. v. Ryan*, — Tex. Civ. App. —, 21 S. W. 1013; *Colorado Consol. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62; *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 101 Am. St. Rep. 98, 76 Pac. 341, 1 Ann. Cas. 761; *Buist v. Guice*, 96 Ala. 255, 11 So. 280.

Messrs. Brigham Clegg and Zane & Stringfellow, for defendant in error:

The difference between the market value of a matured crop on the same or similar land, under similar conditions, at the nearest market, less the cost of harvesting and marketing, and the market value of the injured crop, if any, is the measure of damages.

*Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254; *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011; *Smith v. Chicago, C. & D. R. Co.* 38 Iowa. 518; *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82; *Anderson v. St. Louis, I. M. & S. R. Co.* 129 Mo. App. 384, 108 S. 37 L.R.A. (N.S.)

W. 605; *Scanland v. Musgrove*, 91 Ill. App. 186.

Damages for discomforts and injuries to his family in his home are wrongs to plaintiff, for which he has the right to recover.

*Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 788; *Story v. Hammond*, 4 Ohio, 376; *Farver v. American Car & Foundry Co.* 24 Pa. Super. Ct. 583; *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 134, 21 Am. Rep. 436.

Sanborn, Circuit Judge, delivered the opinion of the court:

Joseph H. Sisam, the plaintiff below, recovered a judgment against United States Smelting Company, a corporation, for \$750 damages caused to his growing crops of lucerne, grain, vegetables, fruits, and berries by the sulphurous fumes emitted from its smelter during the years 1903, 1904, 1905, and 1906, and \$50 on account of the discomfort, sickness, and inconvenience inflicted upon him, his wife, and other members of his family, by the nuisance these fumes maintained in and about his home. The smelting company sued out a writ of error which presents its complaints of the course of the trial, which its counsel have reduced to three: (1) That incompetent evidence of damages resulting from the injuries to the crops was received, and a wrong rule for their measurement was given to the jury; (2) that there was no substantial evidence to sustain the recovery of such damages; and (3) that, under the law, the plaintiff could not lawfully prove or recover for injury to the health and comfort of his wife.

The specifications of error on which they rely to sustain their complaint that incompetent evidence of damages to the crops was received are (a) that after the plaintiff had introduced evidence that the fumes from the defendant's smelter injured his crops of potatoes in the year 1903, from time to time when the wind permitted them to float over his land throughout the growing season of the crop, and that he raised only 100 bushels to the acre, and would have raised 350 bushels to the acre if the fumes had not injured his crops, the court permitted him to testify what the value of potatoes was that year at the time of harvesting and gathering them, over the objection that the market value at the time the injury was inflicted was the only competent evidence of value; (b) that, after similar evidence regarding the plaintiff's crop of potatoes in 1904 had been given, like testimony of their market value was received; and (c) that after like testimony regarding the plaintiff's crop of potatoes in 1905 had

been given, similar evidence of their market value was admitted. But there was no error in these rulings because, at the time they were made, the evidence was that the injury to the respective crops of potatoes from the fumes was continuous, though intermittent, through out each growing season, and hence that it did not cease until the potatoes matured. The injury to each crop was not done; it was not finished, until the crop ceased to grow, and when the crop ceased to grow the time for gathering and harvesting it had arrived. Conceding, therefore, that the time for measuring the damages was when the injury was done, the testimony of the market value of the potatoes at the time of the gathering and harvesting, which the court below received, was at that time.

The alleged error on which counsel rely to sustain their contention that the court gave to the jury the wrong rule for the measurement of the damages to the crops is that it charged the jury that the general measure of damages to growing crops by wrongful acts was the depreciation of the market price thereof caused by the acts at the time and place of the injury; that this rule could not be applied; that crops growing rarely have any market value; that the complicated circumstances of this case required them to consider the entire damage done to the entire crop injured in each year by the fumes; that this injury took place during the growing seasons from day to day, so that necessarily their attention must be directed to some other period of time than the time of the injury; that the other time to which they should direct their attention was the harvest time, when the crop first had a market value; and, to determine the extent of the plaintiff's injury, they should consider what crop the plaintiff would have raised in each year, if there had been no fumes from the smelter; that they should then ascertain the market value of that crop at the time when it first had a market value, at the nearest place where it had such a value; that they should deduct from that sum the market value of the crop the plaintiff actually raised, and that they should take from the remainder the expense the plaintiff saved because he did not raise, harvest, or gather that portion of the crop he would have raised, which he was prevented from raising by the fumes, and that the result would be the amount of damage to the crop.

It will be noticed that in this charge the court treated the crop of the plaintiff in each season as one and indivisible, and, considered in this way, the injury to it did not cease until its maturity, for the fumes diminished, but did not destroy, his

crops of potatoes, wheat, beets, oats, and lucerne, and he harvested them, while some of his crops of berries and fruits were destroyed before maturity. If the request had been made that the jury should be instructed to consider and find separately the damage at the time of their destruction, caused by the destruction of the specific crops, no part of which matured, and that specific rules for the measurement of that damage should be given to the jury, and this request had been denied by the court, questions would have been presented in this case which are not now here. This is a court for the correction of the errors of the court below, and that court commits no errors upon questions upon which it does not rule. No request was made in this case of the character which has been mentioned, and none that a more specific charge upon the subject of the measure of damages should be given, and the only objection urged or exception taken was that the court instructed the jury to find the value of the probable crop and the actual crop in each season at their respective maturities, instead of at the time when the injury was inflicted. It is a complete answer to this criticism that the injury was inflicted at different times during the growing seasons when the direction of the wind and the condition of the atmosphere permitted the fumes and their products to settle on the crops, and this injury was not completed in any year until the crop of that year matured.

The true measure of the damages to a growing crop by a wrongful act which destroys it is its value at the time and place of the destruction. And the true measure of the damage to a growing crop injured, but not rendered worthless, by such an act, is the difference between the value of that crop before, and its value after, the injury, at the time and place thereof. *Sedgw. Damages*, 937. It is easy to announce this rule, but it is more difficult to determine what evidence shall be considered, and what effect that evidence shall have, in determining these values and the damage. The stronger reason and the great weight of authority are that evidence of the kind of crop the land will ordinarily yield, of the stage of the crop's growth when injured or destroyed, of the average yield per acre of similar land in the neighborhood, the crop of which was cultivated in the same way, and was not injured, of the market value of the crop injured, and of the market value of the probable crop without the injury, at the time of maturity, of the expense that would have been incurred after the injury in fitting for market the portion of the crop the wrongful act prevented from maturing, of the time of the injury, and of

the circumstances which conditioned the probability of the maturing of the crop at that time in the absence of the injury, is competent, and may be weighed by the jury to find the damage to a growing crop at the time of its injury. *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; *Teller v. Bay & River Dredging Co.* 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 942, 944, 12 Ann. Cas. 779; *Dennis v. Crocker-Huffman Land & Water Co.* 6 Cal. App. 58, 91 Pac. 425, 429; *Little Rock & Ft. S. R. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 390, 392; *Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006, 1008; *Hunt v. St. Louis, I. M. & S. R. Co.* 126 Mo. App. 261, 103 S. W. 133; *Berard v. Atchison & N. R. Co.* 79 Neb. 830, 113 N. W. 537, 538; *Kansas City, M. & O. R. Co. v. Mayfield*, — Tex. Civ. App. —, 107 S. W. 940, 941; *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526, 527; *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336; *Colorado Consol. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62, 63; *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, 256; *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011, 1012; *Smith v. Chicago, C. & D. R. Co.* 38 Iowa, 518, 521; *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82; *Anderson v. St. Louis, I. M. & S. R. Co.* 129 Mo. App. 384, 108 S. W. 605, 607.

There are authorities that damage to growing crops at the time they are injured or destroyed may not be measured by the jury by the difference between the market value at the maturity of the probable crop without the injury, and the value of the injured crop less expense of fitting for market the portion of the probable crop which did not mature. *Lester v. Highland Boy Gold Min. Co.* 27 Utah, 470, 472, 101 Am. St. Rep. 988, 76 Pac. 341, 1 Ann. Cas. 761; *Burnett v. Great Northern R. Co.* 76 Minn. 461, 79 N. W. 523, 524; *Ward v. Chicago, M. & St. P. R. Co.* 61 Minn. 449, 63 N. W. 1104; *Bryne v. Minneapolis & St. L. R. Co.* 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; *St. Louis, I. M. & S. R. Co. v. Yarborough*, 56 Ark. 612, 20 S. W. 515, 516; *St. Louis, I. M. & S. R. Co. v. Lyman*, 57 Ark. 512, 22 S. W. 170, 171; *Little Rock & Ft. S. R. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 390, 392; *Teller v. Bay & River Dredging Co.* 151 Cal. 209, 12 L.R.A. (N.S.) 267, 90 Pac. 942, 944, 12 Ann. Cas. 779; *Dennis v. Crocker-Huffman Land & Water Co.* 6 Cal. App. 58, 91 Pac. 425, 429; *Risse v. Collins*, 12 Idaho, 689, 87 Pac. 1006, 1008; *Carter v. Wabash R. Co.* 128 37 L.R.A. (N.S.)

Mo. App. 57, 106 S. W. 611; *Hunt v. St. Louis, I. M. & S. R. Co.* 126 Mo. App. 261, 103 S. W. 133; *Berard v. Atchison & N. R. Co.* 79 Neb. 830, 113 N. W. 537, 538; *Gulf, C. & S. R. Co. v. Carter*, — Tex. Civ. App. —, 25 S. W. 1023; *Kansas City, M. & O. R. Co. v. Mayfield*, — Tex. Civ. App. —, 107 S. W. 940, 941; *Hays v. Crist*, 4 Kan. 350, 351. There are also decisions that such damage may be so measured. *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, 256; *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011, 1012; *Smith v. Chicago, C. & D. R. Co.* 38 Iowa, 518, 521; *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82. The majority of the decisions that hold that such damage may not be so measured adhere to the true rule that evidence of the value at maturity of the probable crop after the injury, of the value of the injured crop at that time, and of the expense of fitting for market the portion of the probable crop that did not mature, is competent, and should be considered by the jury in determining the damage to the growing crop at the time of the injury. The only conceivable reason for the admission of such evidence to the jury is thereby to present to them a basis, and often the best and the only substantial basis, for their finding of the damage to the growing crop at the time of the injury, and the rational meaning, as well as the actual effect, of these decisions, is that the difference between the values at maturity of the probable crop after the injury, and the actual crop, less the cost of fitting for market the portion of the probable crop which did not mature, does not alone fix the measure of the damage to the growing crop at the time of the injury, but that this amount, the probability, at the time of the injury, in view of all the circumstances of each case, that this amount would have been realized by the owner if the injury had not been inflicted, in addition to his actual realization from his crop, and the fact, if that be the fact, that the injury was inflicted some time before the time of the maturity of the crop, should all be considered by the jury, and from all of these facts and circumstances, and not from this amount alone, they should find the amount of the damage which the owner sustained to his growing crops at the time of the injury. This is a reasonable and practical rule for the measurement of such damages. It is not in conflict with the general current of authority, and it is a necessary and natural deduction from the established rule that the value at maturity of the probable crop, the value of the actual crop, and the

expense of fitting for market that portion of the probable crop which does not mature, is competent evidence for the jury to consider in determining the damage to the growing crop at the time of its injury. And in view of the continuance of the injury in this case to each season's growing crop as a whole, until that crop matured, and the time for harvesting and marketing had arrived, the court committed no error in its instruction to measure the damage by the difference between the value of the probable crop and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which did not mature.

The next contention of counsel for defendant is that their motion for a directed verdict, and their motion for a verdict for nominal damages only, should have been granted because the plaintiff produced no evidence of the cost of cultivating to maturity that portion of the probable crop which was prevented from maturing by the fumes of the smelter, and because the proof was that the damage to the crops was caused by the fumes from four smelters, only one of which was operated by the defendant, and there was no substantial evidence what part of this damage was caused by the smelter the defendant operated. They claim that there was no substantial evidence of any definite amount of damages in this case, because the proof was that the growing crops of apples, cherries, pears, and berries were destroyed long before the time of their maturity, and there was no substantial evidence what expense of cultivating these crops from the time when their destruction was patent until the time of their maturity was saved to the plaintiff by their destruction. Conceding that this was the proof, and conceding that without such proof of expense the plaintiff was entitled to no damage on account of the destruction of these specific crops, the conclusion that there was no substantial evidence of damage in the case, and that the court should have directed a verdict for the defendant, or should have limited the plaintiff's recovery to nominal damages, does not follow. It does not follow, because there was plenary proof that in 1904 the plaintiff carefully cultivated to maturity 4 acres of potatoes; that his crop would probably have been 300 bushels to the acre, if it had not been injured by the fumes from the smelters; that it was only 100 bushels to the acre; that the market value of potatoes at the time of their maturity was 60 cents per bushel; and that the expense of harvesting and marketing them was 10 cents per bushel. The expense of cultivating in the same way 4 acres of potatoes when they produce 100 bushels per acre is

the same as when they produce 300 bushels per acre. There, therefore, was substantial evidence of facts from which the jury could lawfully find a definite amount of actual damage to the plaintiff's crop of potatoes in the year 1904. The record in hand contains similar evidence regarding the plaintiff's crops of potatoes in each of the years 1903, 1905, and 1906, and relative to each of his crops of lucerne, wheat, oats, and beets. The result is that the contention that there was not substantial evidence of a definite amount of damage to plaintiff's crops, because there was no evidence of the expense of cultivating a few of them between the times of their respective destructions and their maturities, is untenable, for the reason that there was ample proof that he had many other crops that he carefully cultivated to maturity, and from which he obtained substantial returns, though much diminished by the fumes of the smelters, and it was as expensive to cultivate these crops to raise the less amounts they produced, as it would have been, in the absence of the fumes from the smelters, to cultivate the land to produce the probable crops without the injury.

The proof was that the fumes of each of four smelters contributed to the injury to the plaintiff's crops. These smelters were the United States, the Bingham, the Highland Boy, and the American. The defendant owned and operated the United States, and the other three were owned and operated by strangers to this action. Was there any substantial evidence what part of the injury to the crops of the plaintiff was caused by the fumes from the United States? There was proof of the distance and direction of each of the smelters from the plaintiff's land, that the United States and the Bingham were about  $1\frac{1}{2}$  miles westerly, the Highland Boy about  $2\frac{1}{8}$  miles northwesterly, and the American about 3 miles northerly, from the plaintiff's land. There was proof of the directions and durations of the winds during the growing seasons of the crops, there was testimony of witnesses that a larger part of the injury by the fumes from the smelters was inflicted by those from the United States, and there was the testimony of Prof. Jones, who had studied the effect of fumes from smelters for seventeen years, that the injuries to crops from such fumes decreased under like conditions inversely as the squares of the distances of the crops from the smelters, and there was testimony tending to show the portion of the injury to the plaintiff's crops inflicted by the fumes from the smelter which the defendant owned and operated. Notwithstanding all this evidence, counsel for the defendant argues that the plaintiff might have proved the number



of tons of ores smelted and the number of tons of sulphur thrown from the stacks of each of the smelters during the growing seasons of the four years under consideration, and that he might thereby have presented accurate and reliable testimony of the proportion of the injury caused by each of the smelters. But the amount of sulphur thrown from the stacks of each of the smelters would not alone determine the proportion of injury which the fumes from those respective smelters inflicted upon the plaintiff's crops. The amount of that injury would still be conditioned by the distances of the respective smelters from the land, by the directions and durations of the winds during the growing seasons, and by the humidity of the atmosphere. Moreover, the question here is not whether or not the plaintiff produced the best or the most reliable or all the evidence of which this issue was susceptible. It is, Was this evidence, which is conceded to have been competent and material, so slight, indefinite, and insubstantial that the jury could not lawfully be permitted to find from it the portion of the damage to the crops of the plaintiff which the fumes of the defendant's smelter caused? A careful reading and thoughtful consideration of all the evidence upon this subject has forced our minds to the conclusion that there was evidence upon this issue in this case so substantial and definite that the court below fell into no error in submitting it to the jury.

In the second count of his complaint the plaintiff alleged that he resided on his land during the years 1903, 1904, 1905, and 1906, with his family; that the dust, fumes, and gases from the defendant's smelter were unpleasant and distressing to him, his wife, and family, and that they caused them great discomfort and impaired their health; and he prayed for damages on this account for the sum of \$1,000, and recovered \$50. On the trial of the case the court permitted the plaintiff to prove, over the objection that he had no cause of action for any damages to his wife or family by reason of the alleged nuisance, that she was made ill by it, and the court charged the jury that if the plaintiff, and if the members of his family living with him on the land, were caused discomfort in the way of coughs and other ailments by the fumes from defendant's smelter, the company must respond in damages therefor. To this charge the defendant excepted, on the ground that it was not liable to respond to the plaintiff for the personal discomfort of the members of his family, and it specifies each of these rulings as error. They present this question: May one whose residence is made uncomfortable and unhealthy by a nuisance prove that his

wife and other members of his family who lived with him therein were made uncomfortable and ill thereby, and recover damages therefor? Counsel for the company contend that the discomfort and illness of the wife is an injury personal to her, that under the statutes of Utah, where this cause of action arose, a husband cannot maintain an action for a personal injury of his wife (Comp. Laws [Utah] 1907, § 1201; Code, §§ 2902, 2904; *Musselman v. Galligher*, 32 Iowa, 383, 384; *Long v. Pennsylvania R. Co.* [C. C.] 149 Fed. 598; *Moiser v. Beale* [C. C.] 43 Fed. 358), and that therefore he cannot prove and recover any damages in an action for a nuisance which renders the residence of himself and family unhealthy or uninhabitable, because the nuisance makes his wife and children who live in it with him sick and miserable. But, conceding the premises, does the conclusion follow? Although a husband may not maintain an action for a personal injury to his wife, he may maintain such an action for the consequences to himself of such an injury, such as the loss of her services and the expense of medical attendance upon her. *Matthew v. Central P. R. Co.* 63 Cal. 450, 451; *McDevitt v. St. Paul*, 66 Minn. 14, 33 L.R.A. 601, 68 N. W. 178.

The plaintiff's second cause of action in this case is not for the personal injury to his wife and to the members of his family, inflicted by the fumes of the smelter. It is for the direct injury those fumes inflicted upon him by rendering his home inconvenient and uncomfortable, and his wife and the other members of his family who were living with him ill and wretched. He had the right to live and to support his wife and family in his home upon his land. He had the right to breathe, and to have his wife and family breathe, air in and about his home, the pure air that was necessary to their lives, their health, and their comfort. Is it not an injury to him that this air was so polluted by noxious fumes and gases that it made his wife suffocating and sick, and his home, which he had established for the comfort of himself, his wife, and family, an abode of misery? If a stranger establishes and maintains a nuisance in the absence of the owner, which makes the members of his family ill and drives them from his home, may he recover no damages because he was not physically hurt?

In *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 328, 335, 27 L. ed. 739, 743, 745, 2 Sup. Ct. Rep. 719, the church, a corporation, brought an action against the railroad company for damages caused by the maintenance of an engine house and machine shop near its house of

worship. The court charged the jury that it was doubtful whether or not the alleged nuisance had depreciated the value of the plaintiff's property, but that, although the property had increased in value, the congregation would be entitled to damages because of the inconvenience and discomfort they had suffered from the use of the shop, and that this discomfort was the primary consideration in allowing damages in that action for the nuisance. This instruction was assailed because, in the language of counsel for the railroad company, "it told the jury that it might assess damages against the railroad company on behalf of the church corporation for the personal inconveniences and discomforts suffered by individuals worshipping in the church." But the Supreme Court sustained it, and said: "The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

If a corporation may recover damages because the discomforts of individuals seeking to worship in its building tend to destroy the use of its church for the purposes for which it was erected, may not a householder recover damages because the discomforts of his wife and the other members of his family caused by a nuisance tend to destroy the use of his home and farm for the purposes for which he obtained and maintains it? The following authorities sustain the court below in its affirmative answer to that question: *Pierce v. Wagner*, 29 Minn. 355, 13 N. W. 170; *Friburk v. Standard Oil Co.* 66 Minn. 277, 68 N. W. 1090; *Mills v. Hall*, 9 Wend. 315, 316, 24 Am. Dec. 160; *Kearney v. Farrel*, 28 Conn. 317, 73 Am. Dec. 677; *Missouri, K. & T. R. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781, 788; *Story v. Hammond*, 4 Ohio, 37 L.R.A. (N.S.)

376; *Ellis v. Kansas City, St. J. & C. B. R. Co.* 63 Mo. 131, 134, 21 Am. Rep. 436. And the conclusion is that the owner of a residence which is rendered inconvenient, uncomfortable, and unhealthy as a home, by the nuisance of sulphurous fumes and their products thrown upon it by another, may prove and recover in an action therefor the damages he suffers himself from the discomfort and sickness thereby inflicted upon his wife and the other members of his family who lived with him in his residence, although he may not, and his wife alone may, maintain the cause of action for the direct personal injury to her.

The judgment below must be affirmed, and it is so ordered.

### ILLINOIS SUPREME COURT.

ALBERT S. C. PENNINGTON

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(252 Ill. 584, 97 N. E. 289.)

#### Carrier — expired ticket — expulsion of passenger — liability.

1. A carrier is not liable in tort for expelling from its train a passenger who presents for passage, after the day of its issuance, a ticket limited because of reduced fare, to such date, although the agent who sells it assures him that it is good, when he is about to board the train.

#### Same — agreement of agent — effect.

2. The agent who sells a ticket which, by its terms, must be used on the day of sale or be void, has no implied authority to bind the carrier by agreeing, after it has expired, that it may be used on a subsequent day.

#### Same — failure to stamp — effect.

3. That the date of purchase of a ticket is not plainly stamped upon it does not affect a provision that it is good only on date of sale, and the conductor may refuse

Note. — The extent of a ticket or passenger agent's implied authority with respect to transportation of passengers, including authority to extend the time limit of tickets, is considered in the note to *Hayes v. Wabash R. Co.* 31 L.R.A. (N.S.) 229.

As to duty of passenger to pay fare wrongfully demanded, in order to avoid expulsion and lessen damages, see notes to *Sprenger v. Tacoma Traction Co.* 43 L.R.A. 706; *Cherry v. Chicago & Alton R. Co.* 2 L.R.A. (N.S.) 695; and *Concinnati, N. O. & T. P. R. Co. v. Harris*, 5 L.R.A. (N.S.) 779. As to rights and duties of passenger receiving defective street car transfer, see notes to *Little Rock, R. & Electric Co. v. Goerner*, 7 L.R.A. (N.S.) 97, and *Montgomery Traction Co. v. Fitzpatrick*, 9 L.R.A. (N.S.) 851.

to honor it on a future day if it carries intelligence to him that it has expired

(December 21, 1911.)

**C**ERTIORARI to the Appellate Court, First District, to review a judgment affirming a judgment of the Superior Court for Cook County in plaintiff's favor in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. John G. Drennan and Edward W. Rawlins, with Messrs. William J. Calhoun, Will H. Lyford, and James M. Sheean, for plaintiff in certiorari:

A passenger is not entitled to ride by virtue of a ticket the limitation of which has expired, and if upon demand of the regular fare he refuses to pay, he may be lawfully expelled from the cars.

Hutchinson, Carr. 2d ed. §§ 571, 575; Boston & L. R. Co. v. Proctor, 1 Allen, 267, 79 Am. Dec. 729; Elmore v. Sands, 54 N. Y. 512, 13 Am. Rep. 617; Burn v. Chicago, B. & Q. R. Co. 153 Ill. App. 319; Hall v. Memphis & C. R. Co. 15 Fed. 67; Burch v. Baltimore & P. R. Co. 3 App. D. C. 346, 126 L.R.A. 130; Boice v. Hudson River R. Co. 61 Barb. 611; Johnson v. Concord R. Corp. 46 N. H. 213, 88 Am. Dec. 199; Churchill v. v. Chicago & A. R. Co. 67 Ill. 390; Little Rock & Ft. S. R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584; Lillis v. St. Louis, K. C. & N. R. Co. 64 Mo. 464, 27 Am. Rep. 255; Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Chicago, R. I. & P. R. Co. v. Brisbane, 24 Ill. App. 463; Rev. Stat. (Ill.) 1909, chap. 114, § 94; Chicago, R. I. & P. R. Co. v. Herring, 57 Ill. 59; Lake Erie & W. R. Co. v. Quisenberry, 48 Ill. App. 338; Cincinnati, S. & C. R. Co. v. Skillman, 39 Ohio St. 444; 2 Hutchinson, Carr. 3d ed. § 1062, p. 1231; 3 Thomp. Neg. 2d ed. § 2602; Hanlon v. Illinois C. R. Co. 109 Iowa, 136, 80 N. W. 223; McClure v. Philadelphia, W. & B. R. Co. 34 Md. 532, 6 Am. Rep. 345; Pittsburgh, C. & St. L. R. Co. v. Nuzum, 60 Ind. 533; Mosher v. St. Louis, I. M. & S. R. Co. 127 U. S. 390, 32 L. ed. 249, 8 Sup. Ct. Rep. 1324; Harp v. Southern R. Co. 119 Ga. 927, 100 Am. St. Rep. 212, 47 S. E. 206; Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481.

Plaintiff was not entitled to ride at the time the ticket was presented so there can be no recovery for the lawful act of expulsion.

Chicago, B. & Q. R. Co. v. Willard, 31 Ill. App. 438; Chicago & N. W. R. Co. v. Bannerman, 15 Ill. App. 100; McKay v. Ohio River R. Co. 34 W. Va. 65, 9 L.R.A. 37 L.R.A. (N.S.)

132, 26 Am. St. Rep. 913, 11 S. E. 737; Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499; Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342, 26 Am. Rep. 531; Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277, 11 N. W. 167; Hufford v. Grand Rapids & I. R. Co. 53 Mich. 121, 18 N. W. 580; Bradshaw v. South Boston R. Co. 135 Mass. 407, 46 Am. Rep. 481.

Mr. James E. McGrath with Mr. John C. Trainor for defendant in certiorari.

Hand, J., delivered the opinion of the court:

This was an action on the case commenced by the plaintiff in the superior court of Cook county against the defendant to recover damages alleged to have been sustained by him in consequence of his wrongful ejection at Hyde Park station, in the city of Chicago, from one of the suburban trains of the defendant upon which he was a passenger, on the evening of December 10, 1893. The general issue was filed and a verdict was returned in the plaintiff's favor for \$4,500, upon which judgment was rendered. That judgment having been affirmed by the appellate court for the first district, the record has been brought to this court for further review by writ of certiorari.

The facts are as follows: The plaintiff, on November 27, 1893, purchased for 14 cents, of the agent of the defendant, a ticket from the Thirty-Sixth street (or Douglas) station to Kensington station, which read:

Illinois Central R. R.  
One passage between  
Douglas (A)  
and  
Kensington

On Suburban Trains only

If presented on date of sale shown on back.  
A. H. Hanson, Gen. Ticket Agent.

Through the ticket were perforated the figures "331:3," which signified to the employees of the defendant that the ticket had been purchased on the 331st day of the year. The plaintiff did not take passage on the train of the defendant on the 27th day of November, but on the 10th of December, thirteen days later, he presented the ticket to the agent at Douglas station, and after looking at the ticket she returned the ticket to the plaintiff and opened the turnstile and admitted him to the platform, where he took passage on one of the trains of the defendant for Kensington. The plaintiff testified, over the objection of the

defendant, that when he presented the ticket to the agent at Douglas station on December 10th he asked her if the ticket was good on that day, and she informed him it was. When the conductor upon the train called upon the plaintiff for his fare, he presented to him the ticket which he had purchased on the 27th day of November. The conductor informed him that the ticket, by its terms, had expired, and that he could not receive it for his passage from Douglas station to Kensington station, and that he would have to pay his fare (31 cents) or get off the train. After some controversy over the payment of the fare between the plaintiff and conductor, the plaintiff, under protest, but without the use of force, left the train at Hyde Park station. The night was cold, and the plaintiff testified he was unable to find the station for some time, although the station and platform were well lighted, and that he froze his hands and feet, and in consequence of exposure was made sick and suffered permanent injury.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court for a directed verdict, which motion was denied. The action of the court in denying such motion having been assigned as error, the question arises: Do the facts established by the evidence most favorable to the plaintiff, when admitted to be true, make out a cause of action in his favor? The action was in tort for the wrongful ejection of the plaintiff from the defendant's train, and if his ejection was lawful there was no legal wrong committed against him, and there can be no recovery.

The law is well settled that a railroad company may, in consideration of a reduced fare, limit the time in which a ticket may be used, and provide if it is not used within the terms of such limitation it shall thereafter be void. The use of the ticket sold to the plaintiff was limited to the day upon which it was sold, and as it was not used upon the day upon which it was sold it thereafter could not be used by plaintiff. The general rule upon the subject is thus laid down by Hutchinson on Carriers (2d ed. § 575), where it is said: "When the ticket limits the time within which it must be used, it will not entitle its holder to a passage after the expiration of that time. Tickets frequently provide that they shall be good for a certain number of days, and it has been often held in such cases that such words amount to a condition or to a stipulation between the carrier and the holder that if they are not used within a specified time the right to be carried under 37 L.R.A.(N.S.)

the contract is lost and all obligation under it on the part of the carrier is at an end."

It is equally well settled that the agent who sells a ticket has no implied authority, after the ticket has expired by its own limitation, to waive such limitation and make a new contract with reference to its use which will bind the carrier. This rule is thus announced in Hutchinson on Carriers, vol. 2, 3d ed. § 1062, where it is said: "An agent authorized to sell railroad tickets has no implied powers after the sale of a ticket is fully completed and his duties in regard to it are at an end, and he cannot then bind the company by representations which contradict the plain terms of the ticket." In Thompson on Negligence, vol. 3, 2d ed. § 2602, it is said: "Mere verbal declarations of the company's ticket agent, made subsequent to the purchase of such ticket, as to its being good at any time thereafter, will not constitute a valid contract, in the absence of proof that the agent had authority to make an oral contract for the company." It is therefore obvious that the ticket which was presented by the plaintiff to the conductor of the defendant's train on the 10th of December did not entitle the plaintiff to ride upon the defendant's train from Douglas station to Kensington station.

The question then arises: Was the conductor of the defendant's train legally justified in requiring the plaintiff to leave the train for the nonpayment of fare? In Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499, the plaintiff purchased a ticket at Mendota from Mendota to Earl. The ticket agent made a mistake and gave him a ticket from Mendota to Meriden. The conductor upon the train upon which the plaintiff took passage insisted on the plaintiff paying his fare from Meriden to Earl, which he declined to do, and the conductor ejected him from the train, and is was held the conductor had the lawful right to collect fare from Meriden to Earl, and upon the refusal of the plaintiff to pay such fare, although he had paid the agent at Mendota his fare from Mendota to Earl, to eject him from the train, and that the conductor was not bound to accept the statement of the plaintiff that he had paid his fare from Mendota to Earl.

It is urged that the ticket purchased by plaintiff in this case was not limited. There is no force in this contention. It stated upon its face that it was good for "one passage . . . if presented on the day of sale." True, the date of sale was not shown on the back of the ticket in such language as was intelligible to the plaintiff, but the perforations on the back of the ticket were placed there for the information

of the employees of the defendant, and not for the information of the plaintiff, as the plaintiff knew the day upon which he purchased the ticket, and the printing upon the face of the ticket informed him in plain language that the ticket was not good after the date upon which he purchased the same; and if he was misled by the ticket agent at the Douglas station turnstile, upon boarding the train he was immediately advised by the conductor that the ticket had expired by its own limitations, and was not good on that date, and would not be received for his passage from Douglas station to Kensington station.

It is clear that the conductor of the defendant's train was well within his legal rights in requiring the plaintiff to pay his fare from Douglas station to Kensington station or to leave the train, and, as he was guilty of no legal wrong in requiring the plaintiff to leave the train at Hyde Park, there was no legal liability resting upon the defendant by reason of his ejection at that station, and there can be no recovery for an injury received by plaintiff in consequence of his being required to leave the train at Hyde Park.

It was error for the court to admit in evidence the conversation of the plaintiff with the ticket seller at the Douglas station, as the ticket seller at the time was powerless to bind the defendant by an admission that the ticket was good upon that date. The supreme court of Iowa, in *Hanlon v. Illinois C. R. Co.* 109 Iowa, 136, 80 N. W. 223, in considering the power of a ticket seller to bind the railroad company after the ticket had been sold and paid for, used the following language: "It is insisted that, as the ticket agent of the defendant at Sioux City was authorized to and did sell the ticket in question, his representations to the effect that it would be good, and might be used for transportation after the expiration of one day from the date of sale, were binding upon the defendant. It will be observed that the representations of the agent were not made at the time the ticket was sold, but on the next day, although within twenty-four hours after the hour of sale. The petition does not allege that the ticket agent had any actual or apparent power to bind the defendant by the representations made, and we are required to determine whether an agent authorized to sell railroad tickets has the implied power to bind the railway company, after the sale is fully completed and his duties in regard to it are at an end, by representations which contradict the plain terms of the ticket sold. We are of the opinion that but one answer can be made to that question. As a general rule,

a special agent can bind his principal by declarations only when they are made within scope of his employment and at the time of performing the duties to which they relate. . . . An agent whose duty it is to sell tickets for his principal has no implied power to construe the contract after the sale is fully completed and nothing remains for the agent to do."

As there can be no recovery in this case, the judgments of the Superior and Appellate Courts will be reversed without remanding the case.

Petition for rehearing denied February 8, 1912.

#### MICHIGAN SUPREME COURT.

MICHIGAN TRUST COMPANY, Admr.,  
etc., of Mary McNamara, Deceased,  
v.

MARY McNAMARA, Appt., et al.

(165 Mich. 200, 130 N. W. 653.)

**Interpleader — judgment debtor — determination of attorneys' liens.**

A judgment debtor may maintain a bill in the nature of a bill of interpleader in a court of equity to determine the respective rights of the judgment creditor and attorneys claiming a lien on the judgment for services, to the fund representing the amount of the judgment, although the judgment is for a claim against a decedent's estate, the funds of which are under the jurisdiction of the probate court.

(March 31, 1911.)

**Note. — Right of representative of decedent's estate to interplead claimants.**

**Exclusiveness of surrogate's jurisdiction.**

Speaking generally of the jurisdiction of probate courts, the commentator in 18 Cyc. 640, has this to say: "Jurisdiction of proceedings for the distribution of an estate, or for the payment of a legacy or distributive share, is usually conferred by statute upon the probate court, within such limits as may be imposed by the statute conferring jurisdiction. In some states the probate court has exclusive primary jurisdiction in such proceedings, and an action cannot be maintained against the representative for the recovery of a distributive share, although his account exhibiting a specific balance against him has been settled and confirmed in the probate court. In others, courts of equity exercise a concurrent jurisdiction therein, although such courts will not usually take jurisdiction unless the probate court cannot afford adequate relief. In still others, courts of equity have jurisdiction ancillary to that of the probate court, the for-

**A** PPEAL by defendant Mary McNamara, from an order of the Circuit Court for Kent County, in Chancery, overruling her general demurrer to a bill in the nature of a bill of interpleader filed by complainant to determine the respective rights of defendant and attorneys claiming a lien on the judgment for services to the fund which represented the amount of the judgment. Affirmed.

The facts are stated in the opinion.

Messrs. A. A. Ellis and H. A. Ellis, for appellant:

The circuit court in chancery has no jurisdiction of the fund, because the fund is under the control of the probate court.

Basom v. Taylor, 39 Mich. 682; Re

Palms, 44 Mich. 637, 7 N. W. 200; Nolan v. Garrison, 156 Mich. 397, 120 N. W. 977; Holbrook v. Campau, 22 Mich. 288; MacLennan, Interpleader, 39; Moore v. Partlow, 84 Ill. App. 361, 184 Ill. 119, 56 N. E. 317; Chandler v. Dodson, 52 Mo. 128; Lafferty v. People's Sav. Bank, 76 Mich. 35, 43 N. W. 34; Buss v. Buss, 75 Mich. 163, 42 N. W. 688; Bently v. Strathers, 5 Ohio L. J. 288; Freeland v. Wilson, 18 Mo. 380; Dunovant v. Stafford, 36 Tex. Civ. App. 33, 81 S. W. 101; Re Regan, 29 Misc. 527, 61 N. Y. Supp. 1074, 167 N. Y. 342, 60 N. E. 658; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649; Weeks v. Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; Heavrich v. Alpena Circuit Judge, 111 Mich. 163, 69 N. W. 226.

mer taking jurisdiction usually where there are special circumstances in respect to which the probate court cannot take jurisdiction, or cannot give adequate relief."

But one case has been found in addition to MICHIGAN TRUST CO. v. McNAMARA which expressly discuss the bearing of the foregoing principles upon the question of an executor's right to maintain interpleader.

That case is First Nat. Bank v. Beebe, 62 Ohio St. 41, 56 N. E. 485, holding that an administrator's right to interplead one who was a distributee and creditor of the decedent's estate, and a judgment creditor of the distributee who has made the administrator and the distributee defendants in a bill to enforce the judgment, should not be denied upon the theory that the probate court has exclusive jurisdiction with respect to the decedent's estate, under a statute providing that the probate court shall have exclusive jurisdiction to direct and control the conduct, and to settle the accounts, of executors and administrators, and to order the distribution of the estate, since under such statute the probate court's power is exhausted when, upon final settlement of the account of the administrator, it enters a general order of distribution; and it has not power to determine the persons to whom distribution is to be made and the amount which each shall receive; but the right of claimants and beneficiaries, where there is a conflict, are to be worked out in other tribunals.

#### Conclusiveness of surrogate's decree.

An executor may maintain an action of interpleader against persons who claim a special fund belonging to the estate as trustees and who have instituted an action for its recovery, and distributees of the estate who have procured an order of distribution directing the payment of the fund to them, under a statute providing that a person upon whom conflicting claims are made for personal property may bring an action against the claimants to compel them to interplead and litigate their several claims among themselves, and that the action of

interpleader may be maintained although the titles of the claimants have not a common origin or are not identical, but are adverse to, and independent of, one another; and an injunction *pendente lite* will be granted to prevent the distributees from enforcing the decree of distribution pending the action of interpleader. Fox v. Sutton, 127 Cal. 515, 59 Pac. 939. It was declared in this case that the decree of distribution could not be regarded as final and conclusive so as to estop the executor from maintaining the action of interpleader, since he did not dispute the claim of the distributees, but sought protection from the demand of the other claimants, who were not bound by the decree. "Under such circumstances," said the court, "it would seem but just that the plaintiff, as executor, should not be compelled to defend said action, and subject himself, perhaps, to liability, not only to pay said money a second time, but also the costs of litigation. Besides, the plaintiff files his bill, not only as executor, but individually, whereas the decree of distribution runs against him of course only as executor."

So, the fact that the surrogate, upon the successful contesting of a will, orders a portion of the estate paid to the contestant, does not affect the right of the executor, who has accepted a draft drawn upon himself by the contestant, which has not been paid, to have the contestant substituted for himself as defendant in an action brought by the attorney who prosecuted the will contest, to fix a lien for his services upon the fund. Davis v. Benedict, 59 Hun, 628, 20 N. Y. Civ. Proc. Rep. 266, 14 N. Y. Supp. 178.

On the other hand, it is held that a surrogate's decree procured by an executor upon filing his final account, which directs the payment of a certain sum to a beneficiary under the will, is *res judicata*, and the executor cannot thereafter maintain a bill of interpleader against a representative and a creditor of the beneficiary, at least where he had full knowledge of the facts relating to the rival claim, and permitted the surrogate to make his decree without

Where an executor or administrator has a clear remedy in the probate court in respect of conflicting claims, he should pursue that remedy, instead of resorting to an action of interpleader.

*Freeland v. Wilson*, 18 Mo. 380; *Baker v. Brown*, 64 Hun, 627, 19 N. Y. Supp. 258; *Hudson v. Saginaw Circuit Judge*, 114 Mich. 116, 47 L.R.A. 345, 68 Am. St. Rep. 465, 72 N. W. 162; *Lafferty v. People's Sav. Bank*, 76 Mich. 35, 43 N. W. 34; *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71; *MacLennan, Interpleader*, pp. 136-142; *Conner v. Weber*, 12 Hun, 580.

A stakeholder or depositary of a fund who has a personal interest in the fund, or who claims a personal interest in the fund, cannot file a bill of interpleader.

making the facts known to him. *Baker v. Brown*, 64 Hun, 627, 19 N. Y. Supp. 258.

And while recognizing that situations are likely to exist when there is a dispute between distributees, that will entitle an administrator to interplead them, the court in *Freeland v. Wilson*, 18 Mo. 380, held that resort could not be had to that remedy where the bill showed that an order of distribution had been made, but did not show its nature or whether it had been complied with. The court said that if the order of distribution had been complied with, the distribution was conclusive if the order had not been appealed from, and that if no distribution had been made, yet it could be made, and then, if not in compliance with law, the statute prescribed a mode by which its errors might be corrected. And it was further declared that if the order was to distribute generally, without naming the distributees, it was within the power of the court making the order to make it specific, and if the whole share of the decedent had been ordered paid to one distributee, in ignorance of the claim of another, that might be ground for an injunction,—and that since all these things were true, there was no necessity for interpleader.

#### Indifference of representative.

An executor who, upon the sale of property belonging to the estate, turns the proceeds over to the widow, and subsequently receives them back from her and invests them for her benefit, paying her the income for a number of years, thereby acknowledges such an independent liability to the widow as will preclude him from maintaining a bill of interpleader against her and legatees under the will who also lay claim to the fund. *Pratt v. Worrell*, 66 N. J. Eq. 194, 57 Atl. 450.

And where a special administrator appointed to receive bank deposits of the decedent appeals from an order directing him to account in the probate court and turn over the funds to the general administrator, he cannot thereafter maintain a

*Mitchell v. Hayne*, 2 Sim. & Stu. 63, 25 Revised Rep. 151; *Moore v. Usher*, 7 Sim. 383, 4 L. J. Ch. N. S. 205; 23 Cyc. 6, note 12; *Hyman v. Cameron*, 46 Miss. 727; *New England Mut. L. Ins. Co. v. Odell*, 50 Hun, 279, 2 N. Y. Supp. 873; *Bridesburg Mfg. Co.'s Appeal*, 106 Pa. 275; *Cogswell v. Armstrong*, 77 Ill. 141; *Groves v. Sentell*, 153 U. S. 465, 485, 38 L. ed. 785, 792, 14 Sup. Ct. Rep. 898; 11 Enc. Pl. & Pr. 465, note 4; *Adams v. Dixon*, 19 Ga. 513, 65 Am. Dec. 608; *Atkinson v. Manks*, 1 Cow. 704; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Williams v. Matthews*, 47 N. J. Eq. 196, 20 Atl. 261; *Public Schools v. Heath*, 15 N. J. Eq. 22; *Jackson v. Knickerbocker Athletic Club*, 49 App. Div. 107, 62 N. Y. Supp. 1109; *Westervelt v. Ackerman*, 3 N.

bill of interpleader against the general administrator and the estate of the decedent's widow, upon the ground that the funds are claimed for the latter estate. *Atkinson v. Flannigan*, 70 Mich. 639, 38 N. W. 655 (the ground of the decision, at least in the lower court, was that the complainant had taken sides in the matter).

So, a trustee in a deed of trust who, after executing the trust and after the demand upon him for the residue by the heirs of the grantor's estate, procures the appointment of an administrator whom he induces to make a demand for such residue, does not occupy such a position of indifference as entitles him to maintain a bill of interpleader against the administrator and the heirs. *Swain v. Bartlett*, 82 Mo. App. 642.

And trustees under a will have such a direct and personal interest in the question whether there has been an abuse of the trust, as to preclude them from bringing a bill in the nature of interpleader for the purpose of obtaining the advice and protection of the court. *Sohier v. Burr*, 127 Mass. 221.

So, an executor who is a residuary legatee under the will has such an interest as precludes him from maintaining a bill of interpleader, although he may bring a bill for instructions. *Ladd v. Chase*, 155 Mass. 417, 29 N. E. 637.

Where the purchase price of land is held by the purchaser, who has been appointed administrator of the vendor's estate, and the fund is claimed both by the distributees of the estate, and by a person claiming adversely to the intestate's estate, and the administrator also claims as a distributee of the estate, he has such an interest both as administrator if the debt is due from him personally to himself as administrator, and as a distributee, as will preclude him from maintaining against the distributees of the adverse claimant either a bill purely of interpleader or a bill in the nature of interpleader. *Blue v. Watson*, 59 Miss. 619. It was pointed out in this case that the distinction between a bill of interpleader and one in the nature of interpleader is that in the former, the complain-

J. Eq. 325; *City Bank v. Bangs*, 2 Paige, 570; *Badeau v. Rogers*, 2 Paige, 209; *Beddell v. Hoffman*, 2 Paige, 199; *Diplock v. Hammond*, 2 Smale & G. 141; *Bignold v. Audland*, 11 Sim. 23, 9 L. J. Ch. N. S. 266, 5 Jur. 51; *Baltimore & O. R. Co. v. Arthur*, 90 N. Y. 234; *Story*, Eq. Pl. § 295; 2 *Story*, Eq. Jur. § 821; *South Western Tele. & Teleph. Co. v. Benson*, 63 Ark. 283, 38 S. W. 341; *Wing v. Spaulding*, 64 Vt. 83, 23 Atl. 615; 11 Eng. Pl. & Pr. 455.

Interpleading cannot be ordered unless the claims threatening the complainant negative each other.

*Moore v. Barnheisel*, 45 Mich. 500, 8 N. W. 531; *Hoyt v. Gouge*, 125 Iowa, 603, 101 N. W. 464; *Sachsel v. Farrar*, 35 Ill. App. 277; *Taylor v. Satterthwaite*, 2 Misc.

441, 22 N. Y. Supp. 187; *Wabash R. Co. v. Flannigan*, 192 U. S. 29, 48 L. ed. 328, 24 Sup. Ct. Rep. 224; *Davenport, R. I. & N. W. R. Co. v. Sinnet*, 111 Ill. App. 75; *Supreme Council, L. H. v. Palmer*, 107 Mo. App. 157, 80 S. W. 699; *Wallace v. Sor-tor*, 52 Mich. 163, 17 N. W. 794; *Byers v. Sansom-Thayer Commission Co.* 111 Ill. App. 575; *School Dist. No. 1 v. Weston*, 31 Mich. 85; *Phillips v. Regan*, 75 Pa. 381.

*Messrs. Kleinhans & Knappen*, with *Mr. Thomas P. Bradfield*, for appellee.

*Moore, J.*, delivered the opinion of the court:

This case is an appeal by *Mary McNamara*, one of the defendants, from an or-

ant only asks to be permitted to pay the money into court and be discharged from liability to the adverse claimant, whereas in the latter, he claims some independent and further relief to which he would be entitled upon the payment of the money; but that an interest in the fund in controversy will as effectually defeat the right to maintain a bill in the nature of interpleader as a bill of pure interpleader.

Interpleading devisee or distributee and his creditor.

See also *Davis v. Benedict and Baker v. Brown*, supra, under "Conclusiveness of surrogate's decree."

It is held in *First Nat. Bank v. Beebe*, 62 Ohio St. 41, 56 N. E. 485, that a proper case for interpleader exists where, for the purpose of enforcing his judgment, a judgment creditor of a distributee files a bill against the administrator and the distributee, the court invoking the general equitable doctrine that where two or more persons severally claim the same thing under different titles, and in interests separate from those of another person who does not claim any title or interest in himself, and does not know to which of the claimants he ought to render the debt, he may resort to interpleader, although the case was held not to come within the meaning of the statute limiting the right of interpleader to actions upon contracts or for the recovery of personal property.

And it is held in *Westervelt v. Ackerman*, 3 N. J. Eq. 325, that an executor might maintain a bill of interpleader against judgment creditors who had issued scire facias against him and the judgment debtors who claimed the funds under notes given by the testatrix to be payable after her death, some of the notes having been given in lieu of land given in trust under the will, and others of them arising from the sale of real estate in which the payee had an interest, and given in consideration of the release of such interest. The court, while intimating that an interpleader will be granted even though there be no actual

necessity therefor, expressed the belief that there was necessity for the remedy in this case. It was stated that executors cannot be protected in any degree unless the recovery against them as garnishees will be a good defense for them at all times in the future; and that it was a nice question whether such a defense would prevail against claims of third persons of which the garnishee had notice, without taking measures to have them investigated and adjusted when he might have done so without difficulty. And it was further declared that a bill of interpleader may be filed although the claim of one of the defendants is actionable at law and that of the other cognizable in equity.

But it is held that since it is essential to the maintenance of a petition for interpleader that there be at least two conflicting claims, each apparently well founded, to a fund in the hands of a person having no interest therein, and who as between the conflicting claimants is perfectly indifferent, an order directing an interpleader will not be awarded upon the petition of an executor, where it appears that he is being sued by a devisee for a sum to which she is entitled under the will of the testator, and also by an attorney who asserts a claim upon the interest of the devisee upon an alleged indebtedness for services, in the absence of allegations in the petition for interpleader showing clearly how and upon what account the creditor is entitled to maintain an action against the executor for the recovery to his own use of the sum due the devisee; and that this is so because ordinarily there is no privity between an executor of an estate and a creditor of the devisee under the will. *Davis v. Davis*, 90 Ga. 136, 21 S. E. 1002.

Interpleading devisee or distributee and one claiming adversely to, or as creditor of, the estate.

See also *Fox v. Sutton*, supra, under "Conclusiveness of surrogate's decree."

It was declared in *Bradford v. Forbes*, 9 Allen, 365, that a bill in the nature of in-



der overruling her general demurrer to a bill of interpleader, so called, filed by the complainant, the Michigan Trust Company, administrator of the estate of Mary McNamara, deceased. A reference to the cases of *McNamara v. Michigan Trust Co.* 148 Mich. 346, 111 N. W. 1066, and *McNamara v. Michigan Trust Co.* 155 Mich. 585, 119 N. W. 1074, will aid in understanding the situation.

The bill avers defendant recovered a judgment against the estate of Mary McNamara for \$11,217, and that the Michigan Trust Company now seeks to pay into court the amount due on this judgment; that in the course of this litigation against the estate of Mary McNamara she has employed attorneys, some of whom claim she has not paid them for their services, and have filed notices of lien in the circuit court and with the Michigan Trust Company, the complainant, notifying the trust company not to pay the money due on this judgment to the defendant Mary McNamara. The bill sets out an attempt to pay the

judgment; that the appellant refused to receive the money due on the judgment, although the administrator has ever since that time, and until notices of other liens than that of McKnight and McAllister, been ready and willing to pay the judgment and interest at the legal rate, subject only to its statutory right to offset the costs taxed against the defendant Mary McNamara.

The bill of complaint sets up in full the amount of the costs taxed against the defendant Mary McNamara, as shown by the records of the supreme court and the records of the Kent circuit court. The bill further sets out that the administrator has never since the 21st day of July, 1908, when the letter was written to the defendant Mary McNamara, claimed any right, title, or interest in or to the amount of the judgment, excepting its right to set off the costs taxed against the defendant, and that the administrator does not know and cannot ascertain the rights of the different defendants under the judgment and notices

terpleader brought by an executor to obtain the direction of the court in the execution of his trust is not the proper mode in which to try the right of ordinary creditors of the deceased to collect their respective demands.

It is held that an executor does not occupy such a disinterested position as between one seeking to recover from him under title claimed to be paramount to that of the testator, and specific legatees under the will, as to entitle him to maintain a bill of interpleader against them. Such is essentially the decision in *Adams v. Dixon*, 19 Ga. 515, 65 Am. Dec. 608, in which the court reasoned that the executor owes no debt or duty to the claimant by title paramount, and that he, as protector of the interest of the legatees, is bound to defend the action by the adverse claimant. It is further stated that the interpleader is not necessary to the ample protection of the executor, since he would be protected against the claims of the legatees by a judgment recovered on title paramount to that of the testator. The same reasons moved the court to deny a further prayer in the bill that the court secure and protect the executor from injury by giving him the benefit of its direction in the marshaling of the assets of the estate.

And a proper case for interpleader was held not to exist in *Hall v. Hall*, 24 Vt. 639, where it appeared from the bill of the administrator that the commissioners had allowed a claim against the estate for a debt of the decedent, and no appeal from the allowance was seasonably taken; that the creditor had commenced a suit upon the administrator's bond to recover the allowance; and that the heirs of the decedent insisted that the amount of the allowance should be distributed among them, and 37 L.R.A.(N.S.)

threatened to bring proceedings to compel such distribution upon the ground that the allowance was made by fraud. The first reason for denying the interpleader was that the case did not come within the rule that, to justify a bill of interpleader, there should be either some specific chattels, or some definite sum of money to which different parties in the same right or in priority of estate make claim, and that the person bringing the bill should be a mere stakeholder, with no interest in the matter, so that when the court decrees an interpleader the plaintiff can step out of the case entirely. It was said that no specific money or chattels were claimed by the different parties, and also that the administrator was a necessary party to the litigation since he, being also an heir of the decedent, had the same interest as the other heirs in a part of the estate. Another reason for denying the relief was that there was no necessity for it, since the administrator so represented the estate in a legal point of view that a judgment in favor of the claimant, and the decree of the probate court requiring payment of the claim among other debts, would be conclusive upon the heirs.

So, one who purchases land and is subsequently appointed administrator of the vendor's estate cannot maintain a bill of interpleader against the distributees of the estate and another person making an adverse claim to the purchase money, for the purpose of determining whether the distributees or the adverse claimant is entitled to the fund; for if the administrator in good faith, though unsuccessfully, defends against the adverse claim, he is protected from any claim to the same property afterwards asserted by the distributees or creditors. *Blue v. Watson*, 59 Miss. 619.

And it is held that where property in

of liens set up in the bill, and cannot without danger and hazard to itself undertake to decide between the defendant Mary McNamara and the other defendants; that on account of the suit in aid of execution by McKnight and McAllister the administrator has already been put to considerable expense and involved in litigation on account of the conflicting claims of the defendants; that it fears it will become further involved in other litigation and suffer other expense, and be put to further and other costs, trouble, and expense on account of these conflicting claims. The bill denies collusion, and sets up the fact that the suit is commenced by the administrator of its own accord, with the consent of the probate court of the county of Kent, for the sole purpose of paying the amount due upon the judgment into court, and the administrator offers and proffers and asks leave to pay the amount due upon said judgment into court, and asks that the conflicting claimants be required to settle their respective claims among themselves, so that

the administrator may not be compelled to suffer unnecessary loss or expense, or pay the judgment more than once.

All of the defendants excepting the defendant Mary McNamara have answered the bill of complaint. The answers all tend to show a disagreement or contest, more or less violent, between the defendant Mary McNamara and the other defendants, and in some cases a contest between the attorney defendants as to the priority of their alleged liens. The defendant Mary McNamara filed a general demurrer, containing twenty-five reasons why the bill should be dismissed, the important one of which is the first: "First. The defendant Mary McNamara demurs because the circuit court for the county of Kent in chancery has no jurisdiction of the fund, which the demurrant claims is under the exclusive jurisdiction of the probate court, thus giving the administrator an adequate remedy at law." The demurrer came on to be heard before the circuit judge, and, with the files of the case and the records of his court

the hands of an executor is claimed, on the one hand, as a gift from the testator, and, on the other, by the residuary legatee under the will, the case is not a proper one for interpleader, since a suit at law by the alleged donee would conclude not only the executor, but the residuary legatee as well. *Fitts v. Shaw*, 22 R. I. 17, 46 Atl. 42.

And where an executor holds the proceeds of a policy of insurance, which are claimed by the next of kin as assets of the estate, and claimed by another person under an assignment by the intestate, although the administrator may properly ask the direction and protection of a court of equity as to the fund, the case is not a proper one for interpleader. *Stevens v. Warren*, 101 Mass. 564.

#### Interpleading distributees.

See also *Freeland v. Wilson*, *supra*, under "Conclusiveness of surrogate's decree."

It was held in *Martin v. Mayberry*, 10 N. C. (1 Dev. Eq.) 169, that an administrator who had not reduced to possession assets in the possession of a distributee could not maintain a bill to interplead this distributee and others claiming the property.

Interpleading persons claiming to be a named legatee or devisee.

An executor may maintain a bill of interpleader to determine which of two claimants is entitled to a legacy, where the name of the legatee in the will is inaccurate and is applicable in some respects to both claimants. *Morse v. Stearns*, 131 Mass. 389.

So, where an executor and trustee under a will which gives property in trust for a certain religious society is sued by one of two bodies claiming to constitute the so-

ciety, for the enforcement of the trust, he may have the other body made a party, and require the claimants to interplead. *First Presby. Soc. v. First Presby. Soc.* 25 Ohio St. 128.

#### Miscellaneous cases.

Not only the stakeholder, but also any party interested in property of any description held by one person who cannot safely turn it over to its apparent owner by reason of conflicting claims, may invoke the remedy given by a statute providing that whenever money or other property in the hands of one person is claimed by two or more persons, any one of the parties interested may bring a complaint in equity in the nature of a bill of interpleader, making all persons who claim to be interested in such money or property parties to the action, and the court shall hear and dispose of all questions which may arise in such case. Therefore, an administrator may, under this statute, maintain an action in the nature of interpleader to determine the title to a savings bank account deposited in the name of the decedent, as between the estate and the widow, who has possession of the pass book, and claims the money as her own. *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001.

An executor whose conveyance to a third person of property belonging to the estate is void for want of power cannot bring a bill of interpleader against persons claiming the purchase money in his hands, without framing his bill so as to present the rights and equities of the purchaser, and to give them an opportunity to be heard. *Pratt v. Worrell*, 66 N. J. Eq. 194, 57 Atl. 450.

L. A. W.

before him, Judge McDonald, after hearing the arguments and considering the briefs submitted, overruled the demurrer, giving the demurrant leave to answer upon the usual terms.

The case is argued at length in the briefs, and was argued fully orally. We think the trouble with the contention of the appellant is that it is based upon the assumption that the claims of the various persons who have notified the complainant not to pay over the fund are claims against the estate of Mary McNamara, deceased, when, in fact, they are claims against the living Mary McNamara, who has obtained a judgment through the agency of the various courts against the estate of Mary McNamara, deceased, the amount of which judgment is in the hands of the complainant ready to be paid over to defendant Mary McNamara, if her creditors had not laid claim thereto. The theory of the bill is that complainant is in doubt as to who is entitled to the money, and wants that doubt solved so that the money can be paid over safely by her. In 1 Words & Phrases, 779, the following occurs: "A 'bill in the nature of an interpleader' is one in which the complainant asks some relief over and above a mere injunction against suit by the contesting parties, and states facts which entitle him to such relief independent of the fact of the adverse claims of the several defendants. *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400, 401." At page 789 of the same volume occurs the following: "A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter amongst themselves without involving the stakeholder in their dispute. *McDonald v. Allen*, 37 Wis. 108, 111, 19 Am. Rep. 754 (citing *Adams*, Eq. 202). . . . A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, either legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any one of them, and does not himself claim an interest in the matter. The object and effect of the bill is to compel such claimants to litigate the question among themselves, so that it may be determined which one of them complainant is under obligation to. The bill will not lie where the complainant has incurred any independent liability by means of an express agreement with any one of the defendants. *Sprague v. Soule*, 35 Mich. 35."

37 L.R.A. (N.S.)

In *School Dist. No. 1 v. Weston*, 31 Mich. 85, which was a bill in the nature of an interpleader, there is a very full discussion of the subject of bills in the nature of interpleader. Justice Christiancy, speaking for the court, used the following language, which we think is germane to the instant case: "The district, since the money became due, has always been ready and willing to pay, whenever it can be ascertained, in this labyrinth of counterclaims, to whom it ought or can safely pay. The contest is one purely between the respective claimants of portions of this fund, no one claiming the whole fund, but some claiming their entire debts without abatement, others their *pro rata*, according to arrangement between Potter and the district. Under the circumstances, the district says by this bill: 'While we are ready and anxious to pay over this money to the parties really entitled, it is impossible for us to ascertain who these parties are. We are mere naked trustees, without interest,—mere stakeholders. We have no objection to your litigating or settling your respective claims to this fund between yourselves. We are ready and anxious to comply with such judicial determination, or such settlement, and to pay over the fund accordingly, but we object to being forced, not only to participate in the battle between you, and its risks and embarrassments, but especially to occupying a position between your respective lines, where your thrusts of each can only reach the other through us. This is your own battle, not ours. We ask to be permitted to set aside, and allow you to aim your blows directly at each other, and take upon yourselves all the risks and responsibilities incident to the contest. We ask to be allowed to place the fund which you are all endeavoring to reach in the hands and custody of the court, who may regulate and direct the contest between you in such manner as shall be found best to secure your respective rights, allowing us to retire from the contest with our costs of this litigation to come out of the fund, which we have till this time held in good faith, for the benefit of the parties who may be found entitled to it, or any portion of it.' This, under the circumstances of this case, would seem to be but a reasonable request on the part of this school district; and if no method had yet been invented or recognized by courts of equity, by which the district could be allowed to retire from the contest in which it has no interest, and by placing the funds in the hands of the court, where the contest may be carried on by the parties really interested, and their rights determined, without holding the complain-

ant liable to this multiplicity of suits, and the risks and embarrassments of protracted litigation, we should have to admit a degree of infirmity in courts of equity, a want of adaptation in the remedies they have contrived to meet the exigencies of business and the adjustment of rights, which would be far from creditable." The demurrer, of course, admits the truth of the averments of the bill. Treating these averments as true, we think they establish a case for a bill in the nature of interpleader. See *MacLennan*, Interpleader, 341.

The decree is affirmed, with costs.

### MISSOURI SUPREME COURT.

ROBERT B. BUCHANAN et al., Appts.,

v.

SAMUEL M. KENNARD et al., Respts.

(234 Mo. 117, 136 S. W. 415.)

#### Charity — denominational hospital — validity.

1. A devise to trustees and their successors forever of property to establish and maintain a hospital for sick and injured persons without distinction of creed, under the auspices of a particular religious de-

nomination or its successors, creates a valid public charity under the statute of Elizabeth, although the benefit is not limited to poor persons.

#### Same — objects — definiteness of selection.

2. Provision for the selection of the objects of a public charity is sufficiently definite where the charity is the construction and maintenance of a hospital for sick and injured persons, without distinction of creed, under the auspices of a particular religious denomination, and "under such rules and regulations as the trustees and their successors" shall, from time to time, establish and maintain.

#### Same — annuities and maintenance of burial lots — effect.

3. The validity of a bequest for the establishment and maintenance of a hospital is not affected by the fact that the fund is charged with the cost of maintaining the burial lot of the donor, and with a small monthly payment to his relatives for life.

(March 31, 1911.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for the City of St. Louis in defendants' favor in a suit by the heirs of Robert A. Barnes, deceased, to establish title to property in which he had attempted to create a trust, and the title to

#### Note. — Enforcement of general bequest for charity or religion.

- I. Introductory, 993.
- II. Nature of chancery jurisdiction over charities, 994.
- III. The requisite public character.
  - a. In general, 996.
  - b. Cemeteries, 997.
- IV. Necessary accordance with law and public policy.
  - a. In general, 998.
  - b. Gifts to foreign charities, 999.
- V. Creation and general requisites of the trust, 999.
- VI. Certainty of purpose.
  - a. Generally, 1001.
  - b. Selection of purpose by trustee, 1001.
  - c. Inclusion of purposes not charitable, 1002.
  - d. Particular purposes and classes of purposes.
    1. Religious purposes, 1003.
    2. Educational and literary purposes, 1006.
    3. Relief of the poor, 1008.
    4. Relief of sickness, 1008.
    5. Matters of municipal, governmental, or public interest, 1009.
- VII. Certainty as to trustees.
  - a. Generally, 1010.
  - b. Misnomer of trustee or beneficiary, 1010.
  - c. Absence of incapacity, 1011.
  - d. Corporations as trustees, 1011.

#### VIII. Certainty as to beneficiaries.

- a. Generally, 1012.
- b. Particular applications of English rule.
  1. Religion, 1012.
  2. Relief of poor, 1013.
  3. Education, 1013.
  4. Other matters, 1013.
- c. Where English rule repudiated, 1013.
- d. Partial return to English rule in New York, 1014.
- e. Selection of beneficiaries by trustees, 1017.
- f. Misnomer of beneficiaries, 1019.
- g. Corporations as beneficiaries, 1019.
- h. Unincorporated associations as beneficiaries, 1019.
- i. Change of purpose or condition of beneficiary, 1020.
- j. Miscellaneous, 1020.

#### I. Introductory.

This note is supplemental to the note to *Hadley v. Forsee*, 14 L.R.A. (N.S.) 49, where the earlier cases are collected. In view of the exhaustive discussion in the former note, the only attempt here made is to set out the recent cases in order.

Owing to the peculiarity of the New York statute, the recent New York cases (with the exception of those relating to cemeteries) have not been classified according to the analysis, but will be found together

which was, under his will, vested in trustees. Affirmed.

The facts are stated in the opinion.

Messrs. A. R. Russell, T. J. Rowe. A. M. Frumberg, H. N. Moore, and E. J. O'Brien, for appellants:

A trust violating the rule against perpetuities is void, unless the object and purpose of such trust is to create a valid public charity.

2 Perry, Tr. 5th ed. § 687; 2 Underhill, Wills, 1195; Johnson v. Holifield, 79 Ala. 423, 58 Am. Rep. 596; Troutman v. De Boissiere Odd Fellows' Orphans' Home, 66 Kan. 1, 5 L.R.A.(N.S.) 704, 71 Pac. 286; Hillyard v. Miller, 10 Pa. 326; Norfolk v. Howard, 1 Vern. 164; Farmers' & M. Bank v. Robinson, 96 Mo. App. 385, 70 S. W. 372; Mason v. Perry, 22 R. I. 475, 48 Atl. 671;

Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Detwiller v. Hartman, 37 N. J. Eq. 347.

A trust in which the objects and purposes are not specifically stated and the beneficiaries clearly designated is void, unless the object and purpose of the trust are charitable in a legal sense.

Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Schmucker v. Reel, 61 Mo. 592; Tiplor v. Keep, 2 Ill. App. 368; Fountain v. Ravenel, 17 How. 369, 15 L. ed. 80; Pennoyer v. Wadhams (School Land Comra. v. Wadhams) 20 Or. 278, 11 L.R.A. 210, 25 Pac. 720; Chambers v. St. Louis, 29 Mo. 543; Morice v. Durham, 9 Ves. Jr. 399, 10 Ves. Jr. 541, 7 Revised Rep. 232, 5 Eng. Rul. Cas. 548.

The trust created by the will, so far as

infra, VIII. d, "Partial return to English rule in New York."

For a reiteration of the principle that charitable trusts are favored, see *Re Peabody*, 154 Cal. 173, 97 Pac. 184; *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A.(N.S.) 724, 123 N. W. 518.

#### Recent definition.

In *Re Lennon*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870, 14 Ann. Cas. 1024, the court said: "A charitable trust is a gift for the benefit of persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering, or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, indefinite as to names and numbers. In short, it is a gift to a general public use."

#### II. Nature of chancery jurisdiction over charities.

The prerogative of the King as *parens patriæ* under the sign manual does not belong to American courts in construing charities. *Hunt v. Edgerton*, 9 Ohio C. C. N. S. 353, 29 Ohio C. C. 377; *Re Nilson*, 81 Neb. 809, 116 N. W. 971.

In *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526, the court said: "While this court is disposed to favor a bequest for charitable uses, and will strive, whenever it can be done consistently with the established pertinent principles of equity, to uphold and enforce them, it has not the power, like the court of chancery in England, to make a will for a testator which he himself has tried, but failed to make. The *cy près* doctrine, which, in one aspect, is but that of approximation, is applied in many of our states. But the prerogative of the King, as *parens patriæ*, under the sign manual, does not belong to the equity courts of this country in construing wills, though it is 37 L.R.A.(N.S.)

conferred upon, and is exercised by, the chancellor in England, as the agent or personal representative of the Crown."

#### Application of statute of uses in various jurisdictions.

The statute of Elizabeth is a part of the common law of Iowa in so far as it recognizes, defines, or indicates what are charitable uses. *Klumpert v. Vrieland*, 142 Iowa, 434, 121 N. W. 34.

The statute is in force in Arkansas (*McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952); in Colorado (*Robbins v. Boulder County*, supra); and apparently in Washington (*Peth v. Spear*, 63 Wash. 291, 115 Pac. 164).

In *Robbins v. Boulder County*, supra, the court said: "While the statute of 43 Elizabeth is, according to the decision in *Clayton v. Hallett*, 30 Colo. 231, 59 L.R.A. 407, 97 Am. St. Rep. 117, 70 Pac. 429, a part of the law of this state, yet it is not the origin of the doctrine of charitable trusts which the equity courts of England, both before and after its adoption, were wont to enforce." It will be seen that in *BUCHANAN v. KENNARD* the court takes a similar view.

In *Hunt v. Edgerton*, supra, the court said that "where the execution is to be by trustee with general or some objects pointed out, then the court will take the administration of the trust, is, we think, the law of practically every state of this union; and we do not hesitate to declare it to be the doctrine of Ohio in relation to trusts. But further than that courts of this state, at least, will not go. So that, notwithstanding the favorable view that courts may take of such public charities, and the desire to enforce such trusts, if it cannot be done according to the intention of the testator, it must fail, the courts will not attempt to direct an independent trust that seems right and proper to the court, without regard to the directions and intention of the testator. This whole question resolves itself into a consideration of whether or not the trustee

it relates to the founding of the hospital, is not a legal and valid public charity, and is therefore void.

Jones v. Williams, 2 Ambl. 651; Hinckley's Estate, 58 Cal. 457; Com. v. Thomas, 119 Ky. 208, 6 L.R.A.(N.S.) 320, 83 S. W. 572; Troutman v. DeBoissiere Odd Fellows' Orphans' Home, 66 Kan. 1, 5 L.R.A.(N.S.) 704, 71 Pac. 286; Chambers v. St. Louis, 29 Mo. 543; Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369; 2 Story, Eq. Jur. § 1155; Morice v. Durham, 9 Ves. Jr. 399, 5 Eng. Rul. Cas. 548; Taylor v. Keep, 2 Ill. App. 368; Income Tax Comrs. v. Pemsell [1891] A. C. 531, 61 L. J. Q. B. N. S. 265, 65 L. T. N. S. 621; Century Dict. title, "Hospital;" Murray's New English Dict. title, "Hospital;" Gitzhoffen v. Sisters of Holy Cross Hospital Asso. 32 Utah, 46, 8

L.R.A.(N.S.) 1161, 88 Pac. 691; Bridgman's Duke, Charitable Uses, 122; Atty. Gen. v. Northumberland, 47 L. J. Ch. N. S. 571, L. R. 7 Ch. Div. 745, 26 Week. Rep. 586; Coleman v. O'Leary, 114 Ky. 388, 70 S. W. 1068; Kelly v. Nichols, 18 R. I. 62, 19 L.R.A. 425, 25 Atl. 840; Re Cullimore, Ir. L. R. 27 Eq. 18; Re Clark, L. R. 1 Ch. Div. 500, 45 L. J. Ch. N. S. 194, 24 Week. Rep. 233; Burke v. Roper, 79 Ala. 138; Re Buck [1896] 2 Ch. 727, 65 L. J. Ch. N. S. 881, 75 L. T. N. S. 312, 45 Week. Rep. 106, 60 J. P. 775; Petersburg v. Petersburg Benev. Mechanics' Asso. 78 Va. 431; Tyree v. Bingham, 100 Mo. 451, 13 S. W. 952; Camp v. Crocker, 54 Conn. 21, 5 Atl. 604; Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445; Re Macduff, 65 L. J. Ch. N. S. 703, 74 L. T. N. S. 706 [1896]

of this trust has the right of selection of beneficiaries from the class of individuals named in the will."

In *Re Nilson*, supra, the court, after stating that it was decided in the case of *St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 83 Am. St. Rep. 553, 84 N. W. 273, that the provisions of the statute of Elizabeth were not enforceable in Nebraska, and that the doctrine of administering charitable trusts *cy près* under the kingly prerogative was inapplicable, went on to say: "It is further settled by that case that the courts of this state have equal power in the administration of testamentary trusts for charitable uses as were possessed by the courts of England prior to and dependent of the statutes of 43 Elizabeth, and that testamentary bequests for charitable purposes will be viewed with favor and will be carried into effect, if the same can be done consistent with established principles."

The statute of Elizabeth is not and never has been in force in Maryland. *Book Depository v. Trustees of Church Rooms Fund*, — Md. —, 83 Atl. 50.

#### The doctrine of *cy près*.

While the expression "*cy près*" may have been at first properly confined to the exercise of the King's prerogative power, it is usual to employ the expression also with reference to the judicial power of the court of chancery, which is held in most jurisdictions sufficient to deal with charitable trusts with liberal powers of construction.

In *Keene v. Eastman*, 75 N. H. 191, 72 Atl. 213, the court refers to the judicial doctrine of *cy près* as in force in New Hampshire, and says further: "It is a principle adopted by courts in the construction of charitable trusts, that the absence of a provision for forfeiture is evidence that the donor did not intend the estate should revert while the carrying out of his general purpose is practicable."

For recognition of this judicial doctrine of *cy près* in California, see *Re Peabody*, 37 L.R.A.(N.S.)

*infra*, VI. d, 1; In *Illinois*, *Mason v. Bloomington Library Asso.* *infra*, VIII. i; in *Massachusetts*, *Richardson v. Mullery*, *infra*, VI. d, 5; *Ely v. Atty. Gen.* *infra*, VI. d, 2; *Grimke v. Atty. Gen.* *infra*, VI. d, 2; in *Rhode Island*, *Brice v. All Saints Memorial Chapel*, *infra*, VIII. i.

#### View of *cy près* doctrine under modern English statutes.

"In *Re Weir Hospital* [1910] 2 Ch. 124, *Cozens-Hardy*, M. R., said in his opinion: "The jurisdiction of the charity commissioners in establishing a scheme is, under § 2 of the charitable trusts act 1890, the same as that of the court of chancery. It is therefore necessary to consider the principles upon which the court of chancery proceeded in this matter. The first duty of the court is to construe the will, and to give effect to the charitable directions of the founder, assuming them not to be open to objection on the ground of public policy. The court does not consider whether those directions are wise or whether a more generally beneficial application of the testator's property might not be found. . . .

There are, however, many cases in which what is known as a *cy près* application is made by the court. In general this is limited to old charities, where, by reason of lapse of time and change of circumstances, the original purpose cannot be carried into effect in the exact way directed by the testator. . . . There may be modern charities in which the *cy près* doctrine can be properly applied, although such cases rarely occur. For example, the fund may be so large as to satisfy the court that it cannot all be applied to the original prescribed purpose. If so, the general charitable intent will prevail and the particular mode will be disregarded. Wherever the *cy près* doctrine has to be applied, it is competent to the court to consider the comparative advantages of various charitable objects, and to adopt by the scheme the one which seems most beneficial. But there can be no question of *cy près* until it is

2 Ch. 451, 45 Week. Rep. 154; Nash v. Morley, 5 Beav. 183; 12 L. J. Ch. N. S. 336, 6 Jur. 520; Re Gassiot, 70 L. J. Ch. N. S. 242, 17 Times L. R. 216; Grant v. Saunders, 121 Iowa, 80, 100 Am. St. Rep. 310, 95 N. W. 411; Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928; Re Good [1905] 2 Ch. 60, 74 L. J. Ch. N. S. 512, 53 Week. Rep. 476, 92 L. T. N. S. 796, 21 Times L. R. 450; Atty. Gen. v. Haberdashers' Co. 1 Myl. & K. 428, 5 Sim. 478, 2 L. J. Ch. N. S. 33; Schmucker v. Reel, 61 Mo. 592; Re Sidney [1908] 1 Ch. 488, 77 L. J. Ch. N. S. 296, 98 L. T. N. S. 625, 24 Times L. R. 296, 52 Sol. Jo. 262; Kendall v. Granger, 5 Beav. 300, 11 L. J. Ch. N. S. 405, 6 Jur. 919; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305; State ex rel. Alex-

ian Bros. Hospital v. Powers, 10 Mo. App. 263, s. c. 74 Mo. 476; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; Atwater v. Russell, 49 Minn. 60, 51 N. W. 629, 52 N. W. 26; Brigham v. Peter Bent Brigham Hospital, 126 Fed. 796, 67 C. C. A. 393, 134 Fed. 513; Woodruff v. Marsh, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. 846; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; Philadelphia v. Elliott, 3 Rawle, 170; Burbank v. Burbank, 152 Mass. 254, 9 L.R.A. 748, 25 N. E. 427; Reading v. Lane, Duke Charitable Uses, 81; Atty. Gen. v. Kell, 2 Beav. 575; Pelham v. Anderson, 2 Eden, 296, Bro.

clearly established that the directions of the testator cannot be carried into effect." In this case the scheme adopted by the board of charity commissioners was set aside as unauthorized; and Kennedy, L. J., said in his opinion: "Neither the court of chancery nor the board of charity commissioners, which has been intrusted by statute, in regard to the application of charitable funds, with similar jurisdiction, is entitled to substitute a different scheme for the scheme which the donor has prescribed in the instrument which creates the charity, merely because a coldly wise intelligence, impervious to the special predilections which inspired his liberality, and untrammelled by his directions, would have dictated a different use of his money. The *cy pres* doctrine can properly be applied only where (to borrow language from Sir George Jessel, M. R., in *Re Campden Charities*, L. R. 18 Ch. Div. 323, 50 L. J. Ch. N. S. 646, 45 L. T. N. S. 152, 30 Week. Rep. 496) it is or has become impossible beneficially to apply the property left by the founder or donor in the exact way in which he has dictated it to be applied, and it can only be applied beneficially to similar purposes by different means."

#### Effect of rules against perpetuities.

In *Kasey v. Fidelity Trust Co.* 131 Ky. 609, 115 S. W. 739, it was held that where a gift was given to a charity in case of the death of a beneficiary without issue, that under the circumstances, an indefinite failure of issue was not intended, but a failure of issue in the lifetime of the parent; and that therefore, the rule against perpetuities did not interfere with the gift to the charity. It was held in the same case that a period of accumulation was not against the rule against perpetuities, where the accumulation was only to take place during the life of the parent, and if she died leaving issue, the property would go absolutely to her issue.

In *French v. Calkins*, 252 Ill. 243, 96 N. E. 877, where a gift to charity was to be paid after a certain annuity, it was held 37 L.R.A. (N.S.)

that this did not create a perpetuity, as there was but a single life, and an annuity was not an estate in property.

Where a will directed that the executor should sell land not later than five years after the death of the testator, and with the proceeds establish a specified charity in a foreign country, it was held that there was no illegal suspension of the power of alienation. *Hagen v. Sacrisson*, supra.

But in *Re Barnett*, 24 Times L. R. 788, where it was provided that a failure on the part of the trustees to comply with certain conditions of the will should cause the whole fund to go over to the commissioners for the reduction of the national debt, it was held that such a gift might take effect after a perpetuity, and it was therefore void.

### III. The requisite public character.

#### a. In general.

In *Laverty v. Laverty* [1907] 1 I. R. 9, where a will provided as to certain funds that the trustees were "to pay out of the income thereof the sum of £100 for masses for the good of my soul, and to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete, and twenty-three years complete, until such boy or man shall have obtained a trade or profession, which sums as said trustees may think proper," the trustees having power to select the boys or men, and to accumulate the fund for the above purpose, it was held that this was not a public charitable trust, as not limited to necessitous persons, nor was it a private bequest to a class of individuals.

But a gift for providing recreation and music and the teaching of singing for the residents of a locality was sustained as for a charitable and public purpose in *Shillington v. Portadown Urban Dist. Council* [1911] 1 I. R. 247, where a testator directed that certain income should be applied by his

Ch. 444, note; *Vaughan v. Farrer*, 2 Ves. Sr. 182; *Masters v. Masters*, 1 P. Wms. 421.

A trust is not charitable unless the testator has devoted the fund to some charitable purpose so definitely and exclusively that the trustees cannot apply any part of such fund to a noncharitable purpose without violating the express terms of the trust.

*Morice v. Durham*, 9 Ves. Jr. 309, 10 Ves. Jr. 541, 7 Revised Rep. 232, 5 Eng. Rul. Cas. 548; *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671; *Kelly v. Nichols*, 17 R. I. 323, 19 L.R.A. 413, 21 Atl. 906; *Atty. Gen. v. Soule*, 28 Mich. 153; *Nichols v. Allen*, 130 Mass. 212, 39 Am. Rep. 445; *Taylor v. Keep*, 2 Ill. App. 368; *Kinike's Estate*, 155 Pa. 101, 25 Atl. 1016; *Re Shattuck*, 193 N.

Y. 446, 86 N. E. 455; *Re Sutro*, 155 Cal. 727, 102 Pac. 923; *Johnson v. Johnson*, 92 Tenn. 559, 22 L.R.A. 179, 36 Am. St. Rep. 104, 23 S. W. 114; *Kendall v. Granger*, 5 Beav. 300, 11 L. J. Ch. N. S. 405, 6 Jur. 919; *Fifield v. Van Wyck*, 64 Am. St. Rep. 756, note; 2 *Perry*, Tr. 5th ed. § 732; *James v. Allen*, 3 Meriv. 19, 17 Revised Rep. 4; *Grimond v. Grimond* [1905] A. C. 124, 74 L. J. C. P. N. S. 35, 92 L. T. N. S. 477, 21 Times L. R. 323; *Re McCauley*, 28 Ont. Rep. 610.

A charitable trust must be for the general public use; that is, the benefit must inure to the entire public.

*Jones v. Williams*, 2 Ambl. 651; *Farmers' & M. Bank v. Robinson*, 96 Mo. App. 385, 70 S. W. 372; *Cocks v. Manners*, L. R.

trustees for the purpose of fostering, encouraging, and providing the means of obtaining healthy recreation, including the teaching of singing in classes or choruses, for the residents of the town of Portadown and the surrounding districts, and for the purpose of providing music and instruments (in so far as my trustees think advisable) for the town band, in such manner and form as "my trustees shall, in their absolute discretion, consider best; but in no case shall my trustees pay away any moneys derived out of my estate for prizes for football, or for rowing for speed."

#### b. Cemeteries.

In *Chapman v. Newell*, 146 Iowa, 415, 125 N. W. 324, it was held that the maintenance of public cemeteries was a charitable use, and therefore within the recognized exceptions to the operation of the statute against perpetuities; and the trusts for the benefit of the public cemeteries in the will were valid, one of which gave the income to the trustees of the cemetery, the other gave property for the benefit of other cemeteries named, and the will authorized the court to appoint trustees as to all the cemeteries.

In *Roe v. Doe*, — Del. —, 80 Atl. 250, where land was granted to grantees and to their successors, to be elected as therein mentioned, as trustees in trust for a public burial ground, and for building thereon a house of worship erected by contributions to be received, with authority to the trustees to sell and convey the church building when erected and the ground upon which it should stand, and the distribution of the proceeds of sale were provided for, the vacancies in the trustees to be filled by the "subscribers," meaning evidently those persons who should contribute to the cost of erecting the house of worship, it appeared that the church part of the property had been conveyed and that a statute had been passed vesting in the town the property vested in the original grantees so far as the burial ground was concerned, and the chancellor having appointed the

town as the trustee of the burial ground, it was held that the town might maintain ejectment for the land, without deciding whether the appointment by the chancellor was necessary or not.

But in *Van Syckel v. Johnson*, — N. J. Eq. —, 70 Atl. 657, it was held that a trust for keeping in good repair and condition that part of the graveyard attached to a certain church wherein the testator's family were buried, and also the rest of the graveyard, was void as not a charitable trust.

#### Private cemeteries.

In *Mason v. Bloomington Library Assn.*, 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603, it was held that a bequest to a trustee, the income to be applied to the care of the decedent's burial plot, was not a gift to any public use, that its purpose was purely private and secular, and that it was void.

So, in *Hilliard v. Parker*, 76 N. J. Eq. 447, 74 Atl. 447, it was held that a gift of a fund for the purpose of keeping in order a graveyard lot was void as not a charitable use, but a purely private trust. See also to the same effect, *Van Syckel v. Johnson*, supra.

It will be noticed that the court in *BUCHANAN v. KENNARD* does not seem to pass upon this question.

In *Lounsbury v. Square Lake Burial Assn.* — Mich. —, 129 N. W. 36, decided in a jurisdiction where the statute of Elizabeth is not in force, where the testator gave \$100 to the trustees of a certain cemetery "as a perpetual fund to be kept at interest by said trustees and the interest used to take care of the graves on my lot in said cemetery, and keep the said lot in order," and gave other property to the trustees of the same cemetery, "to be used to build a good and substantial iron fence around the said Square Lake Cemetery, and whatever is left after erecting said iron fence around the same is to be used by said trustees to build a vault in said cemetery for the use thereof, to be controlled by the trustees of said cemetery," it was held that the first gift of \$100 was void as a perpetuity, but that



12 Eq. 574, 40 L. J. Ch. N. S. 640, 24 L. T. N. S. 869, 19 Week. Rep. 1053; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L.R.A. 360, 53 Am. St. Rep. 48, 18 So. 394; *Re Lennon*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870, 14 Ann. Cas. 1024; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Coe v. Washington Mills*, 140 Mass. 547, 21 N. E. 906; *Drury v. Natick*, 10 Allen, 180; *Field v. Drew Theological Seminary*, 41 Fed. 371; *People v. Powers*, 8 Misc. 628, 29 N. Y. Supp. 950; *Delaware County Institute v. Delaware County*, 94 Pa. 166; *Re Nottage* [1895] 2 Ch. 653, 64 L. J. Ch. N. S. 695, 12 Reports, 571, 73

L. T. N. S. 269, 44 Week. Rep. 22; *Pennyroyer v. Wadhams* (School Land Comrs. v. Wadhams) 20 Or. 278, 11 L.R.A. 210, 25 Pac. 720; *Troutman v. De Boissiere Odd Fellows' Orphans' Home*, 66 Kan. 1, 5 L.R.A. 704, 71 Pac. 286; *Tyssen, Charitable Bequests*, 4.

There is no public purpose or public benefit in the treatment of sickness or injury unless such treatment is restricted to the poor, whose support is a public duty.

*State ex rel. Garth v. Switzerland*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; *Deal v. Mississippi County*, 107 Mo. 464, 14 L.R.A. 622, 18

the other gift was valid, and was not invalid by reason of the cemetery being unincorporated, as the gift was not charged with a permanent use, and in any event was to certain trustees, and not direct.

#### Decisions under particular statutes.

Where a will gave a sum of money to a town council "to be held by the said town council and their successors in office in perpetual trust, to apply the income of said sum to the ornamenting and keeping in repair of my said burying ground forever," and the town council declined to receive the legacy, it was held that the gift was saved by the statute permitting town councils to take funds for the purpose of the gift in question, but that the court had no power to appoint another trustee; and leave was given the executor to pay the money into court, so that he might account, and that opportunity might be offered to the town council to accept the legacy as trustee within a reasonable period of time. *Rhode Island Hospital Trust Co. v. Warwick*, 29 R. I. 393, 71 Atl. 644.

In *Driscoll v. Hewlett*, 132 App. Div. 125, 116 N. Y. Supp. 466, affirmed in 198 N. Y. 297, 91 N. E. 784, it was held that under the religious corporation law of 1895, a religious corporation might take and hold property in trust for a private cemetery lot, as that was evidently the intent of the statute.

While the language of the statutes is not identical, it seems that after the case of *Driscoll v. Hewlett*, a different decision would be made in a case like *Re Waldron*, 57 Misc. 275, 109 N. Y. Supp. 681, where a will gave to the village of Waterford a sum "in trust, to be invested and reinvested by the trustees of said village and their successors in office . . . and to apply and expend the income therefrom, . . . in keeping my lot in the Waterford Rural Cemetery and the stone and monument thereon and such as may be erected thereon, clean and in good order and repair;" and it was held that this was not a charitable trust, and could not be sustained under the act of 1893, as to charitable, etc., uses, and that the village of Waterford was not entitled to take it under its act of incorporation. 37 L.R.A. (N.S.)

tion, nor under the general village law, which provided: "The board of cemetery commissioners of a village may take and hold any property given, bequeathed, or devised to it in trust, to apply such property or the income thereof for the improvement or embellishment of such cemetery, or the erection or preservation of a building, structure, fence, or walk therein, or for the removal, erection, or preservation of a tomb, monument, stone, fence, railing, or other erection or structure on or around any lot therein, or the planting or cultivation of trees, shrubs, flowers, or plants in or about a lot therein, or for otherwise caring for and maintaining a lot therein according to the terms of such grant, devise, or bequest,"—as this statute did not provide for a trust for perpetual care.

In *Re Perkins*, 68 Misc. 255, 124 N. Y. Supp. 998, where a joint will provided: "First: After all my just debts and funeral expenses are paid, our monument in Washington Street Cemetery in Fair Haven, Vermont, is properly lettered and perpetual care of the lot in the above named cemetery is secured," the court said: "Under the provisions of §§ 113 and 114 of the real property law (Consol. Laws, chap. 50), a trust for the purpose of lettering the monument and the perpetual care of the lot is not invalid, if the same were to be administered within this state. And as the trust operates upon personal property in this state, to be expended for the purposes mentioned without the state, I think, in accordance with the opinion of Judge Houghton, in *Catt v. Catt*, 118 App. Div. 742, 103 N. Y. Supp. 740, that the provisions of the instrument in question created a valid trust as to the part of the personality necessary to provide for the lettering of the monument and the care of the lot. This trust can be administered by the supreme court."

#### IV. Necessary accordance with law and public policy.

##### a. In general.

In *Kramph's Estate*, 228 Pa. 455, 77 Atl. 814, it was held that a gift for the education of ministers, who were to teach the doctrine of the New Jerusalem as laid down in

S. W. 24; State ex rel. Industrial Home v. Pike County, 144 Mo. 275, 45 S. W. 1096; Citizens Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Rev. Stat. 1899, §§ 8993, 8994; State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 508; Thomas v. Edmonson County, 8 Ky. L. Rep. 265; McIntire v. Pembroke, 53 N. H. 407; Hudgins v. Carter County, 116 Ky. 133, 72 S. W. 730; Dodge County v. Diers, 69 Neb. 361, 95 N. W. 602, 5 Ann. Cas. 232; Board of Health v. Renville County, 89 Minn. 402, 95 N. W. 221; Labrie v. Manchester, 59 N. H.

120, 47 Am. Rep. 179; Clinton v. Clinton County, 61 Iowa, 207, 16 N. W. 87; Jay County v. Fertich, 18 Ind. App. 1, 46 N. E. 699; Knightstown v. Horner, 36 Ind. App. 139, 75 N. E. 13; Vionet v. First Municipality, 4 La. Ann. 43; Tollefson v. Ottawa, 228 Ill. 134, 11 L.R.A. (N.S.) 990, 81 N. E. 823; Re Yturburru, 134 Cal. 567, 66 Pac. 729; Wisconsin Keeley Institute v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; Re House, 23 Colo. 89, 33 L.R.A. 832, 46 Pac. 117; Webster v. Rapides Parish, 51 La. Ann. 1204, 25 So. 988; Baltimore v. Keeley Institute, 81 Md. 106, 27 L.R.A. 646, 31 Atl.

the writings of Swedenborg, was not invalid from the fact that certain of the doctrines of Swedenborg might not have been in accordance with the morality of the country, as it did not appear that any of such doctrines in any unfavorable way were a part of the religious doctrine of the New Jerusalem Church.

It may be noted that where, at the time of the testator's death, neither land in England nor in Ontario could be devised to charitable uses, it was held that a gift to such uses by one domiciled in England of mortgages secured on freehold properties in Ontario was not permissible. *Re Hoyles*, 26 Times L. R. 516, [1910] 2 Ch. 333, 79 L. J. Ch. N. S. 720, 103 L. T. N. S. 127, 54 Sol. Jo. 582, affirmed in 27 Times L. R. 131, [1910] W. N. 275.

#### *b. Gifts to foreign charities.*

Gifts to charity to be distributed out of the jurisdiction are frequent.

Thus the courts have sustained:

—an Iowa bequest "to the poor of Voorst, Gelderland, Netherlands," in *Klumpert v. Vrieland*, *infra*, VIII. b, 2;

—a North Dakota gift for the care and support of destitute children in Sweden, in *Hagen v. Sacrison*, *infra*, VIII. e;

—Nebraska gifts to certain churches in Norway for the relief of certain classes of poor persons, in *Re Nilson*, *infra*, VIII. e.

See also *Re Perkins*, *supra*, III., where a provision in a New York will for the care of a cemetery lot in Vermont was upheld.

See also, as to a gift for missions to a corporation of another state, *Jordan v. Universalist General Convention*, *infra*, VII. d.

In *Miller v. Ahrens*, *infra*, VIII. g, it was held that a bequest to a foreign corporation was to be construed under the circumstances as if made to a voluntary association.

In *Green v. Fidelity Trust Co.* 134 Ky. 311, 120 S. W. 283, 20 Ann. Cas. 861, upon the question whether the court would administer a foreign charity, the court said that it might perhaps technically be held that the proper course would be for the trustee to pay over the income to a foreign trustee to administer the charity in the foreign jurisdiction. See also, as to assumption

that the foreign court will appoint a trustee, *Hagen v. Sacrison*, *infra*, VIII. e.

#### *V. Creation and general requisites of the trust.*

In *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526, it was held that a bequest for a hospital building in a city, provided the city will support and maintain the same, is invalid, as dependable upon an impossible, legally nonenforceable condition precedent.

#### *Precatory words.*

In *Gilchrist v. Corliss*, 155 Mich. 126, 130 Am. St. Rep. 568, 118 N. W. 938, where a will provided: "I request that at my death, my said wife, Ella J. Potter, make her will, and will at least two thirds of what she receives under this, my will, to some charities, named and designated by her, said charities to be in the city of Alpena, Michigan, and the amount so willed to be payable at her death, as it is my wish that she have and use all the income from that portion of my estate willed to her as long as she lives," it was held that this only gave one third of the estate to the wife absolutely, and that upon her failure to exercise the power of appointment there was an intestacy as to the other two thirds.

In *Pembroke Academy v. Epsom School Dist.* 75 N. H. 408, — L.R.A. (N.S.) —, 75 Atl. 100, where the will provided: "I give and bequeath to the trustees of Pembroke Academy the sum of \$1,000 in money, the annual income of which sum I wish to be expended in paying the tuition of such poor boys in said town of Epsom, of good moral character, as may be recommended from time to time to the trustees of said academy by a majority of the board of selectmen of said town of Epsom as worthy and deserving this privilege," it was held that the words of the testator were not precatory, but a command.

In *Re Burley* [1910] 1 Ch. 215, where a testatrix by a codicil provided: "I wish Colonel Russell to use £1,000, part of the legacy given to him by my above will, for the endowment in his own name of a cot in the Ipswich and East Suffolk Hospital, and to retain the balance of the said legacy

437; *Leavitt v. Morris*, 105 Minn. 170, 17 L.R.A.(N.S.) 984, 117 N. W. 393, 15 Ann. Cas. 961.

A hospital merely for sick and injured persons is not necessarily charitable, in the sense of fulfilling a public purpose.

*People ex rel. New York Institute v. Ritch*, 16 Misc. 464, 39 N. Y. Supp. 927; *University of Louisville v. Hammond*, 127 Ky. 564, 14 L.R.A.(N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Phillips v. St. Louis & S. F. R. Co.* 211 Mo. 419, 17 L.R.A.(N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742; *Washingtonian Home v. Chicago*, 157 Ill. 414, 29 L.R.A. 798, 41 N. E. 893; *State ex rel. Alexian Bros. Hospital v.*

*Powers*, 10 Mo. App. 263; *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; *Cook County v. Chicago Policlinic*, 233 Ill. 268, 84 N. E. 220; *People ex rel. Thompson v. Ravenswood Hospital*, 238 Ill. 137, 87 N. E. 305; *Gray Street Infirmary v. Louisville*, 23 Ky. L. Rep. 1274, 55 L.R.A. 270, 65 S. W. 11; *Wathen v. Louisville*, 27 Ky. L. Rep. 635, 85 S. W. 1195; *Thiel College v. Mercer County*, 101 Pa. 530; *Webber Hospital Asso. v. McKenzie*, 104 Me. 320, 71 Atl. 1032; *Gitzhoffen v. Sisters of Holy Cross Hospital Asso.* 32 Utah, 46, 8 L.R.A.(N.S.) 1161, 88 Pac. 691; *Brown v. La Société Française*, 138 Cal. 475, 71 Pac. 516.

for his own use and benefit," and by a second codicil provided: "I wish Colonel Russell, after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit," it was held that the legacy was given for the charitable purposes mentioned in the codicils, and that the precatory words were positive directions.

In *French v. Calkins*, 252 Ill. 243, 96 N. E. 877, it was held that a bequest "to the rector, wardens, and vestry" of a certain church, where there was an additional statement in the will that the money is to be used and applied in such manner as the rector, wardens, and vestry deem proper, as a memorial to the family of the testatrix, was a valid gift, the court saying: "The precatory words following the bequest, expressing a wish that it should be used in the purchase of real estate for the erection of permanent improvements in connection with the church property, to remain as a permanent memorial of affection for the church body and the membership thereof, were sufficient to create a trust and require that the bequest be devoted to that use, which was unquestionably of a charitable nature."

Trust as distinguished from absolute gift to trustee.

In *Re Morgan*, 56 Misc. 235, 107 N. Y. Supp. 393, affirmed *sub nom. Re Durand*, 127 App. Div. 945, 111 N. Y. Supp. 1118, which was affirmed in 194 N. Y. 477, 87 N. E. 677, where the will provided that in a certain contingency "I desire to use my said estate for the purposes of female education of high grade in the city of Rochester, and under the management of the trustees of said university; the said institution to be made a part of said university if the trustees choose to make it such, or to be kept independent and subject to their management and control. When said trustees shall have signified their acceptance of said devise and bequest, I direct my said executors 37 L.R.A.(N.S.)

to pay over the said proceeds of my estate into the hands of the said trustees of the University of Rochester, to be held by them as a perpetual fund, and the income thereof to be devoted to the objects named," it was held that this was an absolute gift to the University of Rochester, without any trust.

In *Gilmore v. Lee*, 237 Ill. 402, 127 Am. St. Rep. 330, 86 N. E. 568, where a dying woman handed a priest of the Roman Catholic Church a certificate of deposit, and said it was to be used for masses for the repose of her soul, it was held that it was "for a charity, and in support of the form of worship to which the deceased belonged, and if the priest accepted it for that purpose, he would be bound to perform the religious services to which it was to be applied, and, as a priest, would earn the money by so doing, and that the disposition of the certificate was valid.

In *Re Meech* [1910] 1 Ch. 426, where a testator gave certain real property upon trust, for and to be held by the masters, etc., of one of the London companies, "for the general purposes of the said company," and authorized the company or his trustees to make and formulate any scheme, etc., "for the temporary or permanent administration of the charity hereby created," or to vest the trust property in the said company or in any existing charity, etc., it was held that inasmuch as the company was not a charitable corporation, although the testator may have been mistaken in that respect, it took the property absolutely free of all charitable trust.

See also *Stoepel v. Latterthwaite*, *infra*, VIII. c.

#### Disposition to meet failure.

Where a will provided for gifts over to other charities in the event of the refusal of the first legatee of a charity to accept, it was held that if such gift failed, either by refusal to accept or by there being no charity, or if the charity named had no existence, the second gift would take effect. *Ege v. Hering*, 108 Md. 391, 70 Atl. 221.

In *Larkin v. Wikoff*, 75 N. J. Eq. 462, 72

The care of a burial lot is a strictly private purpose.

Lloyd v. Lloyd, 2 Sim. N. S. 255, 21 L. J. Ch. N. S. 596, 16 Jur. 306; Rickard v. Robson, 31 Beav. 244, 31 L. J. Ch. N. S. 897, 8 Jur. N. S. 655, 7 L. T. N. S. 87, 10 Week. Rep. 657; Fowler v. Fowler, 33 Beav. 616, 33 L. J. Ch. N. S. 674, 10 Jur. N. S. 648, 12 Week. Rep. 972; Hoare v. Osborne, L. R. 1 Eq. 585, 35 L. J. Ch. N. S. 345, 12 Jur. N. S. 243, 14 L. T. N. S. 9, 14 Week. Rep. 383; Johnson v. Holifield, 79 Ala. 423, 58 Am. Rep. 596; Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Bates v. Bates, 134 Mass. 110, 45 Am. Rep. 305; Kelly v. Nichols, 17 R. I. 323, 19 L.R.A. 413, 21 Atl. 906; Knox v. Knox, 9 W. Va. 124; Hartson v. Elden, 50 N. J. Eq. 522, 26 Atl. 561;

Atl. 98, affirmed in 77 N. J. Eq. 589, 78 Atl. 1134, the court said: "Of course, the doctrine of *cy pres*—that is, the doctrine that a fund for charity, being impossible of application according to the intention of the donor, shall be applied as nearly as may be according to his intention—can have no existence when the donor himself provides for the application of the fund in the event of the failure of the charitable use to which he, in the first instance, directed that it should be devoted." In the same case it was held that where the trustees of a charitable trust are given a certain absolute discretion by the deed, the court will not interfere with it unless there has been mala fides.

## VI. Certainty of purpose.

### a. Generally.

In Korsstrom v. Barnes, 167 Fed. 216, the testator gave his residuary estate to his executors in trust to sell, and after paying necessary expenses, to pay the proceeds of said sale to "the trustees of the Theosophical Society at Adyar, Madras, India, or wherever the said Theosophical Society may be located, appointed or acting under a deed of trust, dated the 14th day of December, A. D. 1892, and duly enrolled," and stating: "It is my express will that the said legacy to the said Theosophical Society in India be used for the purpose, as far as possible, in obtaining translations into English of the ancient Hieratic Scriptures, believed to exist in India and elsewhere, for the use of the Theosophical Society and its branches all over the world." The court, in holding the gift invalid as the trustees could not be identified, as the purpose was uncertain, and as there was a perpetuity, said: "The defendants are required to convert the whole residue of the estate into money, the money is bequeathed in trust to an official board, the members of which are designated in an enrolled deed of trust which cannot be identified with certainty, for a use which cannot be defined with certainty, and for the benefit of a *cestui que trust*" 37 L.R.A. (N.S.)

Re Corle, 61 N. J. Eq. 400, 48 Atl. 1027; Van Syckel v. Johnson, — N. J. Eq. —, 70 Atl. 657.

Where an unapportioned and unascertainable portion of a trust fund is bestowed upon an invalid or unlawful purpose, the whole trust fails, regardless of the validity of the other portions.

Atty. Gen. v. Hinxman, 2 Jac. & W. 270, 22 Revised Rep. 119; Fowler v. Fowler, 33 Beav. 616, 10 Jur. N. S. 648, 33 L. J. Ch. N. S. 674, 10 L. T. N. S. 682; Cramp v. Playfoot, 4 Kay & J. 481; Chapman v. Brown, 6 Ves. Jr. 404, 5 Revised Rep. 351; Beekman v. People, 27 Barb. 280; Limbrey v. Gurr, 6 Madd. Ch. 151, 22 Revised Rep. 262; Hunter v. Atty. Gen. 68 L. J. Ch. N. S. 449, [1899] A. C. 309, 47 Week. Rep. 673,

which is merely an aggregation of people in all parts of the world, and not an organized entity, and there is no prescribed limitation of time within which the trust is to be executed or the fund expended."

### b. Selection of purpose by trustees.

In McPherson v. Byrne, 155 Mich. 338, 118 N. W. 985, where the statute of Elizabeth is not in force, it was held where a woman dying delivered certain certificates of deposit to a friend, to be used for charity, "just as he wished," after paying last expenses, that this was an attempt to make a gift for charitable purposes with the charity wholly indefinite, and that the gift failed.

In Wilcox v. Atty. Gen. 207 Mass. 198, 93 N. E. 599, Ann. Cas. 1912 A, 833, where property was given in trust to carry out certain purposes mentioned to the trustee "relating to certain benevolent and charitable institutions," the homestead estate to be known as the "Elphal Tucker Borden Play Grounds," it was held that the trust was so indefinite that it could not be executed.

But testamentary provisions have been upheld as charitable bequests:

—where the residue of the estate was given to trustees to distribute "among such charitable institutions, persons, or objects, in such amounts, upon such terms, and for such purposes, as they decide to be most worthy, having regard, but in their sole discretion, to such as I have been interested in during my life." Gill v. Atty. Gen. 197 Mass. 232, 83 N. E. 676;

—where the will created a special trust, mentioning the name by which the fund was to be designated, and authorized the trustees to devote the unexpended income to such charitable purposes as they and their successors "judge will do the most real good, and giving preference to several objects instead of a few." Selleck v. Thompson, 28 R. I. 350, 67 Atl. 425;

—where, in default of written directions, the trustees were to distribute the residue of the estate 'among such religious, charit-

80 L. T. N. S. 732, 15 Times L. R. 384; Mason v. Perry, 22 R. I. 475, 48 Atl. 671; Kelly v. Nichols, 17 R. I. 306, 19 L.R.A. 413, 21 Atl. 906; Coit v. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Van Syckel v. Johnson, — N. J. —, 70 Atl. 657; Tilden v. Green, 130 N. Y. 29, 14 L.R.A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; RoBards v. Brown, 167 Mo. 456, 67 S. W. 245; Stevens v. De La Vaulx, 166 Mo. 20, 65 S. W. 1003; Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145; Shepperd v. Fisher, 206 Mo. 208, 103 S. W. 989.

Messrs. Thomas F. Galt, A. Lee and J. F. Lee, for respondents:

The will of Robert A. Barnes created a public charitable trust in these defendant trustees, because:

able, and benevolent purposes and objects, or institutions, as in their discretion shall be best and proper," there being an expression of confidence in their ability and integrity, and a release of any liability on their part to account for the fund. Dulles's Estate, 218 Pa. 162, 12 L.R.A. (N.S.) 1177, 67 Atl. 49. The court said: "The practical questions, therefore, in such cases, are, first, is the testator's general intent ascertainable? and, second, is there any tribunal provided to ascertain the specific objects to which such intent is to be applied? If so, the trust is not void for uncertainty, whether it is for a technical charity or not. The testatrix's will in this case complies with both these conditions, and is entitled to be carried out according to its terms."

—where the trustees were empowered to divide the residue "amongst such local or Scottish charitable institutions, and schemes already constituted, or which may hereafter be constituted (and which may include these hereinbefore named) [to which specific legacies had been given], as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they, in their absolute discretion, may deem proper." Dick v. Audsley [1908] A. C. 347.

### *c. Inclusion of purposes not charitable.*

Most of the recent cases on this branch of the subject illustrate the rule set forth in the note to Hadley v. Forsee, 14 L.R.A. (N.S.) 49, that in order that the gift shall possess that certainty which will give it validity, the language must require that the fund shall be expended for charity and for nothing else.

In Re Sutro, 155 Cal. 727, 102 Pac. 920, the court said: "Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the inventor alone. or 37 L.R.A. (N.S.)

(a) It was devised in trust for the benefit of an unlimited number of undesignated persons.

(b) For the purpose of healing the sick and injured generally,—a charity.

(c) No person engaged in the management of the charity could derive any profit from it.

Jackson v. Phillips, 14 Allen, 539; Cawee v. Nottingham Lunatic Asylum [1891] 1 Q. B. 585, 60 L. J. Q. B. N. S. 485, 65 L. T. N. S. 155, 39 Week. Rep. 461, 55 J. P. 582; Ould v. Washington Hospital, 95 U. S. 310, 24 L. ed. 451; 6 Cyc. 897, 902; Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Hinckley's Estate, 58 Cal. 457; Troutman v. De Bois-

those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them, to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule stated, that the entire trust was invalid."

In Van Syckel v. Johnson, — N. J. Eq. —, 70 Atl. 657, where a testator gave certain money to his executors in trust to be invested and the interest to be applied to keeping in good repair and condition that part of the graveyard attached to a certain church wherein his family were buried, and also the rest of the graveyard, and, if the church should fail to make up the salary of the pastor, the balance of the interest, or so much as necessary, should go toward the salary, it was held that the entire bequest was void, as the good gift for the salary of the pastor was mingled with the noncharitable object of the provision for keeping the graveyard in order.

So, in Moseley v. Smiley, — Ala. —, 55 So. 143, where a man for a valuable consideration conveyed a parcel of land to himself and two others, "trustees for Tabernacle Alliance Hall and Schoolhouse, and to their successors in office," Tabernacle Alliance being a voluntary unincorporated association whose members were admitted by ballot, it was held that the deed did not require that the property be used solely for charitable purposes, and if it might be so applied to other purposes, it was too indefinite for the court to execute.

The recent English cases enforce the same doctrine. Thus, gifts have been held entirely void as not necessarily entirely for charitable purposes:

—where a testator, gave personal property to trustees "upon trust, to dispose of the same for such charitable uses or for such emigration uses, or partly for such charitable uses and partly for such emigration uses, as they shall, in their absolute and uncontrolled discretion, think fit." Re Sidney [1908] 1 Ch. 488 (affirming [1908] 1 Ch. 126);

—where a will provided: "I desire that

siere Odd Fellows' Orphans' Home, 66 Kan. 1, 5 L.R.A. (N.S.) 704, 71 Pac. 286; Tyssen, Charitable Bequests, pp. 4, 5; State ex rel. Alexian Bros. Hospital v. Powers, 10 Mo. App. 263; Bispham, Eq. 6th ed. ¶ 12; Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Hearn v. Waterbury Hospital, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; Burke v. Roper, 79 Ala. 138; Hennepin County v. Brotherhood of Gethsemane, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; Doughten v. Vandever, 5 Del. Ch. 51; Weeks v. Hobson, 150 Mass. 377, 6 L.R.A. 147, 23 N. E. 215; Hoeffer v. Clogan, 171 Ill. 462, 40 L.R.A. 730, 63 Am. St. Rep. 241, 40 N. E. 527; Union P. R. Co.

v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Long v. Rose-dale Cemetery, 84 Fed. 135; Thornton v. Franklin Square House, 200 Mass. 465, 22 L.R.A. (N.S.) 487, 86 N. E. 909; Webster v. Wiggins, 19 R. I. 73, 28 L.R.A. 510, 31 Atl. 824; Hewett v. Woman's Hospital Aid Asso. 73 N. H. 556, 7 L.R.A. (N.S.) 497, 64 Atl. 190; 2 N. Y. Rev. Stat. 9th ed. 1896, Laws 1893, chap. 498; Burbank v. Burbank, 152 Mass. 254, 9 L.R.A. 748, 25 N. E. 427; Downes v. Harper Hospital, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; Ellenherst v. Pythian, 110 Ky. 923, 63 S. W. 37; Jenkins v. Berry, 119 Ky. 350, 83 S. W. 594; Sisters of Third Order v. Peoria County, 231 Ill.

my executors, with the assistance of Mr. J. R. H., Mr. —, the art master, and any persons they may call in to assist them, shall expend the said residue in any manner they may think desirable to encourage artistic pursuits or assist needy students in art." Re Ogden, 25 Times L. R. 382;

—where a testator gave property to trustees to hold in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institution, persons, or objects, in connection with the Roman Catholic faith in England, as he shall, in his absolute discretion, think fit. Re Davidson, [1909] 1 Ch. 567.

So, in Re Freeman [1908] 1 Ch. 720, where the testator gave part of his estate to the treasurers for the time being of the Charity Organization Society in London, or any other society or corporate body which might thereafter be formed to take over its property to carry on its work, upon trust to invest the same, and out of the annual income arising from such investment to pay and retain one-tenth part of such income "for the purposes of the society, as the governing body may think fit, and to divide and pay the residue of such annual income to such other society or societies as shall, in the opinion of the governing body of the Charity Organization Society, be most in need of help, besides fulfilling the standard of good management, efficiency, and economy of such Charity Organization Society," it was held that this was not a charitable trust, as the society might select a society which was not a charitable one, and that the gift was void.

It will be seen that in BUCHANAN v. KENNARD the court decided that a charitable trust would not fail because a small portion of the income was to be devoted to keeping the donor's cemetery lot in repair, but the court does not seem to pass upon the question whether the provision for such repair was a charitable use or not.

Where trustees were directed to pay over the fund to a hospital of a certain character, 37 L.R.A. (N.S.)

to be selected by them under certain circumstances, it was held that the testatrix could not have contemplated that the hospital selected should be one conducted for profit. French v. Calkins, *infra*, VIII. e.

#### Sustaining valid part of gift.

The reader will notice that in BUCHANAN v. KENNARD the court considers that the addition of a noncharitable purpose is not important when not commingled with the charitable bequest.

In this connection, reference should here be made to Tate v. Woodyard, 145 Ky. 613, 140 S. W. 1044, where it was held that a deed to the master of a lodge of Masons, and to his successors in office, of a tract of land for the "purpose of a lodge room and Baptist church and a graveyard," was, under the Kentucky statute relating to charitable uses and religious societies, a valid trust for charitable purposes in so far as it provided for a church and a graveyard.

#### d. Particular purposes and classes of purposes.

##### 1. Religious purposes.

The word "religious" has been held to be *prima facie* charitable in Re Salter, [1911] 1 I. R. 289, where a will provided that the income should be disposed of "for the use of the Protestant Orphan Society of the county of Carlow, or for or towards the relief and benefit of such poor and necessitous Protestant widows and widowers, resident in the county of Carlow, or to both of such objects or purposes, or to such other merely and purely charitable or religious purpose or purposes for the benefit of, or advantage of, members of the Church of Ireland, or other Protestant denomination within the said county of Carlow, in such shares and proportions, and in such manner, as my said trustees shall, in their uncontrollable discretion, think fit." It was held that this was a valid charitable gift. The court said: "The word 'religious' is *prima facie* charitable, and it does not appear to me that the testator has in the words 'charitable or re-

317, 83 N. E. 272; *Cook County v. Chicago Policlinic*, 233 Ill. 268, 84 N. E. 220.

Where the intent of the testator to create a charitable trust is once shown, courts of equity will construe the trust with the greatest liberality.

Atty. Gen. v. *Haberdashers' Co.* 1 Myl. & K. 428, 5 Sim. 478, 2 L. J. Ch. N. S. 33; *Mason v. Perry*, 22 R. I. 475, 48 Atl. 671; *Ingraham v. Ingraham*, 169 Ill. 450, 48 N. E. 561, 49 N. E. 320; 1 Story, Eq. Jur. 1165; 2 Perry, Tr. 630; *Sanderson v. White*, 18 Pick. 333, 29 Am. Dec. 591; *Doughten v. Vandever*, 5 Del. Ch. 51.

A hospital for sick and injured persons generally, without distinction as to rich or poor, and without profit, is necessarily char-

itable in the sense of conferring a public benefit.

*Jenkins v. Berry*, 119 Ky. 350, 83 S. W. 594; *Hennepin County v. Brotherhood of Gethsemane*, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595; *Sisters of Third Order v. Peoria County*, 231 Ill. 317, 83 N. E. 272; *Cook County v. Chicago Policlinic*, 233 Ill. 268, 84 N. E. 220; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L.R.A. 224, 33 Atl. 595; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Webber Hospital Assn. v. McKenzie*, 104 Me. 320, 71 Atl. 1032; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 35 L.R.A. 269, 45 Pac. 270.

ligious' drawn such a contrast or distinction as would show an intention to enable the trustees to apply the gift to purposes religious, but not charitable, or would deprive the word 'religious' of its prima facie charitable meaning."

In *Gordon v. Craigie* [1907] 1 Ch. 382, where the testatrix bequeathed a sum to the vicar and churchwardens for the time being of Kingdom, "to be applied by them in such manner as they shall, in their sole discretion, think fit," it was held that this was a good charitable legacy for the benefit of the parish of Kingdom for ecclesiastical purposes.

See also, in this connection, *French v. Lawrence*, *infra*, VIII. e; *Huger v. Protestant Episcopal Church*, *infra*, VIII. a.

In *Re Charlesworth*, 26 Times L. R. 214, 101 L. T. N. S. 908, where a testator by his will bequeathed to certain officers for the time being of a certain clerical society, certain property upon trust, to appropriate the dividends arising therefrom in payment of the expenses of the annual dinners which the society held, and which had hitherto been paid by members of the society out of their own pockets, the court said: "It seems to me that the result of relieving the members from the expense of the dinner must tend to increase the objects calculated to advance religion. I do not think I should be justified in holding this gift to be bad because some of the members were perfectly well able to pay for the dinner. I therefore hold that the bequest is a good charitable gift."

But in *Re Barnett*, 24 Times L. R. 788, it was held that a legacy to one of the London guilds "upon trust to give a livery dinner on each anniversary of my birthday, the 6th of May, and to invite to such livery dinner the churchwardens for the time being of St. Leonard, Foster lane, in the city of London," was not a good charitable gift.

#### Education and support of ministry.

In *Kramph's Estate*, 228 Pa. 455, 77 Atl. 814, where a testator made certain gifts to 37 L.R.A. (N.S.)

trustees, "In trust, for the purpose of endowing a university of the New Jerusalem, to be founded in the consolidated city of Philadelphia, for universal New Church education in these United States, and for the education of New Church ministers, who are to teach the doctrine of the New Jerusalem, as laid down in the writings of the Honorable Emanuel Swedenborg, said New Church University to be under the care and superintendence of a body of trustees rendered corporate by a perpetual charter legally obtained," the court directed that the property should be given to the Academy of the New Church, an incorporated institution, as satisfying the requirements of the testator, except that it was in the suburbs of Philadelphia, and not in the city, and this the court thought was within its power in the premises.

For other gifts for the education and support of the ministry, see *McDonald v. Shaw*, *infra*, VII. a; *Washburn College v. O'Hara*, *infra*, VIII. e.

#### Church property.

See *French v. Calkins*, *supra*, V.

#### Sunday schools.

In *Sprowl v. Blankenbaker*, — Ky. —, 127 S. W. 496, where a will gave certain property "to the Sunday school cause, under the control of the Methodist Episcopal Church, South, and the Missionary Baptists of Kentucky, each denomination to receive equally of said bequest, and to be deposited in some reliable bank, or loaned to responsible persons, all to be under the management of the Broadway Street Methodist and Broadway Street Baptist churches of Louisville, Jefferson county, Kentucky, and the annual interest to be applied, or appropriated to the subject specified," it was held that this was a good charitable trust, and that the two churches last named, together with a life beneficiary, had power of sale.

The item directing the trustees to care for the grave of Mr. Barnes, and pay \$25 per month to William A. Barnes for life, does not defeat the charitable trust.

Tiedeman, Real Prop. 3d ed. ¶¶ 200-203; Clarke v. Brookfield, 81 Mo. 503, 51 Am. Rep. 243; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; Piper v. Moulton, 72 Me. 155; Giles v. Boston Fatherless & Widows' Soc. 10 Allen, 355; Drury v. Natick, 10 Allen, 183; Nourse v. Merriam, 8 Cush. 11; Hornberger v. Hornberger, 12 Heisk. 635; Re Williams, L. R. 5 Ch. Div. 735, 47 L. J. Ch. N. S. 92; Fisk v. Atty. Gen. L. R. 4 Eq. 521, 15 Week. Rep. 1200; Dawson v. Small, L. R. 18 Eq. 114; Rev. Stat. 1899, § 5216.

#### Missions.

In Re Redish, 26 Times L. R. 42, where a will gave property upon trust, to convert and hold the same in trust for two persons named, or the survivor of them or other the editors of a certain missionary periodical, "to be applied by them or him for the furtherance of missions in Central Africa in such manner as the editors, in their uncontrolled discretion, may think fit, for the use of the brethren labouring there," it was held that this was a good charitable bequest.

See also, as to missions: Re Johnston, *infra*. VII. b; Guild v. Allen, *infra*, VIII. h; Jordan v. Universalist General Convention, *infra*, VII. d; Re Kenny, *infra*, VII. c.

—*cy pres* doctrine as to a gift to missions.

In Re Peabody, 154 Cal. 173, 97 Pac. 184, where a testatrix gave all her real estate "to my executors, to be transferred by them to the Woman's Occidental Board of Missions, . . . with the Executive Committee of the Woman's Presbyterian Missionary Society of the Los Angeles Presbytery as trustees and managers thereof. . . . This property to be used as a temporary resting place, not for invalids, . . . but for the weary Christian workers in limited circumstances from either the Home or Foreign field," and gave the income of all the residue of her property, together with that of the proceeds of any sales of real estate, to be used in aiding to meet the expenses of such house of rest, it was held that this was not within the inhibition of the California statute against trusts to convey, as it would be construed as intended that the executor should simply turn the property over to the beneficiary. And inasmuch as the statute restricting gifts to charity where there are legal heirs cut down the gift to one third of the California property, it was held that under the *cy pres* doctrine the court would be authorized to direct the trustees to sell the undivided one-third interest and use the proceeds in a manner indicated by the court to carry out the intent of the testatrix, although not precisely in the manner she may have contemplated. The court said: 37 L.R.A. (N.S.)

Kennish, J., delivered the opinion of the court:

This suit in equity was instituted in the circuit court of the city of St. Louis on the 18th day of August, 1909, by the appellants, as heirs of Robert A. Barnes, deceased, against Samuel M. Kennard, Samuel Cupples, and Murray Carleton, as trustees under the last will and testament of the said Robert A. Barnes. One of the said heirs, who did not join as plaintiff, was made a codefendant. By the provisions of the will of the said Robert A. Barnes certain bequests were made to said trustees for the purpose of erecting and maintaining a hospital for sick and injured persons, and the purpose of this suit was to have such bequests adjudged invalid, the trus-

"As this court said in *Hinckley's Estate*, 58 Cal. 512: 'We entertain no doubt that, in the general devolution upon the courts of this state of all judicial power, with respect to charities, is included the power *cy pres*, so far as the same may be employed in directing trustees named in a will or deed to carry into effect the general lawful and charitable intent, when the particular scheme is impracticable.'"

#### Masses.

In *Gilmore v. Lee*, 237 Ill. 402, 127 Am. St. Rep. 330, 86 N. E. 568, where a dying woman handed a priest of the Roman Catholic Church a certificate of deposit, and said it was to be used for masses for the repose of her soul, it was held that it was for a charity and in support of the form of worship to which the deceased belonged; and that if the priest accepted it for that purpose, he would be bound to perform the religious services to which it was to be applied, and, as a priest, would earn the money by so doing, and that the disposition of the certificate was valid.

So, in *Kavanaugh's Will*, 143 Wis. 90, 28 L.R.A. (N.S.) 470, 126 N. W. 672, where the will left the residuary estate for masses for the repose of the souls of the testator and certain specified relatives. "The masses will be said according to the direction of Thomas J. Fenlon and J. P. Watt, of Maple Grove, Wisconsin, and I hereby appoint them to direct where and when to say said masses," it was held that "a bequest for masses for testator and certain specified relatives being, under the doctrine of the Catholic Church, for the benefit of all mankind, is a valid public charity, and not subject to statutory provisions governing the creation of private charities;" and it was also held that the statute as to the distribution of land was not controlling, as the will effected an equitable conversion which was required in order to carry out this purpose.

And in *Re Eppig*, 63 Misc. 613, 118 N. Y. Supp. 683, where the will directed the executors to pay and expend a certain sum, "the same to be applied by them from time to



tees divested of all title thereto, and the title vested in the heirs of the said Robert A. Barnes, and for general relief. A demurrer to the petition was sustained, and the plaintiffs declining to plead further, a final judgment was entered against them, from which they appealed to this court.

The full text of the will and six codicils thereto, all of which are of unusual length, are set forth in the petition. By the provisions of the will it appears that property of great value was therein disposed of and many bequests were made to charities, relatives, and friends. This suit is concerned only with those provisions by which bequests are made for the erection and maintenance of a hospital for sick and injured persons and for the endowment thereof.

time in their discretion to the payment of the expense of Roman Catholic masses to be procured by them to be said for the repose of the souls of my deceased parents," the court said: "A bequest for the saying of masses for the repose of the dead is a gift for a religious use. . . . It is to be observed that the executors are not directed merely to pay these sums to an unnamed beneficiary. The direction is that the executors by such payment, and as an accompanying duty, shall procure the masses to be said. It is also required that the executors shall exercise their discretion as to the application of the sums bequeathed. There is no discretion as to whether or not these sums shall be used. The direction as to their use is absolute; but the duty is laid upon the executors to determine, from time to time, what portion of the fund shall be at any given time devoted to the masses, and over what period these disbursements shall spread. To see to it that the purposes of the payment shall be fulfilled and, as an incident thereto, to control the rate and progress of the payment, is an active and continuing responsibility which cannot be effectually discharged without possession of the gift. It seems, therefore, that there is a gift to the executors for a religious use upon a valid and effectual trust."

But in *Re Lennon*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870, 14 Ann. Cas. 1024, where a bequest was given to a bishop "to have the same amount of masses celebrated as soon as possible for my soul," it was held this bequest lacked every element of a bequest for charity or charitable use, it was not for the public nor a class, nor had it continuance and perpetuity; that it was not prohibited as a bequest for a superstitious use in California, and that it was not affected by the statute prohibiting bequests for charity in a will made within thirty days before the death of the testator, and restricting them in other wills, where there were legal heirs, to one third of the estate.

## 2. Educational and Literary purposes.

In *Hilliard v. Parker*, 76 N. J. Eq. 447, 74 Atl. 447, in sustaining the validity of a 37 L.R.A. (N.S.);

These provisions and the purposes thereof, together with the issues tendered thereon, are referred to and concisely stated in the following passages from plaintiffs' petition, namely:

"These plaintiffs further state that by items 18, 19, and 20 of said original will, item 3 of the first codicil thereto, items 7, 9, and 10 of the said third codicil thereto, item 2 of the said fourth codicil thereto, and items 2, 3, and 6 of the said fifth codicil thereto, said testator, Robert A. Barnes, deceased, willed, devised, and bequeathed to certain trustees therein named certain definite and specific real and personal property, together with all the rest, residue, and remainder of his estate, real or personal, and of whatever kind, nature, or de-

bequest of money, the net interest to be annually paid to the treasurer of a certain library, "to be expended in the purchase of books, and to be and remain always a fund for that purpose," the court said: "I think it manifest that the donee in this bequest referred to must be regarded as an association charitable, in a legal sense, so far as the rule against trusts in perpetuity is concerned. It is manifestly an association formed and conducted for the public good in the dissemination of learning, and in no sense for private gain or profit."

In *Godfrey v. Hutchins*, 28 R. I. 517, 68 Atl. 317, where a will provided: "To the treasurer of any one or more societies or organizations whose object is the improvement and education of the colored people of the South, (1) I give the sum of \$10,000 for the uses and purposes of said societies. but I leave it wholly to the judgment of my said trustees or trustee for the time being, as to the time when, how much of, and to what society or societies or organizations said sum of \$10,000 or any part thereof, shall be paid, having reference to the ability of my estate and the efficiency of any of said societies in the above object," the court said: "That gifts for the advancement of learning, science, and the useful arts, without any particular reference to the poor, are regarded as charities, is well settled. . . . The class is designated, viz.: the colored people of the South, and the fund is to be given to any one or more societies or organizations whose object is the improvement and education of said class. The societies and organizations are to be selected by the trustees or trustee for the time being. And whenever a discretion is given by the founder of a charity to trustees to select the beneficiaries out of a class, it is not necessary that they be designated by name, or specifically pointed out. . . . In our opinion, therefore, the gift is a perfectly valid one for charitable uses, and not void for indefiniteness or uncertainty. . . . The trustees have not the discretion not to pay said legacy or any part thereof, but, when the existence of efficient societies or organizations of the kind named in the will

scription, not otherwise specifically bequeathed or devised, all of which will more fully appear in said items as hereinabove fully and at large set forth, in trust forever, to said trustees and their successors in the trust therein and thereby attempted to be created, for the following uses and purposes, and none other, to wit:

"(1) To furnish a site for the purpose of erecting and maintaining thereon a hospital for sick and injured persons, without distinction of creed, under the auspices of the Methodist Episcopal Church, South, of the United States, or its successors, and under such rules and regulations as said trustees and their successors shall from time to time establish and maintain, to be

forever called and known as the 'Barnes Hospital.'

"(2) To erect and furnish the Barnes Hospital buildings upon the site above mentioned.

"(3) As an endowment for the use and benefit of said Barnes Hospital hereinbefore provided for, for the support and maintenance of said hospital.

"(4) To keep the lot of said testator, Robert A. Barnes, in Bellefontaine cemetery, and all improvements thereon, in the best repair and condition forever.

"(5) To pay to William A. Barnes, a cousin of the testator, the sum of \$25 per month during his lifetime.

"That plaintiffs are advised by counsel, and believe, that the said provisions con-

is established, must exercise the discretion, given them by the will, of selecting the beneficiary or beneficiaries from among them."

In *Chapman v. Newell*, 146 Iowa, 415, 125 N. W. 324, where a testator made a gift "to the permanent school fund of Louisa County, Iowa," and stated in his will "that there is no better way of remembering the present generation than to assist, so far as I can, in advancing the interest of the public schools of this county," the court held that this was a valid gift, that it was proper to speak of school moneys which were apportioned by the state among the various counties, and were in a sense permanent, as a permanent school fund, that the county had power by statute to receive the gift, and that in any event the court would not allow the trust to fail for want of a trustee.

For other trusts for educational purposes see *Green v. Fidelity Trust Co.* *infra*, VIII. b, 3; *Barker v. Petersburg*, *infra*, VIII. b, 3; *Maxcy v. Oshkosh*, *infra*, VII. d.

#### Education in art.

In *Mason v. Bloomington Library Asso.* 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603, the court said: "That the creation of a trust to establish for the benefit of the public an art studio or art gallery and studio for the advancement of education in art is, within the meaning of all the authorities, a charitable trust, we have no question." Compare *Re Ogden*, *supra*, VI. c.

#### Education in socialism.

In *Peth v. Spear*, 63 Wash. 291, 115 Pac. 164, where land was conveyed in trust for the benefit of the "membership now existing and hereafter to exist of the Brotherhood of the Co-operative Commonwealth," which was described as an "unincorporated association or body of persons acting together for the purpose of owning, acquiring, operating, conducting, and maintaining a communal industrial institution, and the education of the people in the principles of socialism," the court said in holding the trust valid: "Since the purpose of its donors

was to provide a place where the doctrines of socialism could be taught by example as well as by precept, the trust can be said to belong to that species of charitable trusts known as educational. As such it is among the objects enumerated as charitable by stat. 43 Eliz. chap. 4, and within practically all the definitions of a charitable use as announced by the authorities. . . . Nor is the trust rendered invalid by the fact that the beneficiaries of the trust are an indefinite number of persons or of an uncertain body or class. Indeed, these requisites are essential to a charitable trust."

#### *Cy près doctrine.*

In *Ely v. Atty. Gen.* 202 Mass. 545, 89 N. E. 106, where the testatrix provided in her will: "The residue of my estate, real and personal, I give, bequeath, and devise for the purpose of founding a Kindergarten Home for Deaf Children, to be located on the old estate owned by me,—to be founded strictly on the family system, the object being to prepare a limited number of young children to enter, under favorable circumstances, those institutions where the deaf are taught to speak by lip movements," and the whole of the estate was insufficient for the purpose intended, owing to a fire after the death of the testatrix, and the accumulation of property sufficiently for carrying out the intention would require an indefinite time, the court said, in enforcing the doctrine of *cy près*: "It seems to have been her purpose to provide for these children the advantages of a home of the kind referred to, and that this intention was paramount in her thought." And it was held that the charity should be administered by a certain home which was carried on for similar purposes to those intended by the testatrix, and in a manner to be approved by the court.

*Ely v. Atty. Gen.* *supra*, was approved in *Grimke v. Atty. Gen.* 206 Mass. 49, 91 N. E. 899, where the property was insufficient and the time of the accumulation would be indefinite, and the court invoked the *cy près* doctrine, there being a general intention expressed by the will for the education

tained in the said items last hereinabove specifically mentioned and referred to unlawfully suspended the absolute power of alienation of such portions of the estate as are herein embraced, and they therefore allege on information and belief that the said provisions are, and each of them is, illegal and invalid in law. That plaintiffs are advised by counsel, and believe, that all of said provisions of said will are indefinite and uncertain in their objects, purposes, and subjects, invalid and unauthorized by law, and that they therefore allege on information and belief that said provisions are, and each of them is, illegal and invalid in law."

Item 18 of the will, by which the testator

of young colored persons beyond the particular intention of founding a specific home for them.

### *3. Relief of the poor.*

In *Weir v. Crum-Brown* [1908] A. C. 162, where a will provided: "I direct my trustees to employ the whole residue of my said estate, means, and effects in instituting and carrying on a scheme for the relief of indigent bachelors and widowers of whatever religious denomination or belief they may be, who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches, whose lives have been characterized by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted by others for that purpose,"—it was held that the fact of indigency stamped the bequest as charitable and that it was not void or uncertain. It appeared that the intention of the testator was that the inmates should be residents or natives of Scotland.

In *Re Donald* [1909] 2 Ch. 410, where there was a gift "to the officer commanding the Northamptonshire Militia for the mess of that regiment, or for the poor of the regiment, £100," the court said: "Now, I think, on the authority of *Re Good* [1905] 2 Ch. 66, that that was a gift for charitable purposes within the statute of Elizabeth, and that it comes within the last clause of the preamble of that statute.—'The aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.'"

For other cases on the relief of the poor, see *Masonic Education & Charity Trust v. Boston*, *infra*, VIII. a; and the following cases, *infra*, VIII. e, *viz.*, *Hillard v. Parker*; *Re Nilson*; and *Hagen v. Sacrisson*.

### *4. Relief of sickness.*

In *Re Burnham*, 74 N. H. 492, 69 Atl. 720, a will gave the residue of an estate "for the establishment and maintenance of a

sought to create the public charity in controversy, is as follows:

"I will and devise to Richard M. Scruggs, Samuel M. Kennard, and Samuel Cupples, as trustees, and to their successors in this trust, as hereinafter provided for, either of the following described parcels of land, which they may select, situate in said city of St. Louis: first, a parcel of land in city block number 362, commencing at a point 50 feet east of North Twelfth street, and on the north line of Madison street, with a front running eastwardly from that point of 100 feet and extending with that width northwardly to the depth of 96 feet and 70 feet to Clinton alley, now called 'Clifton place;' second, a parcel of land in city block number 2366, having a front of 100

hospital to be located at said Manchester, and to be known as the Balch Hospital," to "be administered by five trustees, to be appointed by the judge of probate. . . . Said trustees may adopt rules and regulations for the management of the trust and constitute officers, committees, and agents in furtherance of the charitable objects of this institution. . . . So much of said rest and residue shall remain unexpended by my trustees after the establishment of the hospital as that the income thereof shall be amply sufficient to pay all taxes," and expenses of maintenance, repair, etc., "and said trustees are directed, as soon as practicable after they shall receive said remainder, to commence the establishment of said hospital, and to prosecute the work as rapidly as may be consistent with the best interest of the hospital." It was found that the fund constituting the residue amounted to \$170,000; and although there were three general hospitals in Manchester when the will was executed in 1901, that the scheme for building another general hospital there, endowed as provided in the will, was not impracticable. A decree was entered that the will created a valid charitable trust and the trustees were advised that the intent of the testatrix was to establish and maintain a general hospital, and that they should so execute the trust.

In *Bowden v. Brown*, 200 Mass. 269, 128 Am. St. Rep. 419, 86 N. E. 351, where a will provided that "the remainder shall . . . be given to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. I leave this in the hands" of certain persons named, and the town declined to accept the property, which was insufficient for the erection and maintenance of the building, it was held that, while this gift constituted a public charity, the testatrix evidently expected that the building would be erected and maintained by the town with the aid of her gift, and it not appearing that she included, or intended to include, any other charity than that specified, and it being impossible to do that which she had in mind, or to discover a

feet on the west line of Elliot avenue, and extending with that width westwardly along the north line of Montgomery street to the depth of 127 feet and 6 inches; to have and to hold, subject to the conditions and limitations hereinafter provided, to said trustees and their successors forever, in trust for the purpose of erecting and maintaining thereon a hospital for sick and injured persons, without distinction of creed, under the auspices of the Methodist Episcopal Church, South, of the United States or its successor, and under such rules and regulations as said trustees and their successors shall, from time to time, establish and maintain, to be forever called and known as the 'Barnes Hospital;' and I hereby will and direct that in case said trus-

tees shall deem neither of the said parcels of land last aforesaid described eligible for a site for said hospital, then and in that case my executors are hereby empowered and directed to sell at private sale, at a price not less than the sum fixed by said trustees, and convey said parcels of land, and pay the proceeds thereof to said trustees with which and from the fund for this purpose in item 18 hereof provided, they shall purchase and acquire other real estate in the central portion of said city of St. Louis, as a site for said hospital, which premises so acquired shall be held in trust by them and their successors forever, and used for the same purpose as the said parcel of land hereinbefore to them devised. This devise and bequest is made upon the

purpose of a similar character, the gift must fail.

For other cases of relief of sickness, see *BUCHANAN v. KENNARD*; *Webber Hospital Asso. v. McKenzie*, *infra*, VII. c; *Ege v. Hering*, *infra*, VIII. g.

In this connection the following English cases are of interest:

In *Re Unite*, 22 Times L. R. 242, 97 L. T. N. S. 292, where a testatrix by her will, made three years before her death, gave £20,000 "towards the rebuilding and equipment, to the satisfaction and under the direction of my executors, of" a certain hospital, "the enlargement of which has been recommended, and which charity I have long desired to benefit," and at the death of the testatrix the hospital was nearly totally rebuilt, but it was only partially plastered, and was neither painted, furnished, nor equipped, it was held that the gift was for a specified purpose, and not to the charity, and that if there was any surplus, that then the question as to what should be done with it must be argued in the presence of the attorney general;

—in *Gordon v. Craigie* [1907] 1 Ch. 382, 76 L. J. Ch. N. S. 240, 76 L. T. N. S. 357, 23 Times L. R. 256, it was held that a gift to the sick and poor fund of the parish church at Cheltenham was good, and ought to be paid to the official trustee of charitable funds, and the income paid to the rector until further order.

##### 5. *Matters of municipal, governmental, or public interest.*

A donation of land to trustees for the use and benefit of the inhabitants of a certain town is a good charitable use. *New Castle Common v. Megginson*, — Del. —, 77 Atl. 565.

So is a devise to a city, the income to be applied to the maintenance and improvement of courts and commons. *Burr v. Boston*, 208 Mass. 537, 34 L.R.A.(N.S.) 143, 95 N. E. 208.

In *Re Graves*, 242 Ill. 23, 24 L.R.A.(N.S.) 283, 134 Am. St. Rep. 302, 89 N. E. 672, 17 Ann. Cas. 137, where the testator gave 37 L.R.A.(N.S.)

\$30,000 to the park commissioners of the city for the erection of a drinking fountain or drinking basin for horses, and in connection therewith provided that a bronze statue of a horse of a certain name should be included, together with a certain inscription thereon, it was held that the court would not look to the motives of the donor as personal or selfish, but rather to the nature of the gift and the object which was to be attained by it; and that the gift was for a charitable purpose, and therefore not subject to the inheritance tax.

In *Staub's Succession*, 123 La. 119, 131 Am. St. Rep. 350, 48 So. 766, where a bequest was given to "the city insane asylum," and it appeared that at the time of the will the city was accustomed to take care of its insane, but later sent them to the state institution, as the law before and afterwards had required, the court said, in sustaining the gift: "A point is sought to be made of the circumstance that the city had permanent charge of the insane while the so-called City Insane Asylum existed, whereas since then she has had charge of them only temporarily, until she can transfer them to Jackson. But we take it to be plain that, the legacy being for the benefit of the insane in the care of the city, irrespective of individuals, it can make no difference whether the particular patients are to spend one day or their entire lives in the hospital, so long as the supply of them is constant and unfailling, which the evidence shows is the case."

In *Richardson v. Mullary*, 200 Mass. 247; 86 N. E. 319, where a bequest was "to be given to the life-saving station to be built and established in Marblehead or Nahant, not yet decided upon," and at the time of the death of the testatrix a life-saving station had been established, built at Nahant, the court said: "The charitable nature and object of the gift, and the fact that its benefits are to extend generally to all the members of the class or classes for whose benefit the life-saving station is established, make it a public charity." And the United States government having failed to accept the trust, it was held that it might

condition and limitation that said real estate or any part thereof, so selected or purchased, as aforesaid, shall never be mortgaged or otherwise encumbered by said trustees or their successors.

"In case of the death, resignation, or removal from said city of St. Louis, of any one of said trustees or of their successors in said trust, or of his failure to, or his becoming incapacitated to, act as such, from time to time, the bishop presiding at the St. Louis Conference of the said Methodist Episcopal Church, South, or its successor, next preceding such death, resignation, removal, failure, or becoming incapacitated, as aforesaid, shall appoint in writing a successor in said trust, who, by virtue of said appointment, shall be vested

with all the same rights, powers, and duties as if he had been one of the said original trustees herein named.

"It is expressly provided that said trustees and their successors, or any of them, shall not receive or be paid any salary, reward, or remuneration of any kind, for any work or labor done or services performed in or about their or his said office or position, for no one is fit for said position who would not act therein gratuitously. This provision is not deemed necessary as to the above named trustees, whom I know, but they may be important in regard to their successors.

"It is further expressly provided that said trustees and their successors, from time to time, shall annually, between the 1st and

be properly considered to have been within the intention of the testatrix that the gift was not only for the benefit of the officers and men of the life-saving station, but for the benefit of the saving of lives on the seashore, and that it could be administered under the doctrine of *cy pres*.

#### VII. Certainty as to trustees.

##### a. Generally.

Where a testatrix gave certain property, real and personal, to the pastor of a certain Roman Catholic parish, "to be used by the said pastor for the purpose of helping to establish a school in said parish for the education of Catholic boys, and for helping to educate young men of the parish for the priesthood," it was held that "the testatrix meant to constitute the pastors of the church in succession as the trustees under the will," and that the gift was a public charity, and not too indefinite. *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952.

See also in this connection *Korastrom v. Barnes*, supra, VI. a; *Re Burnham*, supra, VI. d, 4; *Chapman v. Newell*, supra, III. b.

##### b. Misnomer of trustee or beneficiary.

Where there is a misnomer, the decision must of course depend upon the facts of each particular case.

In *Gilchrist v. Corliss*, 155 Mich. 126, 130 Am. St. Rep. 568, 118 N. W. 938, it was held under the evidence that under the provision, "To women's work in foreign fields, and to women's work in home lands (not Tank Home) I give (\$5,000)," the legatees respectively entitled to take were two corporations respectively named "Women's Board of Missions of the Interior," and the "Woman's Home Missionary Union of the Congregational Churches of Michigan." In the same case it was also held that a gift to the Protestant missionary work among the poor colored people of the South was intended for the American Missionary Association.

In other cases it has been held:

—that by the "Woman's Health Protec-  
37 L.R.A. (N.S.)

tion Association of New York City" the testatrix intended the "Ladies' Health Protective Association of the City of New York," in *Wait v. Political Study Soc.* 68 Misc. 245. 123 N. Y. Supp. 637;

—that a legacy to "the trustees of the Presbyterian Home for Old Ladies, situated in Richmond, Virginia," there being no such corporation, was intended for the Richmond Home for Ladies, a corporation, in *Jordan v. Richmond Home*, 106 Va. 710, 56 S. E. 730;

—that a gift to "the Convent of the Sisters of Mercy at Fort Smith, known as Saint Anne's Convent," "for the purpose of helping to educate poor Catholic children," was good charitable a gift to "the Sisters of Mercy of the Female Academy of Fort Smith," a corporation, in *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952.

In *Re Johnston*, 141 Iowa, 109, 119 N. W. 275, where the testatrix in the third clause of her will made a bequest to the First Presbyterian Church of Toledo, Iowa, of which she was a member, and the fourth clause provided: "I further give, devise, and bequeath to home and foreign missions \$200 in money, to be divided equally, share and share alike," it was admitted that said church is embraced in the Presbyterian Church of the United States, which maintains a board of foreign missions and a board of home missions, both being incorporated, for the advancement of Christianity at home and abroad, and to which the church at Toledo made contributions at stated intervals to enable them to carry on their charitable enterprises, and it was held that the bequest was valid to the boards.

See also *Guild v. Allen*, infra, VIII. b.

But in *Re Parkes*, 25 Times L. R. 523, where the testator gave his entire estate upon charity, to be divided between certain charities, one of which was "The Protestant Church Bible Society," and it appeared that there was no such society, although there were Bible societies claimant, it was held that it was plain that the testator was thinking not of a particular society, but of certain objects; and that the legacy

15th days of January of each year, make and deliver to the said bishop, presiding at the said conference aforesaid, next preceding said 1st day of January, and publish daily for one week in a prominent newspaper, published in said city, their report in writing, showing the state and condition of said hospital and its finances during the next last preceding year, the number of patients received and discharged, the income received and from what sources, the expenditures made and for what purposes, and the amount of the then-present assets in their hands, and in what they consist, and how invested, and where their funds are kept. And none of the moneys or funds to them at any time belonging shall be deposited or kept in any bank whose capital stock

paid in, exclusive of surplus, is less than \$500,000."

In other parts of the will relating to and making bequests for the proposed hospital language is employed by the testator which discloses his deep solicitude and concern for the accomplishment in due time of that charitable purpose, but we do not deem it necessary to a proper understanding of the issues presented that these several provisions should be set forth in this statement.

Eleven separate points are stated in appellants' brief and a large number of authorities cited in support of each. In the printed argument the propositions relied upon are set forth in the following compact form, namely:

"(1) That the will of Robert A. Barnes

failing, there must be a scheme and an application of the money *cy près*.

#### *c. Absence or incapacity.*

The court will not allow a charitable trust to fail for want of a trustee. *Re Crawford*, 148 Iowa, 60, 126 N. W. 774.

In *Hagen v. Sacriston*, 19 N. D. 160, 26 L.R.A. (N.S.) 724, 123 N. W. 518, the court said: "Charitable trusts do not fail for want of trustees. The legal estate, in such a case, is regarded in abeyance, or as vested in the heirs or executors of the donor for the use of the beneficiaries, or the court will appoint a trustee to carry out the charitable purposes of the testator. 5 Am. & Eng. Enc. Law, 920, and vol. 1, Supplement thereto, 959, and cases cited. See generally upon the subject of charitable trusts, the exhaustive note in 14 L.R.A. (N. S.) 155."

In *Re Kenny*, 97 L. T. N. S. 130, where a will directed the payment of money to a certain person, "to be paid and applied by him to or for such missionary object or objects at home, abroad, or in the colonies, as he shall, in his absolute discretion, select," and the legatee lived for a number of years after the testatrix, but did not make any selection of the beneficiaries for the money, his personal representatives were permitted to carry out the purpose and to administer the fund.

In *Webber Hospital Asso. v. McKenzie*, 104 Me. 320, 71 Atl. 1032, where a will provided: "The balance of my estate and property, real and personal, and all that shall accrue to said estate, not otherwise mentioned, to constitute a fund which, when it shall have amounted to \$75,000, the income from which to be used for the maintenance of a free hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment. If a hospital shall not have been built when the above hospital fund shall have amounted to \$75,000, \$25,000 of the principal may be used for building one, provided a sufficient sum is guaranteed for its maintenance," it was held that this created a valid trust 37 L.R.A. (N.S.)

within the scope of a public charity, and that the court could appoint a trustee.

But in *Ingraham v. Sutherland*, 89 Ark. 596, 117 S. W. 748, where the will provided that at the death of the testator's wife and son "what of my estate is left, if any, shall be appropriated to building a house of worship belonging to the Methodist Episcopal Church (South) and a Masonic Hall. My desire is that the church and hall should be built together, either on my premises or somewhere near, as may be agreed upon by the neighborhood. But if the church and hall shall be built separately, then the amount of my estate shall be equally divided between the two interests," the court said: "The part of the estate of the testator intended to be appropriated to the building of a church and Masonic Hall was not bequeathed or devised to anyone. The beneficiaries for whom the appropriation for a Masonic Hall was intended were not named. No description of the hall to be built is given; and no one was appointed or authorized to be appointed to direct how and according to what plans it shall be built, or to accept it when built. The devise for the hall is too vague, indefinite, and uncertain to be capable of enforcement, and is void."

See also *Robbins v. Boulder County*, *infra*, VIII. e; *Chapman v. Newell*, *supra*, VI. d, 2; *Green v. Fidelity Trust Co.* *infra*, VIII. b, 3; *French v. Lawrence*, *infra*, VIII. e.

#### *d. Corporations as trustees.*

In *Jordan v. Universalist General Convention*, 107 Va. 70, 57 S. E. 652, where the remainder in certain real estate was given to "the trustees of the Universalist General Convention, and by them to be sold and the money applied to mission work in the United States of America," and it appeared that said general convention was a New York corporation, it was held that the gift was valid and the corporation might take it.

In *Kasey v. Fidelity Trust Co.* 131 Ky. 609, 115 S. W. 739, a gift to the Fidelity Trust & Safety Vault Company, the income

under consideration creates a trust in perpetuity, such as can be upheld only in the case of a legal and valid public charity.

"(2) That said will is so lacking in designation of specific beneficiaries, and is so indefinite in its purposes and objects, that it cannot be upheld as a private trust, and is void, unless it is a legal and valid public charity.

"(3) That said trust as created by said will is not a legal and valid public charity."

The correctness of the first two of the foregoing propositions is conceded by respondents, and the sole remaining question is the third, which is more fully stated elsewhere in appellants' brief, as follows: "The trust created by the will, so far as it relates to the founding of the hospital, is

to be paid to the American Bible Society, was upheld as a good charitable trust.

In *Maxcy v. Oshkosh*, 144 Wis. 238, 31 L.R.A.(N.S.) 787, 128 N. W. 899, 1136, it was held that a public charitable trust was created by a will devising property to trustees, with directions to erect a memorial manual training school, to be perpetually maintained, and after the building is erected, to turn the property over to a municipal corporation, the unexpended balance of the fund to be used for the maintenance of the school, in connection with tuition fees, with no provision for reverter in case of diversion of the property. In the same case it was held that a municipal corporation may accept and perpetually administer a trust, where the donation is made to aid some public purpose, charitable in its nature, which it is the legal duty of the municipality to support and provide for. And it was further held that where the gift was made conditional on other contributions for the same purpose, the city, as part of its general system of education, could make such contributions, and that the provision that "a tuition fee shall be charged which, in the judgment of the city of Oshkosh or trustees appointed by said city of Oshkosh, shall be sufficient, together with the income of the aforesaid fund, to perpetually properly maintain said school," should be construed to mean that only those persons from whom a tuition fee could lawfully be exacted should pay it.

See also *Barker v. Petersburg*, *infra*, VIII. b, 3.

### VIII. Certainty as to beneficiaries.

#### a. Generally.

In *Masonic Education & Charity Trust v. Boston*, 201 Mass. 320, 87 N. E. 602, where the question was as to whether certain property was for a public charity, and therefore exempt from taxation, the court said: "This bequest is made expressly for the benefit of indigent and needy Masons within a designated territory, by making provision for their relief and com-

not a legal and valid public charity, and is therefore void."

Although the first two of the foregoing propositions are not controverted, it may be said with reference to them that the testator evidently sought and intended to create a public charity by the devises and bequests of item 18 of the will. That purpose plainly appears from these two provisions of the bequest: (1) The objects of the charity are indefinite, vague, and uncertain. (2) The grant to the trustees is made in perpetuity. Both of these provisions are recognized as valid—the first as essential—in a public charity, while either of them would render invalid a devise or bequest intended as a private trust. Therefore it is apparent that this bequest cannot

fortable support at a home to be erected when the fund with accumulations should be sufficient, and which should bear the testator's name. The object to be accomplished being purely charitable, and the number to be benefited indefinite, even if the gift is limited to a class, these features are sufficient in law to constitute the gift a public charity."

See also *Korsstrom v. Barnes*, *supra*, VI. a; *Wilcox v. Atty. Gen.* *supra*, VI. b.

#### b. Particular applications of English rule.

##### 1. Religion.

In *Huger v. Protestant Episcopal Church*, — Ga. —, 73 S. E. 385, where a landowner executed a deed to the Protestant Episcopal Church in the Diocese of Georgia, described as a corporation, "in trust, nevertheless, for the use and benefit of the religious congregation in the county and state first mentioned, called St. John's Protestant Episcopal Church, its successors and assigns," there was evidence tending to show that there was at that place an existing congregation known as St. John's Church, or St. John's Mission, though it was never formally organized as St. John's Church, and it was held, that the trust so created was not void for want of a beneficiary, as even if there was no such church in actual existence when the deed was executed, but it was only in contemplation, this would not of itself render the trust void; and that under a deed of the character above set forth, it could not be declared that the trust therein created had failed or become impossible of accomplishment, so as to cause a reversion to the founder or her heirs, although there had been no active or organized congregation known as St. John's Church for some fourteen or fifteen years before the commencement of litigation.

See also *Re Peabody*, *supra*, VI. d, 1; *McDonald v. Shaw*, *supra*, VII. a; *Brice v. All Saints Memorial Chapel*, *infra*, VIII. l.

be upheld as a private trust, and that it must be upheld, if at all, as a public charity.

We are now to consider whether the bequest in item 18 of the will creates a valid public charity. In the determination of this question we are to deal with the subject in its legal sense; that is, a public charity recognized as such by the law, and which may be enforced and the bequests therefor administered in accordance with the purpose and intention of the founder of the charity, under the jurisdiction and guidance of the equity powers of the courts. Public charities for the temporary and immediate relief from the consequences of public calamity or visitation, though of frequent occurrence and most commendable in

those engaged therein, aid us but little in determining what is a public charity in the sense involved in this inquiry. Neither can we look for light from any legislative act or declaration of the lawmaking body of this state, notwithstanding the fact that public charities, in the legal sense, are well recognized by our laws and many at the present time are in force and contribute in no small degree to the material well-being of our people. The question must be decided by resort to the common law of England, as built up and construed by the courts, and which by statute has been made a part of the law of this state.

Trusts for charitable uses or public charities, as known at the present time, are of ancient origin, and have long been recog-

## 2. Relief of poor.

In *Klumpert v. Vrieland*, 142 Iowa, 434, 121 N. W. 34, where a bequest "to the poor of Voorst, Gelderland, Netherlands," was sustained, the court said: "The answer averred, and it is to be taken as true on demurrer, that Voorst is a municipal corporation of the Netherlands, and by the poor of that place are meant all who are supported by its institutions of charity; and under the laws there such a bequest is to be distributed among such institutions, according to the number of persons supported by each. Though the bequest is to be construed according to the laws of this state, it is to be executed in a foreign country, and the testator, in directing that his bounty be bestowed on 'the poor of Voorst,' may well be assumed to have accorded to this expression the meaning it has in that place as identifying the beneficiaries intended."

See also *Re Nilson*, *infra*, VIII. e.

## 3. Education.

A gift by the will of a resident of Kentucky to a lodge of Masons to erect and maintain in or near the corporate limits of a certain city of Indiana, a building, such as the income of the gift, accumulated for a certain time, would suffice "to erect and conveniently maintain under its perpetual supervision, direction, and control, and shall maintain forever the same as an institution for the nurture, support, and education of the poor [white] infant orphans under the age of seventeen years of the Free Masons of the state of Indiana," creates a good public charity. *Green v. Fidelity Trust Co.* 134 Ky. 311, 120 S. W. 283, 20 Ann. Cas. 861, where the trustee nominated by the will not having accepted the trust, the will further provided that the court might appoint a trustee, which was done.

In *Barker v. Petersburg*, 41 Ind. App. 447, 82 N. E. 996, where a testatrix gave the residue of her estate to a town "for the erection of a public school building in said town," it was held that she could have had 37 L.R.A. (N.S.)

in mind only the children entitled under the law to the benefit of public schools of the town, and that these were not only ascertainable, but ascertainable by reference to rules prescribed by the legislature; that the will was not void for indefiniteness, and that the town had power to take as trustee.

Where the testator directed that his trustees "pay and apply the income of the trust funds exclusively for the maintenance, support, education, or otherwise for the benefit of blind persons resident in the city of Newcastle or the county borough of Gateshead, and only to such blind persons as are hereinafter referred to,—that is to say, for the benefit of blind persons only who, in the opinion of my trustees, intend to be or are likely to be honest, steady, industrious,—my intention being that the payment or application of the said income shall not take away or weaken the self-respect of the blind persons from time to time deriving benefit therefrom, but shall tend to make the same blind persons fit for work and capable of earning an independent living,"—it was held that this was a good charitable gift. *Re Elliott*, 102 L. T. N. S. 528.

See also *Ely v. Atty. Gen.* *supra*, VI. d, 2; *Grimke v. Atty. Gen.* *supra*, VI. d, 2; *Godfrey v. Hutchins*, *supra*, VI. d, 2; *Hunt v. Edgerton*, *infra*, VIII. e.

## 4. Other matters.

See *Richardson v. Mullery*, *supra*, VI. d, 5; and as to relief in sickness, see *BUCHANAN v. KENNARD*.

### c. Where English rule repudiated.

In *Arnett v. Fairmont Trust Co.* — W. Va. —, 73 S. E. 930, it was held that bequests, one of \$40,000, to trustees named, "to be placed and used to the very best of said parties' knowledge in helping the poor those who are deserving, in lifting young men up and helping the work along in putting down intoxicants drinks and saving souls. Let this money be used in the way God may direct for His cause;" the other



nized as a part of the common law. In England, courts of chancery exercised jurisdiction over them during the reign of Queen Elizabeth, in which, as appears from the records of such courts, many cases were brought for the purpose of enforcing compliance with the provisions of the trust in question in order that the bequest might be administered in accordance with the intention of the founder of the charity. 2 Perry, Trusts & Trustees, 6th ed. 604.

In the forty-third year of the reign of that sovereign, and after the jurisdiction of courts of equity to enforce such trusts had become well established, what is known and referred to as the "statute of charitable uses," or Stat. 43 Eliz. chap. 4, was enacted by Parliament, and that act has had

a most important bearing upon the subject of public charities from that date until the present time. That statute, together with the common law of England upon the same subject, was made a part of the law of this state, and with the decisions of this court now constitute the law upon public charities by which we must be governed in the determination of this case. In the preamble of Stat. 43 Eliz. chap. 4, a number of classes of public charities are set forth as then existing and to which the act applied. As appellants contend that the bequest in controversy in this case cannot be upheld as a public charity unless it can be shown to fall within some one or more of the classes thus enumerated, we shall set

of "\$10,000 to be placed in the Baptist Church to be used for Lord's work in the way he may direct," are void for uncertainty.

In *Stoepel v. Satterthwaite*, 162 Mich. 457, 127 N. W. 673, where a will stated: "Having been at the Sanitarium many times, and knowing personally the amount of charity work done in connection with his business, and feeling the importance of this work, I hereby give and bequeath to William H. Jones the sum of two thousand (\$2,000) or four shares of Calumet & Hecla copper stock, to be used as he sees best for carrying on the work of relieving suffering," it was held that this was not a personal gift to Dr. Jones, and that it must fail for indefiniteness, and uncertainty of the beneficiary.

#### ***A. Partial return to English rule in New York.***

In New York, as shown in the note to *Hadley v. Forsee*, 14 L.R.A.(N.S.) 49, there has been by statute a partial return to the English rule.

In *Fralick v. Lyford*, 107 App. Div. 543, 95 N. Y. Supp. 433, affirmed in 187 N. Y. 524, 79 N. E. 1105, where a will gave \$5,000 to "the Progressive Spiritual Society of Waverly, New York, to be used by the said society in such manner as it may deem most expedient for the development and advancement of spiritualism at Freeville, Tompkins county, New York," it was held that as the beneficiary named was not incorporated, it could not take the legacy; that the bequest was a direct bequest, and one not in trust; that the statute of 1893 did not apply except where the gift was in trust, and probably did not apply where the trustee was incapable of taking, and that the legacy was void.

So, in *Wait v. Political Study Soc.* 68 Misc. 245, 123 N. Y. Supp. 637, where the will gave certain bonds to the executor in trust, the proceeds from the principal and interest derived from the said bonds to be distributed in part to the Society of Political Study of New York City, which was §7 L.R.A.(N.S.)

not incorporated at the death of the testatrix, but was incorporated afterwards and before the distribution, it was held that this could not enable it to take the bequest, and that the act of 1893 did not so enable it. It was also held that the statute of 1893 would not sustain a legacy which was direct to an unincorporated institution, and not in trust, following *Fralick v. Lyford*.

So, in *Re Compton*, 72 Misc. 289, 131 N. Y. Supp. 183, it was held that a direct gift to an unincorporated association could not be sustained for charitable purposes.

In *Catt v. Catt*, 118 App. Div. 742, 103 N. Y. Supp. 740, where the testator disposed of part of his property, real and personal, as follows: "To the Iowa State College of Agriculture and Mechanic Arts, to be used to found as many scholarships of one hundred (\$100) dollars as the income of the same shall provide," the fund to be known as the "Geo. W. Catt Scholarship Fund," and the "scholarships shall be given to the most needy students in the sophomore year," etc., the Iowa State College not being a corporation or association, nor having any legal entity at all, being merely an institution conducted by the state, it was held that it could not take the gift, and that the state of Iowa could not take a gift which was partly real estate in the state of New York, upon a trust of this kind, the will containing no equitable conversion, and that the statute of 1893 did not affect the matter.

In *Tavshanjian v. Abbott*, 59 Misc. 642, 112 N. Y. Supp. 583, modified as to costs in 130 App. Div. 863, 115 N. Y. Supp. 938, and so affirmed in 200 N. Y. 374, 93 N. E. 978, where a will directed the executors promptly to cause the incorporation of a society under the laws of the state of New York, to be managed by five trustees, to be named by the executors, and that immediately after the incorporation of said society, the executors should pay over to the trustees thereof the sum of \$5,000, "to be under the complete control of such trustees, and is to be loaned in sums of \$500 or less at a time, to any honest and deserving Armenian, to help him in his business,

out the title and preamble of that act. They are as follows:

An Act to Redress the Misemployment of Lands, Goods, and Stocks of Money Heretofore Given to Certain Charitable Uses.

Whereas Lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money and Stocks of Money, have been heretofore given, limited, appointed, and assigned, as well by the Queen's most excellent Majesty, and her most noble Progenitors, as by sundry other well disposed Persons; some for Relief of aged, impotent, and poor People, some for maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, free Schools, and Scholars in Universities, some for Re-

pair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks, and Highways, some for Education and Preferment of Orphans, some for or towards Relief, Stock, or Maintenance for Houses of Correction, some for Marriages of poor Maids, some for Supportation, Aid, and Help of young Tradesmen, Handicraftsmen, and Persons decayed, and others for Relief or Redemption of Prisoners or Captives, and for Aid or Ease of any poor Inhabitants concerning Payments of Fifteens, setting out of soldiers, and other Taxes; which Lands, Tenements, Rents, Annuities, Profits, Hereditaments, Goods, Chattels, Money and Stocks of Money, nevertheless have not been employed according to the charitable Intent of the givers and Founders thereof, by reason of

the loan to be repaid, with interest, and to be made only on business principles, and upon such security as said trustees shall deem advisable," the court said: "This provision contemplates a profitable business enterprise to be incorporated without provision for the issue of stock, and consequently a kind of corporation not capable of being created under the existing laws of the state of New York. Such a corporation might conceivably be created by special act; but since the trust must meanwhile be necessarily uncertain, the ownership and power of alienation over the fund would be suspended otherwise than by the statutory lives, and consequently this bequest is in violation of the statute." The court held further that the statute of 1893 could not help the case, as this was a business enterprise, and not a charitable use.

In *Re Shattuck*, 193 N. Y. 446, 86 N. E. 455, reversing 118 App. Div. 888, 103 N. Y. Supp. 520, it was held that the following clause in a will was invalid, owing to the indefiniteness and uncertainty of the beneficiaries: "All the rest, residue, and remainder of my real and personal property I give, devise, and bequeath to my executor hereinafter named, in trust, however, the rents, profits, and income thereof to be expended by him annually, and to be paid over to religious, educational, or eleemosynary institutions as in his judgment shall seem advisable, not more than \$500, however, to be paid to any one such institution in any one year." The court said: "It is manifest that it is necessary for a testator to define his purpose and intention in making a trust sufficiently so that the court, at the instance of the attorney general, representing the beneficiaries, can by order direct in carrying out the trust duty. . . . The act of 1893 doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain, but a trust may be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible, for the courts to administer. We make these suggestions for the express purpose of calling attention to the fact that

there must be some limitation upon the power of a testator to make a valid trust, if he leaves his objects and purposes undefined and the beneficiaries indefinite and uncertain. . . . In this will the testatrix, without defining the use to which the income of the trust fund is to be applied, directs generally that it be paid over to such particular ones of certain institutions as, in the judgment of the trustee, seems advisable. The power of the court to control the trustee is bounded by the directions of the testatrix. It cannot add to or take from the terms of this will, properly construed, any more than it could if the testatrix had specified by name the particular institutions entitled to the income of the trust fund, and she had included among them one or more manufacturing or transportation corporations. The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same shall be held invalid."

And in *Re Compton*, supra, where the will provided: "I desire that the sum of \$1,800 (eighteen hundred dollars), invested in the Lord's work in care of Miss S. A. Lindenberger (of which I receive the income during my lifetime), shall not be withdrawn from said work at my decease, but shall wholly remain in that work;" the court, in holding that this gift could not be sustained as a charitable use, referring to the statute, said: "The act doubtless saves a trust from being invalid because the beneficiaries are indefinite and uncertain; but a trust may be so indefinite and uncertain in its objects and purposes, as distinguished from its beneficiaries, as to be impracticable, if not impossible, for the courts to administer."

So, in *Re Seymour*, 67 Misc. 347, 124 N. Y. Supp. 637, where the testatrix directed that certain property should be turned over to a certain individual, stating: "It is my desire that if I should be taken away that the said Schuyler C. Pew have this property, to use as he may desire in the Master's work," the court said: "The provisions of the will are ambiguous, their mean-

Frauds, Breaches of Trust, and Negligence in those that should pay, deliver, and employ the same: (2) For Redress and Remedy whereof, Be it enacted by Authority of this present Parliament. . . .

Referring to that statute as a part of the law of this state, appellants maintain the following: "So it may be considered as settled that the statute of charitable uses is in force in Missouri. And the question then arises whether the trust created by this will is a charity under that statute. In every state where this statute is considered in force, courts look to this statute for the purpose of ascertaining what uses are charitable and what are not." There is no doubt as to the correctness of appellants'

proposition that the statute of charities uses is in force in this state, but it is equally true that the common law of England upon the subject of such uses, as it existed at the time of and before the enactment of that statute, is also in force in this state. Rev. Stat. 1909, § 8047; *Chambers v. St. Louis*, 29 Mo. 543; *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346; 2 Perry, *Trusts & Trustees*, 6th ed. 694.

In the case of *Chambers v. St. Louis*, supra, this court, speaking through Judge Scott, said: "Of late years the subject of charities has undergone a great deal of investigation, both in England and the United States; and the result of that investigation has strengthened the opinion

ing obscure. In my opinion the provisions must be construed as an ineffectual attempt to create a trust; ineffectual because her objects and purposes are undefined and the beneficiaries indefinite and uncertain."

But in *Re Robinson*, 203 N. Y. 380, 96 N. E. 925, post, 1023, the court sustained a provision that the executor should pay over the residue to certain named trustees, who were authorized to add five to their number, and to disburse the principal or interest or both, in their discretion: "To provide shelter, necessaries of life, education, general or specific, and such other financial aid as may seem to them fitting and proper, to such persons as they shall select as being in need of the same. Preference is to be given to persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian, or Episcopal, and who are not addicted to the use of intoxicants or tobacco, nor to attendance at theatrical entertainments." The court said: "The personal property law, so far as necessary for the present discussion, is as follows: 'No gift, grant, or bequest to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. It is doubtless true that the paragraph of the will by which the trust is attempted to be created is susceptible of more than one construction; but a construction which is fairly within the rules of law, and that sustains the trust, and devotes the fund included therein to purposes permitted by law and to the good of humanity, should be preferred.'"

So, in *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149, affirmed in 201 N. Y. 546, 95 N. E. 1133, where a will provided: "The sum remaining I desire my executors to divide the surplus among such American charities they may think well of, and I would like these sums to be given to any

society that assist poor needlewomen (seamstresses) whose toil is so poorly required. If no such organization exists, the money to be divided for the benefit of incapacitated sailors and their families," it was held that the testator intended a trust, and that it was valid under the statute of 1893. The court said: "I see no difficulty in the way of upholding this provision as a trust for charitable uses, the object of it being the assistance of poor needlewomen. That purpose may be accomplished through the medium of any incorporated society having that for its object. The purpose is sufficiently indicated to enable the court to control the action of the trustees, and it is made the duty of the attorney general to see that the trust is properly administered. This will was evidently drawn by the testator himself. His purpose is reasonably plain, and I think that it should be carried out, if any effect whatever is to be given to the statute in question. It was improper to appoint the attorney general as trustee. The statute contemplates that he shall act in another capacity. The judgment should be modified by striking out the provision appointing the attorney general as trustee."

In *Re Deming*, 112 N. Y. Supp. 170, where a legacy was given "to the Genesee Conference Permanent Fund Association, to be used by them for the relief of aged ministers of the Methodist Episcopal Church, \$200," and it appeared that the corporation named had been dissolved before the death of the testatrix, it was held that the money should be paid into court under that statute of 1893, to be administered by it according to the provisions in the will.

In *Starr v. Selleck*, 145 App. Div. 869, 130 N. Y. Supp. 693, where the testator gave certain property to trustees "to be used towards the purpose of maintaining a clubhouse or clubrooms for the social resort of young men and boys upon the west side of the city of New York, borough of Manhattan, or to the purposes of similar work, social or educational, for such young men or boys, as individuals," it was held that this trust was properly sustainable

that the law of charities did not derive its existence from the statute of 43 Elizabeth, and that there was an inherent jurisdiction in the court of chancery over the subject of charities before the enactment of that statute. The opinion of the Supreme Court of the United States in the case of the Philadelphia Baptist Association, in which a contrary doctrine was intimated, has not given satisfaction; and in subsequent cases occurring in the state courts it has not been followed. Judge Story, speaking of that case in the subsequent one of *Vidal v. Philadelphia*, 2 How. 196, 11 L. ed. 233, says: "Very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain

a curious and very interesting collection of the chancery records in the reign of Queen Elizabeth and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for indefinite and general charities as well as for specific charities, were familiarly known to, acted upon, and enforced in the court of chancery." Whatsoever doubt, therefore, might be properly entertained on the subject when the case of the Philadelphia Baptist Asso. v. Hart, 4

under the statute of 1893, but it was also held, however, in that case, that whether it was or not a good trust under that statute, the attacking party was estopped from contesting it.

#### *e. Selection of beneficiaries by trustees.*

In *French v. Calkins*, 252 Ill. 243, 96 N. E. 877, where a will gave property to trustees and directed that after a certain annuity and other purposes "the trustees shall pay over the money or securities to some hospital offering care and treatment for tubercular patients, or such a corporation or society conducting such a hospital as the trustees may select, and in making such selection the trustees are to consult with and be largely guided by the homeopathic medical board of the city of Chicago as to the institution most deserving of the bequest," it was held that this was a valid charitable gift, that it was not void for uncertainty, and that the testatrix could not have contemplated that the hospital selected should be one conducted for profit.

In *Re Nilson*, 81 Neb. 809, 116 N. W. 971, where the will of a resident of Nebraska contained bequests to two churches in different places in Norway, the bequest in one case to be invested, the principal to remain inviolate, "and the interest shall be paid annually on the 1st day of December, and be distributed on the following Christmas to worthy and needy servant girls and the widows and orphans of deceased sailors and fishermen who are not a public charge," the other bequest being in the same language, except that the widows and orphans were to be "of deceased peasants or under-tenants who strive and use their best efforts to maintain themselves and families so as not to depend on charity, but who are, from force of circumstances, unable to do so;" and appointed in each case the pastor, the president of the county commissioners, and the county treasurer of the respective localities, and their successors in office, as trustees to carry out the provisions of the bequest, it was held that the trust was a  
37 L.R.A. (N.S.)

valid, charitable trust, sufficiently definite as to the trustees and the class of beneficiaries, and as to the selection of the individuals who were to receive the charity, and that the trust was in all respects valid and enforceable. The beneficiaries were held to be clearly limited to persons of the classes named, living in Norway.

Where the testator provided after the death of his wife, whom he appointed executrix, "if any property is left after paying funeral expenses and liabilities, I desire the same to be divided into four equal parts . . . one part to the feeble Congregational churches of New Hampshire," it was held that the testator knew that his trust must be administered under such person as the court might appoint to carry out his will after the death of his wife, and that it would be necessary for some person to make a selection among the churches as to which ones were feeble, and the administrator was directed to divide the fund into four equal parts, and to pay over and distribute one of them among the feeble Congregational churches in New Hampshire. *French v. Lawrence*, 76 N. H. 234, 81 Atl. 705.

In *Hilliard v. Parker*, 76 N. J. Eq. 447, 74 Atl. 447, it was held that a provision that the net interest arising from a certain fund should "be annually expended by my executor in the purchase of fuel for the most needy women of the borough of Woodstown, to be selected by my surviving executor as he shall judge of their needs; provided the same shall not extend to women living with their husbands, and shall be a perpetual fund forever," was a good charitable trust.

Where the will appointed the trustee and stated: "It is my will that the yearly interest arising from said fund be applied by my trustee to the education of colored children, by which I mean, in whole or in part of negro blood," and authorized the trustee to combine the money of the testatrix with other funds for similar purposes, and expressed a preference that in such case, a manual labor school after the plan of one then in existence should be established and supported, the court, in concluding that the bequest was a valid one and that the trus-

Wheat, 1, 4 L. ed. 499, was before the court (1819), these doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded." And in the case of *Missouri Historical Soc. v. Academy of Science*, supra, this court, discoursing upon the subject of what is a public charity under the law of this state, and the effect of the statute of Elizabeth upon the subsequent jurisdiction of courts of equity over such charities, said: "Any gift not inconsistent with existing laws, which is promotive of science or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a charity within the meaning of the authorities cited; and

it is none the less a charity because not so denominated in the instrument which evidences the gift. And the validity of such charitable gifts is not at all dependent on Stat. 43 Eliz. chap. 4, nor does the jurisdiction of courts of equity in such cases depend on that statute. The contrary view was at one time entertained by the Supreme Court of the United States (*Philadelphia Baptist Asso. v. Hart*, supra), but that idea was reversed and thoroughly exploded in the *Girard Will Case*, 2 How. 127, 11 L. ed. 205, which has since been followed."

These cases are cited, and many of the same import could be added, to show that the purpose of the statute of Elizabeth was not constructive or definitive as to the law of charitable uses, but was intended solely

tee had power to select the individual beneficiaries of the class named, said: "The great weight of American authorities on this are to the effect (1) that the individual beneficiaries of a charitable trust must necessarily be vague and uncertain, and it is sufficient if a class is designated from whom the trustee can select the same. (2) That a trustee clothed with the power of administering a trust fund for such public charity has, without special delegation thereof, incidental authority to select from the classes named the individual beneficiaries thereof." *Hunt v. Edgerton*, 9 Ohio C. C. N. S. 353, 29 Ohio C. C. 377.

In *Washburn College v. O'Hara*, 75 Kan. 700, 90 Pac. 234, where the testator bequeathed all of the remainder of his estate, in trust, to the trustees of an incorporated educational institution, to be held by them as a perpetual fund for the higher education of young men, to be selected by such trustees for the Christian ministry, it was held that such bequest created an educational trust, which is a public charity. The court did not seem to think it worth reference that the will provided: "In case of several applicants for the benefit of this fund, my grandchildren or great-grandchildren are to have first preference on the same conditions as others, and the children of Kansas home missionaries the second preference."

In *Hagen v. Sacrison*, 19 N. D. 160, 26 L.R.A. (N.S.) 724, 123 N. W. 518, where the will provide: "I desire that there shall be founded, established, and maintained in my native county or district, known as Taskog Sogn Darsland, in the Kingdom of Sweden, a children's home for the reception, care, nurture, succor, and support of the destitute children of that vicinity, and that such children's home, when so established, shall be under the charge and custody of the proper officers of such district of Sogn having the proper supervision of the poor, but whose official designation is not known to me at this time, the selection of such officers being left to my executor, to be selected and designated in accordance with the laws of the Kingdom of Sweden;" 37 L.R.A. (N.S.)

and the testator directed that part of the fund should be devoted by his executor to the building and establishing of the home, and that the remainder should be turned over to the proper foreign officers for its benefit, to be invested by them according to the laws,—it was held that this was a valid charitable trust, and that it was not necessary to determine whether the foreign municipality was legally designated to execute it, as it appeared that it was capable and ready to do so. The court said: "Where a charitable bequest is made to a trustee in a foreign country, the court will not assume that, should the trustee refuse to act, a foreign court will permit the trust to fail, but will assume that it will appoint a trustee;" and that it was immaterial whether the title meantime vested in the heir by operation of law or not, as the executor had the necessary power of sale and other powers in the premises. It further held that the beneficiaries were not uncertain as to class, as the words "of that vicinity" meant of the socken or county, and that the beneficiaries were by the testator intended to be selected by the officials. (It may be noted that it was held by the lower court in this case that under the laws of Sweden, only one half of the testator's property could be applied to the purpose indicated, but this question was not before the court on the appeal.)

But it was held in *Robbins v. Boulder County*, 50 Colo. 610, 115 Pac. 526, that "where there is an entire absence of trustees, and no details or plans for carrying out the testator's object, and no method prescribed for executing the trust, and no delegation of power to anyone to select the particular beneficiaries where they are designated in the will merely as belonging to a general class, the same cannot be enforced by the courts."

For other cases on this subject, see *Buchanan v. Kennard*; *Gill v. Atty. Gen.* supra, VI. b; *Pembroke Academy v. Epseom School Dist.* supra, V.; *Selleck v. Thompson*, supra, VI. b; *Dulles's Estate*, supra, VI. b; *Godfrey v. Hutchins*, supra, VI. d, 2; *Re Kenny*, supra, VII. c.

to provide a new jurisdiction or legal machinery to correct existing abuses in such charities, for the reason, as stated in the act, that the properties theretofore given to the charities therein named, "as well, by the Queen's most excellent Majesty, and her most noble Progenitors, as by sundry other well disposed Persons . . . nevertheless have not been employed according to the charitable Intent of the givers and Founders thereof, by reason of Frauds, Breaches of Trust," etc. Speaking of this statute and its effect, it has been said that "since the passage of this statute all the objects named therein are considered charitable. There are also many other uses, not named, and not within the strict letter of the statute, but which, coming within its spirit,

equity, and analogy, are considered charitable." 2 Perry, Trusts & Trustees, 6th ed. § 692. But this statute, even though remedial and not intended to establish a new standard as to what was a public charity, did enumerate the several classes of such charities for which the remedy was provided, and, as there was no reason for omitting any from the benefits thereof, it must be conceded that it was intended to include the leading charities then known, and it has been said that one of the things accomplished by it was: "It established an enumeration, or kind of definition, standard, or test, to which all gifts and grants in trust could be brought, in order to determine whether they were charitable." 2 Perry, supra, § 696.

*f. Misnomer of beneficiaries.*

See supra, VII. b.

*g. Corporations as beneficiaries.*

In *Baltzell v. Church Home*, 110 Md. 244, 73 Atl. 151, where a will directed the trustees to pay and distribute over funds, "One half or part to the Church Home and Infirmary of Baltimore city, to whom I give and bequeath the same to be kept by said legatee as a separate fund . . . and the income thereof used in maintaining aged and infirm persons in said home, or in maintaining free beds in their infirmary, in the discretion of said legatee, and to pay over the remaining part . . . to the Emmanuel Church Home in the city of Baltimore, to whom I give and bequeath the same, to be kept as a separate fund, . . . and the income thereof used under their rules and in the discretion of said legatee in assisting or maintaining poor, respectable sewing girls or apprentices, unable to pay over \$2 a week for their board, or unable to pay anything,"—it was held that the gifts were direct to the corporations, and being for purposes authorized by their charters, were valid; that the class of beneficiaries was not too indefinite, and that the trust was not obnoxious to the rule against perpetuities.

In *Ege v. Hering*, 108 Md. 391, 70 Atl. 221, the court held and said: "We . . . think that the gift to the Church Home and Infirmary, 'to endow a bed according to the custom and purpose of said institution,' was a valid one. The mere fact that it was, by the terms of the will, to be applied to a particular clear and well-defined object plainly within the sphere and function of the institution has been several times held by us not to avoid a gift which would have been good if it had been made to the same institution for its general corporate purposes."

Under the Constitution of West Virginia, providing: "No charter of incorporation shall be granted to any church or religious denomination. Provision may be made by general laws for securing the title to church

property, and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church or religious denomination," and statutes providing that local societies should have control of devices, etc., of land as a place of public worship or as a burial place, or as a residence for a minister, not exceeding 60 acres outside of a city, town, or village, and the statute further inhibiting foreign corporations from powers other than those granted to domestic corporations, it was held in *Miller v. Ahrens*, 150 Fed. 644, that a devise of several thousand acres to a trustee to sell at public or private sale, and pay over the proceeds "to the First Spiritualist Church of Baltimore city, a corporation created under the laws of the state of Maryland and existing in Baltimore city," was void for uncertainty, as the church must be considered as a voluntary association, and that such devise was for the benefit of an association of individuals unnamed, who might increase and add to its number to-day and lose by death and withdrawal to-morrow, and whose membership was not known and was indeterminate.

See also *Re Morgan*, supra, V.

*h. Unincorporated associations as beneficiaries.*

In *Guild v. Allen*, 28 R. I. 430, 67 Atl. 855, where there was a gift to "Woman's Baptist Foreign Missionary Society, connected with the First Baptist Church of Providence, Rhode Island," and there was no Woman's Baptist Foreign Missionary Society connected with the said church, but there was an unincorporated voluntary association connected with said church, called the Woman's Foreign Missionary Association, which sent out its funds through the corporation known as the Woman's Baptist Foreign Missionary Society, it was held that this corporation should receive the bequest on receipt of an agreement from its executive officers that the same should be expended as directed by the will. In the same will, where it was provided: "I give

From the foregoing authorities, it clearly appears that the statute cannot be looked to as the sole test of what it a public charity, but that "many other uses, not named, and not within the strict letter of the statute, but which, coming within its spirit, equity, and analogy, are considered charit-

able." As supporting this view of the law, it may be noted that one of the more than fifty cases in which the courts of England had exercised chancery jurisdiction over public charities before that statute was enacted is reported as follows: "Bill to compel defendant, who is feoffee in trust, to

and bequeath to the Home Missionary Society of the First Baptist Church of Providence, Rhode Island, one thousand (\$1,000) dollars," and it appeared that there was no Home Missionary Society of such church, but that the Woman's Baptist Home Missionary Society of the First Baptist Church of Providence, Rhode Island, was an unincorporated voluntary association, and that the Woman's American Baptist Home Missionary Society of Boston was a corporation under the laws of Massachusetts, it was held that the unincorporated association was entitled to the money, which could be paid to the individuals composing it, or to any agent whom they duly authorized to receive it.

See also *Peth v. Spear*, supra, VI. d, 2; *Korsstrom v. Barnes*, supra, VI. a; *Huger v. Protestant Episcopal Church*, supra, VI. d, 1.

#### 4. Change of purpose or condition of beneficiary.

In *Mason v. Bloomington Library Asso.* 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603, where the will gave in trust to trustees certain property "to establish, in connection with the Bloomington Library Association, an art studio or art gallery and studio, meaning thereby a suitable place wherein works of art will be collected, kept, preserved, or exhibited for the advancement of education in art, the conduct, management, and supervision of which art gallery and studio shall be in charge of the officers of the Bloomington Library Association. The said art gallery or studio shall be named the 'Russell Art Annex,' or some suitable name or appellation of which the name Russell shall be a part, in commemoration of my mother, Rachel P. Russell. The said trustees may, in their discretion, turn over to said Library Association the whole or a part of the principal sum of said fund for the use aforesaid, or may put and keep the whole, or a part thereof, at interest upon good security, collect the interest thereof, and pay the same as collected to said Bloomington Library Association for the use as aforesaid," and it appeared that, long before, the Bloomington Library Association had conveyed all of its property to the directors of the Withers Public Library, an association organized under the laws of the state of Illinois, it was held that, under the *cy pres* doctrine, "the fund disposed of by that paragraph of the will should be held by trustees for the purpose of establishing, in connection with the Withers Public Library, an art studio or art gallery and studio, wherein works of art might be col-

lected, kept, and preserved or exhibited, for the advancement of education in art."

In *Brice v. All Saints Memorial Chapel*, 31 R. I. 183, 76 Atl. 774, where the court's decision was that the controlling instrument was a declaration of trust, the court said: "The primary object disclosed in all these instruments is the establishment of a chapel for the celebration of religious worship according to the forms and usages of the Protestant Episcopal Church in the United States of America. The other provisions are all subordinate to that. If conditions have changed so as to render it impossible to continue the execution of the trust in strict conformity with all the particular provisions, that cannot be permitted to defeat the trust. . . . A general charitable intent is expressed in said trust instruments, and the trust property may properly be applied *cy pres*."

Where the testator in his will gave £25,000 to the Institute of Medical Sciences Fund, University of London, and after this had been paid, the scheme was given up and the funds returned to the donor, a suggestion by the attorney general that the money had been devoted to a charitable purpose, and that therefore it ought to be applied *cy pres*, was denied by the court. *Re University of London Medical Sciences Institute Fund* [1909] 2 Ch. 1, 78 L. J. Ch. N. S. 562, 100 L. T. N. S. 423, 25 Times L. R. 358, 53 Sol. Jo. 302.

#### j. Miscellaneous.

It may be noted that where contributions were made by various individuals upon what they believed to be a promise upon the part of the board of directors of a certain corporation connected with the Methodist Church to afford an appropriate meeting room for the gratuitous use of the Methodist Church for all proper uses, under their direction, which corporation issued certain shares of its stock as representing such contributions to "treasurer" or "treas" "church room fund," and later ceased to furnish the room, and proposed to distribute the proceeds derived from its own liquidation among other stockholders, with no reservation for the protection of the aforesaid shares, it was held, although the statute of Elizabeth was not in force in the jurisdiction, that to sanction such a proceeding would operate as a fraud, both upon the original contributors and upon the associations or organizations for the benefit of which the contributions were made. *Book Depository v. Trustees Church Rooms Fund*, — Md. —, 83 Atl. 50.

B. B. B.

make an estate in certain lands in Tottenham and Hornsey, to the hospital of St. Bartholomew, in West Smithfield, for the endowment of a chapel there, 'because great multitudes of Christian people of all parts of England and other nations for sickness, poverty, and misery, continually of custom resort to the said hospital, and there relieved; and finally have their Christian sepulture round about the said chapel.'" *Wakering v. Bayle*, Proceedings in Chancery, vol. 1, cited in note on *Vidal v. Philadelphia*, 2 How. 156, 11 L. ed. 217. It is evident from this report that the hospital there recognized as a public charity was not limited to "aged, impotent, and poor people," but that the sick were also the recipients of its bounty, though neither poor nor miserable.

The purpose of the devise and bequest in controversy is stated in the will to be "in trust for the purpose of erecting and maintaining thereon a hospital for sick and injured persons, without distinction of creed, under the auspices of the Methodist Episcopal Church, South, of the United States, or its successors, and under such rules and regulations as said trustees and their successors shall from time to time establish and maintain." The position of appellants in assailing the validity of the foregoing provision as creating a public charity is stated as follows: "There is no restriction of the benefits of this hospital to the poor, and it is the absence of any such restriction that precludes the conclusion that any charity is thereby created. This is the vital question in this case: Is a 'hospital for sick and injured persons,' without any further designation or restriction, a charity in the sense of relieving the poor? . . . Both in England, where the statute of charitable uses originated, and in those states of the Union where it has been followed, the rule is universal that, unless the gift or trust is for public educational purposes, public religious purposes, or works of public utility, benefiting and open to the general public, it must be in some form or manner for the relief of poverty. . . . Charity, in the sense of relieving or benefiting individuals, is synonymous with charity in the popular meaning,—the relief of the poor."

Under this contention, the poverty of the recipients of the charity is made an essential element of a valid public charity in all cases where the charity is to be bestowed upon individuals instead of upon the general public. This contention, even if we confine the definition of public charities to such as are included in the statute of Elizabeth, as insisted by appellants, is placing too restricted a construction upon the law, 37 L.R.A. (N.S.)

for, under the first class, "aged, impotent, and poor people," it is manifest that if the aged or impotent must be poor, in order to be proper objects of a public charity, then the words "aged" and "impotent" are meaningless and add nothing to the requirement of poverty. As to the subsequent classes, "maintenance of sick and maimed soldiers and mariners," and "aid and help to young tradesmen," it may also be said that, if poverty be necessary to entitle them to bounty, they would have been comprehended within the words "poor people," as used in the first class. We have not overlooked a few cases cited by appellants in support of their contention, but they are not in accord with the spirit of the law in this state, or with the current of authority upon the subject.

While poverty is the condition generally recognized in the bestowal of public charity upon individuals, it is not the only condition, as abundantly appears from the authorities. Indeed, it is not the fact of poverty alone which makes a person a proper object of charity, and this is shown by the existence of penal laws in England, along with the law of public charities, for the punishment of sturdy beggars. It is the need or want of food, clothing, shelter, or other bodily ministrations, so commonly found among the poor, which prompts the exercise of public charity to that class. But a person who is sick, injured, or afflicted, or in a helpless condition, is none the less a proper object to be included in the purpose of a public charity, although he may not be poor. This is the broad sense in which in *Webber Hospital Asso. v. McKenzie*, 104 Me. 326, 71 Atl. 1036, speaking of a hospital as a public charity, the court said: "It was to be open to all. The rich should not be turned away because of their wealth, nor the poor because of their poverty,"—and in which this court in *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346, defined a public charity as "any gift not inconsistent with existing laws, which is promotive of science or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience." In 2 Perry, *Trusts & Trustees*, 6th ed. § 687, that author includes in charitable trusts "all gifts for the relief and comfort of the poor, the sick, and the afflicted." And at § 692 the same author continues: "Since the passage of this statute, all the objects named therein are considered charitable. There are also many other uses, not named, and not within the strict letter of the statute, but which, coming within its spirit, equity, and analogy, are considered



charitable." And in 8 Cyc. 902, public charities are defined as follows: "Charities are either public or private. Every public trust, though benefiting the rich and the poor alike, is a charitable trust, and these terms have the same meaning." In accordance with the foregoing doctrine, public charities have been upheld in which the bequest was made to relieve "the great suffering, distress, famine, and want caused by the destruction of life and property by storms, floods, fires, and other accidental and natural causes" (*Kronshage v. Varrell*, 120 Wis. 161, 97 N. W. 928); and where a bequest was to a life-saving station (*Richardson v. Mullery*, 200 Mass. 247, 86 N. E. 319); and "to give shelter to homeless people at night, irrespective of creed, color, or condition" (*Croxall's Estate*, 162 Pa. 579, 29 Atl. 759); and for the purpose of establishing a fund and maintaining a hospital for the benefit of "infirm, afflicted, or unfortunate persons who are residents of said Pittsfield at any time, and who may be admitted into said hospital by the officers or authorities thereof for treatment; and also for all who may reside elsewhere, and who may be admitted therein for treatment" (*Burbank v. Burbank*, 152 Mass. 254, 9 L.R.A. 748, 25 N. E. 427); and "for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics" (*Hayes v. Pratt*, 147 U. S. 557, 37 L. ed. 279, 13 Sup. Ct. Rep. 503); "for the maintenance of a free hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment" (*Webster Hospital Asso. v. McKenzie*, 104 Me. 320, 71 Atl. 1032). From the foregoing cases it must be taken as settled that public charities for the relief of persons who are made objects of the charity for reasons other than their poverty will be upheld. The language of the case last cited, as to the purpose of the trust, does not differ materially from that of the bequest under consideration, and, construing it, the court said: "The rich should not be turned away because of their wealth, nor the poor because of their poverty." And why is not that, as was the purpose of the testator in this case, the true spirit of public charity? It was said of old, "The poor always ye have with you;" and because of that truth, and the need, want, and distress which closely wait upon poverty, the poor have always been, and ever will be, the chief concern of those who have means and are moved by the noble purpose of devoting it to the well-being

37 L.R.A. (N.S.)

of their fellow men. But sickness, pain, and suffering are the heritage of all. We are continually attended by peril and may at any time, and when least expected, be stricken by misfortune and affliction. No man can be so rich or so circumstanced as to be exempt from this condition. And, if so overtaken, is charity to withhold its ministrations because the stricken sufferer may not be poor? Is the Samaritan to refuse to bind up the wounds of the unconscious man on the wayside because he may have means to pay a physician? Charity, whether public or private, sees the need, or want, or affliction, or suffering, and its first concern is to bring relief. The question of whether the recipient is able to pay is the merest incident and of minor importance. In the case under consideration, the ability of the sick or injured to pay may be regarded as almost an intrusion into the high charitable purpose of the benefactor, who would relieve "sick and injured persons, without distinction of creed." Such a gift and for such a purpose, aside from the aid of the liberal rule of construction applied by the courts in such cases, comes well within the language of this court in upholding as public charities, "gifts which are for the amelioration of the condition of mankind." Nor have counsel for appellants, with all of the ability, research, and learning shown in their brief, called the attention of this court to a single case in which any court has pronounced a bequest made for such a purpose invalid and insufficient to establish a public charity.

The testator gave directions that the bequest should be "under the auspices of the Methodist Episcopal Church, South, of the United States, or its successor, and under such rules and regulations as said trustees and their successors shall from time to time establish and maintain." It was not necessary that the bequest should have been more definite as to the selection of the objects of the public charity, or for administering and carrying out the purposes of the gift, than it was made in this provision of the will. The sufficiency of the bequest in this regard, and the contention that the trustees are given such power as would authorize them to select the rich as patients and exclude the poor, are answered by the case of *Chambers v. St. Louis*, supra, in which the court (loc. cit. 589, 590, 29 Mo.) said: "If, under such circumstances, the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained. If all the recipients of a charity could be designated with certainty at the time of its creation, there would be no necessity for a

law for charitable uses different from that which governs all other trusts. The only difficulty in the way would be the law against perpetuities, and that would not exist where the donation in trust was made to a corporation. From the very nature of the subject, charitable gifts must be objects vague and uncertain. The subjects of the charity may be numerous, and they are to be sought for and ascertained by those to whose discretion and judgment the dispensation of the relief is intrusted. The founder of a charity, by placing his fund in the hand of a competent trustee, . . . with power to carry that object into effect, makes the trustee his substitute or delegate. Cannot any individual who has the means employ them for the relief of 'poor emigrants and travelers coming to St. Louis on their way to settle in the West?' If he can carry out this charity himself, may he not appoint another to do it for him? Could it be objected to such a course that the trustee would not know how to act? As the donor of the bounty is willing to confide its management to the discretion of his agent, so long as the agent acts in good faith his acts are the acts of his principal, and there is no one but the principal to complain. If the agent abuses his trust, he, like all other fiduciary agents, is subject to the control of the courts."

The fact that bequests made for the payment of a sum to a relative of the testator monthly, and of another sum for the keeping of the burial lot of the donor in repair, were made charges upon a part of the fund bequeathed for the erection and maintenance of the hospital, is not important in its bearing upon the validity of the bequest. These bequests are not commingled with the purpose of the bequest for the hospital. They are merely charges upon the fund bequeathed to the trustees for the purpose of the principal charity, and their only effect is to diminish the available funds to that extent.

We have examined carefully the bequest involved in this litigation, and the many authorities of this and other courts cited as to the law governing the subject of public charities, and we have arrived at the conclusion that the testator, by the provisions of his will, created a valid public charity under the laws of this state. The charity thus provided for is of such extent and of such possibilities for good among the people of the city where the testator lived, and where he directed it to be established, that there should be no unnecessary delay in bringing to the objects of his bounty and solicitude the blessings of his praiseworthy gift.

37 L.R.A. (N.S.)

Entertaining the foregoing views, the judgment should be affirmed. It is so ordered.

All concur, except Valliant, Ch. J., absent.

Petitions for rehearing denied April 11, 1911.

## NEW YORK COURT OF APPEALS.

RE PROBATE OF WILL OF MARY S. ROBINSON, Deceased.

BURTON C. MEIGHAN, Exr. and Trustee, et al., Appts.

(203 N. Y. 380, 96 N. E. 925.)

**Charity — will — indefinite designation of persons.**

1. The words, "and such other financial aid" to persons in need as may seem fitting and proper, in a will establishing a trust to provide shelter, necessities of life, education, and such other financial aid, etc., with preference for elderly and disabled Christian persons of good moral character, members of Evangelical churches, will be construed as requiring aid of the same general character as the purposes specified, so as to come within the statute providing that no gift for religious, educational, charitable, or beneficent purposes shall be invalid by reason of the indefiniteness and uncertainty of the beneficiaries.

**Same — specific education — validity.**

2. Providing a fund for the specific education of the poor does not destroy the charitable nature of the gift.

**Will — construction — charity — sustaining.**

3. In case a will attempting to create a charity is susceptible of more than one construction, that one should be preferred which, if fully within the rules of the law, sustains the trust and devotes the fund to purposes permitted by law and to the good of the community.

**Trust — nonresident beneficiaries — enforcement.**

4. A court will not refuse to sustain a charitable trust because the beneficiaries are not confined to residents of the state.

(November 28, 1911.)

**A**PPPEAL by the executor and trustees of the will of Mary S. Robinson, deceased, from the portion of the order of the Appellate Division of the Supreme Court, Second Department, which affirmed a decree of the Surrogate's Court of Westchester

**Note.** — As to enforcement of general bequests for charity or religion, see notes to *Hadley v. Forsee*, 14 L.R.A. (N.S.) 49, and *Buchanan v. Kennard*, ante, 993.

County declaring a certain trust attempted to be created by said will invalid and void in a proceeding for the probate of the will. Reversed.

Statement by Chase, J.:

Mary S. Robinson, the testatrix, died a resident of Westchester county, October 16, 1909, leaving an estate consisting of personal property only. She left an instrument in writing, bearing date January 26, 1904, purporting to be her last will and testament. It was offered for probate in the surrogate's court of Westchester county, and her next of kin and the attorney general of the state of New York were duly cited to appear in the proceeding. The next of kin and said attorney general thereafter duly appeared, and one of said next of kin filed an answer to the petition for the probate of said will, expressly putting in issue the validity, construction, and effect of the sixth to eleventh paragraphs, inclusive, of said instrument, and in said answer denied that the said provisions constitute a valid disposition of personal property by will under the laws of this state.

The surrogate found that the will was duly executed in accordance with the laws of the state of New York, and that it is the last will and testament of said deceased; but he found, as a conclusion of law, that the trusts attempted to be created by the sixth, seventh, and ninth paragraphs of said will are invalid, and that the eighth, tenth, and eleventh paragraphs of said will are void, and that the testatrix died intestate as to all of her property, except that part thereof given and bequeathed by the second, third, and fourth paragraphs of her said will, and that the next of kin of the testatrix are entitled to her residuary estate in equal shares. *Re Robinson*, 71 Misc. 87, 129 N. Y. Supp. 1020. An appeal was taken by the executor and trustees named in the will from the decree of the surrogate's court, entered in accordance with said findings, to the appellate division of the supreme court, so far as it declares parts of said will invalid or void. The appellate division modified said decree by declaring valid the trust set forth in the sixth and seventh paragraphs of the will, and as so modified said decree was affirmed. *Re Robinson*, 145 App. Div. 925, 130 N. Y. Supp. 259.

The eighth paragraph of the will provides, in case of the death of certain persons and the survivor of them, or of certain other contingencies, for a gift over of the fund given in trust by the sixth and seventh paragraphs of the will to the fund provided by the ninth paragraph of the will. The eleventh paragraph of the will provides that

if any person named in the will contests the same, such person shall forfeit any right to participate in the estate.

The ninth and tenth paragraphs of the will are as follows:

"Ninth. I direct my said executor to pay over the rest, residue, and remainder of my estate to the said Burton C. Meighan and Frank B. Upham, in trust, however, for the following uses and purposes: The said trustees are to invest such portion of the fund as shall not be used for the purposes herein specified, in the securities prescribed by law as savings bank investments, and they are to disburse the principal or interest, or both, of said fund in their discretion as follows, to wit:

"To provide shelter, necessities of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such persons as they shall select as being in need of the same. Preference is to be given to persons who are elderly or disabled from work, and to persons who are Christians, of good moral character, members of one of the so-called Evangelical churches, to wit, the Methodist, Baptist, Presbyterian, Congregational, Moravian, or Episcopal, and who are not addicted to the use of intoxicants or tobacco, nor to attendance at theatrical entertainments.

"Tenth. I authorize and empower my said trustees, in their discretion, to appoint other persons, not exceeding five, to act with them in the execution of the trusts, or either of them, herein provided for; and I direct that the execution of said trusts shall thereupon devolve upon all of the said trustees jointly and upon the survivors of them. If the said two trustees, Burton C. Meighan and Frank B. Upham, deem it advisable, they may cause a corporation to be created for the purpose of executing the trusts provided for in this will."

The executor and trustees named in the will appeal from that part of the order of the appellate division which affirmed the decree of the surrogate, declaring the ninth paragraph of the will invalid and the tenth and eleventh paragraphs void.

Mr. Arthur M. Johnson, with Mr. Henry Necarsulmer, for appellants:

Trusts for religious, charitable, educational, or benevolent uses are recognized by the statute law of the state of New York, and such trusts are not invalid by reason of the indefiniteness or uncertainty of the beneficiaries named therein, and are not subject to the statute against perpetuities.

*Re Shattuck*, 193 N. Y. 460, 86 N. E. 455; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568; *Rothschild v. Schiff*, 188 N. Y.

331, 80 N. E. 1030; *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535; *Mount v. Tuttle*, 183 N. Y. 358, 2 L.R.A.(N.S.) 428, 76 N. E. 873; *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; *Murray v. Miller*, 178 N. Y. 316, 70 N. E. 870.

The construction of the provisions of ¶ 9 of the will of deceased, made by the surrogate and adopted by the appellate division, was erroneous.

*Roosa v. Harrington*, 171 N. Y. 350, 64 N. E. 1; *Kahn v. Tierney*, 135 App. Div. 903, 120 N. Y. Supp. 663; *Crozier v. Bray*, 120 N. Y. 375, 24 N. E. 712; *Hermance v. Ulster County*, 71 N. Y. 487; *People ex rel. Huber v. Feitner*, 71 App. Div. 481, 75 N. Y. Supp. 738; *Re Reynolds*, 124 N. Y. 395, 26 N. E. 954; *Donahue v. Keeshan*, 91 App. Div. 606, 87 N. Y. Supp. 144; *DuBois v. Ray*, 35 N. Y. 166; *Mee v. Gordan*, 187 N. Y. 400, 116 Am. St. Rep. 613, 80 N. E. 353, 10 Ann. Cas. 172; *Lewis v. Howe*, 174 N. Y. 340, 66 N. E. 975, 1101; *Haug v. Schumacher*, 166 N. Y. 506, 60 N. E. 245.

Properly construed, the provisions of ¶ 9 of the will of deceased constitute a valid gift in trust for educational, charitable, and benevolent uses.

*Kelly v. Hoey*, 35 App. Div. 273, 55 N. Y. Supp. 94; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568; *Re Shattuck*, 193 N. Y. 446, 86 N. E. 455; *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149, 201 N. Y. 546, 95 N. E. 1133; *Re Griffin*, 167 N. Y. 71, 60 N. E. 284; *Farmer's Loan & T. Co. v. Ferris*, 67 App. Div. 1, 73 N. Y. Supp. 475; *Re Durand*, 56 Misc. 235, 107 N. Y. Supp. 393.

The purpose and intention of the testatrix in making the trust contained in the ninth paragraph of the will are sufficiently defined, and no objection on that ground can properly be urged to the validity of the trust.

*Re Shattuck*, 193 N. Y. 451, 86 N. E. 455; *Rothschild v. Schiff*, 188 N. Y. 330, 80 N. E. 1030; *St. Johns v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; *Fairchild v. Edson*, 154 N. Y. 211, 61 Am. St. Rep. 609, 48 N. E. 541; *Kelly v. Hoey*, 35 App. Div. 273, 55 N. Y. Supp. 94; *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535; *Hull v. Pearson*, 36 App. Div. 224, 55 N. Y. Supp. 324; *Re Griffin*, 167 N. Y. 71, 60 N. E. 284; *Allen v. Stevens*, 161 N. Y. 146, 55 N. E. 568.

Mr. Lewis E. Carr also for appellants.

Mr. Edward R. Otheman, for respondent:

The ninth clause of the will does not constitute a charitable trust, and was correctly held by the appellate division to be void.

37 L.R.A.(N.S.)

*Re Shattuck*, 193 N. Y. 456, 86 N. E. 455; *Schettler v. Smith*, 41 N. Y. 328; *Morice v. Durham*, 9 Ves. Jr. 399, 5 Eng. Rul. Cas. 548; *Re Scott*, 31 Misc. 85, 64 N. Y. Supp. 577; *Re Seymour*, 67 Misc. 347, 124 N. Y. Supp. 637; *Re Stokes*, N. Y. L. J. Feb. 23d 1910; *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149.

Chase, J., delivered the opinion of the court:

Gifts for religious, educational, charitable, or benevolent uses, to indefinite or uncertain beneficiaries, are now permitted in this state by express provision of statute. *Personal Property Law*, § 12 (*Laws of 1909*, chap. 45 [*Consol. Laws 1909*, chap. 41]); *Real Property Law*, § 113 (*Laws of 1909*, chap. 52 [*Consol. Laws 1909*, chap. 50]).

The law relating to gifts for charitable uses, as it existed prior to chapter 701 of the *Laws of 1893*, which was substantially re-enacted in said *personal property law* and said *real property law*, has been changed. *Re Shattuck*, 193 N. Y. 446, 86 N. E. 455; *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568.

The spirit of love and religion which is the basis of charity should be exercised in construing the provisions of such acts. A will, however, must sufficiently define the beneficiaries and the purpose of the testator, so that the trust can be enforced by the courts; otherwise the will does not come within the provisions of the acts. The gifts must be also for a public, and not for a private, purpose. This court has recently construed the provisions of the act of 1893 in the *Shattuck Case*, 193 N. Y. 451, 452, 86 N. E. 456, and there say: "It is manifest that it is necessary for a testator to define his purpose and intention in making a trust sufficiently so that the court, at the instance of the attorney general, representing the beneficiaries, can by order direct in carrying out the trust duty." And the court further say: "The intention of the legislature in passing the act of 1893 was to save to the public charitable gifts made in trust to uncertain and indefinite beneficiaries. Gifts for the benefit of private institutions or individuals were not intended to be included within its provisions."

It is not seriously contended but that the trust attempted to be created by the ninth paragraph of the testatrix' will is within the provisions of the *personal property law*, and can be carried out, providing the purpose and intention of the testatrix in defining the beneficiaries is lawful and sufficiently clear, so that the same can be enforced by

the courts. The important question for determination on this appeal is whether the gift provided by the will is confined to religious, educational, charitable, or benevolent uses. The answer to such question involves the purpose of the testatrix.

The personal property law, so far as necessary for the present discussion, is as follows: "No gift, grant, or bequest to religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same." The purpose of the trust must come within the uses specified in the act. In construing the will now under consideration, the words "such other financial aid" must be read with the words that precede them and the expression of preference in selecting persons to receive the fund, subsequently stated in the same paragraph; and as so read, the preceding words not being exhaustive, such comprehensive words should be held to refer to financial aid of the same general character and purpose as that included in such preceding words. They should be construed to mean other financial aid for similar urgent and necessary purposes. *Re Reynolds*, 124 N. Y. 388, 26 N. E. 954; *Re Hermance*, 71 N. Y. 481, 487; *Lewis v. Howe*, 174 N. Y. 340, 346, 66 N. E. 975, 1101; *People ex rel. Huber v. Feitner*, 71 App. Div. 479, 75 N. Y. Supp. 738; *Garvey v. Garvey*, 150 Mass. 185, 22 N. E. 889; 1 *Jarman, Wills*, 5th ed. 417.

The rule which we are applying is that, where certain things are enumerated, and such enumeration is followed or coupled with a more general description, such general description is commonly understood to cover only things *ejusdem generis* with the particular things mentioned. In such case it is presumed that the testator had only things of that class in mind. *Given v. Hilton*, 95 U. S. 591, 24 L. ed. 458.

The word "need" is used in the same paragraph of the will as a noun, and as such it is defined to mean: "A state requiring supply or relief; pressing occasion for something; urgent want; necessity; exigency." It is also defined to mean: "The lack of anything desired or useful, as, 'He felt the need of a better education.'" The latter meaning is by lexicographers said to be its meaning in a milder sense. Its general and more commonly accepted meaning is stated in the first-quoted definition, and also as: "Want of the means of subsistence; poverty; indigence; destitution."

Reading the statement of preference in the selection of beneficiaries in connection

with the words "shelter, necessities of life, education, general or specific," and also associating with such words the thought of want and necessity, which, in the connection in which they are used, they naturally and commonly imply, it is plain and unmistakable that the testatrix intended the trust for the benefit of those in need, who require shelter, necessities of life, and education, and not for those simply desiring something useful; and that the discretion vested in her trustees extends only to selecting such persons as to them shall seem fit and proper among those in want, necessity, exigency, poverty, indigence, and destitution. Construed as stated, the purpose of the testatrix was within the language of the statute, which authorizes gifts "to religious, educational, charitable, or benevolent uses." Shelter, necessities of life, education, and other like benefactions to be supplied to those in need, to be selected by the trustees, is a definite purpose.

It is urged, however, by the respondent that the will authorizes the trustees to expend the fund for special education, and that to such extent it is not within the terms of the statute. The language of the statute does no confine educational uses to such as are general. There is nothing in the fact that specific education, as distinguished from general or common-school education, was contemplated by the testatrix that condemns the trust as being one other than for charitable uses. Charity at least includes any department or extent of education primarily and fairly calculated to make the recipient self-supporting. A gift is not without the bounds of charity because the training contemplated thereby may include special or specific education. *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; *Rothschild v. Schiff*, 188 N. Y. 327, 80 N. E. 1030; *Re Shattuck*, 193 N. Y. 446, 86 N. E. 455.

The respondent refers to the *Shattuck Case*, 193 N. Y. 452, 86 N. E. 456, as specifically holding that the word "educational," as used in the statute, does not necessarily indicate a public charitable use. In that case this court say: "The word 'educational' does not necessarily describe a public or charitable institution, and for that reason, as we will show, the trust is not saved by the provisions of the act of 1893." That language was used with reference to an educational institution, and in connection with a will that gave, in general terms, the trustee authority to use the income of the trust by paying the same "to religious, educational, or eleemosynary institutions as in his judgment shall seem advisable." It was there held that an educational in-

stitution includes a private, as well as a public, institution, and that, so far as it included a private institution, it was without the terms of the statute.

In the will now under consideration, a gift to an institution is not contemplated. It authorizes the use of the money included in the trust to furnish an "education, general or specific." A specific education is no more without the charitable purpose of the testatrix than is a general education, and the construction of the words relating to education are in no way controlled by what was said in the Shattuck Case.

It is doubtless true that the paragraph of the will by which the trust is attempted to be created is susceptible of more than one construction; but a construction which is fairly within the rules of law, and that sustains the trust and devotes the fund included therein to purposes permitted by law and to the good of humanity, should be preferred. *Crozier v. Bray*, 120 N. Y. 366, 375, 24 N. E. 712; *Mee v. Gordon*, 187 N. Y. 400, 410, 116 Am. St. Rep. 613, 80 N. E. 353, 10 Ann. Cas. 172; *Young Women's Christian Home v. French*, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729; *Kelly v. Hoey*, 35 App. Div. 273, 55 N. Y. Supp. 94; *Thomas, Estates Created by Wills*, 1657. In our judgment, the construction of the will as we have indicated is the more reasonable one. It being determined from the will that the trust and the purpose of the testatrix in her attempt to establish it are for the uses enumerated in the statute, the courts can and will, at the suit of the attorney general of the state, compel the trustees to carry out the same according to such purpose and for such uses.

Trusts otherwise valid under the acts mentioned are sustained, although the beneficiaries are not necessarily or in terms confined to residents of this state. *St. John v. Andrews Institute*, 181 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708; *Manley v. Fiske*, 139 App. Div. 665, 124 N. Y. Supp. 149, affirmed in 201 N. Y. 546, 95 N. E. 1133; *Allen v. Stevens*, 161 N. Y. 122, 55 N. E. 568; *Rothschild v. Schiff*, 188 N. Y. 327, 80 N. E. 1030; *Bowman v. Domestic & F. Missionary Soc.* 182 N. Y. 494, 75 N. E. 535.

A gift for the uses specified in the statute may, under the direction of the will, be administered and enforced by and through a corporation subsequently created for that purpose. *St. John v. Andrews Institute*, supra.

The validity and effect of the eleventh paragraph of the will was not discussed, nor was a decision upon the appeal, so far as it relates thereto, insisted upon in this court.

The order of the Appellate Division, so 37 L.R.A. (N.S.)

far as it relates to the ninth and tenth paragraphs of the will, should be reversed, and the provisions of the said paragraphs of the will should be declared valid and enforceable, with costs to all parties appearing and filing briefs, payable out of the fund.

Cullen, Ch. J., and Haight, Vann, Werner, Willard Bartlett, and Hiscock, JJ., concur.

#### ALABAMA SUPREME COURT.

WILLIAM J. HAGAN, Appt.,

v.

COMMISSIONERS' COURT OF LIMESTONE COUNTY et al.

(160 Ala. 544, 49 So. 417.)

**Tax — limitation of indebtedness — excess — constitutional construction.**

1. A constitutional provision allowing counties to levy a special tax in addition to the amount they may have regularly collected, to pay for public buildings, has no operation in counties where the indebtedness exceeds the limitation imposed upon them by another section.

**County — indebtedness — special tax levy.**

2. A county cannot avoid the constitutional limitation upon its indebtedness by agreeing to pay the contract price of a public building, with interest, out of the proceeds of a special tax levy laid for a series of years for that purpose, although the contract expressly provides that no debt is created or incurred by the county.

**Same — indebtedness — determination.**

3. In determining whether or not a debt incurred for a public building will exceed the constitutional limitation upon the indebtedness which the county may incur, the aggregate amount of the contract price must be considered, although it is to be paid in instalments out of the tax levies for a series of years.

(April 6, 1909.)

**APPEAL** by complainant from a decree of the Chancery Court for Limestone County dissolving a temporary injunction in a suit to enjoin the assessment of a certain tax and the issuance of tax warrants. Reversed.

The facts are stated in the opinion.

Messrs. Sanders & Thach, for appellant:

A municipality indebted to the limit cannot evade the Constitution and incur further debt, by creating a "special fund" to

Note. — See note, post, 1058.

pay the debt, when such special fund has its source in general taxation of the community.

Gray, Limitations of Taxing Power, pp. 1080, 1084, 2105, 2106; Ottumwa v. City Water Supply Co. 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315; Beard v. Hopkinsville, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872; Voss v. Waterloo Water Co. 163 Ind. 69, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 Ann. Cas. 978; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; Lamar Water & Electric Light Co. v. Lamar, 128 Mo. 188, 32 L.R.A. 157, 26 S. W. 1025, 31 S. W. 756; Eaton v. Mimnaugh, 43 Or. 465, 73 Pac. 754; Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279; Tally v. Commissioners' Ct. — Ala. —, 39 So. 167.

Mr. M. K. Clements also for appellant.

Mr. W. R. Walker, for appellees:

Where a special tax is levied to pay upon a contract, and the proceeds thereof assigned in payment thereof, no debt within the Constitutional interdiction is created.

State ex rel. Helena Waterworks Co. v. Helena, 24 Mont. 521, 55 L.R.A. 336, 81 Am. St. Rep. 453, 63 Pac. 99; Prince v. Quincy, 128 Ill. 443, 21 N. E. 768; Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476; Swanson v. Ottumwa, 118 Iowa, 161, 59 L.R.A. 620, 91 N. W. 1048; Kiehl v. South Bend, 36 L.R.A. 228, 22 C. C. A. 618, 44 U. S. App. 687, 76 Fed. 921; Saleno v. Neosho, 127 Mo. 627, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190; Johnson v. Pawnee County, 7 Okla. 686, 56 Pac. 701; Shannon v. Huron, 9 S. D. 356, 69 N. W. 598; Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982; Lawrence County v. Meade County, 10 S. D. 175, 72 N. W. 405; Darling v. Taylor, 7 N. D. 538, 75 N. W. 766; Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279; Eaton v. Mimnaugh, 43 Or. 405, 73 Pac. 754; Law v. People, 87 Ill. 385; Springfield v. Edwards, 84 Ill. 626; Koppikus v. State Capitol Comrs. 16 Cal. 248; People ex rel. McCullough v. Pacheco, 27 Cal. 175; Beard v. Hopkinsville, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 224, 24 S. W. 872; Fenton v. Blair, 11 Utah, 78, 39 Pac. 485; State ex rel. Barton v. Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Hanley v. County Ct. 50 W. Va. 439, 40 S. E. 389; Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 467; Denny v. Spokane, 25 C. C. A. 164, 48 U. S. App. 282, 79 Fed. 719; Stephens v. Spokane, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; McEwen v. Spokane, 16 Wash. 212, 47 Pac. 433; Winston 37 L.R.A. (N.S.)

v. Spokane, 12 Wash. 524, 41 Pac. 888; Baker v. Seattle, 2 Wash. 576, 27 Pac. 462; Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Re State Warrants, 6 S. D. 518, 55 Am. St. Rep. 852, 62 N. W. 101; Gray, Limitations of Taxing Power, §§ 2063, 2076, 2078; Stone v. Chicago, 207 Ill. 492, 69 N. E. 970; Jacksonville R. Co. v. Jacksonville, 114 Ill. 562, 2 N. E. 478.

Mr. G. W. L. Smith also for appellees.

Denson, J., delivered the opinion of the court:

The court of county commissioners of Limestone county, under the power and authority conferred upon them by § 133 of the Code of 1907, having first determined that it was necessary that a new courthouse for that county should be erected, on the 19th day of November, 1908, in the regular way, entered into a contract with the Falls City Construction Company, a corporation, of New Jersey, for the erection of the same. According to the resolution adopted by the court, the contract price agreed upon and fixed was not to exceed the principal sum of \$59,000, and the interest thereon at the rate of 6½ per centum per annum, payable semiannually.

The court adopted the following, among other, resolutions: "Be it further resolved by the court that there shall be levied, and there is hereby levied, a special county courthouse tax of one fourth of 1 per centum on all taxable property of said county, upon the assessment last made for state taxes, for the years 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, and 1917, in payment of the said sum, not to exceed the principal sum of \$59,000 and the interest thereon, as represented by the county courthouse warrants provided for in the contract made with said company herein set out, for the erection, completion, and furnishing of said building, and which tax levy and this resolution ordering the same shall constitute and is a continuing contract between said county and said company, their successors and assigns, and shall not be in any way limited or repealed so long as any of said county courthouse warrants (which may be agreed upon) and the interest thereupon shall remain outstanding."

The contract with the company is fully set out in the resolutions of the court, and adopted by the court. Article 19 of the contract, or so much of it as is necessary for present purposes, is in this language:

"It is further stipulated and agreed that the consideration herein set forth, to discharge the obligation to the contractor by said county, said court and said county hereby sells, assigns, transfers, sets over, and confirms to the said Falls City Con-

struction Company, all of the special county courthouse tax levy and all of the proceeds derived from the levy and collected of the special courthouse tax and levy thereof of one fourth of 1 per centum on all the taxable property of said county for and during the years hereinafter mentioned, as provided by §§ 128 and 145, both inclusive, of the Code of 1907, and out of which tax levy said contractor or its assigns shall be and are entitled to receive the following proceeds, with interest from February 1, 1909, at the rate of 6½ per centum per annum, payable semiannually, that is to say, said contractor shall receive, to wit:

Out of said tax levy for the year 1908..\$2,000  
 Out of said tax levy for the year 1909..\$6,500  
 Out of said tax levy for the year 1910..\$7,000  
 Out of said tax levy for the year 1911..\$7,500  
 Out of said tax levy for the year 1912..\$8,000  
 Out of said tax levy for the year 1913..\$8,500  
 Out of said tax levy for the year 1914..\$9,000  
 Out of said tax levy for the year 1915..\$9,500  
 Out of said tax levy for the year 1916..\$1,000

"The foregoing principal instalments, except the one for \$2,000, shall bear interest at the rate of 6½ per centum per annum from February 1, 1909, payable semiannually, until each of said instalments accrue, and provided further that said foregoing described interest, added to the foregoing principal instalments, create and make the regular total instalments of the amounts the contractor is entitled to receive from said tax fund, which are as follows," etc.

The itemized amounts are then set out, making: Total principal, \$59,000; interest, \$15,989; grand total, \$74,989. The contract continues in this language: "And said county and this court agrees to levy said special courthouse building tax of one fourth of 1 per centum per annum during the years 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, and 1917, for the purpose of creating the proceeds and revenue above set forth, and further agrees to evidence said sum and instalments above set out by the issuance of valid and lawful warrants drawn on said fund for the principal and interest thereon, and said warrants shall be of the denomination of \$500 each, and have coupon warrants annexed to them representing the interest. It is agreed that no debt is hereby created or incurred by said county, but instead thereof a transfer and assignment of the proceeds of said special tax levy to the amounts herein stated for the foregoing named years are made to said contractor as the consideration and payment for the erection, completion, and furnishing of said courthouse building."

A taxpayer filed the present bill, and by it seeks to have the assessment of the tax

and the contract declared void, the judge of probate enjoined from issuing the warrants called for in the contract, and the parties restrained from tearing down the old courthouse. A temporary injunction was granted. The defendants attacked the equity of the bill by demurrer, and moved to dissolve the injunction. On the hearing the demurrer was sustained and the injunction dissolved. From the decree the complainant appealed, assigning the same for error.

The theory of the bill is that the contract creates a debt against the county, which, added to the debt of the county in existence at the time the contract was entered into, exceeds the debt limit prescribed by § 224 of the Constitution of 1901. That section, so far as the same is applicable here, is in this language: "No county shall become indebted in an amount including present indebtedness, greater than 3½ per centum of the assessed value of the property therein," etc. The averments of the bill show that the assessed value of the property in the county, for the year 1908, was \$4,228,319, and that the indebtedness of the county was \$135,000. Three and one-half per centum on the valuation would give \$147,991.16, and the difference between this amount and the indebtedness would be \$12,991.16. Thus, it is shown by the averments of the bill, that, if the amount the contractor is to receive for the courthouse should be determined to be a debt, the limit prescribed by the Constitution has been exceeded, and the contract, together with the levy of taxes to meet its requirement as to consideration, should be held void, unless the effect of § 215 of the Constitution of 1901, on account of the purposes for which the levy and contract were made, is to exempt them from the inhibition contained in § 224.

Section 224 is peculiar to the Constitution of 1901; that is to say, such a provision never existed in the organic law of the state prior to the adoption of that Constitution. Hence there is no decision by our own court for our guidance in the construction of such constitutional provision. Many of the states of the Union, however, have similar provisions in their organic law. Gray, in his work on Limitations of the Taxing Power and Public Indebtedness, writing in respect to such provisions, says: "In the decision of questions arising under these constitutional debt limits, considerations of policy have no place. While it is true that all questions of policy are for the legislature or the people, there are many questions of construction in which the courts allow policy to have some weight, at least when they feel so inclined. But these



provisions limiting indebtedness are purely arbitrary, and when the people adopt them all questions of policy are deemed settled. They are to be construed neither liberally nor with excessive strictness, but solely in accordance with their plain meaning. If the people of a state have adopted a mistaken policy in their Constitution, the only remedy is an amendment of that instrument." [p. 1051.]. The intention or purpose in incorporating such a provision in the Constitution is obvious. It was to curb the improvident creation of debts by counties, and thus protect the taxpayers against excessive and unnecessary burdens. It may well be that another reason (one suggested by appellees' counsel) also influenced the framers of the Constitution, namely, that the credit of the counties might be strengthened, and the counties thereby possibly enabled to secure reductions in the rates of interest to be paid on their obligations; but, however this may have been, it is reasonable and proper, in considering the question in hand, that the first-mentioned purpose should be borne in mind.

Upon its face § 224 would seem to afford no room for construction. Its language is clear and explicit and self-construing. But it is thought that the question at issue becomes a complicated one when viewed in the light of § 215 of the Constitution, and it is therefore appropriate at this point to bring that section into view. It provides: "No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein, than one half of 1 per centum; . . . provided further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, any county may levy and collect such special taxes, not to exceed one fourth of 1 per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected." It is under this section that the levy of the taxes mentioned in the contract was and is contracted to be made, and the revenues to be derived from such levy are those which the resolution adopted by the court and the contract purport to sell and assign to the construction company, in payment of the courthouse, completed and furnished. Construing the two sections of the Constitution together, it is obvious that § 215 is without any field of operation in a county the indebtedness of which is up to 37 L.R.A. (N.S.)

the limitation fixed by § 224, or whose indebtedness, added to the debt contemplated or about to be contracted, will exceed that limitation; and it is only in those counties not so indebted that § 215 may be brought into play and applied. We think amplification of this point unnecessary, as both parties hereto seem to concede the correctness of the above construction of the two sections in question.

The vital question in the case then is: Would this contract create an indebtedness?

It is frankly admitted in brief of one of appellees' counsel that the contract here involved "is bottomed upon, and patterned after, the holdings of the supreme court of Illinois," as set forth in the case of *Springfield v. Edwards*, 84 Ill. 626, and *Law v. People*, 87 Ill. 400. Further, that the endeavor of the respondents has been to meet the phases which might arise, should it be held that § 215 is not exempt from the limitation imposed by § 224. This is an important, though perhaps an unnecessary, admission; for few could read the contract without being impressed with the conviction that the parties thereto must have been sensible of the difficulties which the Constitution interposed in their way, and that the phraseology of the contract was ingeniously framed for the purpose of avoiding the restrictions imposed by the organic law; but, in considering the contract, we must not forget that we are dealing with substance, not with form. It is the thing done, or sought to be accomplished, which must determine the question of the power of the county to levy the tax and make the contract. This depends upon the true construction and effect of the whole contract in connection with the constitutional limitations, and not upon the form or mere phraseology of some of the parts of the contract.

Taking up the question then: Does this contract create a debt within the meaning of the Constitution? It is argued that, under the rulings made in the Illinois case, no debt was created, "in that, in the moment of its creation, it became satisfied by payment; and that therefore, though there may have been in one sense a debt created sufficient to authorize the levy of the special tax, yet that debt was immediately paid by the appropriation, in accordance with the Constitution and statutes of this state, of the proceeds of said tax to the liquidation of said debt." The statutes here referred to are embraced in article 3 of the Code of 1907, §§ 133 to 139 inclusive. These sections provide, among other things, in conformity to § 215 of the Constitution, for the levy of a special tax to pay for the erection of county buildings, and further

provide that the taxes collected shall not be used for any other purpose. Adverting to the argument of counsel, based on the Illinois cases, in support of the theory that no debt was created in this case, we confess that the reasoning employed seems to us rather too subtle for practical purposes,—the construction of a written Constitution. As has been stated, the Constitution is not to have a narrow or technical construction, but must be understood and enforced according to the plain, common-sense meaning of its terms. So understood and interpreted, the obvious intent of § 224 is to restrain counties from obtaining money either upon the general credit of the county, or by pledge or transfer of its revenue or assets, thereby creating a debt and imposing additional burdens upon the citizens, which, whether directly or indirectly, involve increased taxation.

In regard to the Illinois cases, the Constitution of that state contained this provision: "No county, city, . . . or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the valuation of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, . . . or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on said debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." [Art. 9, § 12.] There were set out certain sections of the city's charter, involved in the cases, but these are not necessary to be repeated. The city of Springfield, indebted up to the constitutional limitation, borrowed money in large sums, and for its repayment and payment of the interest thereon, at 10 per centum per annum, which was taken out in advance, issued warrants on its treasury; it being provided in the warrants or bonds that, if the same were not paid when due, they should bear interest until paid. The warrants were issued presumably when there were no funds in the treasury for their payment, and no tax had been levied to raise revenues for that purpose. The city was enjoined from levying taxes where-with to pay the warrants, and on appeal to the supreme court it there contended that "when liabilities are created, and appropriations are made, which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of 37 L.R.A. (N.S.)

the Constitution; and that temporary loans are not, when within the limits of the revenue expected to be realized."

Answering the contention, the court said: "The first branch of this position has support in *Grant v. Davenport*, 36 Iowa, 396, *People ex rel. McCullough v. Pacheco*, 27 Cal. 175, *Koppikus v. State Capitol Comrs.* 16 Cal. 253, *State v. McCauley*, 15 Cal. 455, *State v. Medbery*, 7 Ohio St. 522, and *State ex rel. School Directors v. New Orleans*, 23 La. Ann. 358. These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys [which] when received meets the services as they are rendered,—thus discharging the liabilities as they arise, or rather anticipating and preventing their existence." After referring to the rule for construing the constitutional clause involved, and holding that the borrowed money constituted a debt notwithstanding warrants were issued to cover it, the court said: "If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute, the debt exists, and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred. . . . In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to, with these qualifications: First, the tax appropriated must at the time be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation, and issuing and accepting of a warrant or order on the treasury for its payment, must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand, is, there is, in such case, no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation—leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased." "But," said the court, "until a tax is levied, there is nothing in existence which can be exchanged, and an obligation to levy a tax in the future, for the benefit of a particular individual, necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy. If the making of the appropriation, and issuing and accepting a warrant for its payment, does not have the effect of relieving

the corporation of all liability, or, in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt."

The other case from the Illinois court (Law v. People, 87 Ill. 385), cited and relied upon by appellees, merely reiterates and emphasizes the expression contained in the case above quoted from.

Assuming that the expressions or rulings found in those cases are exempt from the principle of *obiter dicta*, and without for the present turning to other authorities, let us for a moment examine by their light the resolutions and contract in judgment. The resolutions purport to levy a tax of one fourth of 1 per centum, for a series of nine years, to raise the money wherewith to pay the price agreed upon for the courthouse, not to exceed the principal sum of \$59,000, with interest thereon at the rate of 6½ per centum, payable semiannually. The principal sum is divided into nine annual instalments. The resolutions also purport to sell, transfer, and assign to the construction company all of the special county courthouse tax levy and all the proceeds derived therefrom, for and during the years mentioned; out of which the contract stipulates the contractor is to receive the annual instalments of the principal and interest from February 1, 1909. Warrants were to be issued for the several instalments, in the denomination of \$500, with interest coupons attached. The resolutions then purport to make the tax levy, together with the action of the court levying the same, a continuing contract between the county and the company, "their successors and assigns, and [to provide that same] shall not be in any way limited or repealed so long as any of said county warrants and the interest thereupon shall remain outstanding."

We do not think it can be said with any show of reason that the resolutions and contract in question square with the rulings of the Illinois court. In the first place, no warrants have been issued or accepted, either for principal or for interest; but granting, for the sake of the argument, issuance and acceptance of warrants, how, may we ask, can there be interest without a debt? "Interest" necessarily involves the idea of a debt, a continuing liability, as its foundation. It is defined by Webster to be: "Premium paid for the use of money, usually reckoned as a percentage; as, interest at 5 per cent per annum on \$10,000." International Dict. So this view of the case repels the idea that the transaction would be a closed one, even if the warrants had been issued, delivered, and accepted. This position is reinforced by the stipulations 37 L.R.A. (N.S.)

that the resolutions levying the tax shall not be limited or repealed "so long as any of said warrants and the interest thereupon shall remain outstanding." If the warrants were considered a full discharge of the obligation of the county, why should interest have been considered at all? Why should it have been stipulated for? Or if, according to the contention of the appellees, "in the moment the debt was created it became satisfied by payment, by the appropriation of the taxes," why should there have been a stipulation for interest running through a series of years? And why should the contract stipulate that the warrants shall be held in trust for the construction company, to be delivered in the future as the work contracted to be done shall progress?

Furthermore evincing that the contracting parties realized the probable invalidity of the tax levy made for a series of years subsequent to the year 1909, the contract stipulates that the county and court agree to levy "said special courthouse building tax of one fourth of 1 per cent per annum during the years 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, and 1917, for the purpose of creating the proceeds," etc. Thus it seems clear that the contract creates an obligation on the part of the county to make the levy in the future for the benefit of the company. In this respect it is obvious that, according to the decision in the case of Springfield v. Edwards, 84 Ill. 626, the existence of a present debt is necessarily implied, in favor of the company and against the county. State ex rel. Helena Waterworks Co. v. Helena, 24 Mont. 521, 55 L.R.A. 337, 343, 81 Am. St. Rep. 453, 63 Pac. 99; Ottumwa v. City Water Supply Co. 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315; Coulson v. Portland, Deady, 481, Fed. Cas. No. 3,275.

But it is urged that no debt is created because the stipulation in the contract is explicit to the effect that "no debt is hereby created or incurred by said county, but instead thereof a transfer and assignment of the proceeds of said special tax levy to the amounts herein stated for the foregoing-named years are made to said contractor as the consideration and payment for the erection, completion, and furnishing of said courthouse building." The case of Swanson v. Ottumwa, 118 Iowa, 161, 59 L.R.A. 620, 91 N. W. 1048, is cited and relied upon as supporting this contention; and it must be conceded that it does so. Not only is this true, but it is quite apparent, from a comparison of the resolutions and the contract there involved with those dealt with in this case, that the scheme here to be passed upon was extracted *in toto* from the

Swanson Case. It therefore becomes necessary to consider that case at some length. The case was decided by the supreme court of Iowa, and the opinion, by Weaver, J., evinces industrious research; but, as was said by the annotator of the case as reported in 59 L.R.A.: The case "well illustrates the result when the effort on the part of the courts to encourage municipal improvement in the face of constitutional restrictions is carried to its logical conclusion. Stripped of subterfuges, that decision permits a municipality which is already indebted beyond the constitutional limit, to impose an additional indebtedness . . . upon its taxpayers, by making a distinction between the taxpayers in their organized capacity and the same persons as individuals." Furthermore, the same questions involved in the case decided by the Iowa supreme court were presented to and decided by the United States court of appeals, in Iowa, in the case of Ottumwa v. City Water Supply Co. 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315, and were determined adversely to the rulings made by the state court, while counsel for appellees here insist that it was the duty of the Federal court to follow the decision of the state court. The opinion of the court of appeals, as we apprehend it, not only accentuates the fact that the court concurred in the state court's interpretation of the Constitution, but makes very clear the point that the difference between the two courts arose, not in the construction of the Constitution, but in the interpretation of the contract or transaction in issue.

But, however this may have been, we are not bound to follow either of those courts, and are at liberty to place upon our own Constitution that construction which to us may seem rational. We do not here recite the facts of those cases; but it will be readily seen, upon a cursory examination of those cases, that the plan there resorted to, to evade the constitutional limitation, has an exact counterpart in the instant case. The same contention was made in those cases as is here urged, to wit, that the transaction would not create a debt on the part of the city, because the municipality only anticipated for its use specific revenues provided to accrue in the future. It would extend this opinion to too great length to quote all of the opinion of the Federal court in criticism of the rulings made by the state court, but we will indulge a limited excerpt: "We have examined carefully the opinion in Swanson v. Ottumwa, and cases which are supposed to give support to its conclusions. It will not be profitable to review in detail the reasoning employed to reach the result arrived at. To our minds

37 L.R.A. (N.S.)

it is not persuasive, and we decline to be guided by it. Its citations exhibit the unceasing attempts in that state [Iowa] and some others to nullify and evade whole-some constitutional limitations upon the power of municipalities to create indebtedness, and thus place intolerable burdens on the taxpayers; and its reasoning but adopts the ingenious, but obviously untenable, arguments by which such attempts have ever been supported." The conclusion reached was that the proposed bonds, if issued, would create an indebtedness against the city, wholly in violation of the Constitution.

"To say that a sum of money due or owing by A to B is not a debt, because A has promised to appropriate, or has appropriated, a portion of his future income to its payment, is a proposition in legal metaphysics" that seems incomprehensible. It does seem plain that the fact that the commissioners' court provide for the levy and collection of taxes to pay the warrants and the interest coupons is a recognition of the fact that their issuance will create a debt against the county. It would be a useless task to attempt to reconcile the decisions of the different courts of the Union in respect to the question. They are out of harmony. But many of them have been read with care, and, bearing in mind the purpose which inspired the adoption of § 224 (heretofore adverted to), and remembering that "Constitutions are the result of popular will, and their words are to be understood ordinarily as used in the sense that such words convey to the popular mind (6 Am. & Eng. Enc. Law, 924, 925), we are constrained to hold that there is nothing in either § 224 or § 215 which indicates that the term "debt" was there used otherwise than in its ordinary and popular sense. On the foregoing considerations, it seems to us that the contract would create a debt, notwithstanding the ingenious plan adopted to show otherwise.

If this is not a sound conclusion,—if the sum contracted to be paid for the courthouse, completed and furnished, is not a debt, because there is a levy of taxes running through a series of years, to be annually collected from all the taxable property in the county, "till the sum to be paid is paid therefrom," and because the contract provides nonliability, and that the warrants shall be paid only from such taxes so specially levied,—then it must be in the power of the court of county commissioners, by mere "jugglery with words," to evade the plain mandate of the Constitution. If that court, by the method adopted, can levy, for a series of nine years, a tax to raise money wherewith to pay for a court-

house, why could it not, at the same time and at the same session, similarly levy a tax to begin at the end of the nine years, and to run through a series of years, to raise money wherewith to pay for a poor-house; and then levy a tax to begin at the expiration of the poorhouse tax series, and to run through still another series of years, say fifty years, to raise money for the construction of public roads? All of these improvements are provided for in § 215 of the organic law.

We cannot assent to the reasoning by which the conclusion is reached that the contract in question does not create a debt. "By means of such artificial reasoning and unlooked-for construction of popular and plain terms and phrases, Constitutions might be stripped of every prohibition upon the legislative power of taxation and creating indebtedness, which the wisdom or fears of the people might place on them." Our conclusion is that, whatever may be the decisions of the courts of other jurisdictions, the contract in question creates an indebtedness. *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 3,275; *Ottumwa v. City Water Supply Co.* 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 315; *Beard v. Hopkinsville*, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872; *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 521, 55 L.R.A. 336, 81 Am. St. Rep. 453, 63 Pac. 99; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820; *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

We are also of the opinion, and so hold, that the amount to be considered in determining whether the debt exceeds the limitation is the aggregate amount of the contract. *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Beard v. Hopkinsville*, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872; *Salem Water Co. v. Salem*, 5 Or. 30; *Prince v. Quincy*, 128 Ill. 443, 21 N. E. 768; *Earles v. Wells*, 94 Wis. 285, 59 Am. St. Rep. 886, 68 N. W. 964. Adding the \$59,000 which the contract provides shall be paid for the courthouse, to the present indebtedness, carries the total indebtedness of the county greatly beyond the constitutional limitation, and, from the considerations which have been adverted to, it logically follows that the contract is obnoxious to the Constitution, and is void.

We have not overlooked the case of *Tally v. Commissioners' Ct.* — Ala. —, 39 So. 167; but even a cursory glance at the facts will disclose that that case did not involve the question of debt limitation, and it is therefore not here in point.

It follows that the decree of the Chancellor 37 L.R.A.(N.S.)

for must be reversed, and a decree will be here rendered overruling the demurrer and the motion to dissolve the injunction.

**Dowdell, Ch. J., and Simpson and Mayfield, JJ., concur.**

Petition for rehearing denied May 11, 1909.

## KENTUCKY COURT OF APPEALS.

### EX PARTE CITY OF NEWPORT, Appt.

(141 Ky. 329, 132 S. W. 580.)

#### Municipal corporation — debt limit — coextensive corporations.

In determining whether or not a municipal corporation has reached its constitutional debt limit, the indebtedness of an independent school district which is coincident with its territorial limits, and which has been created by the legislature a distinct municipality, with power to create indebtedness to a certain amount, is not to be considered.

(December 16, 1910.)

**A** PPEAL by the city from a judgment of the Circuit Court for Campbell County holding an ordinance providing for the issue and sale of bonds for street improvements valid. Affirmed.

The facts are stated in the opinion.

Mr. C. T. Baker for appellant.

**Lassing, J.,** delivered the opinion of the court:

By an ordinance duly and regularly passed by the general council, and approved by its mayor, the city of Newport provided for the issue and sale of \$100,000 worth of its bonds for street improvement purposes. Prior to the passage of this ordinance, two thirds of the voters voting at an election held for that purpose, in compliance with § 157 of the Constitution, voted in favor of the issue of these bonds. Thereafter a question arose as to the right of the city to issue that amount of bonds, the claim being made that it would increase the city's indebtedness beyond the constitutional limit. Suit was accordingly brought to test the validity of the ordinance. The case was prepared and submitted to the circuit judge for judgment, and upon consideration he held the ordinance valid, and the city appeals.

The only question affecting the validity of this ordinance is whether a certain indebtedness of the board of education of the

**Note.** — See note, post. 1058.

city of Newport is to be regarded and treated as an indebtedness of the city. If it is, then the ordinance does in fact provide for an indebtedness in excess of that which the Constitution authorizes; whereas, if the indebtedness of the board of education is not to be considered and treated as a part of the indebtedness of the city, then the indebtedness provided for is within the constitutional limitation, and the ordinance is valid.

Cities of the second class are not permitted to incur an indebtedness, including existing indebtedness, exceeding in the aggregate 10 per cent of the assessment next before the last assessment previous to incurring the indebtedness. It is shown that the assessment for the city for the year 1909 was \$13,209,357. When the ordinance was passed, the limit of indebtedness which the city could incur, therefore, was \$1,320,935.70. At that date the indebtedness of the city, after deducting the amounts in the sinking and sewer funds, is shown to have been \$1,160,977.54. At that time the indebtedness of the board of education was \$95,000. If the indebtedness of the board of education is to be treated as an indebtedness of the city, the city would not be authorized to incur an additional indebtedness in excess of \$64,958.16, for this amount would bring its total indebtedness up to 10 per cent of the assessment of the previous year.

In *Brown v. Board of Education*, 108 Ky. 783, 57 S. W. 612, this court held that under § 157 of the Constitution, the board of education had not authority to become indebted beyond the income for any one year without the consent of two thirds of the legal voters of the city. And it is therefore argued that as the board of education could not, in any one year, incur an indebtedness beyond a certain amount, except by a vote of the people interested, the indebtedness of the board must be treated as part of the indebtedness of the city. This is not a necessary inference. The question here involved was not raised in that case; nor has it been passed upon by this court. But in *Gray on Limitations of Taxing Power & Public Indebtedness*, § 2148, the rule, supported by the weight of authority in other states, is said to be that, "where two or more municipal corporations or political bodies are wholly or partly coincident in territory, they are nevertheless regarded as separate bodies for the purposes of constitutional debt limitations, unless the contrary is expressed in the Constitution. In reckoning the indebtedness of a county, the indebtedness of a city within its borders is not to be considered; in reckoning the indebtedness of a city, the debt of an independent school district wholly or

partly in the city limits is not to be considered; and *vice versa*."

In *Campbell v. Indianapolis*, 155 Ind. 186, 57 N. E. 920, the supreme court had under consideration the question as to whether or not the indebtedness of the school board of the city of Indianapolis should be taken into account as a part of the city's indebtedness in determining whether or not the constitutional debt limit of the city had been reached. It was held that the debts of the civil city of Indianapolis and those of its school corporation are not to be aggregated to determine the debt limit to which either is entitled under the Constitution, but that the right or power of each of these corporations to contract an indebtedness not in excess of the limit fixed by the Constitution is affected only by its own existing debts. A similar conclusion was reached by the supreme court of Illinois in *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203. To the same effect are *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 71 N. W. 86; *Board of Education v. National L. Ins. Co.* 36 C. C. A. 278, 94 Fed. 324; *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682.

While it is true that the indebtedness of the board of education must be finally met by a tax levied upon all of the property in the city, it is equally true that its bonded indebtedness is secured by a lien upon the school property. The legislature has seen fit to make the board of education in cities of the second class an independent and distinct municipal corporation. *Board of Education v. Townsend*, 140 Ky. 248, 130 S. W. 1105; *Brown v. Board of Education*, supra. An examination of the acts creating said boards discloses the fact that they are given more independent powers than have the boards of education in cities of any other class. They have ample authority to do everything that is necessary to control and maintain the schools in said cities,—full power to create indebtedness and issue bonds within certain restrictions and limitations, and to pledge any property that may be acquired for school purposes, together with its equipment, to secure said indebtedness. In these matters they have exclusive control, free from any supervision or direction on the part of the general council. There is no constitutional restriction upon the legislature denying it the right to create school boards, giving to them these general powers. On the contrary, § 183 of the Constitution specially directs the legislature to provide by proper legislation for an efficient system of common schools. Under this authority the legislature has created the school board as an independent and distinct mu-

ncipal corporation, exercising its rights and powers throughout the city limits.

The opinion in the case of *Richmond v. Powell*, 101 Ky. 7, 27 S. W. 1, relied upon as an authority by the city, is not in point, for the reason that Richmond is a city of the fourth class, and the power and authority of school boards in cities of the fourth class is entirely unlike that which may be exercised by school boards in cities of the second class; and, further, the bonds referred to in that case were issued by the city itself, and, of course, there could be no question but that the city would be liable for its bond issue, no matter for what purpose the indebtedness may have been created. The bonds evidencing the indebtedness of the school board in this case were issued, not by the city, but by the school board. Hence the case of *Richmond v. Powell* throws no light upon the question involved in this case.

In some jurisdictions where this question has arisen, school boards are given the right to make the tax levies for school purposes, while in this state, in cities of the second class, the board does not have such power. But it is given the right to determine the needs of the school for the current year, and to require the council to make a levy to meet these demands. No substantial distinction can be drawn between an act which gives to the board the right to levy the tax and an act which gives it the right to require it to be done. The result is the same. In creating the school board an independent corporation, the legislature invested it with certain rights and powers, among them being the power to determine the amount of money necessary to meet the school needs during any one year, and, under certain contingencies and conditions, to borrow money and pledge the school property to secure it. But this power is not unlimited, for we find that such board may not incur an indebtedness in excess of 2 per cent of the taxable property of the district. If this indebtedness, so incurred, were to be treated as a part of the indebtedness of the city, why the necessity for placing any limitation as to amount? The provision of the Constitution quoted fixes the limit beyond which the city may go, and if the indebtedness of the school board is to be treated as a part of the indebtedness of the city, and the city should have already reached its constitutional limit, then the power granted to the school board authorizing it to incur an indebtedness of 2 per cent would be a nullity. The legislature, instead of granting it this right to incur an indebtedness of 2 per cent, should have granted this right provided such indebtedness, when so incurred, would not increase 37 L.R.A. (N.S.)

the indebtedness of the city beyond its constitutional limit. Evidently the legislature did not place this construction upon § 158 of the Constitution, but, in making provision to meet the requirements of § 183 of the Constitution, it authorized the school boards of cities of the second class to incur an indebtedness of not exceeding 2 per cent of the taxable property of the district, if the needs of the school required, without regard to the city's financial condition. This was the plain legislative intent, and, there being no constitutional provision denying to the legislature this right, the act should be upheld.

The Chancellor having reached this conclusion, his judgment is affirmed.

#### INDIANA SUPREME COURT.

CITY OF LOGANSPORT et al., Appts,  
v.  
MICHAEL A. JORDAN.

(171 Ind. 121, 85 N. E. 959.)

**Municipal corporation — debt limit — necessary improvements.**

1. That a sewer is necessary to receive and dispose of the storm water in a municipality, and thereby prevent actions against it for damages, does not justify its incurring indebtedness for the sewer in violation of the constitutional limitation of its indebtedness.

**Same — when indebtedness arises.**

2. An indebtedness of a municipality for public improvements arises, for the purpose of determining whether or not it is exceeding its constitutional debt limit, when the work is completed and accepted, and it is not necessary first to assess the special benefits and ascertain the amount of the cost which the municipality is required to pay.

**Injunction — municipal indebtedness — debt limit.**

3. If, at the time a public improvement is completed and accepted by a municipal corporation, its constitutional debt limit has been exceeded, the city may, at the suit of taxpayers, be enjoined from taking any steps to raise money by levying a tax against the taxpayers of the city to pay for the improvement.

**Municipal corporation — debt limit — avoiding — annual instalments.**

4. A municipal corporation cannot avoid a constitutional limitation upon the amount of its indebtedness, by attempting to pay for a public improvement completed and accepted at a time when such limit has been exceeded, by dividing the cost into instal-

**Note.** — See note, post, 1058.

ments and levying one each year until the entire amount is paid.

**Appeal — nonprejudicial error.**

5. A judgment which is right on the law and facts will not be reversed for intervening errors of procedure.

(October 29, 1908.)

**A**PPEAL by defendants from an order of the Circuit Court for Cass County enjoining the assessment and collection of taxes for certain improvements in alleged violation of a constitutional debt limit. Affirmed.

The facts are stated in the opinion.

Messrs. G. W. Funk, M. Winfield, Laury & Mahoney, D. B. McConnell, G. C. Taber, McConnell, Jenkins, & Stuart, and Myers & Yarlott for appellants.

Mr. George W. Walters, B. F. Long, W. H. H. Miller, C. C. Shirley, and S. D. Miller for appellee.

Jordan, J., delivered the opinion of the court:

This action was instituted on October 1, 1906, by appellee, a resident taxpayer of the city of Logansport, to enjoin that city from incurring and paying any indebtedness in its corporate entity, in violation of the provisions of article 13 of the state Constitution, which provides: "No political or municipal corporation in this state shall ever become indebted in any manner or for any purpose, to any amount in the aggregate exceeding 2 per centum on the value of taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporations, shall be void: Provided," etc. Members of the city's common council and others of its officials, together with certain other persons, were made codefendants. The indebtedness in controversy, as claimed, arises out of the construction of a certain sewer by the city of Logansport. On a trial before the court on the issues as joined, there was a finding in favor of plaintiff, and, over the separate motions for a new trial by the several defendants, the court entered its decree perpetually enjoining the city of Logansport "from making any appropriation of money from the treasury of said city for the payment of any part of the cost of constructing the Herring system of sewerage on the West Side of said city of Logansport, constructed by the defendant Uhl under contract with said city." The decree further provided that the "defendants are each and all perpetually restrained, enjoined, and prohibited from levying any tax upon the property in

said city, to be collected or used for the purpose of paying any part of said cost of such sewerage system, and from in any manner providing for the payment of the cost of said system in said city," etc. From this decree, the city and the other defendants prosecute this appeal, and have jointly and severally assigned errors.

A condensed statement of the facts appears to be as follows: For many years the city of Logansport had experienced trouble in taking care of the storm water from its streets and alleys in that part of the city known as the "West Side." At various points it overflowed private property after every heavy rain, and did much damage. There was no sewerage system in this part of the city. This condition of affairs apparently was controlling in causing the city council, on March 1, 1905, to pass a declaratory resolution for the construction of a sewerage system to drain said part of the city. On September 5, 1903, an owner of property on the West Side filed suit against the city for damages resulting from the discharge of storm water from the streets and alleys upon his property, and for an injunction against the further continuance thereof. Trial in the case was had and a special finding of facts was made, with conclusions of law thereon, and filed by the court on March 8, 1905. This was eight days after the declaratory resolution ordering the construction of the sewerage system was passed by the city council. On March 9, 1905, the court rendered its decree, granting plaintiff \$100 damages, and perpetually enjoining the city from permitting the water from its streets and alleys to accumulate and overflow on plaintiff's property, and mandating the city to remedy the situation complained of by making alterations and improvements in certain streets and gutters. While this case was pending, but before any finding had been made, the city council passed a resolution, as hereinbefore stated, declaring the existence of a necessity for the construction of a sewerage system on the West Side of the city, and providing for the construction of said system, and adopting detailed plans and specifications therefor, which action was taken, and the sewer ordered constructed under the provisions of the act of the general assembly of the state of Indiana approved March 11, 1901 (Laws 1901, p. 401, chap. 179). Bids were advertised for and received April 5, 1905, and were opened on April 7, 1905, and on April 11th the contract was let to appellant Dennis Uhl, and a contract entered into between him and the city.

The sewerage system, as ordered, appears to have been intended not only for the



benefit of property owners, but also for the general benefit of the city of Logansport, by furnishing an outlet for the storm water from the streets and alleys of the city; and because of this fact said sewer was constructed much larger than it would have been if the system had been only for sanitary purposes and for the benefit of private property. The work of constructing the sewer under the contract was done under the supervision of the board of public works of the city, and was completed on or before February 19, 1906, and was found to cost under the contract the sum of \$173,574.39; and on this latter date was accepted by the city as completed. Soon thereafter the common council referred the matter of making assessments for the payment of the cost of the sewer to the board of public works, under the provisions of the act of March 11, 1901, and on June 16, 1906, this board filed its report with the clerk of the city showing all its proceedings and setting out the assessments it had made, which showed that the aggregate assessments against private property, representing the total special benefits, was \$121,195.96, and the balance of \$52,378.43 was assessed against the city of Logansport. This report was received by the council on July 3, 1906. On August 1, 1906, the common council, by resolution duly adopted, and after a hearing extended to property owners, modified the assessments made and reported by the board of public works, by reducing all assessments against private property 12½ per cent, and added the reduction to the amount assessed against the city, and confirmed the assessments as so modified. By this resolution the total special assessments on private property aggregated \$106,083.30, and the balance of \$67,491.09 was assessed and charged against the city as its portion of the benefits derived from the sewer. By this resolution the council further provided that this \$67,491.09 should be paid in ten equal annual instalments, and that a special tax levy should be made each year for that purpose. Soon after this assessment was made against the city, a property owner and taxpayer of the city filed suit against the appellants, praying that the city be enjoined from paying or providing for the payment of any part of the assessment against the city, on the ground that the city was already indebted far beyond 2 per cent of its taxable property, and had no cash on hand with which to pay any part of the assessment. Hearing was had before the court, and a temporary injunction granted as prayed. Soon after this, the defendants in the latter suit moved that the court modify this injunction by confining it strictly to the assessments made 37 L.R.A. (N.S.)

by the city council on August 1, 1906. In September, 1906, for the purpose of securing a new assessment, contractor Uhl, one of the appellants in this case, as relator, filed an action in the Cass circuit court against the city of Logansport and its board of public works, praying that they be mandated to make a new assessment for the payment of the contract price of said sewerage system, in accordance with the provisions of "An Act Concerning Municipal Corporations," approved March 6, 1905 (Laws 1905, p. 219, chap. 129), it being the theory of the plaintiff that the former assessments had been made under a wrong statute. The result of this action was that a peremptory writ of mandate was issued by the court, directing the board of public works to proceed at once to make a new assessment under the act of 1905. In pursuance of this mandate of the court, the city's board of public works immediately convened, and by resolution voted to begin at once the work of making new assessments, and at the time of the commencement of the suit at bar it was engaged in making such assessment. On October 1, 1906, before the commencement of this suit, the board of public works had proceeded so far in making these assessments that it had determined approximately what the assessment against the city would be. On that day the board addressed an official communication to the city comptroller, announcing therein that the benefits accruing to the city from the sewerage system in question were "largely in excess of \$15,000," and asking for an appropriation "for the use of our department in that amount to pay the same." In pursuance of this communication and request, the comptroller, with the assistance of the city's attorney, proceeded to prepare his recommendation to the mayor, therein advising the appropriation of \$15,000 for the payment of part of the city's benefits derived from the sewer, and the making of a special levy of 17 cents on each \$100 by which to raise the amount. These steps appear to have been taken on the evening of October 1, 1906, at which time members of the common council and the mayor of the city were waiting in the office of the city attorney to have prepared the proper ordinances making the appropriation and tax levy suggested. The attorneys for appellant Uhl were in consultation with the board of public works, members of the common council, and city officials.

There is evidence to show that it was the intention of the proper city authorities to make the suggested appropriation and tax levy; but, while the city attorney was engaged in preparing the recommendation of

the comptroller to the mayor, and before he had time to prepare the appropriation or tax levy ordinances, the suit in bar was commenced, and a temporary restraining order served on appellants, preventing further action. It is shown that the city of Logansport, at the time the proceedings for the construction of the sewer in question were instituted by the common council, and at the time said sewer was completed and accepted, and also at the time this suit was commenced, was already indebted over the 2 per cent limit, as fixed by article 13 of our Constitution, and at the time this suit was commenced, there was no cash on hand to be devoted to sewer purposes, and all money that would be received by the city from taxes or other sources for the year 1905 and preceding years, which was collectable in 1906, had already been appropriated for other necessary purposes. The tax levy for 1906 and all appropriations for the year 1907 had been made a week or two before this suit was instituted, but no provision had been made for money with which to pay any part of the cost of the sewerage system in controversy. It appears that the matter in respect to the sewer had been before the common council and the city officials continuously since March 1, 1905, with the full knowledge that a large portion of the cost of the sewer would have to be paid by the city, but the city made no provision for meeting this obligation. This being true, the city was, by the provisions of said article, prohibited from incurring any new or additional indebtedness, unless such indebtedness could be paid out of the current revenues of the city not devoted to other purposes. It will be observed that the language of the Constitution is positive and imperative. It declares that "no political or municipal corporation in this state shall ever become indebted in any manner or for any purpose." (Our italics.) It is therefore wholly immaterial for what purpose the indebtedness in excess of the constitutional limit is incurred. It falls within the prohibition if the amount thereof exceeds the current revenues of the municipality. *Valparaiso v. Gardner* (1884), 97 Ind. 1, 49 Am. Rep. 416; *Laporte v. Gamewell Fire Alarm Teleg. Co.* (1896), 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Perry County v. Gardner* (1900), 155 Ind. 165, 57 N. E. 908; *Cason v. Lebanon* (1899), 153 Ind. 567, 55 N. E. 768; *Voss v. Waterloo Water Co.* (1904), 163 Ind. 69, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 Ann. Cas. 978; *French v. Burlington* (1876), 42 Iowa, 616. This holding is not to be understood as contravening the decision of this court in *Logansport v. Dyke*, 37 L.R.A. (N.S.)

man (1888), 116 Ind. 15, 17 N. E. 587, wherein it is held that a city indebted beyond the constitutional limit is not prohibited from contracting with an attorney or agent for his services to contest the validity of the city's indebtedness, or to secure a reduction thereof. Such indebtedness is held not to come within the scope of the constitutional provision. In this case, so far as the constitutional inhibition is concerned, it makes no difference, nor does it afford the city of Logansport or its authorities justification by reason of the fact, that the construction of the sewer in question was necessary in order to dispose of the storm water, and thereby prevent suits against the city for damages. The prohibition of the Constitution operates upon the indebtedness coming within it, without regard to the necessity therefor, and without regard to its form or the manner or method by which it is evidenced. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Culbertson v. Fulton* (1888), 127 Ill. 30, 18 N. E. 781.

Having said this much as preliminary, and in answer to some of the contentions of appellants, we shall consider what the parties herein regard as the pivotal questions in the case. There appears to be a wide difference between counsel for the respective parties in respect to the time at which the indebtedness incurred by the city for its portion of the cost of the construction of the sewer arises. The contention of appellants' counsel is that no indebtedness could arise or be created against the city of Logansport until the final estimate of the benefits resulting to the city by reason of the sewer was ascertained, and an assessment therefor levied against the city. It is therefore argued that the fact that no assessment had been made against the city when this suit was instituted rendered the suit premature, and for this reason alone the relief demanded should have been denied by the lower court and the proceedings dismissed. The contention of appellee's counsel is that the indebtedness of the city for its share of the cost of the sewer was incurred at the time the work of constructing the sewer was completed by the contractor, and the sewer accepted by the city. The theory adopted by the trial court apparently was that the indebtedness against the city for its portion of the cost of the sewer arose at the time the work was completed, and was accepted by the city, and, as at that time the city was already indebted beyond the constitutional limit, and there being no provision for the payment of any part of the indebtedness, the latter,

under the provisions of the Constitution, was void in its entirety, and the injunction would lie. Appellants' counsel concede that this would be the result if the theory advanced by the trial court is correct, but they insist that, under the facts in the case and the law relative thereto, this theory is not correct, and cannot be sustained. They assert that the court adopted this theory in the very teeth of the holdings in the appeals of *Quill v. Indianapolis* (1890), 124 Ind. 298, 7 L.R.A. 681, 23 N. E. 788; *Voss v. Waterloo Water Co.* 163 Ind. 69, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 Ann. Cas. 978; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768. These cases do not sustain this latter assertion. If, under the facts in this case, it can be held that the obligation of the city for its share of the cost of the sewer, which may be assessed against it at the time the final estimate is made, was created at the time the work was completed by the contractor, and accepted by the city, then it is settled that the city has no legal authority to pay such assessment. *Cason v. Lebanon*, supra, was a suit to enjoin the city of Lebanon from letting a contract for improving a street in that city. Among the grounds upon which it was sought to base the right to injunctive relief was that the city would incur an indebtedness on account of street and alley crossings to the amount of \$1,500, which indebtedness, as charged in the complaint, would be in violation of the provisions of article 13 of the state Constitution. This court, in considering the constitutional question there involved, said: "If the city does not have the money with which to pay its share of the cost of said improvement when the same is completed and accepted, as well as its ordinary current expenses that came into existence at or before the time of said acceptance, it has no right or authority to pay the same at any time thereafter, and may be enjoined from so doing."

We are constrained to differ with appellants' learned counsel that in no sense could any indebtedness exist against the city for its share of the cost of the construction of the sewerage system until the final assessment of special benefits arising therefrom was made by the board of public works, and the amount determined which the city would be required to pay. Section 3544, *Burns's Anno. Stat. 1905*, Acts 1905, p. 219, § 120, pertaining to towns and cities, provides: "In making assessments against each lot or parcel of land for the construction of any sewer, as provided for in this 37 L.R.A. (N.S.)

act, said board of public works shall, as soon as any contract for the construction of any such sewer has been completed, make out an assessment roll with the names of the property owners and descriptions of the property primarily assessed for such sewer or drain, as hereinbefore provided. . . . The board shall also have the power to determine what part, if any, of the benefits resulting from such improvement, accrue to said city, and any amount so found shall be assessed against such city on said roll, and paid out of funds appropriated to the use of said board for such purpose by the common council: Provided, that no more than \$500 shall be paid out of the city funds for any one improvement, unless pursuant to an ordinance specially appropriating the same for such specific improvement." While it is true that there is no positive declaration in the statute that any indebtedness shall accrue in favor of the contractor against either the benefited property owners or the city for the cost of making the improvement, nevertheless it will be noted that § 3544, supra, requires the board of public works, "as soon as any contract for the construction of any such sewer has been completed," to make out an assessment roll, etc.; or, in other words, to take the necessary steps, and determine, primarily at least, the special benefits accruing to the several lots and parcels of land. The provisions of this section also empower and require the board of public works to determine what portion, if any, of the benefits resulting from the improvement, shall be apportioned on the assessment roll to the city, such assessment roll, when completed, to be delivered to the department of finance. When the contractor, in such cases, has fully completed his work according to the contract, then the duty, under the law, devolves upon the city, through its proper officials, to receive and accept it. The contract price for the work, when so completed, certainly had been earned by the contractor, and when the city accepts the work as completed, it is manifest that at such time an indebtedness comes into existence against the city in its corporate entity, for whatever benefits it derives therefrom. The power to determine the amount of money which the city shall pay as the equivalent of the benefits derived by it, by reason of the improvement, is by law lodged in the board of public works. The mere determination of such amount by the board certainly cannot be said to create the indebtedness against the city for its share of the work.

It is not material when the city's share of the indebtedness which arises out of the construction of the sewer becomes due and

payable to the contractor. The real question is, at what time did the debt come into existence? for, as said by this court in *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588: "The rule is that the cash must be in the treasury to pay the same when the debt comes into existence, not when it becomes due." The maturity of the debt is not controlling. In *Springfield v. Edwards* (1877), 84 Ill. 626, the court said: "A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition." Of course, no indebtedness can be said to arise against the city in advance of anything being supplied to it; but let us suppose, by way of illustration, that a city should purchase, on a deferred payment, horses necessary for its use, could it in reason be asserted that an indebtedness would not be created against the city for the amount of the purchase price of the horses at the time they were furnished to and accepted by the city under the purchase contract? With what plausibility then can it be argued that when the contractor in this case furnished to the city the sewer completed according to the contract, and it was accepted by the city, an indebtedness was not created against the city for whatever benefits it derived by reason of the construction of such sewer? Again, suppose that A should furnish to B, for his use certain property, under a mutual agreement that the amount of its value to be paid by B should thereafter be determined by certain designated persons. Under such circumstances certainly an indebtedness would be created against B in favor of A at the time the property was accepted by B, for the amount of its value as subsequently determined by the persons designated for that purpose. This we think fairly illustrates the view that the indebtedness against the city in this case, was created at the time the sewer was completed, received, and accepted by the city. We are confirmed in this view of the question, and in so holding we are supported, by the following authorities: *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768; *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781; *Springfield v. Edwards*, 84 Ill. 626; *French v. Burlington*, 42 Iowa, 616; *Buck v. Eureka* (1899), 124 Cal. 61, 56 Pac. 612. In *Laporte v. Gamewell Fire Alarm Teleg. Co.* supra, the court said: 37 L.R.A. (N.S.)

"It is clear that the indebtedness came into existence December 18th, when the work was completed and accepted, if not before. There was not sufficient cash in the city treasury to pay such indebtedness at that time, and the constitutional provision was violated." In *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612, which was an action to recover for the value of the services of an attorney at law, it was said in the syllabus: "The implied liability was incurred when, from time to time, the services were fully rendered, and the city, with knowledge, accepted the benefit of them." At the time the sewer was completed and accepted by the city, at which time, as we hold, the indebtedness came into existence, it was already indebted beyond the constitutional limit, and there was no money in its treasury available to pay any part thereof. Certainly, any attempt on the part of the city officials to raise money by levying a tax against the property of appellee and other taxpayers of the city, to pay the prohibited indebtedness, either in whole or in part, would be without the warrant of law, and could be enjoined. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768.

The officials of the city apparently entertained the view that the total assessment against the city could be met by it in annual instalments, and thereby an indebtedness could be avoided by the city's levying a tax to pay each of such annual instalments. The law, however, affords no warrant for this view of the question. The sewer was not contracted for upon any instalment plan. Necessarily, therefore, whatever part of its cost which was chargeable to the city would have to be assessed against it as an entirety and so paid. However, were such view correct, the unfortunate financial condition of the city left it without any money to apply to the payment, in whole or in part, of even the first instalment of \$15,000, for which, as it appears, the board of public works requested an appropriation. It was conceded at the trial that the city would have no money during the year 1906 to apply upon the assessment, or on any instalment thereof, and that the only source from which it expected to secure funds to apply to the payment of this instalment was the proposed levy of 17 cents, which was about to be made on October 1, 1906. This levy would have realized for the city about \$15,000 for the year 1907.

Certain alleged intervening errors are presented and urged by appellants for reversal; but, as the judgment of the lower court, under the facts established and the law applicable thereto, is clearly right, it must be affirmed without regard to any

intermediate errors, as such errors under the circumstances can exert no influence over the merits of the case. *Germania F. Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003, and authorities there cited.

After a careful consideration of this appeal, we discover no available error. The judgment is therefore in all things affirmed.

Petition for rehearing denied.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

CHARLES F. ALLISON et al., Appts.,  
v.  
CITY OF CHESTER et al.

(69 W. Va. 533, 72 S. E. 472.)

#### Municipal corporation — debt limit — contract extending over years.

A contract of a municipal corporation with a waterworks company, for a supply of water for public use, for a stipulated number of years, at a stipulated price per year, payable in quarter-annual payments, is not void, by § 8, article 10, of the Constitution (Code 1906, p. lxxix), limiting municipal indebtedness, because the aggregate of such payments for the full term of the contract, with existing indebtedness, exceeds the amount for which such municipality is, by said section, allowed to become indebted. The validity of such contract is tested by the aggregate of the quarterly payments for the first year.

(September 9, 1911.)

**A** PPEAL by plaintiffs from a decree of the Circuit Court for Hancock County dismissing their bill and dissolving an injunction restraining defendants from carrying into effect certain ordinances providing for the payment of money to the defendant water company by the defendant city for a water supply. Affirmed.

The facts are stated in the opinion.

Mr. J. B. Sommersville, for appellants:

The contract of the municipality with the water company for its supply of water was void.

List v. Wheeling, 7 W. Va. 501; Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279; Brannon v. County Ct. 33 W. Va. 789, 8 L.R.A. 304, 11 S. E. 34; Davis v. County Ct. 38 W. Va. 104, 18 S. E. 373; Camden Clay Co. v. New Martinsville, 67 W. Va. 525, 68 S. E. 118; Walla Walla v. Walla

Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Chesapeake & O. R. Co. v. Miller, 19 W. Va. 408; Welch Water, Light & P. Co. v. Welch, 64 W. Va. 373, 62 S. E. 497; Beard v. Hopkinsville, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872; Salem Water Co. v. Salem, 5 Or. 29; Coulson v. Portland, 1 Dedy, 481, Fed. Cas. No. 3,275; Chicago v. McDonald, 176 Ill. 404, 52 N. E. 982; Dawson v. Dawson Waterworks Co. 106 Ga. 696, 32 S. E. 907; Dill. Mun. Corp. 4th ed. § 130; Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385.

Messrs. Hubbard & Hubbard, Billingsley & Clark, and W. B. Moore, for appellee South Side Waterworks Company:

The obligation incurred by the city by virtue of these ordinances does not constitute a debt within the meaning of the term as used in § 8 of article 10 of the Constitution.

Weston v. Syracuse, 17 N. Y. 110; Garrison v. Howe, 17 N. Y. 458; Wentworth v. Whittemore, 1 Mass. 470; People v. Arguello, 37 Cal. 525; Saleno v. Neosho, 127 Mo. 627, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 192; Re Adams, 12 Daly, 457; Clark v. Nevada Land & Min. Co. 6 Nev. 208; McElhaney v. Crawford, 96 Ga. 174, 22 S. E. 895; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

A limitation of municipal indebtedness is not violated by a contract for a supply of water at an annual rental, merely because the aggregate of the rentals during the life of the contract may exceed the limit of indebtedness.

Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Beard v. Hopkinsville, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 239, 24 S. W. 872; 8 Am. & Eng. Enc. Law, 1002; 20 Am. & Eng. Enc. Law, 1175; Valparaíso v. Gardner, 97 Ind. 1, 49 Am. Rep. 417; McBean v. Fresno, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; List v. Wheeling, 7 W. Va. 501; Welch Water, Light & P. Co. v. Welch, 64 W. Va. 373, 62 S. E. 497; Camden Clay Co. v. New Martinsville, 67 W. Va. 525, 68 S. E. 118; Addyston Pipe & Steel Co. v. Corry, 197 Pa. 41, 80 Am. St. Rep. 812, 46 Atl. 1035; Erie's Appeal, 91 Pa. 398; Grant v. Davenport, 36 Iowa, 396; Cunningham v. Cleveland, 39 C. C. A. 211, 98 Fed. 657; Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 157; Fidelity Trust & G. Co. v. Fowler Water Co. 113 Fed. 560; Ludington Water-Supply Co. v. Ludington, 119 Mich. 480, 78 N. W. 558; Anoka Waterworks, E. L. & P. Co. v. Anoka, 109 Fed. 580.

Mr. George D. Ingram for appellee city.

Headnote by MILLER, J.

Note. — See note, post, 1058.  
37 L.R.A. (N.S.)

Miller, J., delivered the opinion of the court:

The decree appealed from, dissolving the preliminary injunction and dismissing plaintiffs' bill, presents for decision a single question, a question of constitutional limitation.

Amendatory of a prior ordinance of November 20, 1903, the council of the city of Chester, on November 4, 1909, adopted an ordinance reciting the passage of the former ordinance, by which it had contracted with the South Side Waterworks Company for a supply of water for extinguishing fires and for other purposes, and since which time the growth of the city had been such as to require the laying of a more extensive system of water mains than originally contemplated and provided for, and that further extensions would be required from time to time, and that the making of such extensions and additions as was and would be required, and was proposed, to meet the new and continually increasing demands, the waterworks company would be required to expend a large amount of money; and furthermore reciting that, in order to justify said company in making such expenditures, and to enable it to secure the funds necessary to extend and enlarge its plant as desired, and proposed, it was then ordained as follows:

"Section 1. That said contract entered into by said ordinance of November 20, 1903, and the acceptance thereof by the South Side Waterworks Company, be altered so that said company shall, for a period of thirty years, supply fire hydrants and water to said city for extinguishing fires and for other purposes, and the said city shall during the said period pay for the same at the rate and upon the conditions following, to wit:

"(1) Said waterworks company shall maintain the fire hydrants already in place in said city and connected with said company's mains, and said company shall also furnish, install, and maintain at such points on said company's mains as may be designated by council such additional fire hydrants as council may from time to time require. Hydrants which may be installed shall be of the same pattern, or equal efficiency with those already in use, and no hydrant once installed or maintained under this contract shall be discontinued during the term thereof.

"(2) Said waterworks company shall, at all times during the term of this contract, except in case of accident to machinery or mains, or when making connections, furnish water at all of said fire hydrants at such pressure and in volume as may be reasonably required for fire protection.

"(3) Said waterworks company shall fur-

nish, erect on its mains, and supply with necessary water, free from all charges to the city, such iron drinking troughs for horses as council may approve, not to exceed four in number, which troughs shall be maintained and kept in good repair by council during the term of this contract.

"(4) The city shall have the right to use water from said fire hydrants for extinguishing fires, and to a reasonable extent for sprinkling and cleaning streets or fire department practice.

"(5) The city of Chester, in consideration of the foregoing stipulations on the part of the waterworks company, agrees to pay said company at the rate of forty-five dollars (\$45), during the term of this contract for each fire hydrant now maintained or hereafter installed under order of the council, up to and including fifty in number. Water for flushing sewers shall be paid for at the rate of 10 cents per thousand gallons. Payments hereunder shall be made quarterly by the city in full for all service rendered by the waterworks company during the preceding quarter."

Section 8, article 10, of the Constitution (Code 1906, p. lxxix.), provides: "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding, thirty-four years: Provided, that no debt shall be contracted under this section, unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

It is conceded that the annual payments provided for in the contract can be paid each year out of the current revenues of the city, but that the aggregate of such payments cannot be so met, and that if such aggregate constitutes an indebtedness within the meaning of the Constitution, the contract is void; for it is also conceded that the questions connected with the making of the contract had not, prior to entering into the same, been first submitted to the vote of the people, as required by the provisions of the organic law.

The sole question presented for decision

then is, Should the aggregate of all the quarter-annual payments provided for in the contract be treated as an indebtedness of the city of Chester, within the meaning of the constitutional inhibition, or only that portion thereof which were thereby to become due the first year?

It is well settled in this, and in other states having like or similar constitutional provisions, that municipalities may not become indebted absolutely or contingently beyond the constitutional limitation, for present delivery of property, or for services performed, or to be performed, as in the building of waterworks or any other kind of municipal improvements, even though the time of payment be postponed to future dates, no matter what may be the form of the contract. Our own cases of *List v. Wheeling*, 7 W. Va. 501; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *Honaker v. Board of Education*, 42 W. Va. 170, 32 L.R.A. 413, 57 Am. St. Rep. 847, 24 S. E. 544; *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604; *Dempsey v. Board of Education*, 40 W. Va. 99, 20 S. E. 811; *Camden Clay Co. v. New Martinsville*, 67 W. Va. 525, 68 S. E. 118, and *Davis v. County Ct.* 38 W. Va. 104, 18 S. E. 373, all with the cases cited, sustain and illustrate the application of this well-settled rule.

But it is contended for appellant, with respect to *Davis v. County Ct.*, not that it was a case on all fours with the case at bar, but that the principles announced therein, and, as it is claimed, substantially approved in *Spilman v. Parkersburg*, *Camden Clay Co. v. New Martinsville*, and other cases, go farther, and, using the language of the decision, hold that, where such municipal authorities "attempt to or do bind, without a proper vote of the people, the levies of future years in any manner or for any purpose whatsoever, either by contract, express or implied, their action in so doing is a usurpation of power, and an infringement of the Constitution, and such contract is null and void." The language of Judge Holt, in *Spilman v. Parkersburg*, much relied on, is: "By the term 'indebtedness' as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time, for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created or voluntarily brought about; or for what purpose, whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any 37 L.R.A. (N.S.)

date running on for thirty-four years; whether for current expenses or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold; it is none the less indebtedness, created in some manner and for some purpose, and is within the purview and the bar of the Constitution." This very broad and comprehensive definition of the term "indebtedness" clearly comprehended the case which the court there had in hand. It is substantially the definition of the term given in 22 Cyc. 75, but this authority says: "It is a word of large meaning, and must be construed in every case in accord with its context." So that when our Constitution makes use of the term "indebted," we must look to the whole context to interpret its meaning. As throwing light on this question the words of the same article of the Constitution: "Nor without, at the same time, providing for the collection of a direct annual tax sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding, thirty-four years." Clearly the liability of the contract we have here is not such an indebtedness as is comprehended by this clause, which apparently is applicable to all indebtedness not inhibited by the Constitution.

Moreover, the language of a court should always be interpreted with reference to the particular case in hand. In the *Davis* Case the controversy related to certificates of indebtedness, or so-called road orders, issued by the county court, apparently, in payment of a county bridge. In *Spilman v. Parkersburg*, the subject of controversy was a contract in the form of a lease, by the terms of which the city of Parkersburg, at the termination of the lease, if all annual payments provided for had been paid, was to become the owner of an electric lighting plant, constructed by the lessor, as provided by the contract. Unquestionably the contracts involved in each of those cases constituted debts from their inception, and although in the latter case the contract for lighting the streets was in form a lease, it was in fact a conditional purchase of the property, binding the levies of the city for future years, an indebtedness of the city, and void as an infraction of the constitutional inhibition against the creation of such indebtedness without submitting the question pertaining thereto to a vote of the people.

The record before us presents no such case as was presented in *Davis v. County Ct.* or *Spilman v. Parkersburg*. The contract here involved relates to an annual supply of water; the water may never be furnished, or furnished for only a portion of the term

provided for; it amounts in our opinion to a mere provision for the necessary current annual expenses of the city, the aggregate of the payments not comprehending an indebtedness inhibited by the Constitution.

It is conceded, however, that there are decisions in other states, notably in Illinois, holding that contracts such as is here involved do constitute indebtedness within the meaning of the Constitution of those states. *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781, and *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982, among other cases, are cited and relied on.

We deem it wholly unnecessary to enter into any extended review or analysis of these cases, or those to the contrary, on which we base our conclusions, or to discuss the underlying principles involved. That has been sufficiently accomplished, we think, in prior decisions of this court, and the numerous cases cited and relied on in the text-books and decisions cited.

In disposing of this case it seems only necessary to say that we are disposed to follow the great weight of judicial authority, including the decisions of the Supreme Court of the United States, and many other state and Federal cases, and, as we think, the better supported by reason, in holding that where the contract or ordinance, as in the case at bar, is one intended to provide for the furnishing of a municipality with water to be used for public purposes, the payment therefor to be made from year to year, such contract should not be construed or treated as the creation of an indebtedness within the inhibition of our Constitution, except as to the amount actually fallen due; but as a mode or means of providing for the necessary current expenses of the municipal government. True, the revenues of succeeding years, to a certain extent, become bound for the future performance of the contract, and beyond the discretion of the municipality to alter or abrogate; but a supply of water is an absolute necessity, indispensable to the very existence of the people, and without such authority to so contract, a municipality would be entirely helpless. Judge Brannon, *arguendo*, citing many cases, expresses approval of this doctrine, in *Welch Water, Light & P. Co. v. Welch*, 64 W. Va. 373, 62 S. E. 497, 498, and we think it sound, and that it is not in conflict with any prior decision of this court. Some of the many cases so holding are *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 23 L.R.A. 402, 44 Am. St. Rep. 232, and note; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; *McBean v. Fresno*, 112 Cal. 159, 57 L.R.A. (N.S.)

31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; *Voss v. Waterloo Water Co.* 163 Ind. 69, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 Ann. Cas. 978; *South Bend v. Reynolds*, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *Grant v. Davenport*, 36 Iowa, 396; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57; *Wade v. Oakmont*, 165 Pa. 479, 30 Atl. 959; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559; *Raton Waterworks Co. v. Raton*, 9 N. M. 70, 49 Pac. 898; *Ludington Water-Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558. In 28 Cyc. 1544, citing in notes the above and many other cases, the law is stated thus: "A contract by a municipality to pay for water, lights, sewage, and the like, at stated times in the future, does not create an indebtedness for the aggregate amount of such payments, within the meaning of a provision limiting the indebtedness of municipalities, and the validity of such a contract is to be tested by the amount of the first payment thereunder."

We hold that the decree appealed from is right, and our opinion is to affirm it.

#### MISSOURI SUPREME COURT. (Division No. 2.)

C. O. TRASK, Resp't.,  
v.

LIVINGSTON COUNTY, Appt.

(210 Mo. 582, 109 S. W. 656.)

#### County — indebtedness — accrual.

The time of letting the contract for a bridge, and not that of its acceptance and the issuance of warrants therefor, is that when the county becomes indebted, within the meaning of a constitutional provision forbidding it to become indebted to an amount exceeding in any year the income and revenue provided for such year, where the statute requires an appropriation to be made for the bridge before the contract is let; at least where the contract requires the bridge to be completed within the year in which the contract is let.

(March 31, 1908.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Linn County in plaintiff's favor in an action upon certain county warrants. Affirmed.

The facts are stated in the opinion.

Messrs. John H. Taylor and F. Sheets & Sons, for appellant:

The county did not become indebted on the bridge contract until the bridges were completed and accepted.

Note. — See note, post, 1058.



*Lum v. The Buckeye*, 24 Miss. 565; *Trowbridge v. Sickler*, 42 Wis. 417; *Chicago v. Galpin*, 183 Ill. 408, 55 S. E. 731; *Saleno v. Neosho*, 127 Mo. 639, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190.

Messrs. Tatlow & Mitchell, for respondent:

The mere acceptance of the bridges and the use thereof by the public did not create an indebtedness; nor did the mere issuance of the warrants create the indebtedness.

*Heidelberg v. St. Francois County*, 100 Mo. 69, 12 S. W. 914; *Anderson v. Ripley County*, 181 Mo. 46, 80 S. W. 263; *Wolcott v. Lawrence County*, 26 Mo. 272; *Phillips v. Butler County*, 187 Mo. 713, 86 S. W. 231; *Unionville v. Martin*, 95 Mo. App. 36, 68 S. W. 605; *Dougherty v. Excelsior Springs*, 110 Mo. App. 626, 85 S. W. 112; *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944.

The contract was necessarily made with reference to the "income and revenue" of a particular year, and could not be so made as to be ambulatory in its nature and applicable to the year in which the bridge might happen to be completed.

*State ex rel. Exchange Bank v. Allison*, 155 Mo. 334, 56 S. W. 467; *Gray, Limitations of Taxing Powers & Public Indebtedness*, § 2076; 2 Beach, *Modern Law of Mun. Corp.* Smith's ed. § 902.

In the absence of any such showing to the contrary, the presumption is that the bridge company kept and performed its engagement and completed the bridges in the year 1889, and had them ready for use by the public on the 1st day of January, 1890.

*Lenox v. Harrison*, 88 Mo. 496; *State ex rel. Gracy v. Bank of Neosho*, 120 Mo. 169, 25 S. W. 372; *Agan v. Shannon*, 103 Mo. 661, 15 S. W. 757; *McCallister v. Ross*, 155 Mo. 87, 55 S. W. 1027; *State use of Public Schools v. Crumb*, 157 Mo. 545, 57 S. W. 1030.

Gantt, J., delivered the opinion of the court:

This is an action by the plaintiff as the assignee of seventeen warrants issued by the county court of Livingston county, to the original holders thereof, for materials furnished and work and labor done for said county in the year 1890. The petition counts separately upon each warrant and its assignment to plaintiff, its presentation to the county treasurer, and its dishonor and protest, and judgment is prayed for the aggregate of all of said warrants with interest. The answer pleads that the said several warrants were issued in excess of the revenue of said county for the year 1890, and also invokes the five-year statute of limitations. The reply was a general

denial. The venue was changed to Linn county. A jury was waived, and the cause tried to the court, and resulted in a judgment for plaintiff for \$2,407.75, at the December term, 1904. The facts developed on the trial were as follows: Plaintiff offered and read in evidence warrants 1 to 16, inclusive, which correspond with the several counts of the petition based thereon; and, as no point is made on them, by agreement of counsel they were omitted from the bill of exceptions. Plaintiff then read in evidence the following stipulation: "In the Linn circuit court, October term, 1904. C. O. Trask v. Livingston County. For the purpose of saving costs, the parties in the above-entitled suit agree that the total income and revenue provided for the year 1890 for the said Livingston county, Missouri, amounted to the sum of \$21,283.66. Second. That the following is a complete and correct copy of the register of warrants for the year 1890 in Livingston county, Missouri, and as contained in the county clerk's warrant register No. 2, beginning at warrant No. 4903, issued on January 6, 1890, and ending with warrant No. 5988, issued on December 30, 1890, which are not copied herein, but amount to total issue of \$26,782.86. Third. That the signatures to the warrants sued on, to wit, the signatures of the county clerk and the presiding judge of the county court of said county, are genuine as well as the signatures of the county treasurer, showing the respective dates of presentment and protest of said warrants; and also the signatures of the respective assignments thereon are likewise genuine. Fourth. It is agreed that any additional proof may be offered by either side as to these facts or any other facts material in this case." Plaintiff then offered and read in evidence Exhibit B, consisting of copies of eleven warrants with their indorsements, Nos. 5379 to 5390, inclusive, all payable out of money in the treasury appropriated for bridge fund, and each for \$500, except the last, which is for \$197. As no point is made as to their form, it is unnecessary to set them out at length. All of which eleven warrants were payable to the Clinton Bridge & Iron Company, each for \$500, except No. 5390, which was for \$197; all protested May 20, 1890; all of which were assigned to the Clinton National Bank, and by it assigned to W. F. Carter, Jr., and upon which an action was brought in the circuit court of Livingston county, and then pending, to the introduction of which defendant duly objected as irrelevant and not the best evidence. Plaintiff then offered the report of the road and bridge commissioner or the bids for building a county bridge

over Grand river, between Chillicothe and Utica, showing the bid of the Clinton Bridge & Iron Company to be \$4,874, and the lowest bid thereof; and of H. Hedges, of the same company, for the bridge over Shoal creek, for \$820, to be the lowest bid, which were approved by the county court; and contracts ordered to be let, and an appropriation made for each, on the 5th day of September, 1889, at the August adjourned term of said county court. Contracts were entered into in writing by said bridge company and the road and bridge commissioner of said county, on September 7, 1889, whereby said bridge company agreed to complete said bridges on or before January 1, 1890, and maintain the same for four years from and after their completion, for which the county agreed to pay said sums of \$4,874 and \$820 in county warrants, to be drawn at the first meeting of the county court after the completion and acceptance of said bridges. The bridge company also entered into a bond for its faithful performance of said contracts. Afterwards, on May 19, 1890, said bridges were accepted, and on May 20, 1890, warrants were ordered issued, and were issued therefor. At the conclusion of all the evidence, defendant prayed the court to declare the law to be that, under the pleadings and the evidence, the finding must be for defendant, which was refused, and defendant excepted. Thereupon the court found all the issues for plaintiff on each of said counts, and rendered judgment in the aggregate for \$2,407.75, to bear interest at 6 per cent from its rendition. On the same day defendant filed its motions for a new trial and in arrest, which were heard and overruled, and defendant excepted.

1. From the foregoing statement it becomes apparent that there is one single issue on this appeal, and that is, Were the warrants sued on issued in excess of the income and revenues of Livingston county for the year 1890? or, stated in a different form, Did said county become indebted on September 7, 1889, the date of the bridge contract, to the amount of \$5,694, or on May 20, 1890, when it issued its twelve warrants to the Clinton Bridge & Iron Company? It is conceded and agreed that the total income and revenue of said county for the year 1890 was \$21,283.66, and the warrants issued that year amounted to \$26,782.86, and this last sum included the twelve bridge warrants, aggregating \$5,694. If the \$5,694 is to be deducted from the total amount of warrants, \$26,782.86, issued by the county in 1890, then the warrants chargeable against the income and revenue for that year amounted to \$21,

088.86, a sum less than the total income and revenue, to wit, \$21,283.66, and they are a valid indebtedness. On the other hand, if these bridge warrants, to the amount of \$5,694, are not to be subtracted, then the warrants for 1890 exceeded the total income and revenue for 1890; and, as the warrants sued on were among the last issued that year, they were in excess of the income and revenue, and plaintiff is not entitled to recover. The simple question then is, When did Livingston county become indebted to the Clinton Bridge Company? In September, 1889, when the county court accepted its bid, and directed the bridge and road commissioner to enter into the contract for the construction of said bridges, and he entered into said contract; or not until it accepted said bridges, and drew its warrants therefor, May 20, 1890? If in September, 1889, that indebtedness was not for 1890, and is not to be charged against the revenue provided for 1890, and plaintiff's warrants, issued for indebtedness created in 1890 and within the revenue provided for that year, are valid. The circuit court held that the bridge contract was an indebtedness incurred in 1889, and not in 1890, and that plaintiff's warrants were issued for indebtedness incurred for current expenses in 1890, and were issued within the revenue provided for the year 1890, and plaintiff was entitled to recover. By § 12, art. 10, Mo. Const. 1875 (Anno. Stat. 1906, p. 287), it is ordained: "No county . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year. . . ." Counsel for the county insist that the county did not become indebted to the bridge company until the bridges were accepted and the county court issued the warrants therefor, on May 20, 1890, and in support of their position rely upon the decisions of this court in *Saleno v. Neosho*, 127 Mo. loc. cit. 639, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190; *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 188, 32 L.R.A. 157, 26 S. W. 1025, 31 S. W. 756; *Neosho City Water Co. v. Neosho*, 136 Mo. 511, 38 S. W. 89; *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 156, 39 S. W. 768; and *Mountain Grove Bank v. Douglas County*, 146 Mo. 56, 47 S. W. 944.

On the other hand, counsel for plaintiff distinguish those cases, and insist the indebtedness accrued when the court accepted the bridge company's bid, made the appropriation, and the road and bridge commissioner, under the order of the court, made and entered into the contract to pay the amount bid when the bridge should be completed according to the contract, which re-

quired the bridge to be completed on or before January 1, 1890. It may as well be stated here and now that the county did not show that the bridges were not completed, according to the contract, in the year 1889, though it did show they were not formally accepted until May, 1890, and the warrants issued then. The constitutional provision found in § 12 of article 10 of that instrument has often been construed by this court. In *Book v. Earl*, 87 Mo. loc. cit. 246, it was well said: "The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system, by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it." For a proper determination of whether the county became indebted for the bridges to the Clinton Bridge & Iron Company in 1889 or in 1890, the law of this state in regard to building and providing bridges where the estimated expense exceeds \$50 must be kept in view and considered. Section 5183, Rev. Stat. 1899 (Anno. Stat. 1906, p. 2705), requires all such bridges to be built by the county. By § 5185 the county court must determine in what manner and of what materials the bridge shall be built, and the probable cost thereof, and require the road commissioner to proceed to the spot where the bridge is to be built, and make an accurate estimate of the cost of the building of the same according to any plan or plans ordered by the court, or such as in the commissioner's opinion may be best, and without delay make report thereof to the court, and order the commissioner to let the contract for building and keeping the same in repair for not less than two or more than four years, to be determined by the court.

The commissioner is required to advertise the time and place of letting the bridge not less than twenty days prior to letting the contract. The commissioner, at public outcry or by sealed bids, lets to the lowest bidder, subject to the approval or rejection of the county court. "If such letting be approved by the court, it shall make an appropriation for building such bridge, and

order the commissioner to contract therefor at the price and let and take a bond payable to the county with two good and sufficient sureties, sufficient to cover all damages that may accrue from the breach of the contract." By § 5188 "the commissioner is forbidden to do anything toward building the bridge or letting thereof until an appropriation for the same shall first be made by the county court." Section 5190 forbids any county court in this state to approve any contract for building or repairing any bridge not made in the manner provided by said chapter 84, Rev. Stat. 1899 (Anno. Stat. 1906, p. 2705). It will be observed the statute requires the county court to make an appropriation to pay for the bridge before it is let or built, and expressly forbids the making of a bridge contract in any other manner than as provided by that chapter. It can be stated as the settled law in this state, that, if the bridge company had, without any public letting, written contract, or appropriation, built these bridges, and completed them on May 19, 1890, and the county court had, on May 20, 1890, issued warrants for what it conceived was the reasonable value thereof, such warrants would not have constituted a valid indebtedness of said county. *Heidelberg v. St. Francois County*, 100 Mo. 69, 12 S. W. 914; *Anderson v. Ripley County*, 181 Mo. 46, 80 S. W. 263; *Wolcott v. Lawrence County*, 26 Mo. 272; *Phillips v. Butler County*, 187 Mo. 698, 86 S. W. 231. In *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944, it was expressly held that the mere issuance of the warrants did not create an indebtedness. Hence the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the "income and revenue provided for such year," which, under the Constitution, must be looked to for the payment of such indebtedness, and it was the "income and revenue provided" for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which, at the date of the contract for the building of said bridges, had never been assessed, levied, or collected. The language of the Constitution is: "No county . . . shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year." It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is con-

tracted or created, and prohibits the anticipation of the revenues of any future year. Any other construction would render § 12 of article 10 nugatory; for, if the county court of Livingston county, in September, 1889, could anticipate the revenue of 1890, it could also anticipate the revenues of 1891 and 1892, and would leave the power of the county, with reference to indebtedness, what it was before the Constitution of 1875 was adopted. In *Gray's Limitations of Taxing Power & Public Indebtedness*, § 2162, the author expresses the view that "the time when the debt actually comes into existence as a binding obligation on the municipality is the time to which all calculations as to its validity should be made."

But it is earnestly urged by counsel for the county that the decisions of this court in *Saleno v. Neosho*, 127 Mo. 639, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190, and the subsequent cases of *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. 188, 32 L.R.A. 157, 26 S. W. 1025, 31 S. W. 756, and *Lamar Water & Electric Light Co. v. Lamar*, 140 Mo. 156, 39 S. W. 768, settled this question by holding that the indebtedness of the county was not created until the bridges were completed. In *Saleno v. Neosho*, supra, and the kindred cases following it, the question was whether a contract by which the city agreed to pay the water company for the use of water for the city and other purposes, \$2,000 per year for a term of twenty years, was a creation of a debt in the aggregate for \$40,000, or was an obligation to pay \$2,000 a year, if the water was supplied according to contract; and it was ruled that it was not the creation of indebtedness for the aggregate of the instalments to be paid under the contract, this court saying: "A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to defendant; and, if not furnished, no payment could be required of it." In *Lamar Water & Electric Light Co. v. Lamar*, 128 Mo. loc. cit. 222, 32 L.R.A. 157, 26 S. W. 1025, 31 S. W. 760, this court quoted with approval from Judge Dillon in his work on *Municipal Corporations*, as follows: "Under the constitutional provisions in Iowa, Illinois, Indiana, and Pennsylvania referred to, it is held that a corporation may make a contract (at least for necessities) covering a series of years, upon which an obligation to pay may arise from 37 L.R.A. (N.S.)

year to year, as the thing contracted for is furnished; and in such case, the whole amount which may ultimately become due does not constitute a debt within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition." 1 Dill. Mun. Corp. 4th ed. 1890, § 136a. In that case it was further said: "The term 'indebtedness' is a wide one, and must be construed in every case, in accord with its context. It has been very recently considered in its application to the subject in hand, by the court in banc; and the conclusion was announced that such an obligation to pay an agreed sum year by year, for the furnishing of certain necessary supplies during a term of twenty years, was not an immediate indebtedness for the entire amount that might ultimately become due by instalments during that term. . . . *Saleno v. Neosho*, 127 Mo. 627, 27 L.R.A. 769, 48 Am. St. Rep. 653, 30 S. W. 190."

It will, we think, be seen, upon close examination of *Saleno v. Neosho* and the *Lamar Cases*, that the great question was whether there was an aggregate indebtedness created in the beginning which would exceed the debt-making power of the corporation, or whether the indebtedness should be treated only as an obligation which would arise from year to year as the water contracted for was furnished; and, in order to ascertain whether the municipal corporation was transgressing the constitutional limit, regard was had only to the amount which might fall due within a certain year, and, if the revenue for that year was sufficient, over and above the payment of other expenses, then there was no debt incurred within the constitutional prohibition. In other words, it was practically decided that, although the contract was for twenty years, it was considered by the court, from the debt-creating point of view, as if it had been twenty separate contracts, one covering each year. And the authorities all agree that, if the amount to be paid in any year under such a contract exceeds the income and revenues for such year, against which it is a charge, it would be invalid, at least to the extent of such excess. There are many considerations which, in our opinion, sustain the decisions in those cases, but they afford no authority for holding that the county court in this state, under the bridge act, can contract for a supply

of bridges covering a period of years, one bridge to be built each designated year, and to be paid for out of the revenue for the year in which it shall be built. All the provisions of the bridge act are inconsistent with any such power in the county court.

We think that the indebtedness for these bridges was incurred, if at all, by the letting and making of the contract therefor, in September, 1889. In *Culbertson v. Fulton*, 127 Ill. 30, 18 N. E. 781, the supreme court had this question before it. The city, on August 15, 1887, entered into a contract for the construction of a system of water-works for the city, and the plant was completed in February, 1888. If the indebtedness was created on the date of the contract, then the assessment for the year 1886 was to govern; if created in February, 1888, at the time the plant was completed and ready for acceptance, then the assessment of 1887 governed. The question was, When was the debt incurred? And the court held that, by entering into the contract on August 15, 1887, the city became indebted within the meaning of the Constitution of Illinois, which, on this subject, is almost in the exact words of our Constitution, the court saying: "It cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and could be compelled to do so if the work should be done according to the contract.

. . . A debt payable in the future is obviously no less a debt than if payable presently." In *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588, it was held that a contract by a city for a fire alarm system, at a time when the city was indebted more than 2 per cent on the assessed valuation of its taxable property, was void under the provision of article 13 of the Constitution of that state, limiting municipal indebtedness to 2 per cent of the value of the taxable property, where such city had no money in the treasury to pay for such system either at the time the contract was made, or when the same was completed and accepted, although there were sufficient funds on hand to pay for it at the time fixed by the contract for such payment. Said the court: "The controlling question in this case is, Do the facts found show an indebtedness of appellant within the inhibition imposed by the foregoing article of the Constitution? A debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. State ex

rel. *Cohen v. Hawes*, 112 Ind. 323, 14 N. E. 87; *Valparaíso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Crowder v. Sullivan*, 128 Ind. 486, 13 L.R.A. 647, 28 N. E. 94. It is the rule in this state that, when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly as furnished, the contract does not create an indebtedness for the aggregate sum of all of the instalments, since the debt for each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of a debt [citing authorities]. If the city can pay this indebtedness when it comes into existence, without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the Constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and there is a violation of the Constitution." It will be observed that the Indiana supreme court takes the same view of water and light contracts for which the city or county is to pay annually as the water or light is furnished, that this court took in the *Neosho* and *Lamar* Cases, and yet it held that the contract in that case for the fire alarm telegraph constituted an indebtedness within the meaning of the Constitution, and distinguished it from cases in which the debt is created in instalments payable annually when the water or light is furnished.

But, confining ourselves to the facts in evidence and the statute governing the building of bridges, as already said, the statute required the county court to make an appropriation before the road and bridge commissioner let the contract. The record shows that the county court, on the 5th of September, 1889, made an appropriation to pay for the building of the bridges. Now, out of what revenue was it authorized to make this appropriation, that of 1889, or that of 1890? We think the Constitution answers this question. They could only make it out of the revenue of 1889; and, in this particular case, this conclusion is reinforced by the fact that the bridges contracted for were to be completed in the year 1889, and, as the obligation was incurred in 1889, and the bridges were to be built in that year, and the appropriation was made in that year, we think there can be no escape from the conclusion that the indebtedness thereby created was a charge against the revenues provided for the year

1889, and not the revenues of 1890. Clearly the county court was not authorized to appropriate revenues which were to be derived from taxation in the year 1890, when such taxes had never been assessed, levied, or collected. While the county court may in any one year draw warrants after the revenue has been provided and the taxes levied, within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years. If not, all that has been said in regard to the force and effect of § 12 of article 10 of the Constitution, to the effect that its purpose was to put counties upon a cash system, instead of the old credit plan, has been in vain.

In our opinion the bridge warrants offered and read in evidence were, if valid at all, chargeable against the revenues of said county for 1889, and we think should be deducted from the total amount of warrants issued in 1890, and, this being so, the plaintiff's warrants were a legal and valid charge for the current expenses of the said county for the year 1890, and the judgment of the Circuit Court awarding plaintiff's judgment therefor was correct, and is affirmed.

Fox, P. J., and Burgess, J., concur.

#### OREGON SUPREME COURT.

CHARLES CUNNINGHAM et al., Appts.  
v.

FRANK SALING, County Clerk, et al.,  
Respts.

(57 Or. 517, 112 Pac. 437.)

#### County — irregular employment of detective — ratification.

1. The allowance by the county court of a claim for services rendered to the county by a detective ratifies an irregular employment of him by the county attorney.

#### Same — debt limit — effect on governmental functions.

2. That a county has reached its constitutional debt limit does not prevent it from incurring liabilities for services necessary to the preservation of the peace and good order of the community.

(Slater, J., dissents.)

(December 31, 1910.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Umatilla County in defendant's favor in a suit to enjoin the payment of an allowance by the county

clerk of a claim for detective services rendered to the county. Affirmed.

#### Statement by McBride, J.:

This is a suit to enjoin the delivery and payment of a warrant drawn by order of the county court of Umatilla county in favor of the Thiel Detective Agency for \$356, for services rendered the county in procuring evidence to convict violators of the local option law in such county. The evidence tends to show that in the year 1908 violations of the local option law became so frequent and flagrant as to become a public scandal. The local officers were appealed to by the district attorney to assist in procuring evidence against the offenders, but either could not or would not afford him any assistance. The court not then being in session, he brought the matter of procuring a detective before the county judge, who agreed that such was the proper course and assured him that it was probable that the county court would ratify such action. Thereupon, on request of the district attorney, the Thiel Detective Agency sent an operative, through whose efforts a large number of offenders were convicted, and a large amount of money in fines was paid into the county treasury. The agency presented a bill for \$356 for this service to the county court, which approved the same and ordered it paid. The indebtedness of the county at the time exceeded the \$5,000 limit prescribed in the Constitution.

Messrs. Carter & Smythe, for appellants:

Payment of an indebtedness in excess of the constitutional limit may be enjoined at the suit of a taxpayer.

Or. Const. art. IX, § 10; *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450; *Brownfield v. Houser*, 30 Or. 534, 49 Pac. 843.

Officers intrusted with the management of public affairs involving the expenditure and disbursement of public revenues should have a clear warrant of law for every such expenditure and disbursement.

*Municipal Secur. Co. v. Baker County*, 33 Or. 338, 54 Pac. 174.

Messrs. A. M. Crawford, Attorney General, and G. W. Phelps, for respondents:

The ordinary expenses of a county within the limit of current revenues, or within a tax levied for a special purpose, may be paid, and should not be classed as voluntary indebtedness, nor the creation or incurring of indebtedness or liabilities, so long as such claims do not exceed the revenues for the current year.

*Municipal Secur. Co. v. Baker County*, 33 Or. 347, 54 Pac. 174; *Fenton v. Blair*, 11 Utah, 78, 39 Pac. 485; *State ex rel. Bar-*

ton v. Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Grant v. Davenport, 36 Iowa, 396; Council Bluffs v. Stewart, 51 Iowa, 385, 1 N. W. 628.

Even though the indebtedness was not provided for within the current revenues, it was in any event an involuntary indebtedness, and incurred in the enforcement of the criminal laws of the state, and such a debt as could not be avoided in the ordinary administration of the governmental affairs of the county.

Burnett v. Markley, 23 Or. 440, 31 Pac. 1050; Municipal Secur. Co. v. Baker County, 33 Or. 344, 54 Pac. 174; Grant County v. Lake County, 17 Or. 463, 21 Pac. 447; Wormington v. Pierce, 22 Or. 613, 30 Pac. 450; Burness v. Multnomah County, 37 Or. 472, 60 Pac. 1005.

The authority to transact county business is vested in the county court, and the employment by such court of persons to assist the regular officers in the discharge of their duties when necessary, and when such employment does not interfere with the powers and duties of such officers, is a valid exercise of such authority.

Bellinger & C. Anno. Codes & Statutes (Or) § 912; Taylor v. Umatilla County, 6 Or. 394; Burnett v. Markley, 23 Or. 436, 31 Pac. 1050; State ex rel. Herren v. Hall, 37 Or. 481, 63 Pac. 13.

McBride, J., delivered the opinion of the court:

1. While the original employment of the detective in this matter was irregular and legally unauthorized, the action of the county court in allowing the bill and directing the payment of it amounted to a ratification of the original employment, so, in this respect, the case stands in the same condition as if the county court had employed the detective in the first instance. Steiner v. Polk County, 40 Or. 124, 66 Pac. 707.

2. While the testimony makes it clear that the indebtedness of the county exceeded the constitutional limit, yet it has been held that the constitutional inhibition only extends to voluntary indebtedness, and not to such as is thrust upon it by operation of law, by which phrase is meant such expenses as cannot be avoided without danger to the peace and good order of the community. Thus, in Municipal Secur. Co. v. Baker County, 33 Or. 339, 54 Pac. 174, it was held that the employment of an expert to check the county books to ascertain whether there had been any embezzlement of the county funds was a duty imposed upon the county by operation of law, and that a warrant issued in payment of such services was valid, although the county had already greatly exceeded the constitutional 37 L.R.A.(N.S.)

limit of indebtedness. It was no doubt true that county authorities could have refrained from hiring an expert, and have trusted to chance, and to the honesty of the official concerned, as to the outcome. They had the physical power to do so, but as the court said: "It was such a service, so far as we are informed by the record, as the county could not well dispense with for the time being even, and perform understandingly and intelligently the functions pertaining to its organization." In the same case the court say: "The most important function of the county is to maintain a local government subordinate to, but as an arm of, the state. Now, the expense incident to and necessary under the laws prescribed by the state to organize and maintain such a government may be said to be thrust upon it by law." This is good law and fits the case at bar. The principal function of every county government is the protection of society, the enforcement of law, and the punishment of crime. This is the highest and most pressing duty which the law imposes upon any county or upon the county authorities, and any expense necessary to punish crime and bring the guilty to justice is an expense imposed upon the county by law. It is a duty that admits of no volition. The authorities cannot avoid it if they would; they should not if they could. In all expenditures for the punishment of crime the real question is, Are they necessary in order to secure the enforcement of the criminal laws? If they are, then a duty exists to make the expenditure, and it may be said to be involuntary in the sense that it is not an expense sought and incurred as the result of deliberate bargain, but arises from the necessity of enforcing the law.

In this case it is evident that the law was being flagrantly violated, and that the local authorities either sympathized with its violation or were too inefficient to prevent it. Under such circumstances there rested upon the county court the duty to use such measures as were necessary to prevent and punish crime, and they have done so effectually. To hold with the contention of plaintiffs would allow many crimes to go unpunished. If a murder should be committed in Umatilla county, and it became necessary to offer a reward, some friend of the murderer, under the guise of a taxpayer, could come forward and enjoin the county from doing so, on the pretext that it was exceeding its indebtedness. The hands of the county authorities ought not to be so fettered, and they will not be.

Judgment affirmed.

Slater, J., dissenting:

I cannot give my assent to the conclusion reached in this case. The debt in question

was incurred by the district attorney of Umatilla county with the consent of the county judge, in employing special detectives to assist in discovering violators of the local option laws, and in procuring evidence of such violation. The excuse for obtaining such special assistance is that local officers would not render the necessary aid to the district attorney to ferret out violators of the law. This case should not be confounded with one where some person has been charged by complaint in a court with the commission of a crime, and the duty is thrust by law upon the prosecuting officer to secure evidence to convict; but it rests primarily upon a mere suspicion or assertion of an officer that the law in some respect is being violated, and upon an assertion that local officers, who were appealed to by the district attorney to assist in procuring evidence thereof, either could not or would not render him assistance. The constitutional limitation (§ 10, art. 11), upon counties contracting debts, reads: "No county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of \$5,000, except to suppress insurrection or repeal invasion. . . ." If the plain meaning of the words of this clause be followed, no doubt or confusion can arise, and no justification can be found for injecting constructive interpolations into it. It was early held by this court in the case of Grant County v. Lake County, 17 Or. 453, 21 Pac. 447, that where the debt in question was not created by the county, but the liability was imposed by the legislature, it was not within the prohibition. There is no straining of the ordinary signification of the words in such construction; and undoubtedly, when the legislature creates an office and requires the salaries and other expenses thereof to be paid out of the county funds, the debt is created not by the county, but by legislative power, and hence is not within the limitation. *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128. From this the distinction arose between a class of debts said to be voluntarily created by the county and those imposed upon it by law. But when it is said, as it is in the majority opinion, as the rationale of the decision, that "the most important function of the county is to maintain a local government subordinate to, but as an arm of, the state," and that, "the expense incident to and necessary under the laws prescribed by the state to organize and maintain such a government may be said to be thrust upon it by law," all limitation upon debts created by the county has practically been taken away. The expression quoted is from the opinion of Mr. Justice Wolverson in 37 L.R.A. (N.S.)

*Municipal Secur. Co. v. Baker County*, 33 Or. 338, 344, 54 Pac. 174. But in a later case (*Eaton v. Minnaugh*, 43 Or. 465, 73 Pac. 754) the whole question was reviewed at some length by Mr. Justice Bean. He expressly concedes that it is not safe to rest the distinction upon the unqualified statements above quoted, for he says: "It manifestly cannot be held that all liabilities arising from the mere discharge of some public duty by a county, or in the performance of some powers conferred upon it by law, are involuntary obligations, and therefore not an indebtedness within the meaning of the Constitution. A large part of the obligations incurred by every county may, without any great impropriety, be said to be involuntary, in the sense that the discharge of the duty in which they were incurred would not have been neglected or avoided without disregarding some provision of law; but if that test alone is to be the standard, a county is practically left free to contract unlimited obligations, notwithstanding the provisions of the Constitution. This would be violating the language of that instrument, and frittering away its meaning by construction."

Although it is admitted in that opinion that it is difficult, if not impossible, to lay down any general rule whereby so to classify such obligations, a further definition of the interpolated phrase "a liability imposed upon a county by law" was deemed essential, and it was there held that a liability which the county is not at liberty to evade or postpone is not within the prohibition, and the converse was stated as "a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or temporarily until means are provided for the payment of the expenses incident thereto, cannot be so held." This, it seems to me, is a very uncertain and unsatisfactory rule by which so important a constitutional limitation is to be judged and applied. Indeed, it was said in that case that each case must be determined largely from its own facts, and by the doctrine of exclusion and inclusion. The plain intent of this clause of the Constitution is to require counties to transact business upon practically a cash basis. The county has authority to levy taxes annually upon all the taxable property within its limits, with which to raise sufficient revenue to pay its expenses (*Bellinger & C. Anno. Codes & Statutes* [Or.] § 3085); and the law and the Constitution contemplate that it will exercise its powers in that respect.

So, also, certain offices have been created, and the duties thereof defined, to secure the



enforcement of the criminal laws of the state. If the law contemplates that any expenditure, aside from the salaries of such officers, is to be made to assist them in the performance of their official duties, then it is also contemplated that such provision should be made by the county, under the taxing power, to provide in advance sufficient funds therefor.

The sheriff is the executive officer of the county, and his duties are specifically defined by § 1017, Bellinger & C. Anno. Codes & Statutes (Or.), and under certain circumstances he may command the power of the county (§ 1015); but the law contemplates that the necessary and usual expense incurred by him in the performance of his official duties must be provided for in advance, for, from the constitutional limitation, debts or liabilities incurred to suppress insurrection or invasion only are expressly excepted. Again, the district attorney is the public prosecutor (§ 991, Bellinger & C. Anno. Codes & Statutes [Or.]), and is required to institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such an offense has been committed (§ 993, Bellinger & C. Anno. Codes & Statutes [Or.]). And, again, a grand jury, having power to compel all persons to come before it and give testimony, is provided to inquire into suspected commission of crimes. Where the law has thus specifically provided methods and means to enforce the law, and to ascertain who, if any, have violated the criminal law, and to secure evidence against those charged, I do not think it can be consistently said, with sound reasoning, that the law has imposed upon the county an unavoidable duty to adopt other and different means at great expense to the county, to reach a coveted end, simply upon the claim that some officer has failed to effectively discharge his duty, or even upon a claim that the usual and legal method has proved ineffective in the particular case.

Certain it is that the debt in question was created by the act of the county, and was not imposed upon it by law; but, measured by the rule heretofore adopted by this court, and by which it is now attempted to be sustained as not within the prohibition, is was not created by the county in the performance of a duty imposed upon it by law, which could not be avoided or postponed, because it was not incurred in the manner that the law contemplates such duty is to be performed. *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273. 37 L.R.A. (N.S.)

# OKLAHOMA SUPREME COURT.

SUPERIOR MANUFACTURING COMPANY, Plff. in Err.,  
v.  
SCHOOL DISTRICT NO. 63, KIOWA COUNTY.

(28 Okla. 293, 114 Pac. 328.)

**School district — limitation of indebtedness — contracts.**

1. Under the provisions of § 4 of an act of Congress approved July 30, 1886 (24 Stat. at L. 171, chap. 818), a school district of a territory cannot become indebted in any manner or for any purpose, to any amount which, in the aggregate, including existing indebtedness, exceeds 4 per centum of the value of the taxable property within such school district, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and any contract entered into by its officers in violation of this section is void.

**Same — acceptance and retention of supplies.**

2. Where the aggregate indebtedness of a school district located in a territory is an excess of four per centum of the value of the taxable property within such school district, as shown by the last assessment for territorial and county taxes, the acceptance, retention, and use of furniture or supplies by the officers of such school district in its behalf will create no liability against the district for the value of the same.

(November 16, 1910.)

**E**RROR to the County Court for Kiowa County to review a judgment in defendant's favor in an action brought to recover upon a warrant issued by defendant to plaintiff for the purchase price of certain school supplies and furniture sold to defendant and for the value of said property retained and used by it. Affirmed.

The facts are stated in the opinion.

Messrs. Morse & Standeven and James H. Wolverton, for plaintiff in error:

Defendant must either restore the property which it claims was unlawfully received, or it must compensate the owner for the value thereof.

*Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Kenicott v. Wayne County*, 16 Wall. 465, 21 L. ed. 320; *Nugent v. Putnam County*, 19 Wall. 252, 22 L. ed. 89; *Coloma v. Eaves*, 92 U. S. 492, 23 L. ed. 582; *East Lincoln v. Davenport*, 94 U. S. 806, 24 L. ed. 324; *United States v. State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647; *Louisiana v. Wood*, 102 U. S. 299, 26 L. ed.

Headnotes by DUNN, Ch. J.

Note. — See note, post, 1058.

155; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Chapman v. Douglas County*, 107 U. S. 355, 27 L. ed. 381, 2 Sup. Ct. Rep. 62; *Ottawa v. Carey*, 108 U. S. 123, 27 L. ed. 675, 2 Sup. Ct. Rep. 361; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 620, 44 L. ed. 612, 20 Sup. Ct. Rep. 498; *Wrought-Iron Bridge Co. v. Utica*, 17 Fed. 316; *Detroit v. Detroit City R. Co.* 56 Fed. 903; *Provisional Municipality v. Lehman*, 6 C. C. A. 349, 13 U. S. App. 411, 57 Fed. 324; *Pullman Palace Car Co. v. Central Transp. Co.* 65 Fed. 158; *Mercer County v. Provident Life & T. Co.* 19 C. C. A. 44, 43 U. S. App. 21, 72 Fed. 623; *Salt Lake City v. Hollister*, 3 Utah, 200, 2 Pac. 201; *Argenti v. San Francisco*, 16 Cal. 256; *Brown v. Atchison*, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465; *Lyons v. Woods*, 5 N. M. 327, 21 Pac. 352; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598; *Whitney Arms Co. v. Barlow*, 63 N. Y. 63, 20 Am. Rep. 504; *Hays v. Galion Gaslight & Coal Co.* 29 Ohio St. 330; *Thompson v. Lambert*, 44 Iowa, 239; *State ex rel. Northwestern Nat. Bank v. Dickerman*, 16 Mont. 278, 40 Pac. 698; *Perkins v. Boothby*, 71 Me. 91; *Livingston v. School Dist. No. 7*, 11 S. D. 150, 76 N. W. 301; *Beach, Pub. Corp. § 226*; *Taylor, Priv. Corp. § 314*; *Spelling, Priv. Corp. § 176*; *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184.

Mr. Thomas W. Conner for defendant in error.

Dunn, Ch. J., delivered the opinion of the court:

This case presents error from the county court of Kiowa county, being originally brought in that county by plaintiff in error as plaintiff, to recover judgment against the defendant in error as defendant, for \$175.40 with 6 per cent interest from the 2d of September, 1903. The petition is in two counts; the first being upon a warrant issued and delivered by defendant to the plaintiff to cover the purchase price of certain school supplies and furniture sold and delivered to the defendant, and the second count is for the value of the said property which was delivered and received by the defendant, and which it still retains and uses.

It is conceded on the part of counsel for plaintiff in error that, under the rule of this court in the case of *Ray v. School Dist. No. 9*, 21 Okla. 88, 95 Pac. 480, it is not entitled to recover upon the warrant issued;

but it is insisted that it is entitled to recover a judgment against the district for the value of the property which it delivered and which the district received, retained, and still uses. At the time this property was sold and delivered to the school district, Oklahoma was a territory, and the defense to the action is made that plaintiff cannot recover on either count by reason of the provisions of § 4 of the act of Congress approved July 30, 1886 (24 Stat. at L. 171, chap. 818), commonly known as the "Harrison act," and which provides "that no political or municipal corporation, county, or other subdivision in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount, in the aggregate, including existing indebtedness, exceeding 4 per centum of the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount, given by such corporation, shall be void. . . ."

It is conceded that, at the time of the purchase and delivery of the furniture, the price or value of which is herein sued for, the defendant school district was indebted in an amount in excess of the 4 per cent above mentioned. Notwithstanding this, however, it is the contention of counsel for plaintiff that the officers of the school district could not purchase, and the district receive, retain and use, the furniture without being liable. And a number of authorities are cited in support of the proposition that the obligation to do justice rests upon all persons, natural and artificial, and that if the school district obtained the money or property of others without authority of law, independent of any contract, it would be compelled to make restitution or compensation. *Marsh v. Fulton County*, 10 Wall, 676, 684, 19 L. ed. 1040, 1042; *Louisiana v. Wood*, 102 U. S. 294, 299, 26 L. ed. 153, 155.

The facts and the law involved in these cases, however, are such as do not render them an authority to sustain in all particulars the contention which plaintiff here advances. Nor is plaintiff's contention sustained by the case of *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, for, in that case, the Supreme Court of the United States, referring to the terms of the charter of the city alleged to have been violated, holds that the provision involved could not have been intended to prohibit incurring an indebtedness exceeding the sum named; that it was in no sense a limitation of the debt of the city. The rule laid down in the

case of Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770, relating to the *ultra vires* contracts entered into by officers of private corporations, where the concern has accepted and is enjoying the benefits, is as follows: "According to many recent opinions of this court, a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of." But this rule has, so far as our investigation has gone, never been extended to the point of creating an obligation against a municipal corporation to pay the value of goods, supplies, or other property, although it has received and retained them, where the same exceeded the legal limit of its debt-incurring power.

The language of the statute invoked is that a municipality shall not "become indebted in any manner or for any purpose." This same language is used in the Constitution of Illinois (§ 12, art. 9), and received a construction at the hands of the supreme court of that state in the case of Springfield v. Edwards, 84 Ill. 626. Referring to this particular language, the court in the opinion says: "There is no difficulty in ascertaining the natural signification of the words employed in the clause of the Constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the Constitution. The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay, 'in any manner or for any purpose' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey."

In other words, this language is intended as a limitation absolute, and is for the protection of the taxpayers against any liability on contracts or purchases made on behalf of the municipality by its agents or officers, beyond an amount certain. After that point is reached, they are powerless, and cannot in any manner or for any purpose burden it with any greater. It is manifest at a glance that to yield to the contention of counsel for plaintiff would virtually wipe out the protection intended by this statute, because, if the district could be

made liable to any extent in excess of the legal limit for the value of property received, this would be one manner of creating indebtedness, and would be the manner to which resort would always be made whenever the necessity or desire to evade the law existed. And in such cases the more the actual danger of excessive indebtedness, and the greater the need for the protection afforded by the act, the greater would be the certainty of its being evaded and an enforceable liability incurred. One of the statutes of Illinois provided that the authorities of a school district might appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses were paid. A district, prior to the existence of the conditions named in the statute, purchased a library, which was by the district received and used. On the district repudiating the contract, the party who sold the library contended that, having received and enjoyed it, the district was bound to pay its value. The supreme court of that state, in the case of Clark v. District No. 1, 78 Ill. 474, considering this contention, said: "The authority given to school directors by statute to 'appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid,' is a limitation of their power to make such purchases to the circumstances named, and is an implied restriction of any power to purchase generally on credit. A purchase of such articles by the school directors on a credit, where it does not appear that there were any surplus funds after all necessary school expenses were paid, applicable to such purchase, is void, and there is no contract implied by law to pay for articles thus purchased, arising from their receipt and use. The only remedy of the seller, under such circumstances, is to claim the property itself."

An exhaustive examination of the authorities on this subject discloses that, while courts have been astute to require and compel private corporations to pay for property purchased *ultra vires* by their agents and officers, where it has been of value and retained and used, they have guarded zealously the rights of taxpayers under statutes similar to the one we are now considering. And have with practical unanimity, held that persons dealing with public officers of municipalities do so at their peril, and are charged with full knowledge of the rights and powers of these agents and officers to make contracts which will bind their principals. The question has arisen in almost every conceivable form; but the conclusion reached by the courts has been one, and that to relieve the municipality of any lia-

bility whatsoever, either on the contract or for the actual value of the property delivered and received.

In the case of Salt Creek Twp. v. King Iron Bridge & Mfg. Co. 51 Kan. 520, 33 Pac. 303, it appeared that certain officers of a municipal township, without authority, entered into a written contract for the construction of a bridge in that township, the price of which was to be met by issuing bonds. The bridge was constructed in accordance with the terms and conditions of the contract, and was accepted by the officials of the township. On suit being brought, it was contended on the part of the township that its officers were without power to make the contract for the bridge or to create any liability against the property of the township to pay therefor. The bridge company answered that the township officials supposed that they were proceeding according to law in making the contract; that they accepted the bridge and continued to use and retain it; and that if the officials of the township had no authority or exceeded their authority, in making the contract, the township should be required to pay the reasonable value of the bridge. In discussing these claims, the supreme court of that state, speaking through Mr. Chief Justice Horton, said: "It is a well-settled rule that township or other municipal officers cannot do by indirection that which they might not do directly. *State ex rel. Reed v. Marion County*, 21 Kan. 419. If township officers may disregard all of the statutory provisions concerning the construction of and payment for bridges, and create a liability against the people of a township by accepting bridges or other work without any power so to do, and thereby make the township liable, then the provisions of the statute defining how bridges should be built and paid for have no force whatever. Under such a rule, the township officers may at any time build and accept bridges and create liabilities against the people of the township without a vote and without limit. As the contract between the township officers and the bridge and manufacturing company is void under the statute, we do not think the other facts disclosed show the township is estopped from asserting the want of power on the part of the township officers, or from defending against any liability for the bridge. There is no innocent holder of bonds in this case, and in fact no innocent parties. The township officers, as well as the bridge and manufacturing company, are presumed to know the law. The statute clearly declares the conditions upon which a municipal township

may obtain bridges; but if the provisions of the statute are overlooked, or voluntarily cast aside by the parties, with full knowledge of all the facts, no estoppel of any kind can be created. There is a seeming hardship in refusing to pay for the bridge after the money of the company has completed it and it is in use upon a regular laid out public highway. But the want of legal authority to contract was known, or ought to have been known, by the company before it expended any of its money. Therefore it is at fault. Those dealing with a township must see to it that its officers have power to act. In this case nothing was concealed, and all the facts appear upon the public records. A township or other municipality can only act by the mode prescribed by law. Any other rule leaves the taxpayers at the mercy of the officers of the township and contractor, and would render all statutory provisions of limitation of power nugatory. *Lewis v. Bourbon County*, 12 Kan. 186; 15 Am. & Eng. Enc. Law, 1124; *Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333 (1887); *Reichard v. Warren County*, 31 Iowa, 381; *Brady v. New York*, 2 Bosw. 187; *Law v. People*, 87 Ill. 385. Of course, as the bridge was constructed upon the highway with the permission of the authorities, the company may remove the same. As the township refuses to pay for the bridge, it can have no interest or right to keep it."

Additional authorities to the same effect as those above cited may be noted as follows: *Louisiana v. Wood*, 102 U. S. 294, 20 L. ed. 153; *Lee v. Monroe County*, 52 C. C. A. 376, 114 Fed. 744; *Wrought Iron Bridge Co. v. Utica* (C. C.) 17 Fed. 316; *La France Fire Engine Co. v. Syracuse*, 33 Misc. 516, 68 N. Y. Supp. 894; *Berlin Iron Bridge Co. v. Wilkes County*, 111 N. C. 317, 16 S. E. 314; *Harrison County Ct. v. Smith*, 15 B. Mon. 155; *Paul v. Kenosha*, 22 Wis. 266, 94 Am. Dec. 598.

While, under the circumstances arising in this class of cases, all the authorities deny the right of recovery either on the contract or *quantum meruit*, still all agree that the municipality cannot keep the property, and that plaintiff is entitled to retake it. This seems to be the only remedy available.

It follows that the judgment of the trial court was correct, and the same is accordingly affirmed.

All concur, except Williams, J., not sitting.

Petition for rehearing denied.

*Note. — Creation of indebtedness within the meaning of debt limit provisions.*

- I. Scope, 1058.
- II. Definitions, 1058.
- III. Object of restricting indebtedness, 1060.
- IV. When indebtedness arises.
  - a. In general, 1062.
  - b. Obligations payable in instalments, 1063.
- V. Obligations payable out of special fund or current receipts.
  - a. In general, 1070.
  - b. Local improvements, 1072.
  - c. Income of year, 1077.
  - d. Anticipation of revenue, 1080.
  - e. Money in treasury, 1085.
  - f. Pledge or mortgage of receipts or property, 1085.
- VI. Obligations imposed by law.
  - a. In general, 1086.
  - b. Torts, 1097.
- VII. Refunding transactions, 1099.
- VIII. Miscellaneous obligations.
  - a. In general, 1103.
  - b. Purchase of equity of redemption, 1105.
  - c. Interest, 1106.
  - d. Judgments, 1107.
- IX. Coincidence of boundaries of municipalities, 1108.

**I. Scope.**

This note is limited to a discussion of the question of what amounts to the creation of an indebtedness within the meaning of debt limit provisions in the constitutions of the various states, in charters of municipalities, or in other statutes relating thereto. It does not include cases on the question of what are to be deemed assets to be deducted from liabilities in estimating the indebtedness of a state or municipal corporation in determining whether it has reach the limit;<sup>1</sup> nor does it include cases

on the question of what constitutes borrowing within the meaning of statutes restricting the power of municipalities to borrow money.<sup>2</sup>

For earlier cases on effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system, see note to *Ottumwa v. City Water Supply Co.* 59 L.R.A. 604; and for a discussion of the question as of what time the assessed valuation is to be taken for purposes of determining the debt limit of a state or municipality, see note to *Lewis v. Brady*, 28 L.R.A. (N.S.) 149.

**II. Definitions.**

In a number of cases dealing with debt limit provisions, an attempt has been made to define the word "debt," but very little help can be gotten from such definitions. Whatever the word may mean when applied to ordinary transactions between individuals, it has been so modified in construing the constitutional and statutory provisions with reference to the creation of obligations, that the decisions involving a given state of facts must be relied on rather than the definitions. A few of these definitions, however, will be given. It has been said that a debt means a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.<sup>3</sup> On the other hand, it is said that the word has no fixed legal significance as has the word "contract," but is used in different statutes and constitutions in sense varying from a very restricted to a very general one. Its meaning, therefore, in any particular statute or constitution, is to be determined by construction, and decisions upon one statute or constitution often tend to confuse rather than aid in ascertaining its significance in another relating to an entirely different subject.<sup>4</sup> This is an accurate statement of what will be found in the decisions. It has been said that whether a claim or demand is a debt

<sup>1</sup>Jordan v. Andrus, 27 Mont. 22, 60 Pac. 118; Levy v. McClellan, 196 N. Y. 178, 89 N. E. 569; Stone v. Chicago, 207 Ill. 492, 60 N. E. 470; Kelly v. Minneapolis, 63 Minn. 125, 30 L.R.A. 281, 65 N. W. 115; Brooke v. Philadelphia, 162 Pa. 123, 24 L.R.A. 781, 29 Atl. 387; Bank for Savings v. Grace, 102 N. Y. 313, 7 N. E. 162.

<sup>2</sup>Richmond v. McGirr, 78 Ind. 192; Gelpcke v. Dubuque, 1 Wall. 221, 17 L. ed. 531.

<sup>3</sup>Erie's Appeal, 91 Pa. 398.

There is no doubt of the meaning of the word "debt" as used in the law. It means "something owed;" "money due or to become due upon express or implied agreement." 1 Bouvier's Law Dict. title Debt.

57 L.R.A. (N.S.)

It denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. Burnham v. Milwaukee, 98 Wis. 128, 73 N. W. 1018.

<sup>4</sup>McNeal v. Waco, 89 Tex. 83, 33 S. W. 322.

The word "debt" as used in a constitutional provision that "not debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent thereon," and "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a

or not is in no respect determined by reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, and does not become a debt until the contingency has happened.<sup>5</sup> On the other hand, it is held that a sum payable in any event, but not yet due, is a debt,—*debitum in presenti, solvendum in futuro*.<sup>6</sup>

Under a constitutional provision forbidding any municipal corporation from becoming indebted in any manner or for any purpose beyond a certain sum, the word "indebtedness" has been held to mean an agreement of some kind by the city to pay money, where no suitable provision has been made for the prompt discharge of the

obligation imposed by the agreement.<sup>7</sup> It is said that an indebtedness cannot arise unless there is either a legal, equitable, or moral obligation to pay a sum of money to another who occupies the relation of creditor, and who has the legal or moral right to call upon or constrain the debtor to pay. It is not always essential to the existence of the indebtedness, that there should be an absolute legal right to coerce payment. It is, however, essential to the idea of a debt, that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay without regard to any future contingency.<sup>8</sup> Indebtedness has been declared to be a state of being in debt, and a debt is defined to

sufficient tax to pay interest thereon and provide at least 2 per cent as a sinking fund," means any pecuniary obligation imposed by contract, except such as was, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation. *Ibid*.

The word "indebtedness" as used in a section of the Constitution providing that municipalities shall not become indebted to an amount "exceeding in any way the income and revenue provided for such year without the assent of two thirds," etc., refers to indebtedness created by contract. *O'Brien v. Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800.

It is essential to the idea of a debt that the obligation must have arisen out of a contract, express or implied, in favor of someone occupying the relation of creditor, which entitles the latter to receive a sum of money, which obligation by possibility he might or ought to enforce against another. *State ex rel. Cohen v. Hawes*, 112 Ind. 323, 14 N. E. 87.

<sup>5</sup> *People v. Arguello*, 37 Cal. 524.

A contract between the shippers of a cargo and the owners of a ship, that the latter shall receive a share of the profits, does not create a debt of the former to the latter until the termination of the voyage. *Davis v. Ham*, 3 Mass. 33; *Frothingham v. Haley*, 3 Mass. 68.

Under the trustee laws of Massachusetts, it has been held that the wages of a sailor, being contingent upon the arrival of the ship, are not a debt until the ship has arrived, and therefore, until then, not attachable. *Wentworth v. Whittemore*, 1 Mass. 471.

A covenant to pay rent quarterly creates no debt until it becomes due, for, before that time, the lessee may quit with the consent of the lessor, or he may assign his term with his consent, or he may be evicted 37 L.R.A. (N.S.)

by a title paramount to that of the lessor; in either of which cases he will be discharged from his covenant. *Wood v. Partridge*, 11 Mass. 488.

<sup>6</sup> *People v. Arguello*, supra.

Standing alone, the word "debt" is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in presenti*, and *solvendum in futuro*. *Ibid*.

A debt payable in the future is no less a debt than if payable presently. *Springfield v. Edwards*, 84 Ill. 626.

<sup>7</sup> *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467.

<sup>8</sup> *Quill v. Indianapolis*, 124 Ind. 202, 7 L.R.A. 681, 23 N. E. 788.

No good reason has been advanced why, under constitutions providing that no indebtedness shall be created "in any manner or for any purpose" beyond a certain amount, the word "indebtedness" should have any other than its ordinary significance, that is, the contraction of an obligation for which there is no present means of payment. *Brashear v. Madison*, 142 Ind. 685, 33 L.R.A. 474, 36 N. E. 252, 42 N. E. 340.

A debt in its general sense is a specific sum of money which is due or owing from one person to another, and denotes not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 45 N. E. 588, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

A debt in a general sense arises out of an express or implied promise made by one person to another to pay a sum of money. *Heinl v. Terre Haute*, 161 Ind. 44, 66 N. E. 450.

be "that which one person is bound to pay to another," or an "obligation." It is that which is due by express agreement, and its definition is not affected by the manner or condition upon which it is to be paid. The constitutional provision is a limitation upon the power of the city to be indebted, that is to say, to contract any indebtedness which shall exceed an amount fixed with reference to its taxable real estate; and if the question whether liabilities upon contract obligations are not to be included in ascertaining the present indebtedness is a debatable one, then it should be resolved in favor of the view which effectuates the purpose of the provision in all its entirety.<sup>9</sup>

### III. Object of restricting indebtedness.

In interpreting debt limit provisions in the constitutions of the states and local statutes and charters of municipal corporations, the conditions which existed prior to their enactment, which they were designed to remedy, should not be forgotten. It was not until the people in many states found themselves carried along by a wave of public extravagance which was likely to bring them to bankruptcy, that they determined to put an end to the danger by setting a limit to expenditures, in the constitutions themselves. The evil was one of extreme seriousness. The debt limit provisions were written in the fundamental law to be obeyed. It is stated in a Penn-

sylvania case, in referring to the time when the constitutional provision in that state was first adopted, that "it is part of the open history of the times that many municipalities, in haste to get the advantages enjoyed by older and wealthier communities, entered recklessly into all kinds of projects under the name of public improvements, and in a few years found themselves, like heirs to an estate burdened with post-obits at ruinous rates, on or beyond the verge of bankruptcy. At the time of the framing of the Constitution, the subject was fresh in the public mind, notably in the cases of county and city bonds in aid of railroads, etc., in the western states, as found in the reports of the Supreme Court of the United States. Pennsylvania was not without its own experience two generations ago in the default of interest, nobly atoned for in the dark days of depreciated currency during the Civil War by the payment of all its obligations in gold, even though not so specified in the bond. The constitutional provision is intended as a restraint on this spendthrift tendency, to curb the extravagances of municipal expenditure on credit, to prevent municipalities from loading the future with obligations to pay for things the present desires, but cannot justly afford, and in short to establish the principle that beyond the defined limits they must pay as they go."<sup>10</sup> This was, no doubt, the experience of many other jurisdictions.<sup>11</sup> The clear and unmistakable pur-

<sup>9</sup> *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569.

The Constitution is to be understood, *prima facie* at least, as using words in their general and popular sense, unless they are clearly technical in their nature. While the word "debt" has a technical use, of somewhat more limited signification than its common meaning, yet it is not naturally or usually a technical word. And it is to be noted that the Constitution uses in immediate and synonymous connection, the word "indebtedness," which is of wider and even less technical significance; and debt and indebtedness in the section in question are not used in any technical way, but in their broad general meaning of all contractual obligations to pay in the future for consideration received in the present. *Keller v. Scranton*, 200 Pa. 130, 86 Am. St. Rep. 708, 49 Atl. 781.

For what constitutes an "indebtedness" within the meaning of constitutional and statutory restrictions of indebtedness of municipal corporations, see also note to *Beard v. Hopkinsville*, 23 L.R.A. 402.

<sup>10</sup> *Keller v. Scranton*, 200 Pa. 130, 86 Am. St. Rep. 708, 49 Atl. 781.

<sup>11</sup> In *Hopkins County v. St. Bernard Coal Co.* 114 Ky. 153, 70 S. W. 289, it is said: "It is a part of the history of this state that in times of popular excitement many

of the counties and towns of the state had voted subscriptions to railroads and other public improvements which had well-nigh wrecked them; and this section of the Constitution, which was borrowed from other states, was adopted as a remedy for the evil."

In adopting the constitutional provisions that no city, etc., shall incur indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without, etc.,—the framers had in mind the great and ever growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into the succeeding year, increasing like a rolling snowball as it went, until the weight of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. *McBean v. Fresno*, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358.

The system previously prevailing in some of the municipalities of the state, by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebt-

pose of the framers of the organic law, in inserting this provision, was effectually to protect persons residing in municipalities from the abuse of their credit, and the consequent oppression of burdensome, if not ruinous, taxation.<sup>12</sup> The mischief to be prevented was the creation of an excessive debt for local improvements or public works, or the loaning of municipal credit, so payable that the burden should not fall upon those who contracted the obligations, or on their revenues, but on posterity.<sup>13</sup>

In the main the courts have shown a disposition to uphold the debt limit provisions in the spirit in which they were enacted, although various schemes have been devised to evade them. The only tendency the courts have shown to waver has been where the obligations sought to be legalized, when beyond the debt limit, were those incurred in carrying on the necessary administration of the government of the state or municipality. Such obligations, when sustained, have been upheld on the theory that

edness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home, and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

At the time the Constitution was framed, the history of the country and of the state afforded examples of municipal corporations which had become bankrupt through the reckless and extravagant management of their governing bodies, and its framers doubtless had under consideration the evils which result both to the taxpayers and the creditors of such corporations, from an unlimited power to create debts. They seem to have kept prominently in view two objects,—the one to protect the inhabitants of municipalities against oppressive taxation; the other to protect the creditors and to preserve the financial honor of such corporations. *Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593.

A recurrence to the history of the times will show that many counties and municipalities had become largely indebted beyond their capacity to pay, for public improvements of various kinds. In many of these states, for a considerable period of time, counties and municipalities aided railway builders, and many of them became bankrupt by reason of the obligations and liabilities incurred in such aid of railway companies and various other public improvements which were deemed advantageous in the rapid development of the territory included within the county. *Rauch v. Chapman*, 16 Wash. 568, 36 L.R.A. 407, 58 Am. St. Rep. 52, 48 Pac. 253.

<sup>12</sup> *Law v. People*, 87 Ill. 385. The court said that under the Constitution of 1818 there was no limit to the power of the municipal assembly to borrow money on the credit of the state, or to authorize municipal bodies to incur indebtedness. Under the Constitution, the general assembly entered upon a gigantic system of internal improvements, paid for by money borrowed by the state; but it ended in bankrupting the state, and almost in the ruin of its citizens. Whilst laboring under the disastrous effect of this policy, the convention 37 L.R.A. (N.S.)

convened that framed the Constitution of 1848, and inserted as part of the instrument the 37th section of article 4, by which the power of the state to incur indebtedness was limited to \$50,000, except to repel invasion, suppress insurrection, or defend the state in war, or when the people should vote to create a debt.

When the convention of 1870 assembled, the abuse of municipal credit under legislative authority had become so manifest, and the necessity for its restriction so apparent, that it was supposed to be wise to apply a restriction to such bodies as well as to the state.

It was obviously the intention of the legislature in submitting, and of the people in adopting, the constitutional provision that no political or municipal corporation of the state whatever shall ever become indebted in any manner or for any purpose to an amount beyond a certain sum, arbitrarily to restrict the power of the municipal corporations to contract debt, to a limited per centum of their taxable property, and to require, when that limit of indebtedness has been reached, that such corporations should be prepared to pay for whatever of value they might obtain without the incurrence of any further indebtedness for any purpose whatever. *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467.

<sup>13</sup> *Bank for Savings v. Grace*, 102 N. Y. 313, 7 N. E. 162.

The constitutional provision was aimed at an actual, not a theoretical, indebtedness,—at a substantial liability which can be discharged only by the enforcement of a tax or an assessment which, when levied, will be a charge upon the taxpayer and a burden for him to remove,—not a formal obligation which may remain as evidence of a once existing debt, but which can in no way be regarded as a present debt to be enforced, and which, if not before canceled, becomes waste paper by the mere efflux of time. *Ibid.*

In *Gubner v. McClellan*, 130 App. Div. 716, 115 N. Y. Supp. 755, it is said that it has been the general policy of the state to meet certain expenses by taxation, and to distribute the payment of permanent public improvements over a period of years by the issuance of bonds of the municipalities, or, as denominated in the city of New York, corporate stock.



they were imposed by law; but, even in respect to this class of debts, some of the courts have stood firm, holding them to be within the constitutional inhibition. Many municipalities were indebted beyond the constitutional limit at the time of its adoption, and yet they have been able to carry on the public business without creating further indebtedness. The history of both states and municipalities since the adoption of the pay-as-you-go policy beyond a certain limit has been satisfactory, proving the wisdom of limiting public expenditure, and showing that there is no reason why these provisions should not be rigidly enforced.

#### IV. When indebtedness arises.

##### a. In general.

Under provisions limiting indebtedness in any year to the income and revenue provided for the year, it may become important to know when an indebtedness arises, in order to determine whether it exceeds the limit set by the Constitution. Where the contract is entire, and payments are not to be made in instalments, it has been held, as in *TRASK v. LIVINGSTON COUNTY*, that the indebtedness arises where the contract is made. The decision in *LOGANSPOUT V. JORDAN* is not in conflict with this rule, since in that case the amount which the city was to pay for the local improvement was not ascertained until the final assessment of special benefits arising therefrom was made, and hence the indebtedness was held to arise at that time. In the case of a contract the amount of the indebtedness would be determinable at the time it is made. So it has

been held that where the proposition for county aid to a railroad upon stipulated conditions has been submitted to the electors of the county, and approved by their vote, and a contract is entered into pursuant thereto, an indebtedness is then created against the county, and not at the time of the completion and acceptance of the work.<sup>14</sup> A contract for lighting, to be performed partly within the year in which it is executed, and partly in future years, creates a liability when the contract is made.<sup>15</sup> Outstanding contracts validly entered into by a city for a public improvement create an indebtedness against the city within the purview of the Constitution. They are not mere agreements for future indebtedness to be incurred upon performance by the party contracted with.<sup>16</sup> But the acceptance of a bid for the construction of a schoolhouse, it has been held, will not be considered as the creation of an indebtedness, where, at the time the bid was accepted, it was understood between the school board and the contractor that a formal contract was to be signed at a future date, the contract to be acceptable to the board, the contractor to furnish a bond subject to the approval of the board, it being apparent that the parties did not on the day of the acceptance assent to all the terms of the contract.<sup>17</sup> And under a statute providing that no corporate bonds issued in exchange for railroad stock "shall be delivered, or be valid if delivered," until the road shall have been completed and in operation, a municipality issuing such bonds has been held not to incur indebtedness thereafter until the completion of the road.<sup>18</sup>

And a debt has been said to be created

<sup>14</sup> *Crogster v. Bayfield County*, 99 Wis. 1, 74 N. W. 635, 77 N. W. 167.

<sup>15</sup> *Kiichli v. Minnesota Brush Electric Co.* 58 Minn. 418, 49 Am. St. Rep. 523, 59 N. W. 1088.

The rule that the liability of a city is to be determined at the time the engagement was entered into, asserted in *Erie's Appeal*, 91 Pa. 398, was recognized in *Nankivill v. Yeosock*, 7 Kulp, 518. See *infra*, IV. b, note 35.

<sup>16</sup> *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569. It was the referee's opinion that the indebtedness to be taken into account is the indebtedness or the amount due and payable under such a contract "at the time the test is made." Gray, J., in an extended consideration of this question, said that if the provision applies, not to the time of the execution of the contract, but only to the time when payment becomes due, very remarkable results may follow. "To illustrate," said he, "if, prior to the time of the completion of the contract for an extensive public improvement, made when the margin of the city's debt 37 L.R.A. (N.S.)

limit, as measured by an indebtedness consisting in direct or absolute obligations, seemed to warrant it, the debt limit is reached through the issuance of bonds to meet payments upon other contracts subsequently made, but completed at an earlier date, is the obligation of payment upon the first contract avoided? Can the provision be invoked by a taxpayer to defeat an obligation of the city valid and binding when incurred? I do not think we should agree to that. Then, may the validity of a contract obligation depend upon conditions as determined by subsequent facts? If contracts are binding when made, are they to be invalidated by after-occurring events in the city's financial career? If the answer is obvious it is at once suggested to the mind that the constitutional debt limitation does include within its provision the actual or estimated indebtedness upon such contracts."

<sup>17</sup> *Baltimore & O. S. W. R. Co. v. People*, 195 Ill. 423, 63 N. E. 262.

<sup>18</sup> *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk*, 96 Wis. 73, 71 N. W. 86.

when services are rendered or goods sold and delivered, and not when warrants therefor are issued.<sup>19</sup> A debt, it has been declared, is created within the meaning of a constitutional provision limiting the power of the legislature to create indebtedness beyond a certain amount, when a statute is passed authorizing an expenditure, and not when the bonds issued therefor are sold, and the money received therefor.<sup>20</sup>

***b. Obligations payable in instalments.***

In determining whether a municipality which has reached or nearly reached its debt limit may contract for an obligation payable in instalments, the aggregate amount of which would be greater than it would be permitted to engage for, two important questions arise: First, whether a present indebtedness is created for the full amount or for the amount of a single instalment, and second, whether such an obligation may be said to create an indebtedness within the meaning of the debt limit provisions for anything more than the single instalments as they become due. Contracts payable in instalments may be divided into two kinds: Those in which the liability of the municipality is to a certain extent contingent, that is, dependent upon the furnishing of something for which it agrees to pay a certain amount annually or monthly for a period of years; and those in which

the liability may be fixed, but payable in instalments, as a contract for the erection of a public building or a waterworks plant, or for the digging of a sewer, payment for which is postponed to the future. This distinction is made in some of the cases, but is not observed in others.<sup>21</sup> There would seem to be little ground for the distinction where the only contingency is the performance of the contract, as in a case where instalments on a construction contract are to become due as the work is completed; but if the contract price is payable in instalment, after the work is finished and accepted there would be no contingency. The ground upon which many of the cases treating of service furnished municipalities in instalments are based is that a present liability is not created for the contract price, the indebtedness arising only when the service is furnished. So, in holding that a statutory provision that no contract shall be made or expenses incurred by a city, unless an appropriation shall have been previously made concerning such expenses, etc., does not apply to a contract for the supply of gas for a period of years, the court said that no indebtedness was to accrue until after the company had commenced supplying gas, and that what this would be it was impossible to determine in advance. If a prior appropriation was essential to the validity of the contract, then it could not have been executed at all,

<sup>19</sup> *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944.

Under a paving contract providing that payments were to be made as the work progressed, and the whole to be paid when the job was completed, it was held that the compensation to the contractor was not a debt within the sense of the charter provision limiting the amount of expenditure during the year, until the services were performed and the contractor entitled to be paid. *Weston v. Syracuse*, 17 N. Y. 110.

<sup>20</sup> *Lewis v. Brady*, 17 Idaho, 251, 28 L.R.A.(N.S.) 140, 104 Pac. 900.

<sup>21</sup> Under a contract in which it was agreed to build an addition to a county courthouse, and to complete the same within a certain time, it was held that the constitutional and statutory provisions by which a county is forbidden "to incur any indebtedness exceeding in any year the income and revenue provided for it for such year" were not violated, where it appeared that the income and revenue of the county for the year when the payments were due were sufficient to meet the payments falling due under the terms of the contract, and to discharge the other current obligations of the county. *Smilie v. Fresno County*, 112 Cal. 311, 44 Pac. 556.

In *McBean v. Fresno*, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358, in holding that annual payments for 37 L.R.A.(N.S.)

a sewer farm are not for a present liability, and do not violate a provision of the Constitution that contracts for indebtedness in excess of the revenue for each year are void, the court declared that in a certain very restrictive sense it may be said that a liability is created by such a contract, but to call it a present liability for the aggregate amount of the payment in the contract, and contemplated thereafter to be made, is not legally permissible.

In a case of contract extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractors therewith who subject themselves to the peril and risk of loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income and revenue of a succeeding year. *Ibid*.

A contract for the construction of a courthouse and jail, and the payment of an annual rental, the title at the end of the rental period to vest in the county, does not create a present indebtedness against the county, for a sum equal to the aggregate amount of such rentals for the entire period for which the contract is to run. *Giles v. Dennison*, 15 Okla. 55, 78 Pac. 174.

for the reason that it was impossible to compute the amount which would be due during the twenty-five years that the contract had to run, even if it had the power to make such an appropriation for such a length of time, or during any part of said time.<sup>22</sup> In Illinois, however, instal-

ment contracts for public service are held to be within debt limit provisions.<sup>23</sup> If the obligation, whether for public service or the purchase of property, or anything else, is contingent, it has been held that there is no indebtedness in the constitutional sense.<sup>24</sup> But in Illinois, although it has

<sup>22</sup> Leadville Illuminating Gas Co. v. Leadville, 9 Colo. App. 400, 49 Pac. 268.

It is the rule of Indiana that when a municipal corporation contracts for necessary things, such as water or light, and agrees to pay for it annually or monthly as furnished, the contract does not create an indebtedness for the aggregate sum of all the instalments, since the indebtedness for each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of the debt. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588.

<sup>23</sup> In *East St. Louis Gaslight & Coke Co. v. East St. Louis*, 45 Ill. App. 591, it was said that the time when gas is furnished under a lighting contract is the time when the debt therefor is incurred, not when the contract was executed.

And the aggregate sum due on a thirty-year lighting contract was said not to be a debt incurred at the making of the contract, within the meaning of the constitutional debt limit provision. *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97. The court said that there was no indebtedness in advance of anything being furnished, but the indebtedness arose as gas was furnished from night to night during the whole period. When the company had furnished gas for a certain month, then there was a liability, but not a debt.

But this was declared to be *obiter* in *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

Some cases have held that a contract by the municipality to pay for the annual supply of necessities, such as light and water, upon rendering the services or furnishing the supplies, is not the incurring of a present indebtedness in the constitutional sense; but Illinois is committed to a contrary doctrine. *Ibid.*

An agreement to pay \$1,610 annually for arc lights, during thirty years, would constitute an indebtedness for the whole amount, and if the aggregate amount were in excess of the debt limit, the contract would be illegal. *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723.

For a similar reason, a contract for furnishing electric lights to a city, to be paid for monthly, was held void. *Schnell v. Rock Island*, 232 Ill. 89, 14 L.R.A. (N.S.) 874, 83 N. E. 462.

<sup>24</sup> In *Toomey v. Bridgeport*, 79 Conn. 229, 64 Atl. 215, 7 Ann. Cas. 148, in holding that a contract for the removal of garbage, calling for the payment of a sum of money

greater in the aggregate than the amount allowed by the city charter to be appropriated in any one year, was valid, the court said: "There is a clear distinction between the expenditure of a sum, or the making of a contract, creating a present indebtedness for a sum during any one year in excess of the revenues or appropriations for that year, and a contract stipulating for the payment of annual sums creating an annual indebtedness for several years, the aggregate amount of which payments or debts would exceed the revenue or appropriation for any one year, but no one of which annual payments or debts would exceed the revenue or appropriation for the year in which it was to be made or incurred. Such restrictions in municipal charters upon the expenditures of each year as those contained in the one before us are not to be constructed as prohibiting the municipalities from making contracts for a reasonable term of years for usual and necessary things, and stipulating therein for annual payment, which will be within the revenue and appropriations for the several years in which they are to be made, when it is for the best interests of the municipalities that such contracts should be made, and their provisions are fair and reasonable."

A contract by which it is agreed to supply a city with a fire alarm and police telegraph system within twelve months from the date of the contract, the contract to continue for five years for the completion and acceptance of the system, the city to pay a certain sum per month rent each and every month during the running of the contract, with the privilege of purchasing the plant and system at any time during the five years for a certain sum, was held not to create a present liability so as to bring it within the inhibition of the constitutional provision that no city "shall incur an indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it in such year," and of a charter provision that "in no case shall a levy be created or a warrant drawn against any fund beyond the actual amount of money existing in the fund wherewith to meet the same." The liability was held to be one that might never become due. *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958.

Where a city, the owner of certain land, entered into a contract with a person by which he was to build a city hall thereon for the use of the city, the building to remain his property, unless the city should exercise the option to purchase the same, the cost not to exceed \$75,000, the building, when completed, to be leased to the

been said that a contingent debt is some sort of a debt,<sup>25</sup> it has been recognized that an obligation might be contingent so as not to create an indebtedness within the meaning of debt limit provisions.<sup>26</sup>

While, in a plain case of indebtedness be-

yond the constitutional limit, the fact that to disallow it might cripple the administration of municipal affairs would have no weight, this fact has apparently had some influence in moving the courts to their decisions when the question was considered

city for twelve years, with the right of renewal for five years longer, at a rental of \$7,200, to be paid annually as the sum should accrue from year to year, was held not to create an indebtedness for the aggregate amount. *South Bend v. Reynolds*, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706. The court said that the city was under no obligation whatever to pay anything for the erection of the building or the purchase of the same when erected. If it attempted to exercise its option, but could not do so without violating the constitutional limitation as to indebtedness, it might be enjoined from doing so.

Where a city entered into a contract for the purchase of a new cemetery, in which it had the right to acquire title to a tract of land for cemetery purposes on payment of a certain sum, part of which amount was paid, and the city had the option of quitting payment at any time, and of taking title to such property as it had paid for, it was held that this did not create an indebtedness, because whether or not the city should pay anything further on the contract was optional. *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

So, the mere fact that a statute offering \$5 for each coyote killed did not specify the total amount that would be paid, and that under its terms, in the course of years, claims might possibly accrue and remain unpaid that, with other debts, would exceed the constitutional debt limit, would not render it invalid. *Bickerdike v. State*, 144 Cal. 681, 78 Pac. 277.

In *Grant v. Davenport*, 36 Iowa, 396, it is said: "Suppose a man having a family to support and is without other means to do it except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore makes a lease for ten years at \$300 per year, or \$3,000 for the term, the rent being payable monthly, quarterly, or annually. Has that man created an indebtedness of \$3,000? Does any fair or legitimate meaning of the word 'indebtedness' or 'indebted,' or does any general acceptance of its meaning, require us to affirm that he is indebted? We think not. Or, if, instead of renting a house, he should contract for the board of his family for a like term, at \$1,000 per year, does he thereby become indebted in the sum of \$10,000? It seems to us not."

<sup>25</sup> A debt payable upon a contingency, as upon the happening of some event, such as the rendering of services or the delivering of property, etc., is some kind of a debt, and therefore within a constitutional pro-

vision forbidding the incurring of legal liability to pay "in any manner or for any purpose." *Springfield v. Edwards*, 84 Ill. 626. The court said that if the contract or undertaking contemplates in any contingency a liability to pay, when the contingency occurs the liability is absolute,—the debt exists,—and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred.

<sup>26</sup> In the *McDonald Case*, supra, note 23, the only contingency or uncertainty as to whether or not the city would be liable to pay at the end of the month was that which might arise from the failure of the contractors to perform the contract, the amount to be paid being definitely ascertained and fixed by the terms of the agreement when entered into. In the case of *Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731, the question was whether the amount of a contract for the furnishing of lights was not unascertained, and to be determined at the end of each month by the number of lamps actually lighted. Under a contract providing that the lamps to be lighted were a certain designated number "more or less," it was held that the amount was not thereby rendered indefinite and uncertain, the parties simply recognizing by the use of the words "more or less" the probable result that one or more of the lamps for one or more nights during a month might not be lighted, the agreement on the part of the city being in effect to pay for the whole number of lamps. But the court said: "It can readily be seen that a contract which leaves the amount to be paid to be ascertained at the end of a month or a year cannot in all cases be treated as creating an indebtedness at the time the contract is entered into, violative of these limitations. Suppose, in this case, the city had not yet reached the limit of indebtedness, but the complainants had contended that the liability created by these contracts would carry it beyond that limit. In that case, if the contracts left the amount uncertain and undertermined, the conclusive answer to the contention would be,—whether or not the amount, when ascertained, added to the indebtedness already incurred, will exceed the constitutional limit, cannot be ascertained until the end of the month, when the lamps lighted and maintained are counted. We are inclined to the view that if the contracts properly construed do not fix the amount of their liability from their dates, they should not be held to create an indebtedness within the meaning of the Constitution. If it be said some indebtedness would arise, though the amount is undetermined, the answer would

doubtful, as where the contracts have called for payment in instalments.<sup>27</sup> The weight of authority favors the view that obligations for public service under contracts calling for payment in instalments as it is rendered do not create an indebtedness against the municipality until the service is performed, at which time the instalments

become due.<sup>28</sup> It has been said that a contract for water and light which is payable in instalments, to run for a number of years, does not create an indebtedness for the aggregate amount of the contract price, since the indebtedness would arise only as the water and lights were furnished and used, and if paid for as agreed would never

be a fixed sum is as necessary to the creation of indebtedness by contract, in the common acceptance of the term 'indebtedness,' as other requisites of the contract. A debt or 'indebtedness' means a determinate or definite liability."

A contract for the aggregate indebtedness of \$13,000 for the purchase of an electric light plant, payable in annual instalments, cannot be said to be not fixed because it includes the payment of interest, taxes, operating expenses, repairs, and insurance, the cost of some of which items cannot be definitely known in advance. *Baltimore & O. S. W. R. Co. v. People*, 200 Ill. 541, 68 N. E. 148.

<sup>27</sup> In *Toomey v. Bridgeport*, 79 Conn. 229, 64 Atl. 215, 7 Ann. Cas. 148, the court said that it would be unfortunate for its taxpayers, if a municipality was required each year to make a new contract for the removal and disposal of its garbage, or for its supply of water or gas and like necessities. The fact that persons and corporations making such contracts must necessarily incur a large expense merely for carrying a suitable plant or equipment for performing the work to be done would generally make it necessary for municipalities to expend a much larger sum to procure the performance of such a contract for a single year, than the annual sum required to be paid under such a contract for a term of several years.

If a city were not allowed to contract for light for some reasonable length of time, and the individual or company were compelled to trust, for his compensation from year to year, to the varying mood of city councils, no one would engage in such a hazardous enterprise. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

A contract to furnish a town with lights for a series of years is not invalidated, because, in the aggregate, the sum due in yearly instalments exceeds the debt limit. *Crowder v. Sullivan*, 128 Ind. 486, 13 L.R.A. 647, 28 N. E. 94. The court said that if municipal corporations could not contract for a long period of time for such things as light and water, the result would be disastrous, for it is a matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expenses for such machinery and appliances, if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant so to cripple the municipalities of the state as to prevent them from 37 L.R.A. (N.S.)

securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained.

In *Welch v. Light & P. Co. v. Welch*, 64 W. Va. 373, 62 S. E. 498, *Brannon, J.*, said: "Why cannot a town make an agreement for light and water for a period beyond a year, to be paid for in instalments in future after the light and water shall have been furnished, though the aggregated instalments would exceed the limit of the Constitution? If it could not, it would be hurtful to the town's powers. It can make a contract for one year, and why not for several, if the cost for one year does not go beyond the limit? Is it not current expense? The Constitution is intended to forbid a fixed present debt payable in the future of a permanent nature, not current annual expenditures."

In *Dively v. Cedar Falls*, 27 Iowa, 227, the court said that "the obligation to pay, so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness within the meaning of the Constitution quite another. If A should undertake to build a courthouse within three years, doing so much and to be paid accordingly each year, the obligation of the contract would arise when executed, but the indebtedness under the Constitution (if there was none other) would be measured by that to be paid each year. If this is not so, then it would be impossible in a majority of instances to even contract for the most necessary public buildings without a prior levy and deposit of the funds in the public treasury. This the Constitution never intended. And while fully disposed to so construe this provision as to guard well the public against onerous and unjust taxation, we are not justified in so reading it as to stop every public improvement or municipal work."

<sup>28</sup> A contract for necessary expenses payable in instalments does not create an indebtedness for the aggregate amount. *South Bend v. Reynolds*, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706.

An annual sum to be paid monthly, for lighting the streets for a limited term, is not the incurring of a new indebtedness within the meaning of the Constitution. *Wade v. Oakmont*, 165 Pa. 479, 30 Atl. 959.

A contract for gas, to be paid for from month to month when furnished, does not create a debt against the municipality. *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188, 7 So. 559.

A contract for the supply of water for a term of years for fire purposes, at a certain sum annually, is not a debt. Mer-

exceed the rate of a single instalment.<sup>29</sup> A municipal corporation may contract for a future supply of water for the city's needs, and stipulate for the payment of an annual rental as the water is furnished, notwithstanding the aggregate of such payments during the life of the contract may exceed

the amount limited by the charter.<sup>30</sup> A contract to pay for rent for suitable offices for the officers of a city, annually or monthly, does not create an indebtedness for the amount of all the annual or monthly payments.<sup>31</sup> So, a contract by a county to pay an accountant \$3,300 as his work of exam-

cantile Trust & Deposit Co. v. Columbus, 161 Fed. 135.

If the execution of a contract for the supply of a city with electric lights creates a debt at all, within the purview of the debt limit provision in the Constitution, the extent of the debt is only the amount of the annual payment provided for, and not the aggregate amount contracted for. *Denver v. Hubbard*, 17 Colo. App. 346, 68 Pac. 993.

A contract to pay for lighting at a certain sum annually does not create a debt for the aggregate sum of the annual instalments, since the debt for each year does not come into existence until the compensation for each year has been earned. *Foland v. Frankton*, 142 Ind. 546, 41 N. E. 1031; *Seward v. Liberty*, 142 Ind. 551, 42 N. E. 39.

Contracts whereby municipal corporations make provision in advance for such prime necessities as light and water, and incur obligations therefor, to be met from time to time, as those necessities are furnished, from current revenues, do not fall within the restrictive operation of Rev. Stat. 1876, § 2448, which prohibits such corporations from contracting debts without providing, in the ordinance by which they are contracted, for their payment. *Blanks v. Monroe*, 110 La. 944, 34 So. 921.

The rule that a promise to pay for prospective services as they are performed, or instalments of interest for future forbearance of money, does not constitute any indebtedness until each instalment becomes due, is not changed in respect to hydrant rentals by a city, by the fact that the city agrees to pay the rentals to the trustees of the mortgage on the plant, on the theory that the city could not, under such circumstances, be released by the waterworks company, from the obligation. *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639.

<sup>29</sup> *Anoka Waterworks, E. L. & P. Co. v. Anoka*, 109 Fed. 580.

Where the contract was for the rental of lights for the use of a city, and payment therefor was to be made only upon the performance of the services provided for, and the annual rental did not exceed the amount the city council was legally authorized to collect and appropriate for each year, it was held not to create an indebtedness against the city within the meaning of the Constitution, forbidding the creation of an indebtedness by the city without providing for the collection of a sufficient amount to pay interest thereon and provide a sinking fund of at least 2 per cent. *Dallas Electric Co. v. Dallas*, 23 Tex. Civ. App. 323, 58 S. W. 153.  
37 L.R.A. (N.S.)

Under a charter provision that a city shall have no power to borrow money or contract any debt which cannot be paid out of the revenue of the fiscal year, etc., the fact that a lighting contract is to run for eight years will not render it illegal, where it does not appear that the city will not be able to meet the instalments as they fall due without exceeding the revenue of the fiscal year. *Merrill R. & Lighting Co. v. Merrill*, 80 Wis. 358, 49 N. W. 965.

Indebtedness for the entire period an electric light plant contract is to run, and the amount of wages of teachers for the entire period covered by their contracts, need not be taken into consideration in determining whether the city has reached the debt limit. *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

<sup>30</sup> *Joseph v. Joseph Waterworks Co.* 57 Or. 586, 111 Pac. 864, rehearing denied in 57 Or. 592, 112 Pac. 1083.

An objection that a contract for the supply of water and light provides for an expenditure of \$100,000 in twenty years, and that the city is forbidden to make such an expenditure without the vote of the people, is inapplicable to a contract providing for a comparatively small annual rental. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

A contract for the supply of water for a number of years, payable quarterly, does not create an indebtedness for the aggregate amount of the contract price. *ALLISON v. CHESTER*. The court said that where the contract is intended to provide for the furnishing of a municipality with water to be used for public purposes, the payment therefor to be made from year to year, such contract should not be construed or treated as the creation of an indebtedness within the inhibition of the Constitution, except as to the amount actually fallen due, but as a mode or means of providing for the necessary current expenses of the municipal government. True, the revenues of succeeding years, to a certain extent, become bound for the future performance of the contract, and beyond the discretion of the municipality to alter or abrogate; but a supply of water is an absolute necessity, indispensable to the very existence of the people, and without such authority so to contract a municipality would be entirely helpless.

<sup>31</sup> *South Bend v. Reynolds*, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706.

A prison lease contract for \$10,000 a month is not unconstitutional on the theory that it appropriates \$600,000 in the aggregate, and creates a debt or liability against the city in excess of the debt limit,

ining the books progressed, at the rate of \$50 on each year investigated, and the rest when completed, made after it had passed its debt limit, was held not shown to be invalid, where it did not appear that the county would not be able to pay out of its current revenues all of its current expenses as well as the instalment to become due under the contract.<sup>33</sup>

The distinction between contracts for public service payable in instalments as the service is rendered, and contracts for the payment of a definite sum in the future in instalments, as already pointed out, is that there is no contingency as to the latter contracts, after that which has been contracted for is rendered and accepted, and nothing remains but to pay the contract price in

future instalments.<sup>33</sup> Although a contract for the supplying of a city with lights may not create a debt until the lights are furnished, this rule does not apply to the construction of a plant for the purpose of supplying electric lights. Where the contract is for the construction of such a plant, and the time of payment is postponed to a later date, and no special levy for the purpose of erecting such a plant is authorized, the rule is well settled that the sums to become due in the future must all be taken into account in estimating the amount of existing indebtedness of the municipality.<sup>34</sup> A contract by which a market house is to be built for a city, the city to pay a rental equal to 6 per cent of the entire cost of the building and value of the real estate, the

since the appropriation is to take effect in the future as the services under the contract are rendered. *State v. McCauley*, 15 Cal. 429. The court said that the lessee could not have claimed at any time after the making of the contract the aggregate of all the monthly instalments, because the state never owed him that amount. The state became indebted only as the services were each month performed. The aggregate amount of the salaries of the justices of the supreme court and of the several district courts of the state would exceed during the period of six years for which they were elected the limit of debt fixed by the Constitution, and yet it would hardly be contended that an act of the legislature appropriating money for their salaries as they respectively became due would be for that reason unconstitutional.

The decision in the *McCauley Case*, was adhered to in *People ex rel. McCauley v. Brooks*, 16 Cal. 11.

<sup>33</sup> *Perry County v. Gardner*, 155 Ind. 165, 57 N. E. 908.

<sup>34</sup> The distinction between a contract for the furnishing of gas to the city, and a contract to build and set up waterworks for a specified sum, one fourth to be paid down and the balance at different times in the future, is that in the former case the liability is not incurred until the article is furnished from time to time, the consideration being received at stated times during the life of the contract, while in the latter case the entire consideration is to be received at once and to be paid in the future. In the first case an indebtedness is created, and in the second case no liability arises on the execution of the contract. *East St. Louis v. Flannigan*, 36 Ill. App. 50.

A contract for the erection of a building at a certain specified price, the building to be complete at a certain date, and payment for which is to be made as the work progresses, on estimates to be made by certain architects, is in effect a contract to pay the price agreed on by the date of the completion of the work, and where the amount thereof is more than can constitutionally be raised by taxes without the

authority of the voters exhibited by election, the contract creates a debt not authorized by such Constitution. *Butts v. Little*, 68 Ga. 272. But the court stated that if the liability to be incurred could be so arranged as not to exceed one fifth of 1 per cent annually on the assessed value of the taxable property of the county, the contract might stand.

But in *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57, it was held that under a provision which forbids any county to incur a debt without first submitting the matter to a popular vote, "except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one fifth of 1 per centum of the assessed value of taxable property therein," a contract for the building of a courthouse without the sanction of popular vote is illegal, although so arranged that, with the means on hand, the cost of the building can, as it falls due, be met annually by a levy of one fifth of 1 per cent on the assessed value of the taxable property of said county, and the liability to be incurred can be so arranged as not to exceed one fifth of 1 per cent. The last-mentioned case was overruled on this point.

<sup>34</sup> *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476. The court said that otherwise the city might, by such contracts, absorb all the general revenue in advance, and leave nothing for the payment of current expenses. "Suppose," declared the court, "a city should anticipate all its general revenues, and thus leave nothing for the payment of current expenses, and suppose, further, that it should issue warrants for the payment of these expenses, which were not paid for want of funds, could not the holder of these warrants enforce them against the city, and, if enforced, and the city is compelled to pay (as no doubt it would be obliged to do) the amount thereof in addition to the amounts previously appropriated for improvements, would not the very object of the constitutional provision be thwarted, and a wise provision of our fundamental law rendered nugatory? The answer to

agreement being for a term of twenty-five years, with the right of election on the part of the city to purchase the property during the term in the manner specified in the agreement, was held to create a debt against the city, although the amount to be paid is specified as rental.<sup>35</sup> A contract for the purchase of an electric light plant by the city for \$13,000, payable in annual in-

stalments of \$1,000, creates an indebtedness in the aggregate amount, within the meaning of the Constitution.<sup>36</sup>

But where a city has already exceeded its debt limit, it cannot create an indebtedness even by instalment, since each instalment would be an indebtedness as it becomes due.<sup>37</sup>

In Illinois, however, where, as has been

these propositions is so obvious that no amount of refinement can add anything to the conclusion."

That a city does not obligate itself to pay more under a contract for a lighting plant and the expense of operating the same, than it had theretofore paid for the lighting alone, does not authorize it to enter into a contract for the construction of such a plant, in violation of the constitutional debt limit provision. *Ibid.*

A city indebted beyond the constitutional limit cannot, through a statutory city hall commission appointed by the city, become further indebted by the issuing of the bonds of the commission for a sum necessary for the erection of a city hall, the city to convey to the commission intrust its present city hall lots and buildings for the purpose of securing the payment of the bonds, the buildings to be erected on such lots to be held for the payment of the bonds, the city to raise such sum annually as may be necessary to pay all expenses for repairs, insurance, and management of such building, in a sum equal to the annual interest on the bonds issued and outstanding, the city to become a tenant of the building, under such provisions and directions as the city council may direct, the city being authorized to assume the indebtedness represented by the bonds whenever it could do so constitutionally, the city, and not the commission, being liable for damages in respect to the erection and repair of the building. *Reynolds v. Waterville*, 92 Me. 292, 42 Atl. 553. The majority of the court considered the true nature of the transaction to be the hiring of money by the city upon the credit of city property through the intervention of a trustee.

A city cannot, on the pretense of renting a city hall through a commission appointed for that purpose, create a debt beyond the constitutional limit, when it is apparent that the city is to have not merely the use of the building, but the building itself, the city really undertaking to purchase the property on the instalment plan, what are denominated rentals in the contract being really partial payments of the cost. *Ibid.* The court said that it would be willing to adopt the middle doctrine on which some of the authorities stood, which allows a municipal corporation, although its indebtedness has already reached the constitutional limit, to make time contracts in order to provide for certain municipal warrants, which involve only the ordinary current expenses of municipal administra-

tion, provided there is to be no payment or liability until the services be furnished, which are then to be met by annual appropriations and the levy of taxes, so that each year's services shall be paid for by each year's taxes; the scheme being universally denominated in the cases as a business or cash or pay as you go transaction, and the like. The court inclined to the belief that on this principle a town or a city might contract for the use of a hall for a term of years to be used strictly for municipal purposes, provided that principle be fairly applied in any case, and not abused; not, however, allowing a hall to be hired for the purpose of subletting either the hall or any part of it. Municipal necessities only were to be regarded.

<sup>35</sup> *Erie's Appeal*, 91 Pa. 398.

<sup>36</sup> *Baltimore & O. S. W. R. Co. v. People*, 200 Ill. 541, 66 N. E. 148.

Under a constitutional provision prohibiting municipalities from becoming indebted in any manner or for any purpose beyond a certain amount, and providing that any municipality incurring any indebtedness as aforesaid shall also, at the time of so incurring the same, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal within twenty years, payments made by the city for rental for an electric light plant constitute a class of indebtedness prohibited, although the payment of the amount thereof is not deferred to a fixed time in the future, and does not bear interest. *Ibid.*

A contract between a city and an electric company, by which the latter agreed to install an electric plant, for which the city agreed to provide a suitable site, to pay all taxes, etc., to lease the plant from the company for five years, and pay quarterly a certain sum for the use thereof, the city, at the expiration of the term of five years, to have the right to buy the same at the price of \$1, was held to be a present binding agreement for the creation of a prospective debt. *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279.

<sup>37</sup> *Brockway v. Roseburg*, 46 Or. 77, 79 Pac. 335; *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

A contract by which a city proposes to add to its bonded indebtedness in the sum of \$42,000 each year for fifty years, for the supply of water and lights, where it has already reached its debt limit, is unlawful. *Duncan v. Charleston*, 60 S. C. 532, 39 S. E. 265.



seen, the courts are very rigid in their construction of debt limit provisions, it has been said that it would seem that a contract payable in instalments is of a divisible nature, so that the aggregate amount of indebtedness extending over a period of years cannot be made the test of the validity of the whole contract.<sup>38</sup>

**V. Obligations payable out of special fund or current receipts.**

**a. In general.**

It is well settled that a contract which provides that the cost of any improvement shall be paid out of a fund expressly created therefor is valid, notwithstanding the provision of the charter as to the limit of the city's indebtedness.<sup>39</sup> It has been held that, notwithstanding the fact that a town has reached its debt limit, it may contract for stone for highways, if it has money in the treasury at that time specially set

apart for the payment of such claims, or if the town had means in its treasury to meet the indebtedness, or would have it in anticipation of its current revenue.<sup>40</sup> But the mere fact that a special fund is created for payment is not enough to make the obligations valid. The creditor must look to the fund alone for his recompense; and if the municipality is liable generally, an indebtedness is created within the meaning of the debt limit provisions.<sup>41</sup>

So, where a city is indebted beyond the charter limit, it has been held that the fact that a contract for lighting provides that payments shall be made in "valid warrants" does not render the warrants valid, on the theory that the contract contemplates that the city will provide a special fund for the payment of the warrants as issued, so as not to make them evidence of indebtedness within the meaning of the charter.<sup>42</sup> But in order to render obligations valid on the theory that they are payable out of a special fund, it has been

The question was first raised in Kentucky in *Beard v. Hopkinsville*, 95 Ky. 239, 23 L.R.A. 402, 44 Am. St. Rep. 222, 24 S. W. 872, in which it was held that a contract by a city to pay an annual rental for the use of water hydrants and electric lights creates an indebtedness within the meaning of the Constitution, when the city, at the time of the execution of the contract, had passed the debt limit, although the income from taxation and other sources would be sufficient to pay all the current expenses, including such rental. It was the contention in this case that under the contract, as the contractor furnished the water and light, and thus earned the money, he was paid therefor, and that consequently the liability was extinguished as soon as it came into existence.

It is said that an obligation in the future upon such a condition as furnishing water in the future is a debt within the meaning of the Constitution. It becomes due when the water is furnished, and if the aggregate indebtedness already exceeds the constitutional limitation, no further contract for the payment of money can be enforced while the city is so situated. *Pontiac Water, Light, & P. Co. v. Pontiac*, 149 Ill. App. 57.

<sup>38</sup> *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982.

For right of municipal corporation to secure public utilities by piecemeal, to avoid constitutional debt limit, see note to *Overall v. Madisonville*, 12 L.R.A.(N.S.) 433.

<sup>39</sup> *Little v. Portland*, 26 Or. 235, 37 Pac. 911.

Certificates of indebtedness issued against a special fund do not constitute indebtedness of a state, but are mere evidence of the holder's right to receive payment out of the fund when collected. *Brown v. Ringdal*, 109 Minn. 6, 122 N. W. 469. 37 L.R.A.(N.S.)

But bonds of a town issued to secure funds with which to rebuild a schoolhouse create a debt against the town, within the meaning of the debt limit provision of the Constitution, since this is not an obligation payable out of specific funds, but is a contract to pay money generally. *Winamac v. Huddleston*, 132 Ind. 217, 31 N. E. 561.

<sup>40</sup> *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 588.

The drawing of warrants for a road against a special road fund already provided, and certain to be paid during the fiscal year, for their payment, is not the creation of a debt or debts within the constitutional prohibition. *Hockaday v. Chaffee County*, 1 Colo. App. 362, 29 Pac. 287. The court said that the application of a special fund to the purpose of its creation, by the drawing of warrants against such a fund, unless the amount drawn during the year exhausts the amount provided for such fund and supposed to be available, is not the creation of a debt, although it anticipates the revenue to be collected, as they are drawn against existing values,—hence cannot be classed and regarded as the debt of the county prohibited by the Constitution, unless in excess, in some year, of the money provided for their payment during that year.

<sup>41</sup> That a statute directing a county to issue warrants in payment for a proposed courthouse requires the county court to levy a tax annually for five years for the payment thereof does not render the warrants valid on the theory that no indebtedness is created, where the payment of such warrants is not limited to any special fund or the money to be raised by special tax. *Eaton v. Mimnaugh*, 43 Or. 465, 73 Pac. 754.

<sup>42</sup> *Brockway v. Roseburg*, 46 Or. 77, 79 Pac. 335

held that there must be a special fund, or at least the tax for the purpose of providing such a fund must have been levied.<sup>43</sup> Where, however, a city intending to contract for the purchase of boilers agreed that an appropriation should be made therefor at a future date, and stipulated that the boilers were not to be paid for until such appropriation should be made, and warrants drawn on a special fund providing therefor, and that no agreement or contract for the purchase of such boilers would be made whereby the seller would ask or receive of the city any warrants or money for such boilers until the appropriation was made for payment of the same, and warrants issued on such appropriation, it was held that this did not create an indebtedness against it.<sup>44</sup> If the creditor is to be paid out of a special fund which has been created, and the municipality is not otherwise liable, the debt limit provisions are not violated.<sup>45</sup>

Where a contract for a street improvement contained a stipulation that the contractors should look for payment only to the fund to be raised by an assessment of the property benefited, and that they would not require the city, by any legal process or otherwise, to pay for the same out of any other fund; and when the improvement under the contract was completed, warrants were drawn upon the treasury in favor of the contractors and made payable out of

said fund, it was held that no indebtedness against the city was created until it failed to collect the fund within a reasonable time, and hence its authority to enter into the contract was not affected by a charter debt limit provision.<sup>46</sup> And where the expenses of the construction of a canal were to be met by certificates of indebtedness, and both the principal and interest of the certificates were to be paid out of funds received for carriage by water, or in payment for lands, and the act authorizing the construction expressly provided against any indebtedness being incurred on the part of the state, it was held that it was not in conflict with the constitutional debt limit provision.<sup>47</sup> An agreement to pay a balance of twenty-four instalments of the purchase price of a waterworks plant was held not to create a debt against a city, where the contract provided for the creation of a special fund, without resorting to the power of taxation, and the waterworks company was required to look alone to that fund in the first instance.<sup>48</sup> A statute creating a levee company, providing for an annual collection by taxation, and appropriation to the company for a number of years, of a certain sum, was held not to create a debt against the state, the money collected being set apart in a special fund, and the state not obligating itself to pay for any sum contracted by the levee com-

<sup>43</sup> Outstanding warrants or orders drawn by a municipality against cash in the treasury, or specifically payable out of a fund to be raised from a tax which has been actually levied, do not constitute an indebtedness within the meaning of the constitutional inhibition. *Blanchard v. Benton*, 109 Ill. App. 569.

A provision in a lighting contract that the city shall each year draw and deliver its order in favor of the company, on the treasurer of the city, as soon as the annual levy and appropriation for the lighting of the streets of the city shall have been made, and payable out of the street lighting fund when collected, for a sufficient sum, etc., was held valid. *Hay v. Springfield*, 64 Ill. App. 671.

In *Griswold v. East St. Louis*, 47 Ill. App. 480, it was said *obiter* that if warrants were payable from a specific appropriation of the taxes levied, but not yet collected, which were accepted in exchange for light furnished, this would be an exchange of one thing for another, creating no debt against the city, but being full payment for such services.

But a debt is created against a city within the meaning of the Constitution, for an amount due for gas furnished to a city prior to the levy of taxes to meet the payment of such sum, although it was agreed in the contract that the fund thereafter to be

appropriated and levied for the payment was alone to be looked to. *East St. Louis v. Flannigan*, 36 Ill. App. 50.

<sup>44</sup> *Bailey v. Sioux Falls*, 19 S. D. 231, 103 N. W. 16.

<sup>45</sup> Obligations payable out of a particular fund, and for which the fund only, and not the municipality, is liable, are not within the inhibition. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588; *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

<sup>46</sup> *Little v. Portland*, 26 Or. 235, 37 Pac. 911. The court said that the reasons assigned by these decisions for the application of the foregoing rule is that materials furnished to and labor performed for a municipal corporation are exchanged for warrants to be drawn upon the treasury and made payable out of a specific fund which has been created by an assessment or levy of taxes, and appropriated to that purpose, under the agreement that the person furnishing the materials or performing the labor will rely upon the specific fund only for payment, and that the corporation shall incur no liability whatever.

<sup>47</sup> *Re Canal Certificates*, 19 Colo. 63, 34 Pac. 274.

<sup>48</sup> *State ex rel. Smith v. Neosho*, 203 Mo. 40, 101 S. W. 99.

pany.<sup>49</sup> But where a city charter forbade the passage of an ordinance obligating the city for the payment of more than \$1,000 except in a certain manner, and an ordinance for the extension of waterworks was not passed in this manner, it was held to be illegal, although it provided that the indebtedness should be met by setting aside a special fund out of the receipts from the waterworks.<sup>50</sup> The court said that, although the city did not contract for a general indebtedness, it did contract for a special indebtedness, and obligated itself to the establishment of a special fund and for the payment of the money in the special fund, which was, within the meaning of the ordinance, obligating itself as much as if a general indebtedness had been created. The character of the fund did not disturb the

obligation. It determined only the character of the obligation and the manner of its enforcement.

If warrants are drawn on a special fund in excess thereof, such warrants, as to such excess, would undoubtedly be invalid, providing the municipality had reached the debt limit, but would probably not render those within the fund void.<sup>51</sup>

#### *b. Local improvements.*

It is well settled that contracts for local improvements, the cost of which is to be borne wholly by the property benefited, form no part of the indebtedness of the municipality within the meaning of the debt limit provisions.<sup>52</sup> Improvement bonds do not constitute indebtedness within the mean-

<sup>49</sup> State ex rel. Louisiana Levee Co. v. Clinton, 25 La. Ann. 401.

<sup>50</sup> Savage v. Tacoma, 61 Wash. 1, 112 Pac. 78.

In Coulson v. Portland, Deady, 481, Fed. Cas. No. 3276, it was held that interest coupons to railway bonds payable half yearly through a period of twenty years, amounting in the aggregate to a sum largely in excess of the debt limit, could not lawfully be issued on the theory that, as the ordinance providing for the issue of these coupons also provided for raising revenue, and appropriated it to the payment of them as they fell due, no indebtedness or liability was thereby created or incurred. The court declared that to say that a sum of money due or owing from A to B is not a debt, because A has promised to appropriate, or has appropriated, a portion of his future income to its payment, is a proposition in legal metaphysics that cannot be comprehended. A debt exists against the city whenever the city agrees to pay money in return for services or for money borrowed. Every one of the interest coupons, when issued by the mayor and auditor as presented in the ordinance, is a promise by it to pay to the holder so much money. If this is not a debt, or evidence of one, then an ordinary promissory note is not. The fact that the ordinance appropriates money to pay these coupons, as they fall due, makes no difference. There is no magic in the legislative formula,—"there is hereby appropriated." That does not change the fact that the city owes these coupons, and what it owes to another is a debt due that other. Besides there is no money in fact set apart by this formula of appropriation, until it is collected. The charter prohibition as to indebtedness in this case included all forms of indebtedness, "whether incurred by borrowing money, loaning the credit of the city, or otherwise."

<sup>51</sup> Whether or not warrants so drawn on a special fund in excess of it can be classed with the general indebtedness of a county so as to swell the aggregate, and render the 37 L.R.A. (N.S.)

warrants void under the constitutional prohibition, the court did not find it necessary to determine, but said that if they could in any case be so considered, it would not invalidate all the warrants of that year, but only those drawn after the fund was exhausted and in excess of it. Hockaday v. Chaffee County, 1 Colo. App. 362, 29 Pac. 287.

<sup>52</sup> The making of local improvements, the expense of which is to be assessed upon and borne by the property benefited thereby, is not within the scope of charter restrictions upon the power of the city to contract indebtedness, since the obligation rests primarily upon the owners of the property benefited. Baldwin v. Oswego, 1 Abb. App. Dec. 62, 2 Keyes, 132.

Money held by the city treasurer, with which to pay assessment warrants when presented, is in no sense a debt of the city. Stone v. Chicago, 207 Ill. 492, 69 N. E. 470.

A local improvement contract payable by special assessment on abutting property does not create a debt against the city within the meaning of the Constitution. Mankato v. Barber Asphalt Paving Co. 73 C. C. A. 430, 142 Fed. 329.

A debt forbidden by the Constitution is not created by an ordinance for a street improvement providing for a special assessment upon abutting property to pay the cost. Coleman v. New Kensington, 140 Fed. 684.

A city has the power, although indebted up to the constitutional limit, to contract for street improvements so far as they are to be paid for by special assessments on abutting property. Ft. Dodge Electric Light & P. Co. v. Ft. Dodge, 115 Iowa, 568, 89 N. W. 7.

Contracts for street improvements made under a statute providing therefor, the cost of which is to be assessed upon abutting property, and payment therefor made by delivering to the contractor the assessment certificates, with a special provision specifying the manner in which probable deficiencies shall be raised, do not create municipal

ing of the Constitution, where the cost is assessed back on the property benefited, and the amounts assessed become a lien on such property, and where it is provided that the proceeds arising from the assessment shall constitute a special fund for the payment of the cost of the improvement and the bonds and certificates, and where it is required that the bonds shall bear the name of the street or alley improved or sewer constructed, and that they shall be payable out of a special fund provided for in the act, since there is no liability against the city, the city authorities being merely an agency for making and collecting the assessment, and the custodian of the fund when the assessments are collected.<sup>53</sup> And

street improvement warrants chargeable to and payable out of particular funds to be derived from local assessments at least do not create a present indebtedness against the city.<sup>54</sup>

And bonds issued to raise money for the construction of free gravel roads do not create indebtedness within the meaning of the Constitution, not being payable out of a general fund of county or township, but being payable out of a particular fund to be raised by a special tax imposed as a benefit, assessed according to its value not upon all the taxable property of the county, but upon all the taxable property in the taxing district.<sup>55</sup> And park certificates issued upon judgments already

indebtedness within the meaning of the Constitution. *Corey v. Ft. Dodge*, 133 Iowa, 666, 111 N. W. 6.

But in *French v. Burlington*, 42 Iowa, 614, it was held that the constitutional provision being that no municipal corporation shall become indebted in any manner or for any purpose beyond a certain amount, this includes necessary, as well as convenient, improvements of the streets, and all other things deemed necessary for the proper comfort and health of the people of the city. It matters not how or for what purpose the indebtedness is incurred. It is prohibited, unless it can be shown to be reasonably certain that such indebtedness can be liquidated and paid from ordinary current revenues of the city.

<sup>53</sup> *Quill v. Indianapolis*, 124 Ind. 292, 7 L.R.A. 681, 23 N. E. 788.

An obligation arising from the issuance of local improvement bonds chargeable against property benefited does not create a municipal indebtedness within the meaning of the Constitution. *Guilfoyle v. Maysville*, 129 Ky. 532, 112 S. W. 666.

Street improvement bonds payable only out of the special assessments levied for the purpose of their payment do not constitute obligations against a city, within the meaning of the Constitution. *Vickrey v. Sioux City*, 115 Fed. 437.

A statute allowing a city to order the original construction of street improvements at the exclusive cost of the abutting owners, and to issue ten-year bonds against the property, which does not pay any cash, does not create municipal indebtedness within the meaning of the constitutional provision limiting municipal indebtedness, since the liability is solely against the property. *Guilfoyle v. Maysville*, supra.

<sup>54</sup> *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462.

Street grading warrants issued against assessments do not create an indebtedness against the city, within the meaning of a charter provision limiting indebtedness. *Denny v. Spokane*, 25 C. C. A. 164, 48 U. S. App. 282, 79 Fed. 719.

A city is not excused from repairing a sidewalk on the theory that it has reached

the debt limit, since assessments for street improvement or street repairs are not generally taxes payable by the people, but are made against those whose property is benefited; and the corporation as such is not therefore liable for such assessments. *New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. 1074.

So, where a city was prohibited from "borrowing" for "general purposes" more than a specified amount, it has been held that a sidewalk improvement is not a "general purpose" within the meaning of the provision. *Galveston v. Loonie*, 54 Tex. 517. The court said that the ultimate reimbursement of the city being secured by a lien on the abutting lots, there would be less reason for limiting the power to borrow for such a purpose, than for general purposes where the city was unsecured, citing *Hitchcock v. Galveston*, 96 U. S. 349, 24 L. ed. 661.

<sup>55</sup> *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124. The court said that the money thus raised according to benefits declared by the legislature could not be appropriated to any purpose except to pay the bonds, and the money raised from the sale of said bonds could be used only to build said roads. No other provision was made for the payment of said bonds, except from the fund raised by said assessment, and the same was pledged by the statute for that purpose, and could not be devoted to any other purpose.

Bonds issued to raise money for the construction of free gravel roads are not the obligations of the county. *Braun v. Benton County*, 17 C. C. A. 166, 34 U. S. App. 393, 70 Fed. 369.

Bonds issued for the construction of free gravel roads do not create a debt against a township. *Switzerland County v. Reeves*, 148 Ind. 467, 46 N. E. 995.

The issuance of bonds to meet the expenses of the building of a free gravel road is not the creation of an indebtedness within the meaning of a provision of the Constitution fixing the debt limit, where such bonds are not payable by the county, or out of the general funds of the county treasury, but are payable out of a particular fund to be raised by the collection of

obtained in favor of a city for unpaid assessments of special benefits, collectable on execution, the holders to get their *pro rata* share as the collections are made, the provision of the charter being that the city shall be liable on such certificates to the holders thereof for the sums collected from the special assessments upon which the certificates are issued, "but not otherwise," have been held not to create an indebtedness against the city.<sup>56</sup> Where, before the issue of ditch bonds, assessments are made upon lands within a certain district to pay them,

it is said they cannot be considered in determining the capacity of a county to incur a debt.<sup>57</sup>

The rule in this respect is the same as in the case of any other special fund. The holders of the obligation must look alone to the fund for their payment.<sup>58</sup> The fact that local improvement bonds are to be paid out of assessments which are made a lien upon the property benefited does not render them legal on the theory that they do not create an indebtedness against the city, where the bonds provide for the pledging of

assessments made on lands adjacent to such roads, divided in such manner as to meet principal and interest of said bonds, and placed as divided upon the tax duplicates against the lands assessed, and collected in the same manner as other taxes, which fund, when so collected, is to be applied to no other purpose than the payment of such bonds and interest. *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Burton v. State*, 111 Ind. 600, 12 N. E. 480.

Bonds issued to raise money for the construction of free turnpike roads were held to create an indebtedness within the meaning of the debt limit provision of the Constitution, although a special fund or resource was provided by assessment for their payment, and notwithstanding the fact that in most cases the assessments would ultimately prove collectable in sums sufficient to pay the debt and interest, where it was not provided that no other fund might be used for the same purpose. *Kimball v. Grant County*, 21 Fed. 145.

<sup>56</sup> *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

<sup>57</sup> *Johnson v. Norman County*, 93 Minn. 290, 101 N. W. 180.

<sup>58</sup> In *Atkinson v. Great Falls*, 16 Mont. 372, 40 Pac. 877, the court said: "It would seem that, if the city has taken the proper steps under the law to assess the property abutting on the street intended to be paved under the contract in question, with the cost of the improvement, and if, in entering into the contract, it has expressly and clearly excepted and protected itself from any liability thereunder for such cost, and the liability created by such contract is confined and restricted to the special fund created by the special assessment upon the property abutting on the street to be paved, and the contractor has expressly agreed to accept the fund raised by said special assessment, and has expressly waived all right to hold the city in any wise responsible or liable for the cost of the paving of said street, then such contract would not create such an indebtedness of the city as is prohibited by § 4, article 13, of the Constitution of the state."

When a city directs a local improvement to be made at the exclusive cost of the abutting property, and a statute requires it to be borne exclusively by the abutting property, the liability for the cost of the

improvement is in no sense that of the city. The contractor must look alone to the property designated by the ordinance directing the improvement, for pay for his work and materials. The city acts for the abutter in making the contract. *Catlettsburg v. Self*, 115 Ky. 669, 74 S. W. 1064.

Bonds issued by a city to cover the cost of a street improvement, chargeable wholly against abutting property, the holders of the bonds being compelled to look alone to the fund created by the collection of assessments against the property for their payment, do not create a liability against the city, within the meaning of the Constitution. *Adams v. Ashland*, 26 Ky. L. Rep. 184, 80 S. W. 1105.

District improvement bonds payable from special assessments made against the owners of abutting property, and in no other manner, and accepted in full satisfaction for the work done, do not create a debt against a city, within the meaning of the Constitution. *Clinton v. Walliker*, 98 Iowa, 655, 68 N. W. 431.

Paving and sewerage bonds and warrants issued under a law specially providing for the payment of the costs of the improvement by assessments against the property improved, such assessments, when paid into the treasury, to constitute a fund out of which the warrants issued are to be paid, the contract for the improvement expressly stating that the city assumes no liability, do not create an indebtedness against it. *Vallelly v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

And whether refunding bonds, in which the credit of the city is pledged to the payment of the cost of local improvement bonds, do not create a debt within the meaning of the Constitution, may be doubted. *Catlettsburg v. Self*, *supra*.

Certificates given for the purchase price of land for park purposes, secured by mortgage on the land purchased, each certificate stating that the city is indebted to the payee in the sum therein mentioned, and reciting that the consideration therefor is the conveyance to the city by the payee, of land for park purposes, and that the certificate is secured by mortgage on the land sold, and that it is payable out of the funds arising from assessments made upon real estate specially benefited by the park established on the land, and concluding with

the faith of the city for the payment of principal and interest thereon.<sup>59</sup> Assessment bonds issued to pay the cost of local improvements constitute indebtedness of a city to be taken into consideration in ascertaining whether the city has reached the debt limit, although the cost is assessed back more or less upon the property benefited, the bonds being absolute and unqualified obligations of the city, issued upon its faith and credit alone, and, when due, payable directly.<sup>60</sup> Street improvement bonds not expressly declared to be payable only out of the funds realized from a special assessment provided for their payment create an indebtedness of the city.<sup>61</sup>

A contract for paving by which a city obligates itself by an absolute promise to pay for work, and fixing a definite price,

payments to be made as follows: "Estimates will be made by the board of public works monthly during the progress of the work, and 75 per cent of the actual amount of work done according to such estimates will be paid by said city to the said second party monthly. The remaining 25 per cent will be retained for the period of thirty days after the acceptance of the work, and at the expiration of said period will be paid to said second party by said city; and said city agrees to accept or reject the work within ninety days after the completion of the whole work provided for in this contract,"—creates an indebtedness against the city within the meaning of the Constitution.<sup>62</sup> But where the obligation which a city attempted to assume by a contract for paving was in terms confined to its power

these words, "it being expressly understood and agreed that there is no liability on the part of the city to pay the amount evidenced by this certificate and secured by the above-described mortgage, out of any other fund than the fund above specified," do not create an indebtedness against the city. *Kelly v. Minneapolis*, 63 Minn. 125, 30 L.R.A. 281, 65 N. W. 115. The court said that if park certificates were secured by mortgage on any portion of the property of the city previously owned by it, or by pledge of its revenue, the certificate would be a part of the indebtedness of the city, for the statute providing a debt limit for cities cannot be evaded by a makeshift of issuing bonds or other obligations of the city making them payable only from the general revenues of the city to be derived from a particular source, or by securing them upon its public buildings or other property which, if sold to pay the obligations, must be replaced by taxation to enable the city to discharge its governmental functions.

<sup>59</sup> *Covington v. McKenna*, 99 Ky. 508, 38 S. W. 518.

<sup>60</sup> *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569.

Local improvement bonds chargeable upon property benefited constitute indebtedness of the city, where the city therein unconditionally and absolutely acknowledges itself to be indebted to, and promises to pay, the bearer, etc., the sum specified therein. *Fowler v. Superior*, 85 Wis. 411, 54 N. W. 800.

Local improvement bonds cannot be said not to increase the indebtedness of the city, on the theory that they are a mere substitute for the assessments which the city owns as a resource for their payment. *Ibid.* The court said: "The language of the Constitution, 'become indebted in any manner or for any purpose,' is to be understood not in its commonly accepted sense. Cannot one become indebted," asked the court, "if he has pecuniary resources sufficient to pay it?"

37 L.R.A. (N.S.)

Where a city charter provides that the city shall be liable for the payment of both principal and interest of local improvement bonds, they create an indebtedness which cannot be incurred if the city has already reached the constitutional limit, although the cost of the improvement is to be assessed against the land benefited. *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557.

Local improvement bonds create an indebtedness against the city, although they recite that they are issued to provide for street improvements, the cost of which is assessable against abutting property, and is made a lien thereon, where the promise on the part of the city is absolute, and it is apparent from the statute authorizing their issuance that it is not expected that the abutting owner shall be liable for the whole cost, and there is no requirement that they shall be payable out of a particular fund. *Burlington Sav. Bank v. Clinton*, 111 Fed. 439.

<sup>61</sup> *Vickrey v. Sioux City*, 115 Fed. 437.

When a city claims that it is not indebted for the contract price for the paving of a street, because the same is to be paid out of a special fund assessed upon property abutting upon the street to be paved, it must prove these allegations by showing that the warrants or other obligations drawn, and to be drawn, by the city on these special funds, are so specific and unequivocal in their terms as to fix the liability for the payment thereof on such special funds, and leave no question that the city is in any way liable therefor. "This," said the court, "can only be properly done by keeping these warrants or other obligations in evidence, so that the court may determine, from an inspection thereof, whether the special funds are solely liable for the payment thereof, or whether or not they constitute an indebtedness of the city." *Atkinson v. Great Falls*, 16 Mont. 372, 40 Pac. 877.

<sup>62</sup> *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

to impose the collection of assessments for the improvement, and if collected by it to pay the same in certificates to the contractors or other persons entitled thereto, and it was expressly provided that upon the transfer of the certificates, the liability of the city to the contractors and to the persons claiming under them should cease, and the city did not attempt to issue any obligation for the payment of money, and agreed only to perform such duties in respect to the certificates, and it did not attempt to guarantee the payment of the certificates, although it guaranteed their regularity and the right to recover on them, it was held that this did not create an indebtedness within the meaning of the Constitution.<sup>63</sup> And it has been held that a contract for paving which does not create an indebtedness because payable by special assessment levied against abutting property is not rendered unconstitutional because it

is further provided that in case such special assessment prove insufficient to pay the amount earned under the contract, the deficiency is to be paid out of a "general paving fund of the city," by warrants drawn thereon.<sup>64</sup> And that where the city has reached the debt limit, it has power to pass an ordinance providing for local improvements, although it specifies that part of the cost of the improvement shall be raised by general taxation, since this is not the creation of a debt, or even the anticipation of a tax levy.<sup>65</sup>

The fact that the municipality may fail to collect assessments on abutting property, and thereby create a deficiency in the fund, does not alter the rule as to its indebtedness.<sup>66</sup>

But the distribution of payment of warrants of a city upon different parts of the aggregate of property does not bring them within the local assessment rule, so that

<sup>63</sup> Tuttle v. Polk, 92 Iowa, 433, 60 N. W. 733.

A statute providing that if, by reason of the prohibition contained in the debt limit section of the Constitution, it should at any time be unlawful for a city to issue bonds provided for by the act, it should be lawful for the city to provide for the issuance of certificates to contractors in payment for the improvement constructed, the certificates to state the amount or amounts of one or more of the assessments made against a lot owner or owners in the payment of the cost of such improvement, and to transfer to the contractor all the right of the city thereto, and to authorize the contractor to receive and collect such assessments by the legal method for the collection of assessments for local improvements, was held not to make the city in any manner liable for the payment of the certificates, but merely to authorize the transfer to the contractor or his assignee, of all the right and interest of the city in the assessments, in payment of the improvements made. It was therefore held constitutional. *Id.*

Where the statute expressly provided for the payment of the costs of local improvements by assessments against the property improved, and such assessments when paid into the treasury constituted a fund out of which the warrants when issued were to be paid, it was held that no indebtedness was created by the issue of such warrants. The court considered this to be the rule even without the provision which the warrants in the case contained, that the city should not be liable. *Vallelly v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

<sup>64</sup> *Corey v. Ft. Dodge*, 133 Iowa, 666, 111 N. W. 6. The court said that the most the city could do in this respect was to pledge itself to meet that contingency by some appropriate fund which it had the legal right to provide for that purpose. 37 I.R.A.(N.S.)

<sup>65</sup> *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 2 N. E. 478.

And a street improvement ordinance is not rendered invalid as to abutting owners, because of the fact that part of the expense is to be borne by the city, thus creating a debt against it beyond the constitutional limit. *Cason v. Lebanon*, 153 Ind. 567, 55 N. E. 768.

In a proceeding for the assessment of damages for land taken for a public street, the question as to the city's debt limit cannot be raised, although the improvement ordinance provides that any part of the compensation, damages, or costs that are not finally assessed against the property benefited shall be paid out of the general funds of the city, where it is apparent from the whole ordinance that the intention is to pay for the property taken by special assessment upon property benefited, and it appears that the city has taken a penal bond from interested property owners conditioned that the city shall not be called upon to contribute any funds to the expense of the improvement. *State ex rel. Thomas v. Superior Ct.* 42 Wash. 521, 85 Pac. 256.

Amounts which a city has been assessed for public benefits in assessment cases, and which remain unpaid, are not debts of the city within the sense of the constitutional limitation. *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970.

<sup>66</sup> That failure to collect part of an assessment for street improvements created a deficit did not require a city to foresee that such would occur, and treat it as a debt within the meaning of the Constitution. *Beaumont v. Masterson*, — Tex. Civ. App. —, 142 S. W. 984.

Where land has been taken pursuant to the power of a city to widen streets, under a statute requiring the assessment of benefits as part of the condemnation proceedings, and there has been such an assessment

it may be said that they are not debts of the city within the meaning of a debt limit statute, where the statute authorizing their issue expressly makes them the indebtedness of the city.<sup>67</sup> And bonds issued to raise funds to enable a city to reimburse itself for payments of an illegal debt created for paving are void, although stating on their face that they are payable out of a paving fund created by the collection of a special tax on abutting property.<sup>68</sup>

In an action by a contractor to foreclose a street improvement assessment lien against a property owner, it has been held that the latter cannot raise the question whether the city, at the time of making the contract, was indebted beyond the constitutional limit.<sup>69</sup>

### *c. Income of year.*

If the contracts and engagements of a municipal corporation do not overreach the

in each case of condemnation, the neglect of the city to collect does not make the claims of the landowners under the awards general city indebtedness. *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462.

<sup>67</sup> *Martin v. Territory*, 5 Okla. 188, 48 Pac. 106; *Spencer v. Gray*, 5 Okla. 216, 48 Pac. 110.

<sup>68</sup> *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532.

<sup>69</sup> *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243.

<sup>70</sup> *Camden Clay Co. v. New Martinsville*, 67 W. Va. 525, 68 S. E. 118.

The true test whether or not a note given for supplies furnished a city creates a debt within the meaning of the Constitution is whether it imposes a burden on the revenues of the city for future years. *Cleburne v. Gutta Percha & Rubber Mfg. Co.* — Tex. Civ. App. —, 127 S. W. 1072.

<sup>71</sup> *Camden Clay Co. v. New Martinsville*, supra.

The rule that "when a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the 'incurring of indebtedness' within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts," was approved in *Erie's Appeal*, 91 Pa. 398, and in *Reuting v. Titusville*, 175 Pa. 512, 34 Atl. 916. To the same effect *Grant v. Davenport*, 36 Iowa, 396.

<sup>72</sup> Under art. 7 of § 7 of ¶ 1 of the Georgia Constitution, providing that a debt hereafter incurred by any county, municipal corporation, or political division of this 37 L.R.A. (N.S.)

dependable current resources for which provision exists at the time the contracts and engagements are assumed, no lawful objections to them can be interposed, however great the indebtedness of the municipality may be.<sup>70</sup> A town may expend its current revenues and accrued funds, and may make contracts to that end. To do so is not to contract debts within the meaning of the constitutional inhibition.<sup>71</sup> The purpose of constitutional provisions limiting current expenditures to the revenues of the year was simply to prevent the fastening of obligations incurred in one year upon the resources of another, and therefore to compel municipalities in effect to conduct the administration of their affairs on a cash basis.<sup>72</sup>

It has been held that it is not necessary to the invalidity of municipal indebtedness under a provision that no county shall become indebted in any manner in any year to an amount exceeding in any year the income

state, except as in this Constitution provided for, shall never exceed 7 per centum of the assessed value of all the taxable property therein, and that no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one fifth of 1 per centum of the assessed value of taxable property therein, with the assent of two thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but that any city, the debt of which does not exceed 7 per centum of the assessed value of the taxable property at the time of the adoption of this Constitution, may be authorized by law to increase at any time the amount of said debt 3 per centum upon such assessed valuation, the general fiscal policy outlined for political subdivisions, such as counties and municipalities, was to provide a system of finance for subordinate public corporations, under which there could be made each year contracts for the expenses of the year, and these were to be paid out of moneys arising from taxes during the year. A liability for a legitimate current expense may be incurred, provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the county or municipality which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year. *Butts County v. Jackson Bkg. Co.* 129 Ga. 801, 15 L.R.A. (N.S.) 567, 121 Am. St. Rep. 244, 60 S. E. 149.

It was evidently the intention of the framers of the constitutional provision that no city "shall incur any indebtedness or liability in anything or for any purpose, ex-



and revenue provided for such year, without the consent of two thirds of the voters, that the municipality shall have made provision for its payment. The inhibition is against creating an indebtedness in any year that the municipality is unable to pay out of its resources for that year.<sup>73</sup> But in Illinois temporary loans made to a city after it has reached the constitutional debt limit are illegal, although within the limits of the revenue expected to be raised.<sup>74</sup> In Wisconsin debts for the ordinary running expenses of a city, and debts within the power of the city to contract, payable within a year out of the incoming revenues actually levied, or in good faith intended to be levied, are not such as are comprehended within the constitutional provision. If, however, the debt is made to mature at such a time as would make it a charge upon the future resources of the city beyond the period stated, then the levy of the tax is necessary to its validity.<sup>75</sup> In Indiana, if the indebtedness of a city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and the Constitution is violated.<sup>76</sup> In New York revenue bonds consisting of such as have been issued under the authority of a city charter, "for purposes other than to meet expenditures under the appropriation for each current year," and which are made redeemable "out of the tax levy for the

year next succeeding the year of their issue," under an appropriation therefor in the budget for such years, do not constitute part of the permanent city debt.<sup>77</sup> And in Texas, under constitutional provisions that "no debt shall ever at any time be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and to create a sinking fund of at least 2 per cent thereon," and "but no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least 2 per cent as a sinking fund," a debt for current expenses, in order to be valid, must run concurrently with the current resources for such purposes, and such a debt cannot be created without such compliance, which matures at such a time as would make it a charge upon the future resources of the city.<sup>78</sup>

The provision of the Utah Constitution that "no debt in excess of the taxes for the current year shall be created by any county . . . in this state, unless the proposition to create such debt shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt," means debts which cannot be paid out of the revenues of the year.<sup>79</sup>

ceeding in any one year the income and revenue provided for it in such year," that the income and revenue of each year pay the indebtedness and liability incurred during such year, and that the revenues and income of a subsequent year shall not be applicable to pay levies of a past fiscal year. *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958.

In *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, it is said that the framers of the provision in the California Constitution, that no county, city, town, etc., shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, etc., meant that no such indebtedness or liability shall be incurred, except in the manner stated, exceeding in any year the income and revenue actually received by such county, etc. In other words, that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.

<sup>73</sup> *Lawrence County v. Lawrence Fiscal Ct.* 130 Ky. 587, 113 S. W. 824.

<sup>74</sup> *Springfield v. Edwards*, 84 Ill. 626, 37 L.R.A. (N.S.)

<sup>75</sup> *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

<sup>76</sup> *South Bend v. Reynolds*, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706.

Whenever a city whose indebtedness exceeds the constitutional limit does not have money on hand arising from current revenues to meet its debts of whatever character, as they come into existence, whether for light, water, labor, or any other expenses, the city has become indebted, and the Constitution is violated. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588.

It is not enough, however, merely to have on hand enough money to pay each indebtedness as it comes into existence, but the same must be paid as it comes into existence, or there must be enough on hand to pay all of such debts outstanding, or there will be an indebtedness created, and the Constitution will be violated. *Ibid.*

<sup>77</sup> *Levy v. McClellan*, 106 N. Y. 178, 89 N. E. 569.

<sup>78</sup> *Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593.

<sup>79</sup> *Fritsch v. Salt Lake County*, 15 Utah, 83, 47 Pac. 1026. The contention in this case was that the liabilities which the rev-

Under the rule laid down in this class of cases, a liability for a legitimate current expense may be incurred, provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the municipality which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year.<sup>80</sup> Where a city council came into office at the beginning of a fiscal year, and executed a note for supplies payable within the year, and, at the time of its execution, the council reasonably contemplated and intended that the note should be paid out of the current revenues of the city for that municipal year, and had reasonable grounds for believing that the revenues would be sufficient for that purpose, it was held that the note did not create an indebtedness against the city within the meaning of the Constitution.<sup>81</sup> A contract for the repair of a portion of a street, for a sum abundantly covered by funds in the treasury available therefor, does not create an indebtedness against the city within the meaning of the debt limit provision of the Constitution.<sup>82</sup>

And a fire alarm system procured as part of the expenses for fire protection, the amount to be expended therefor being within the sum appropriated for fire, does not

create a debt within the meaning of the Constitution.<sup>83</sup>

And it was held that the payment of rent for a building used by a city would not be enjoined, although the city had reached its debt limit, where the money therefor was in the treasury and had been appropriated for the purpose.<sup>84</sup>

Where, under a charter of a city, the comptroller is authorized to borrow in anticipation of its revenues, not to exceed in amount the amount of such revenues, such sums as may be necessary to meet expenditures under the appropriation for each current year, and for this purpose revenue bonds may be issued to be redeemed out of the proceeds of the taxes levied, it was held that, in ascertaining the capacity of a city to become indebted under the Constitution, only such of these bonds were to be included in ascertaining the indebtedness as had been outstanding more than five years since their issue; and that it was not essential to their exception under the constitutional provision, that these revenue bonds should have been issued during the year when the tax became payable against which they were issued; provided that when issued they represented those taxes within the amount of the levy unpaid, and were payable from the proceeds of their collection, neither

enue was sufficient to pay during the year did not, in a legal sense, constitute indebtedness, and that therefore the expression, "no debt in excess of the taxes of the current year shall be created," means that a debt shall not be created in excess of the revenue of the year and an amount equal to the tax levy of the year; or, in other words, that the liabilities of the year may equal the entire revenue of the year, including the tax levy, and in addition a sum equal to the tax levy; that the county may expend the entire revenue, and in addition create indebtedness equal to the tax levy. The court said that it appears to be clear that a debt exceeds the taxes when it remains after they have been expended, and, if taxes are construed to mean the entire revenue, that the debt is in excess of it, if it remains after it has been expended.

<sup>80</sup> Tate v. Elberton, 136 Ga. 301, 71 S. E. 420.

Under a provision that "no county . . . shall be allowed to become indebted in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose," it is not sufficient to show that warrants sued upon were issued in excess of the revenue of the year, but it must be shown that the limit of indebtedness had been reached at the time the warrants were drawn. Geo. D. Barnard & Co. v. Knox County, 2 L.R.A. 426, 37 Fed. 563. 37 L.R.A. (N.S.)

Under a statutory provision that whenever debts and liabilities have been created, which, added to the salaries of county officers and other estimated liabilities fixed by law for the remainder of the year, equal the aggregate revenue of the county for current expenses, no further allowance of any accounts must be made, it is the estimate of the revenue at the time an account is presented for allowance which must control the action of the board in allowing or refusing it. The word "revenue," as used in the section, does not mean the actual money which shall be received in the county treasury, but the estimated revenues. Babcock v. Goodrich, 47 Cal. 488.

<sup>81</sup> Cleburne v. Gutta Percha & Rubber Mfg. Co. — Tex. Civ. App. —, 127 S. W. 1072.

A note payable within the year of its execution, and within the fiscal year of the city which gives it, does not create a debt against the city, within the meaning of the constitutional provision requiring the creation of a sinking fund to liquidate it, since it matures concurrently with the city's revenues for the year, and, if paid according to promise, would not be chargeable upon the revenues of future years. Ibid.

<sup>82</sup> Reuting v. Titusville, 175 Pa. 512, 34 Atl. 916.

<sup>83</sup> Brashear v. Madison, 142 Ind. 685, 33 L.R.A. 474, 36 N. E. 252, 42 N. E. 349.

<sup>84</sup> Booth v. Weiss, 15 Phila. 159.

Constitution nor charter fixing the time for issuing them, that being a matter left to the discretion of the comptroller, to be governed in its exercise by the city's needs and the amount of the particular year's uncollected taxes.<sup>85</sup>

But it was held that an ordinance obligating a city to raise each year \$1,000 to maintain a library, in case it is donated to the city, creates an obligation beyond the revenues for the year, within the meaning of the constitutional provision forbidding such indebtedness without the assent of the voters.<sup>86</sup> It was urged in this case that the library would be maintained as the city maintains its fire and police department, and that its cost would be simply a part of the annual expenses of the city; but the court said that the purposed ordinance would bind all subsequent councils to levy a sufficient tax to support the library.

That the county loses money after its collection will not affect the validity of the obligation.<sup>87</sup> But it has been held that where the Constitution limits the obligation of the municipality upon any indebtedness or liability that it may incur, to the incoming revenue provided by it for the year in which such indebtedness and liability is incurred, one who has performed labor in plumbing, gas fitting, and tinning upon engine houses of the city, under the employment of officers in charge of the fire

department, cannot recover out of the revenue of the subsequent year, because of the fact that the revenue or the fund out of which his claim would otherwise be payable has been exhausted by expenditures for a general election in excess of the estimate therefor made by the supervisors.<sup>88</sup>

Where, however, by reason of the fact that an unexpected portion of a fund out of which the plaintiff's claim for work is payable exists when the contract is made, the claim is valid at its inception, he is, upon its completion, entitled to a judgment, with the direction therein that it should be satisfied only out of the income or revenue provided by the city for the fiscal year in which the liability in his favor was incurred.<sup>89</sup>

#### *d. Anticipation of revenue.*

Whether obligations are payable out of a particular fund or current revenues, the rule is that appropriations in anticipation thereof do not create an indebtedness within the meaning of debt limit provisions. Public revenues may be appropriated in anticipation of their receipt, whether there are funds in the treasury to meet them or not.<sup>90</sup> In an Iowa case, it is said that in ascertaining whether the contemplated indebtedness is within the current revenues, a fair, and perhaps liberal, view should be taken of the city's finances. It will not do to say that the revenue which is absolutely

<sup>85</sup> *Levy v. McClellan*, 196 N. Y. 178, 89 N. E. 569.

<sup>86</sup> *Ramsey v. Shelbyville*, 119 Ky. 180, 68 L.R.A. 300, 83 S. W. 116, 1136.

That it cannot be determined how long the library will run or remain in existence does not change the rule, on the theory that it cannot be determined that any indebtedness beyond the first year's levy will be incurred. The court said that an obligation payable in the future is no less a debt within the meaning of the provision than if payable at once. An obligation to pay which may be defeated upon the happening of some contingency—as in this case the library ceasing to exist—is certainly an obligation until the contingency happens. Such an obligation must fall within the words "indebtedness in any manner or for any purpose." *Ibid*.

City revenue bonds not issued as the New York Constitution permits, in anticipation of the collection of the taxes levied in the year in, or in advance of, which they are issued, and payable out of such taxes; but issued in the year following the collection of such taxes levied, after the time for the collection has expired, and only for the arrears thus ascertained, and issued for a fixed term of ten years, form part of the permanent debt of the city, which must be taken into consideration in determining 37 L.R.A. (N.S.)

whether the city has exceeded its debt limit. *Gibson v. Knapp*, 21 Misc. 499, 47 N. Y. Supp. 446.

<sup>87</sup> *Lawrence County v. Lawrence Fiscal Ct.* 130 Ky. 587, 113 S. W. 824.

The fact that money has been paid out on warrants issued after those claimed illegal does not affect their validity. *Mountain Grove Bank v. Douglas County*, 146 Mo. 42, 47 S. W. 944.

<sup>88</sup> *Weaver v. San Francisco*, 111 Cal. 319, 43 Pac. 972.

<sup>89</sup> *Ibid*.

<sup>90</sup> *State ex rel. Ash v. Parkinson*, 5 Nev. 15.

The amount of anticipation tax warrants is not a debt of the city in the constitutional sense. *Stone v. Chicago*, 207 Ill. 492, 69 N. E. 970.

It is well settled that even though the limit of municipal indebtedness may have been reached, an appropriation of anticipated income does not create an indebtedness. *Little v. Portland*, 26 Or. 235, 37 Pac. 911.

If a municipal corporation be indebted to the constitutional limit, valid appropriations of the revenue may be made in anticipation of the collection thereof, to meet the ordinary expenses of the current fiscal year. *People ex rel. Seeley v. May*, 9 Colo. 414, 15 Pac. 36.

certain to be received by the collection of taxes may not be anticipated, at least to some extent, and an indebtedness accordingly contracted. But on the other hand, the rule will not be so relaxed as to appear to render the Constitution nugatory.<sup>91</sup>

In an advisory opinion of the judges of the supreme court as to the legality of an act of the legislature to provide for the issue of warrants by the state to defray current expenses, based on revenues assessed, and not yet collected, in upholding the statute, it was said that if the legislature had not power so to appropriate funds, then the appropriations of each legislature in excess of the cash actually in the hands of the state treasurer, and in the fund from which such appropriations were made, would, to the extent of such excess, constitute the creation of a debt against the state. It is well understood that the aggregate of the general appropriations of each legislature of a state generally greatly exceeds the amount of actual cash in the hands of the state treasurer when such appropriations are made. The taxes levied and in process of collection are treated as in the state treasury, though not yet actually paid over to the state treasurer.<sup>92</sup> It has been said that if a city obligates itself to pay, no matter what its revenues from special assessments, a debt is created which falls within the constitutional inhibition. If,

however, it simply appropriates a part of its revenue, and pledges that to the payment of the obligation, or if it simply undertakes as trustee or agent to collect these assessments, and apply them on the work without liability on its part for anything further, no debt is created. Or, if it appears that it has on hand, at the time the debt is created, a sufficient fund to meet the indebtedness, or if the debt is payable in instalments, and it has enough in its hands at the time the instalments mature to pay them, then there is no debt in a constitutional sense.<sup>93</sup> So, it has been held that where warrants for money borrowed to pay a city's current expenses are made absolutely payable without grace on the day named, and bear interest thereafter, they are invalid when issued after the city has reached the debt limit, although they specify that they are payable out of taxes levied for the fiscal year in which they are issued, stating that the taxes have been levied, and that they are issued for an amount not exceeding the appropriation, and not exceeding the amount of uncollected taxes appropriated to their payment, and which will be thus applied, where they do not state that they are payable only out of these taxes or the fund for which the advance has been made. The court said that the recitals do not limit the right of the holder to payment out of these taxes, nor

<sup>91</sup> French v. Burlington, 42 Iowa, 614.

If a city has on hand, at the time a warrant for supplies is issued, funds with which to meet it, without trenching upon the rights of creditors for current expenses of the city, the warrant is valid, although such funds may thereafter be wrongfully applied to other purposes. Phillips v. Reed, 107 Iowa, 331, 76 N. W. 850, 77 N. W. 1031.

A charter provision that a corporation shall not issue any bond, note, or other obligation or evidence of indebtedness, except as therein provided, whereby the city shall become obligated to pay any sum of money, was held not to prevent the city from anticipating the collection of its revenues. Alpena v. Kelley, 97 Mich. 550, 56 N. W. 941. The court said that to hold that a city could in no case anticipate the actual collection of any portion of the taxes might result in delaying the city unreasonably in making contracts, and subject the city to actions for negligent injuries; or on the other hand, in requiring the spreading of a tax so large that the promptly paid portions thereof would be sufficient to meet all expenses.

<sup>92</sup> Re State Warrants, 6 S. D. 518, 55 Am. St. Rep. 852, 62 N. W. 101.

A statute of Illinois provides: "That, whenever there is no money in the treasury of any county, township, city, school district, or other municipal corporation, to

meet and defray the ordinary and necessary expenses thereof, it shall be lawful for the proper authorities of any county, township, city, school district, or other municipal corporation, to provide that warrants may be drawn and issued against, and in anticipation of, the collection of any taxes already levied by said authorities for the payment of the ordinary and necessary expenses of any such municipal corporation, to the extent of 75 per centum of the total amount of any said tax levy: Provided, that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected, and not otherwise, and shall be received by any collector of taxes in payment of the taxes against which they are issued, and which taxes, against which said warrants are drawn, shall be set apart and held for their payment." Under this statute anticipation warrants are invalid, which recite that they are to be paid out of any moneys in the treasury not otherwise appropriated, and do not show that they are payable solely from taxes already levied and from said taxes when collected, and not otherwise. Coles County v. Goehring, 209 Ill. 142, 70 N. E. 610.

<sup>93</sup> Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532.

could be so limited by the language of the certificates.<sup>94</sup>

In order that appropriations in anticipation of revenues to be received from taxation may be valid, it has been held that the levy must have been made the reason, for this has been well stated in an Illinois case<sup>95</sup> in which it is said: "Courts of the highest standing in other states have regarded the word 'debt' as a term of variable and flexible meaning, and have been able to construe it as meaning something different from the common understanding. They have been unable to see any line of demarcation between the appropriation by a municipality of taxes which have been already levied, and are legally certain to reach the treasury, where the appropriation operates only to assign the fund without creating any obligation on the part of the municipality, and a contract by which a municipality obligates itself to make levies in the future, and appropriate the same to a designated object."

Notwithstanding the fact that the indebtedness of a county has reached the debt limit, warrants issued for meeting the current expenses of the county, and in anticipation of the collection of taxes already levied, are valid obligations, to the extent of the amount of the taxes so levied and collect-

able; and the issuance of such warrants does not increase the amount of the existing indebtedness of the county, within the meaning of the Federal limitation. And, to render such warrants invalid, it must affirmatively appear that no taxes had been provided for their payment when the warrants were issued.<sup>96</sup>

Another requirement is that the fund alone shall be liable to satisfy the obligations. Whatever form the particular transaction may take, its effect must be that of an assignment *pro tanto* without recourse, by the municipality, of the fund to accrue from the current levy of taxes, and the warrant or instrument of assignment must be expressly made payable out of the incoming revenue for the current year. Since all persons must know the law, it is not absolutely necessary that the assignment should state on its face that it is accepted in full satisfaction of the claim on account of which it is given, and that no liability is incurred by the county because of its issue. The instrument issued, is accepted, and must be construed, as though all constitutional and statutory provisions bearing upon its stability were expressly set out among its written or printed terms and conditions.<sup>97</sup>

The rule applicable to this class of cases

<sup>94</sup> Fuller v. Chicago, 89 Ill. 282.

A warrant drawn as follows: "No. — \$ — Chicago — 187—, Treasurer of the City of Chicago: Pay to —, or bearer, — dollars, and charge to department of Public Works Appropriation. — Mayor. Countersigned — Comptroller,—was held to be drawn on the treasurer generally, and not on any particular fund, and therefore not a warrant in anticipation of revenue. Ibid.

That the city only intends to pay certificates of indebtedness out of the taxes levied for the year in which the advances were made cannot be held to be an anticipation. To have that effect, the warrant on the treasurer should be specifically drawn against the uncollected taxes of a particular year, a fund against which the money was advanced, and not against a general fund, or other fund in the treasury. Ibid.

Contracts create obligations against a city within the meaning of the Constitution, where the city agrees to issue warrants to levy a tax for the payment of the same, and obligates its revenues to the payment of such warrants. Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

<sup>95</sup> Schnell v. Rock Island, 232 Ill. 89, 14 L.R.A.(N.S.) 874, 83 N. E. 462.

<sup>96</sup> Johnson v. Pawnee County, 7 Okla. 686, 56 Pac. 701.

Warrants issued upon a fund to create which a tax has been duly levied do not constitute a debt within the meaning of the 37 L.R.A.(N.S.)

Constitution. The warrants merely represent the tax levied, but not then collected. The fact that a municipality is indebted to the full constitutional limit does not prevent the same from levying such taxes as it is authorized to levy by law, and issuing its warrants within the limits of such levy, in anticipation of their collection; and as long as the warrants issued are within the amounts lawfully levied, they do not create an additional debt. To render such warrants invalid, it must affirmatively appear, therefore, that no tax had been provided for their payment when the warrants were issued. Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982, followed in Shannon v. Huron, 9 S. D. 356, 69 N. W. 598; Lawrence v. Meade County, 10 S. D. 175, 72 N. W. 405.

The allowance of claims against the county equal to the revenues of the current year is not a creation or incurring of any indebtedness or liability. Fenton v. Blair, 11 Utah, 78, 39 Pac. 485. The court said that while the taxes for the current year are not collected until the end of the year, they are undoubtedly, after they are levied, regarded as a legal certainty, and are to be treated as if already collected, and allowances may be made against such taxes to the extent of such levy.

<sup>97</sup> People ex rel. Seeley v. May, 9 Colo. 404, 12 Pac. 838.

There can be no legal indebtedness beyond the constitutional limit. After such limit is reached, therefore, warrants or

is well stated in *Springfield v. Edwards*,<sup>98</sup> a leading case on the subject, in which the court said that it was prepared to yield its assent to the doctrine that revenues may be appropriated in anticipation of their receipt as effectually as when actually in the treasury, with these qualifications: First, the tax appropriated must at the time be actually levied; second, by the legal effect of the contract between the corporation and the individual made at the time of the appropriation, the appropriation, and issuing and accepting of the warrant or order on the treasurer for its payment, must operate to prevent any liability to accrue on the contract against the corporation. The court said: "The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order on the treasurer for its payment is issued and accepted, the transaction is closed on the part of the corporation,—leaving no future obligation, either absolute or contingent,

upon it, whereby its debt may be increased. But until a tax is levied, there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future, for the benefit of a particular individual, necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy. If the making of the appropriation, and issuing and accepting a warrant for its payment, do not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt."<sup>99</sup>

Certificates of indebtedness purporting to bind a city, not drawn against the revenue or taxes levied for any particular year, not stating that they can be paid out of any particular tax or fund, cannot be said to have been issued in anticipation of revenue already levied and collected, so as to bring them within the rule that certificates so issued do not constitute indebtedness.<sup>100</sup>

other instruments representing supposed municipal liability are of no legal force or effect. The annual taxes cannot be collected at the beginning of a fiscal year, and hence necessary labor or materials can in certain counties seldom be paid for in cash when furnished. Therefore the question is, How should the cost of such labor or materials be discharged without money in the treasury, and without incurring indebtedness? *Ibid*.

But where the county warrants issued after the debt limit had been reached were general in form, and did not purport to be payable by any particular fund, or out of the revenue from the taxes of any specified year, and it was not claimed that when the instruments issued it was the intention to restrict in any manner the county's liability or the supposed indebtedness represented thereby, it was held that it could not be treated as an assignment of anticipated revenue. *Ibid*.

<sup>98</sup> 84 Ill. 626.

<sup>99</sup> To the same effect, *East St. Louis v. Flannigan*, 26 Ill. App. 449.

Where a warrant or order payable from a specific appropriation of a tax levied, but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished or to be furnished, so that there is in fact but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation; but obviously for any failure in that regard, the remedy must be against the officers, and not against the corporation, for otherwise a contingent debt would in this way be incurred by the corporation. *Springfield v. Edwards*, *supra*.

It is not enough in Illinois that the object is to pay under some fixed and definite 37 L.R.A. (N.S.)

scheme, from some particular fund which is pledged for payment. *Schnell v. Rock Island*, 232 Ill. 89, 14 L.R.A. (N.S.) 874, 83 N. E. 462.

<sup>100</sup> *Law v. People*, 87 Ill. 385. The court said that the theory is that a corporation which has reached the constitutional limit of its power to create indebtedness may, when a tax is levied, but not collected, draw against the fund thus levied and provided, although not in the treasury, and thus appropriate and virtually assign the amount specified in the warrant on the treasurer, to the person to whom it is issued and delivered, and the amount, being assigned or set apart to him, when collected, he has the right to receive, and it becomes the duty of the officers to collect and pay it to him, and failing in their duty, he can have an action against them for its recovery. But with a corporation thus situated, the legal effect of issuing and receiving the warrant is that the person receiving an assignment or appropriation of so much of the specific tax already levied, and against which the warrant is drawn, by receiving it, discharges the corporation from all liability on account of the services or articles for which it is drawn, and agrees to look to the tax thus levied and appropriated, and to the officers, for his pay, and he thereby discharges the corporation from any and every kind of liability therefor. In such a case the warrant is given and received in full satisfaction for the services rendered or material furnished. Where a corporation is thus situated, and it hires labor or it purchases material, as it can incur no debt, it may, thus hiring or purchasing, agree thus to transfer so much of the tax then levied as will pay for the same, to the person performing labor or furnishing material.

But although revenues may be anticipated, they cannot be anticipated to such an extent as to permit or pay off indebtedness incurred in one year out of the revenues of following years.<sup>1</sup> Anticipation warrants cannot be issued against the aggregate amount of taxes for ten years.<sup>2</sup> The difficulty is not obviated by authorizing the issue of anticipation warrants to the amount that the levy would produce on

the assessment of the preceding year upon the taxable property of the county.<sup>3</sup> That there was a failure or misappropriation of a part of the current revenue will not affect the validity of warrants issued and received in full for the ordinary necessary and current expenses of a city, for a purpose authorized and required, and within the limit of the revenues of the city for the year.<sup>4</sup>

If the written assignment of the portion of the incoming revenue be accepted as payment in full for labor or materials furnished to the county, no debt is incurred. One thing is simply exchanged for another. Since, in such case, the assignee takes all the risk if the taxes are not collected, relying upon his right to compel the proper officers to perform their duty in the premises, no liability, contingent or otherwise, attaches to the county. But the taxes from which the revenue assigned is to accrue must have been levied previous to such assignment. It is a plain legal, as well as business, principle, that no valid assignment can take place of a fund that has no existence either in fact or in law. *People ex rel. Seeley v. May*, 9 Colo. 414, 15 Pac. 36.

A warrant drawn as follows: "From the taxes of the year . . . appropriated and levied for the police department, when received by you, pay . . . or bearer the sum of . . . dollars, being for services rendered (or materials furnished), and payable out of the appropriation for said department, and charge the same to the police fund. The taxes to be collected for account of this fund are specially appropriated, set apart, and pledged to the payment of this and all warrants drawn thereon, and which warrants do not exceed eighty-five per cent of the appropriation made therefor. This warrant is also receivable in payment of city taxes for the year," does not create a debt against the city, since such warrants have no legal effect except as an assignment without recourse on the city, made by the city to the holder of the warrant, of the part of the uncollected taxes mentioned in the warrant. *Fuller v. Heath*, 89 Ill. 296.

An indebtedness is not created where the agreement is to accept certificates of assessment in full satisfaction. *Laporte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 686, 58 Am. St. Rep. 359, 45 N. E. 588.

So, a contract for a fire alarm system was held invalid, where made at a time when the city had passed the debt limit, when there was not enough money in the treasury at the time the contract was made or accepted to pay for the same, although there were funds on hand sufficient to pay therefor at the date set in the contract for payment. *Ibid.*

<sup>1</sup> *French v. Burlington*, 42 Iowa, 614.

<sup>2</sup> *Hodges v. Crowley*, 186 Ill. 305, 57 N. E. 889. In order to authorize the issuing 37 L.R.A. (N.S.)

of warrants upon an appropriation, so as to give the transaction the effect contemplated by the foregoing rule, it is a prerequisite that the tax appropriated upon which the warrants are drawn must at the time be actually levied; and second, that the legal effect of the contract between the corporation and the individual receiving the warrants, made at the time of the appropriation, must be that the appropriation, and issuing and accepting of the warrants on the treasury for their payment, are such as to prevent any liability on the contract against the corporation.

Granting that a city has the right to levy a special assessment for the purpose of maintaining and operating an electric light plant, it does not follow that it can anticipate its future general revenues for the purpose of erecting such a plant. *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

<sup>3</sup> *Hodges v. Crowley*, *supra*. The court said that there is no reason for presuming, much less could it be ascertained as a fact, that the assessment for the year preceding the levy was not greater in amount than for the year following, or for each of the remaining nine years. To say, if it proves insufficient, the loss must fall upon the holders of the warrants, did not meet the question before the court, which was whether anticipation warrants could be lawfully drawn upon a levy the amount of which could not be ascertained, so as to relieve the transaction on the part of the county of the character of "becoming indebted" beyond the constitutional limit.

<sup>4</sup> *Cedar Rapids v. Bechtel*, 110 Iowa, 196, 81 N. W. 468.

In *Darling v. Taylor*, 7 N. D. 538, 75 N. W. 766, in holding that warrants for current expenses may be issued in anticipation of the collection of taxes already levied, the court said: "We fully appreciate the fact that the . . . rule adopted, . . . in its practical operation, may be attended by some embarrassments; but, if no more warrants are ever drawn against an existing tax levy than the aggregate amount of such levy, the corporate indebtedness will not be increased by issuing such warrants, except in cases of a partial or total failure to collect the taxes actually levied. In legal theory, this failure never occurs, and if in fact there should, in an exceptional instance, be a deficit occasioned by such failure, the same could lawfully be met and extinguished by an additional levy of taxes for that purpose. The constitu-

But it has been held that a county cannot, in addition to the ordinary current expenses and other liabilities payable within a year, create a liability in anticipation of uncollected taxes. It has no power to anticipate in a year more than a year's uncollected taxes assessed at the maximum rate;<sup>5</sup> and that unappropriated current revenues, including those past due and uncollected, cannot be anticipated by voluntary indebtedness of the county, especially when the county is otherwise largely indebted for the ordinary current expenses.<sup>6</sup> And the debt limit having been reached, assignments of a portion of the incoming revenue, made in excess of the amount covered by the annual levy, would be illegal.<sup>7</sup> And a contract for the construction of an electric light plant for a city has been held within the provisions of a statute prohibiting municipalities from anticipating their revenues.<sup>8</sup>

#### *e. Money in treasury.*

There seems to be a conflict of opinion on the question whether obligations incurred after the debt limit has been reached constitute indebtedness within the meaning of the Constitution, where there is money in the treasury to meet them. It has been held that the issue of city warrants in any sum, however great, above the debt limit, does not create a debt in violation of the Constitution, if the city has money in its treasury to meet its indebtedness;<sup>9</sup> and that, if there is in the treasury of a city an amount of cash sufficient to cover the excess of a bond issue beyond the constitutional debt limit, the bonds will be valid, and in the absence of any evidence on the point, the holders of the obligations will prevail.<sup>10</sup> In a Kentucky case it is said that the amount of debt created by the appropriation of a sum of money for the building of a courthouse is the difference between the available assets on hand and the contract price of the work. To the

extent that there is money on hand or assets available for the purpose in view, to that extent there is no creation of any debt.<sup>11</sup> On the other hand, it has been held that the fact that funds may be in the treasury to pay the instalments of purchase money for an electric plant as they fall due is not enough to validate the contract, where the city has reached its debt limit and no levy has been made to meet them;<sup>12</sup> and that the salaries of officers and employees of the county, if not paid as the official or other service is rendered, become county indebtedness; and the price of lumber or other material purchased, if not paid for on delivery, becomes indebtedness.<sup>13</sup> It would seem, however, that under the rule that cash on hand constitutes assets, the new obligations would not constitute indebtedness within the meaning of the debt limit provisions, when there is sufficient cash on hand to pay them, unless the money in the treasury was destined to take care of current expenses.

#### *f. Pledge or mortgage of receipts or property.*

The rule that a city or village does not create an indebtedness by obtaining property to be paid for wholly out of the income thereof is a reasonable one. Under this rule<sup>14</sup> the pledging of water receipts to the construction of waterworks, and the transfer from the general to a special fund, do not create a new indebtedness within the meaning of the Constitution.<sup>15</sup> But the property pledged must be the only property liable to satisfy the obligation. If the creditor may look beyond this, an indebtedness is created within the meaning of the debt limit provisions.<sup>16</sup> So it has been held that certificates issued by the city to raise money to acquire a street railway constitute indebtedness, although there is no right of action against the city on account thereof, where the property of the city, other than the railway

tional limit does not at all abridge the right to levy taxes."

<sup>5</sup> Rogers v. LeSueur County, 57 Minn. 434, 59 N. W. 488.

<sup>6</sup> Municipal Secur. Co. v. Baker County, 33 Or. 338, 54 Pac. 174.

<sup>7</sup> People ex rel. Seeley v. May, 9 Colo. 414, 15 Pac. 36.

<sup>8</sup> State ex rel. Knollman v. King, 109 La. 799, 33 So. 776.

<sup>9</sup> Dively v. Cedar Falls, 27 Iowa, 227.

<sup>10</sup> German Ins. Co. v. Manning, 95 Fed. 597.

<sup>11</sup> Field v. Stroube, 103 Ky. 114, 44 S. W. 363.

<sup>12</sup> Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279.

<sup>13</sup> L.R.A. (N.S.)

<sup>14</sup> Fritsch v. Salt Lake County, 15 Utah, 83, 47 Pac. 1026.

<sup>15</sup> Evans v. Holman, 244 Ill. 596, 91 N. E. 723.

<sup>16</sup> Griffin v. Tacoma, 49 Wash. 524, 95 Pac. 1107.

<sup>17</sup> A contract by which a city indebted beyond the constitutional limit acquires an electric lighting plant to be paid for out of the annual levy for lighting purposes, but without further obligating itself, the language of the contract being: "But it is understood and agreed by said company, that in case the city accepts this proposition, such acceptance shall create no indebtedness against said city in favor of this company," was held valid. Hay v. Springfield, 64 Ill. App. 671.



property and its income, is pledged to the payment.<sup>17</sup> Where it is provided that payment is to be secured in case the income of the waterworks plant is insufficient therefor, out of a fund created by levying a tax of 1 per cent for a certain period of years, the fact that the special tax is levied for the payment has been held not to alter the rule.<sup>18</sup>

The limitation as to indebtedness cannot be evaded by providing that when the corporation has issued bonds in payment of debts beyond the constitutional limit, for labor and materials furnished in the erection and furnishing of a building and making improvements for the corporation, the bondholders shall have a lien upon such building or furniture and effects therein, and upon the land of the corporation on which such building or improvements are constructed, to the amount of such indebtedness, on the theory that this does no more than to compel the surrender of that which the corporation has acquired by the void obligations, since the provision is for the appropriation of the whole building and land upon which it stands, its practical operation being to appropriate in part the lawful property of the corporation in payment of a void obligation.<sup>19</sup>

Contracts for the purchase of park lands, under statutes granting the city power to purchase lands on credit and providing that "for that purpose the proper officers of said city may execute and deliver to the vendor of such land or property purchased,

an instrument creating a lien thereon, . . . for such purchase money, without creating any corporate liabilities therefor, to secure the whole or any part of the price," etc., were held not to create an indebtedness within the meaning of the debt limit provision of the Constitution.<sup>20</sup> And the purchase by a city of a waterworks plant subject to a mortgage secured by the payment of bonds was held not to create an indebtedness on the part of the city to the amount of the bonds, other property of the city not being liable to be taken therefor; and it was declared not to alter the rule, that the bondholders, by enforcing their right to take away the water plant, may deprive the city of so much of its money as up to that time has been paid upon the purchase.<sup>21</sup>

## VI. Obligations imposed by law.

### a. In general.

The question whether debt limit provisions apply to obligations imposed upon states and municipalities by law, as distinguished from those that are discretionary or voluntary, has been a troublesome one for the courts, and has led to opposite results in the decisions, and also to a conflict of views upon this important matter. When the debt limit has been reached, some means must be devised for carrying on governmental functions. In some jurisdictions the problem has been solved by declaring that indebtedness imposed by law

<sup>17</sup> Street railway certificates issued for the purpose of acquiring a street railway create an indebtedness within the meaning of the Constitution, although it is provided therein that such certificates shall "under no circumstances, be or become an obligation or liability of the city, or payable out of any general fund thereof, but shall be payable solely out of a specified portion of the revenues or income to be derived from the street railway property for the acquisition of which they were issued," where the use of the streets is mortgaged for the benefit of the holders of such certificates for a period of twenty years after foreclosure, since this would be giving the holder more than a purchase money mortgage on the property acquired with the fund derived from the use and sale of such certificates. *Lobdell v. Chicago*, 227 Ill. 218, 81 N. E. 354.

The rule applicable in special assessment cases does not apply to the issuance of certificates to raise money for the acquirement of a street railway system, where, in addition to the property of the railway to be acquired, the right to the use of the street for railway purposes for twenty years is pledged to the payment of the certificates. *Ibid.*

37 L.R.A. (N.S.)

<sup>18</sup> *East Moline v. Pope*, 224 Ill. 386, 79 N. E. 587. The court said it would be different if nothing but the income of the waterworks were pledged.

<sup>19</sup> *Mosher v. Independent School Dist.*, 44 Iowa, 122. The court said that if it were possible to ascertain the exact property acquired by the selling of the void bonds, so as to place the parties *in statu quo*, there might be some force in the argument.

<sup>20</sup> *Burnham v. Milwaukee*, 98 Wis. 128, 73 N. W. 1018. It was urged that even if there were no debts created by these contracts, in the ordinary signification of the term, still there was such an inchoate obligation that manifestly the city, from mere prudential reasons, would feel bound to make the payments in order to save the property. The case was distinguished from the class of cases holding that a debt is created where the power exists to enforce payments out of the corporate property by reason of the pledge or hypothecations thereof, by saying that here the city acquired no title to the lands covered by the contracts until it paid all of the instalments.

<sup>21</sup> *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639.

on the political organization is not indebtedness within the meaning of the debt limit provisions. The Oregon cases, which support the doctrine that involuntary indebtedness is not prohibited, rest upon the peculiar wording of the Constitution of that state, which is that the political body shall not "create" any debts beyond the specified limit. This is said to have a different meaning from provisions that a state or municipality shall not "become indebted" beyond a certain amount.<sup>22</sup> But this is adhering strictly to the letter of the law. It is doubtful if those who enacted the

constitutional provisions had any such distinction in mind. Very likely the difference in language was accidental. If the authors of these provisions had the distinction in mind, it would have been an easy matter to have made it clear. It is probable, then, that the object of the enactments, although differing in language in the respect pointed out in the Oregon decisions, was the same.<sup>23</sup> Most of the decisions, however, holding indebtedness incurred for the purpose of maintaining the political organization of the state or municipality involuntary, rest not upon the letter of the restric-

<sup>22</sup> The provision in the Oregon Constitution is "no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of \$5,000, except to suppress insurrection or repel invasion." Or. Const. art. 1, § 10. It does not provide, as in many other states, that a county shall not "be allowed or permitted to become indebted" beyond a certain sum, but simply prohibits it from "creating" such an indebtedness. *Eaton v. Mimnaugh*, 43 Or. 465, 73 Pac. 764.

The state Constitution prohibits a county from "creating" an indebtedness in excess of a certain amount, and does not apply to involuntary indebtedness thrust upon it by operation of law. *Brockway v. Roseburg*, 46 Or. 77, 79 Pac. 335.

But where the language of a city charter is that the indebtedness of the municipality "must never exceed" a certain amount, the rule is different. *Ibid*.

The constitutional inhibition that no county shall create any debts or liabilities which shall, singly or in the aggregate, exceed the sum of \$5,000, except to suppress insurrection or repel invasion, does not apply to all debts and liabilities against a county over and above that sum, but only to those created by the county. *Grant County v. Lake County*, 17 Or. 453, 21 Pac. 447. The court said that a county is mainly a mere agency of the state government,—a function through which the state administers its governmental affairs,—and it has but little option in the creation of debts and liabilities against it. It must pay the salaries of its officers, the expenses incurred in holding courts within and for it, and various and many other expenses the law charges upon it, and which it is powerless to prevent. Debts and liabilities arising out of such matters, whatever sum they may amount to, cannot in reason be said to have been created in violation of the provision of the Constitution referred to, as they are really created by the general laws of the state, in administration of its governmental affairs.

This construction was recognized in *Wormington v. Pierce*, 22 Or. 606, 30 Pac. 450, and still later approved in *Burnett v. Markley*, 23 Or. 436, 31 Pac. 1050.

Before it can be said that a county has exceeded the constitutional limit of indebtedness, 37 L.R.A. (N.S.)

edness, it must appear that the debts have been voluntarily created by the county in its corporate capacity. *Burnett v. Markley*, supra.

In *Eaton v. Mimnaugh*, supra, it was contended that the Constitution prohibits the county, but not the legislature, from incurring the debt; that while a county cannot of itself create any debt in excess of the constitutional limit, the legislature may create a liability for any legitimate governmental purpose, and impose its payment upon the county, regardless of the Constitution; but the court said that under such a construction, the Constitution would afford but little protection to taxpayers. To rid itself of the undesirable restraint, it would only be necessary for the county to secure the enactment of a law imposing debts upon it for the construction of expensive jails, courthouses, highways, or other public improvements, regardless of its financial condition or the wishes of its people; or, if the county authorities were unwilling to incur such indebtedness, designing persons might secure such legislation.

<sup>23</sup> In *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 34 L.R.A. 835, 71 Am. St. Rep. 926, 45 Pac. 494, in holding salaries of officers within the inhibition of the Constitution, it is said: "We are not unmindful of the difference in language between the Constitution of this state and that of some of the other states above referred to, but in respect to the present inquiry we fail to observe that the courts have drawn or indicated any distinction by reason of such difference in language. The object in either case is the limitation upon municipal indebtedness. To 'become indebted' would seem to be no broader, nor to be any more restrictive, than to 'create a debt.' If a county is prohibited from becoming indebted, we are not able to impart to that language any greater restriction upon the character of the indebtedness, than if the prohibition is against the 'creation of a debt.' If the constitutional limitation operates to restrain the legislature from imposing obligations upon a county in excess of the limitation in the one case, so far as the mere difference in words is concerned, it would have the like effect in the other case."

tive clause, but upon the broader ground of necessity, and the rule adopted is that debt limit provisions apply only to those obligations that are entered into voluntarily, that is, to those as to which the governing powers have some discretion.<sup>24</sup> But having decided that debt limit provisions do not apply to obligations imposed by law, the next problem which arises is the determination of what are and what are not voluntary or involuntary obligations, that

is, obligations as to which the political body may exercise a discretion, or obligations which it has thrust upon it by law,<sup>25</sup> and in the solution of this problem each case must be determined largely from its own facts.<sup>26</sup> In general, it may be said that the necessary expenses incident to the maintenance of the political organization will be deemed involuntary obligations, or liabilities imposed by law.<sup>27</sup> Included in such expenses are the salaries of officers

<sup>24</sup> Strictly speaking, an indebtedness cannot be created except by a contract either express or implied. An indebtedness prohibited by the Constitution is such as is created by voluntary action by both debtor and creditor. *Thomas v. Burlington*, 69 Iowa, 140, 28 N. W. 480.

Constitutional provisions limiting the amount of county indebtedness that may be incurred are to be construed as having reference to that class of debts which it is optional with the court or other governing body to the county to incur, and not to be taken as having reference to compulsory obligations cast on the county by operation of law, as where a county is required to pay the ordinary expenses attending the maintenance of courts and the enforcement of the laws within the county, or where particular officers are required to provide, at the expense of the county, the necessary supplies for the proper discharge of the duties of their office. *George D. Barnard & Co. v. Knox County*, 2 L.R.A. 426, 37 Fed. 563.

The constitutional provision that "whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county included within such city, to become indebted, shall cease, etc.," is not violated by an act making certain county offices salaried offices, and providing for the payment of the salaries of the incumbents thereof, since the indebtedness which the counties so situated are prohibited from incurring is only such as is created for purposes other than for the maintenance of their political organization. Indebtedness created for this purpose is impliedly sanctioned by a provision expressly excepting from the operation of the constitutional provision certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for the year. *McGrath v. Grout*, 171 N. Y. 7, 63 N. E. 647.

<sup>25</sup> In *Municipal Secur. Co. v. Baker County*, 33 Or. 338, 54 Pac. 174, it is said that it is difficult to lay down a rule by which to discriminate clearly between debts voluntarily incurred and those imposed by law. The most important function of the county is to maintain a local government, subordinate to, but as an arm of, the state. Now, the expense incident to, and necessary under the laws prescribed by the state to organize and maintain, such a government, may

be said to be thrust upon it by law; but such as the county court, acting in its capacity as fiscal agent of the county, has volition to contract, or such as may be wholly within its discretion to impose upon the county or not, as its judgment may dictate, is that against which the constitutional inhibition is directed. The undoubted purpose of this particular clause was effectually to protect persons residing within the county, from the abuse of their credit and the consequent oppression of burdensome, if not ruinous, taxation; and it ought to be clear that a county is powerless to prevent, before it should be permitted to incur, any indebtedness beyond the limits thereby imposed. If there is a doubt whether a debt has been cast upon a county by operation of law, or has been voluntarily created, those who have the burdens to bear consequent upon such determination should have the benefit of the doubt, and the protection of the Constitution. Officers intrusted with the management of public affairs, involving the expenditure and disbursement of public revenues, should be able to find a clear warrant of law for every such expenditure or disbursement.

<sup>26</sup> "Each case," said the court in *Eaton v. Mimnaugh*, 43 Or. 465, 73 Pac. 754, "must be determined largely from its own facts, and by the doctrine of inclusion and exclusion. It manifestly cannot be held that all liabilities arising from the mere discharge of some public duty by a county, or in the performance of some powers conferred upon it by law, are involuntary obligations, and therefore not an indebtedness within the meaning of the Constitution. A large part of the obligations incurred by every county may, without any great impropriety, be said to be involuntary, in the sense that the discharge of the duty in which they were incurred could not have been neglected or avoided without disregarding some provision of law; but if that test alone is to be the standard, a county is practically left free to contract unlimited obligations, notwithstanding the provisions of the Constitution. This would be violating the language of that instrument, and frittering away its meaning by construction."

<sup>27</sup> A debt for current expenses is not such a debt as contemplated in § 5, art. 11, of the Texas Constitution. *Dwyer v. Brenham*, 65 Tex. 526.

Appropriations for other than necessary current expenses, creating obligations not

and employees of the government,<sup>28</sup> policemen, marshals,<sup>29</sup> or persons sworn in to assist the sheriff.<sup>30</sup> The fees paid the

architect for the preparation of plans and specifications may properly be regarded as a part of the general expense of construct-

already existing, without adequately providing a revenue therefor, create a debt within the meaning of the Constitution. *State v. Clinton*, 28 La. Ann. 201.

Under a constitutional provision that a municipality shall not become indebted to an amount "exceeding in any way the income and revenue provided for such year, without the assent of two thirds," etc., current expenses for the year cannot be counted as an existing debt. *O'Bryan v. Owensboro*, 113 Ky. 680, 68 S. W. 858, 69 S. W. 800.

Necessary governmental expenses made mandatory by the Constitution are not within the county debt limit prohibition of the Constitution. *Rauch v. Chapman*, 16 Wash. 568, 36 L.R.A. 407, 58 Am. St. Rep. 52, 48 Pac. 253. The court said there has been much controversy at times among our statesmen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty, and property, and preservation of peace and good order in the state, cannot remain in abeyance, and it would make these various provisions of the Constitution contradictory, and render some of them nugatory, if a construction were placed upon the limitation of county indebtedness which would destroy the efficiency of the agencies established by the Constitution, to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the Constitution had such consequences in view.

But where a part of the warrants issued for necessary expenses were issued at a time before the county had reached the debt limit, the amount of such warrants cannot be deducted from the amount of indebtedness outstanding, in order that an equal amount of warrants issued for other purposes after the debt limit had been reached may be substituted and rendered valid. *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583.

The rule announced as to necessary expenditures for counties is applicable to municipalities, although a municipal corporation is voluntarily organized and the county is an involuntary quasi corporation. *Hull v. Ames*, 26 Wash. 272, 90 Am. St. Rep. 743, 66 Pac. 391.

The employment of an architect by a city to prepare plans and specifications for buildings which it proposed to construct was not the creation of a debt, within the purview of §§ 5 & 7 of art. 11 of the Constitution, which prohibits the creation of a debt by a municipal corporation, unless at the time of its creation, a tax be levied to provide a fund to pay the interest and create a sinking fund for the payment of

the debt at maturity. *Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S. W. 425.

<sup>28</sup> A constitutional provision that no county, city, etc., shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two thirds of the qualified voters, etc., does not apply to the salary of an officer, which a statute of the state requires to be paid. *Lewis v. Widber*, 99 Cal. 412, 33 Pac. 1128. The court said that it was quite apparent that this clause of the Constitution refers only to an indebtedness or liability which one of the municipal bodies mentioned has itself incurred,—that is, an indebtedness which the municipality has incurred, or a liability resulting in whole or in part from some act or conduct of such municipality. The clear intent expressed in the clause was to limit and restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. But the stated salary of a public officer, fixed by statute, is a matter over which the municipality has no control and with respect to which it has no discretion, and the payment of his salary is a liability established by the legislature at the date of the creation of the office. It is not therefore an indebtedness or liability incurred by the municipality within the meaning of this clause of the Constitution.

Warrants issued for the payment of salaries of county officers, after the county has reached the debt limit, are valid as compulsory obligations of the county, imposed by the Constitution and laws of the state. *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717.

Salaries and wages of officers and employees of a city, for services rendered by them in the necessary conduct of the city's ordinary affairs, or material or supplies furnished the city, necessary for its use in the conduct of its ordinary affairs, constitute valid items of expenditure, although the city is beyond its debt limit. *Pilling v. Everett*, — Wash. —, 120 Pac. 873.

And where the debt limit section has a proviso that it shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state, salaries of city officers and employees, and a judgment obtained against the city by reason of a defective sidewalk, come within the proviso. *Butler v. Lewiston*, 11 Idaho, 393, 83 Pac. 234.

<sup>29</sup> Services as policeman, marshal, and treasurer come within the requirement of necessities, since without these the police powers of the municipality must fail. *Hull v. Ames*, 26 Wash. 272, 90 Am. St. Rep. 743, 66 Pac. 391.

<sup>30</sup> The provision in the Constitution forbidding municipalities from becoming indebted in any manner or for any purpose

ing the buildings; but the contract for the payment of such fees may be entirely distinct from the contract for the erection of the buildings, and its validity in no way depend upon the validity of the building contract.<sup>31</sup> Other obligations held to be involuntary are those incurred in effecting a compromise of indebtedness,<sup>32</sup> for examining county books,<sup>33</sup> furnishing supplies,<sup>34</sup> insurance, books, and stationery,<sup>35</sup> for printing,<sup>36</sup> and coal for a waterworks plant.<sup>37</sup> Warrants issued for guarding

quarantine patients have been held compulsory obligations, since the protection of the health of the citizens from contagion is an imperative duty of the city.<sup>38</sup>

Where, at the time a courthouse was erected, the county seat was a new mining camp, which but a short time before had been destroyed by fire, and most of the buildings were small frame cabins, none of them being a suitable place to deposit the county records, or to accommodate the county officers, it was held that a county

beyond a certain amount will not prevent the county from contracting for the payment of services of persons sworn in by the sheriff to guard property. *Hopkins County v. St. Bernard Coal Co.* 114 Ky. 153, 70 S. W. 289. The court said that the duty of preserving the public peace, and protecting life and property, cannot be avoided because the income provided for the year by the fiscal court will be insufficient to pay the guards provided by statute. It is the duty of the fiscal court to provide a sufficient fund for this purpose when the necessity arises, if it has not been provided before. It was not the purpose of the Constitution to disable the municipalities of the state from maintaining the public peace or protecting the good name of the state. On the contrary, the Constitution was enacted by its makers, "grateful to Almighty God for the civil, political, and religious liberties we enjoy," that "the great and essential principles of liberty and free government may be recognized and established."

<sup>31</sup> *Houston v. Glover*, 40 Tex. Civ. App. 177, 89 S. W. 425.

<sup>32</sup> In *Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587, it was held that a contract for services rendered in effecting a compromise and settlement of a large outstanding bonded indebtedness of a city did not create a new and additional debt, within the meaning of the section of the Constitution imposing the debt limit, since to give the Constitution such a construction would effectually tie the hands of municipalities, so to speak, and disable them from entering into any arrangement for refunding or reducing the amount of their pre-existing indebtedness by new promises to pay, or by any arrangement looking to a compromise.

The last-mentioned case is cited with approval in *Perry County v. Gardner*, 155 Ind. 185, 57 N. E. 908, in which the action was to recover for services rendered as an accountant. The court said that to ascertain from the accounts, books, and records, through the agency of an expert accountant, the financial condition of certain offices the true amount and nature of the outstanding indebtedness, the character and amount of allowances made by the board of commissioners, and the sums which may have been wrongfully charged, retained, embezzled, or lost through the negligence or fraud of their officers, may be and is quite

as important to the municipal corporation as to obtain a compromise or reduction of liabilities already known to exist. Indeed, such a previous investigation is an indispensable preliminary to any measures having for their object the protection of the municipality against imposition and fraud, and the recovery of moneys justly due it.

<sup>33</sup> Services rendered in bringing county books up to date, and in examining them to ascertain whether there has been any stealing or not, are necessary to the orderly and prudent management of the business and governmental affairs of the county, and a charge therefor creates an involuntary indebtedness not within the inhibition of the Constitution. *Municipal Secur. Co. v. Baker County*, 33 Or. 338, 54 Pac. 174.

<sup>34</sup> A claim for supplies for prisoners furnished under a contract with a city and county falls within the same rule. *Goldsmith v. San Francisco*, 115 Cal. 36, 46 Pac. 816.

<sup>35</sup> Warrants issued for the insurance of city buildings, services in making assessment rolls, city printing, postage, stationery for city officers, and necessary expenses of the city clerk, are compulsory obligations. *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

Necessary books and stationery for the use of county officers are included in the compulsory obligations of the county. *George D. Barnard & Co. v. Knox County*, 2 L.R.A. 426, 37 Fed. 563.

<sup>36</sup> A debt for printing the ordinances of a city was held to be one for current expenses, and therefore not such a debt as is contemplated in the debt limit provision of the Constitution. *Dwyer v. Brenham*, 65 Tex. 526.

Warrants for publishing notices and printing ballots are an obligatory expense, since a city organized under our form of government cannot be maintained without elections, and the law governing elections and insuring their efficacy cannot be enforced without expense. *Gladwin v. Ames*, *supra*.

A claim for the public printing of the state, including the printing of the laws and the decisions of the courts, is one for necessary current expenses. *State v. Clinton*, 28 La. Ann. 201.

<sup>37</sup> *Martin-Strelau Co. v. Dubuque*, 149 Iowa, 1, 127 N. W. 1013.

<sup>38</sup> *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

building was absolutely necessary for county officers and the proper care of the records, and was therefore within the rule of authorized compulsory obligations.<sup>39</sup>

If the obligation is one which, as already stated, is discretionary, it falls within the inhibition of the debt limit provisions.<sup>40</sup> Although there may be circumstances under which the building of a new courthouse would be deemed an involuntary obligation, in general it has not been so regarded.<sup>41</sup>

<sup>39</sup> Farquharson v. Yeargin, 24 Wash. 549, 64 Pac. 717. The court said that while ordinarily warrants issued in payment of money expended in building a courthouse would not fall under the class of compulsory obligations, the conditions existing here made them such.

Warrants for labor and materials furnished in the building of a county jail are compulsory obligations within the meaning of the rule. Gladwin v. Ames, 30 Wash. 608, 71 Pac. 189.

The reasonable cost and expenses of making repairs upon a courthouse is incidental to the management of the affairs of a county, and not unlawful, even though the amount thereof, added to other items of current expenses, exceeds the statutory limitation of the taxing power of the county. Upton v. Strommer, 101 Minn. 97, 111 N. W. 956. "The situation," it is said, "is no different from a case where by storm or other calamity, the buildings of a county are unroofed or otherwise damaged, and rendered unfit for occupancy, in which case it would be the clear duty of the county board to provide economically all necessary repairs, the cost of which would constitute a necessary expense, to which the statute limiting the power of taxation would not apply."

But Brown, J., who did not concur in the disposition of the case, was of the opinion that the transformation of an ordinary village engine house or village hall, into a courthouse, amounts to something more than making repairs to an existing courthouse owned by the city. Ibid.

<sup>40</sup> Generally speaking, it may be said that a liability imposed upon a county by law, which it is not at liberty to evade or postpone, is involuntary, and not within the terms of the Constitution. But a liability arising from the performance of some public duty of a discretionary character, or which the county authorities may, in their discretion, postpone indefinitely or temporarily until means are provided for the payment of the expenses incident thereto, cannot be so held. Eaton v. Mimnaugh, 43 Or. 465, 73 Pac. 754.

<sup>41</sup> Municipal Secur. Co. v. Baker County, 33 Or. 338, 54 Pac. 174.

In no event, and under no possible construction of the Constitution, does it seem that a debt incurred by a county for the building of a new courthouse can be said to be involuntarily incurred. It is the duty of a county to provide offices for its

It has been said that there is a plain distinction between a contract for the use of rooms or a building for city purposes, and the erection by a city of a building to be used for such purposes. The one is an ordinary expense, while the other involves municipal ownership of the building or rooms, and means of furnishing the offices, and is an extraordinary expense.<sup>42</sup> The matter of placing shelving and boxing in courthouse vaults, insuring county property,

officers, and rooms and accommodations for holding its courts, jails for the confinement of prisoners, and the like. It is assumed, however, that this will be done within the current revenue. The county has authority to levy taxes annually upon all the taxable property within its limits, with which to raise revenue sufficient to pay its expenses (Bellinger & C. Anno. Codes & Stat. § 3085); and the law and the Constitution contemplate that it will exercise its powers in that respect. Eaton v. Mimnaugh, supra.

When a county is already provided with an ample courthouse, the provisions of the Constitution cannot be avoided by a mere change of the county seat. Ibid.

Remodeling, and building three new additions to, a courthouse, do not fall within the meaning of current county expenditures. Book v. Earl, 87 Mo. 246.

The purchase of a courthouse site at the expense of \$4,000 is not an ordinary expense, within the meaning of a provision of the Constitution permitting ordinary expenses, without the submission of the question to the vote of the people. Bannock County v. Bunting, 4 Idaho, 150, 37 Pac. 277.

<sup>42</sup> South Bend v. Reynolds, 155 Ind. 70, 49 L.R.A. 795, 57 N. E. 706.

In Grant v. Davenport, 36 Iowa, 396, it is said that it is very manifest that a city already indebted to its maximum limit cannot purchase upon credit real property with buildings thereon suitable for its offices, council rooms, etc.; nor can it, having real estate, make a valid contract upon its credit for the erection of such buildings; nor employ laborers to put up such buildings, and issue daily, weekly, or otherwise its warrant for such labor, where its cost is manifestly above the amount it can pay out of its ordinary current revenues and at the same time defray its other necessary and current expenses. But it may rent such real estate and buildings for a like use, and agree to pay at fixed periods a reasonable rent not exceeding, with the other expenses, its ordinary current revenue; and such a contract for payment of rent would not be creating an indebtedness, for it is in effect a cash transaction where the payments are made *pari passu* with the accumulation of the rent; and the length of time the contract is to continue, whether it be for thirty days or thirty years, does not alter its effect.

and purchasing toll roads, of constructing and repairing county bridges under a statute authorizing their construction in the discretion of the county courts, the repairing of courthouses, jails, and other necessary buildings for the use of the county, have been held discretionary, and an obligation created therefor is voluntary, and therefore invalid if beyond the debt limit.<sup>43</sup> Under the same rule fall contracts for replatting and reindexing records and for the purchase of a poor farm.<sup>44</sup> The cost of engines and other apparatus has been held not included in the expenses of a fire department, within the meaning of the statutory limitations imposed on fire department expenses.<sup>45</sup> And the requirement of an electric light plant by a city, to supply itself and inhabitants with light, has been declared not a reasonable and necessary current expense, such as a city which has

reached the debt limit is allowed to incur only under a statutory provision.<sup>46</sup>

And an act appropriating a sum of money to reimburse a public printer for loss sustained by him by being compelled to negotiate state warrants at a discount has been held to create a new indebtedness against the state, within the debt limit provision.<sup>47</sup> The building of a garbage plant has been held in New York an extraordinary expense, within the meaning of a charter provision requiring the submission of the question of such expenses to vote.<sup>48</sup>

In many jurisdictions, however, the doctrine that debt limit provisions do not apply to obligations imposed on political organizations by law is denied, and the rule has been adopted that it applies to all obligations arising *ex contractu*.<sup>49</sup> When a municipality has reached the debt limit, therefore, in these jurisdictions, it

<sup>43</sup> *Municipal Secur. Co. v. Baker County*, 33 Or. 338, 54 Pac. 174.

<sup>44</sup> A contract for the work of replatting and reindexing records of a county, under a statute according counties a wide discretion in the matter, is a voluntary obligation. *Ibid.*

The purchase of a poor farm, being discretionary, creates a voluntary obligation against the county. *Ibid.*

<sup>45</sup> *Leonard v. Long Island City*, 47 N. Y. S. R. 761, 20 N. Y. Supp. 26.

<sup>46</sup> *Palmer v. Helena*, 40 Mont. 498, 107 Pac. 512.

<sup>47</sup> *State ex rel. Salomon v. Graham*, 23 La. Ann. 402. The court said that if the revenues of the state are inadequate to meet the interest of the public debt and the current expenses of the necessary state agencies to preserve the government, an appropriation (whereby the liabilities of the state are increased) for any other purpose than the support and maintenance of the machinery of the government is a debt within the meaning of the Constitution.

<sup>48</sup> *Mander v. Coleman*, 109 App. Div. 454, 95 N. Y. Supp. 696.

Likewise an expenditure for voting machines is an extraordinary expenditure. *People ex rel. United States Standard Voting Mach. Co. v. Geneva*, 45 Misc. 237, 92 N. Y. Supp. 91.

<sup>49</sup> The legislature cannot impose upon a county a compulsion to incur debt, nor can a county involuntarily assume it, as against the disability of a constitutional prohibition. *Lake County v. Rollins*, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651. The court said: "We cannot say, as a matter of law, that it was absurd for the framers of the Constitution for this new state to plan for the establishment of its financial system on a basis that should closely approximate the basis of cash. It was a scheme favored by some of the ablest of the earlier American statesmen. Nor can the fact disclosed in the bill of exceptions, that, after the adoption of the state Constitu-

tion, the county officials and many of the people, designedly or undesignedly, disregarded the constitutional rule, render the plan absurd. If it was a mistaken scheme, if its operation has proved or shall prove to be more inconvenient than beneficial, the remedy is with the people, not with the courts."

A county in Colorado cannot be made liable for a debt contracted above the amount fixed by said constitutional provisions, although the debt is for ordinary county expenses, evidenced by county warrants. The court said: "We must decline to read the expression in § 6, 'and the aggregate amount of indebtedness of any county, for all purposes, etc., as if it were written 'and the aggregate amount of such indebtedness.'" *Ibid.*

In *Guthrie v. Territory*, 1 Okla. 188, 21 L.R.A. 841, 31 Pac. 190, Mr. Justice Burford, speaking for the court, said: "And even if it should appear that the claims were in excess of the limit, it would not invalidate the statute. This congressional provision is a limit on the municipal authorities, but does not limit the power of the legislature to levy assessments on the property within the corporation by proper legislation." But the court in *Martin v. Territory*, 5 Okla. 188, 48 Pac. 106, said that this was a *dictum*, and it was expressly overruled in *Guthrie v. New Vienna Bank*, 4 Okla. 194, 38 Pac. 4, in which it was held that a legislature has no power to impose a liability upon a city beyond the debt limit.

The act of Congress of July 30, 1886, is a limitation upon the legislature as well as upon the city authorities, in the creation of city indebtedness; and any indebtedness, whether created by the city authorities or by the legislature, in excess of the limit of 4 per cent of the assessed valuation of property within the city, determined by the last assessment thereof for territorial and county purposes, is without authority of law and void. *Martin v. Territory*, *supra*.

must manage somehow thereafter to pay as it goes. Where a statute provided that that no town shall incur any debt in excess of 3 per centum of the taxable property of such town, etc., it was urged that, as the statute imposes upon towns the duty of keeping their highways in repair, and makes them liable for damages sustained by reason of the highways being out of repair, a debt necessarily incurred in the discharge of said duty is a compulsory obligation, or a debt created by law, and hence binding, notwithstanding the statute; but the court held otherwise, saying it is true that in a certain sense all town debts may be said to be created by law, and hence compulsory, because the town has no authority to incur any debt except as such authority is con-

ferred upon it by law; and while the duty is devolved upon it to keep its highways in repair, to provide for its paupers, and to do many other things requiring the expenditure of money, still it is governed by the statute in the performance of all these duties, and must keep within the limits prescribed thereby, or else the statute is rendered inoperative and of no avail. In short, it is the imperative duty of municipal corporations so to manage their affairs as to keep within the debt limit prescribed by the legislature.<sup>50</sup> Where the involuntary expense doctrine is denied, expenditures beyond the debt limit cannot be allowed on the plea of necessity,<sup>51</sup> or because it will embarrass or cripple the administration of the government,<sup>52</sup> it being

<sup>50</sup> McAleer v. Angell, 19 R. I. 688, 36 Atl. 588.

In holding that a statute forbidding a town to draw warrants upon its treasurer when it had no money in the treasury, etc., did not apply to supplies for the poor, the court said: "That the aggregate indebtedness of the town shall not exceed the constitutional limitation is the only restriction upon the power of a town to become indebted to discharge such duties devolved upon it by law." Kankakee v. McGrew, 178 Ill. 74, 52 N. E. 893.

<sup>51</sup> The necessity for an electric light plant constitutes no justification or excuse for the violation of the constitutional provision as to the debt limit. Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

A contract for electric lighting which creates an indebtedness beyond the constitutional debt limit cannot be justified on the theory that such lighting is one of the necessities of city life; that to provide it is one of the urgent items of current expenses; that a modern plant cannot be obtained by a yearly contract, and that it is so costly that no one will take the risk of supplying it in that way. Spilman v. Parkersburg, 35 W. Va. 605, 14 S. E. 279.

That a fire alarm telegraph may be necessary for the welfare of the city will not enable the city to install it, if it is already indebted beyond the constitutional debt limit, where the provision of the constitution is that the corporation shall not "in any manner or for any purpose" become indebted beyond the amount fixed. Brash-ear v. Madison, 142 Ind. 685, 33 L.R.A. 474, 36 N. E. 252, 42 N. E. 349. The court said that in such circumstances the most necessary expenses must be met by the current revenues, and that a debt cannot be contracted even for cleaning the streets, or for protecting the city from fire.

Where the constitutional provision is that no public or municipal corporation of the state shall ever become indebted in any manner or for any purpose, to an amount in the aggregate exceeding a certain amount, it will be considered as applicable to debts

contracted on account of the current and ordinary expenses of the respective municipalities to which it refers, such as a contract for fire alarm strikers and signal boxes. Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 467.

The necessity for the construction of a bridge does not warrant the expenditure of money therefor in excess of the constitutional debt limit. Ada Twp. v. Kent Circuit Judge, 114 Mich. 77, 72 N. W. 35.

That a county may be in need of a courthouse, and that it is the duty of the county commissioners to provide one, will not give the county the right to incur an indebtedness therefore in excess of the statutory limit. Rogers v. LeSueur County, 57 Minn. 434, 59 N. W. 488.

Though a county has outgrown its courthouse, this does not authorize the county to contract for the erection of a new one, where it has reached its debt limit, under a proviso permitting expenditures in emergencies where the public health and safety require it. Fiscal Ct. v. Com. 139 Ky. 307, 117 S. W. 301.

The fact that a statute empowers the city to build or rent a market house, and that a market house is necessary for the convenience of the people, will not authorize the city to contract for the rental or purchase of one after it has reached its debt limit. Erie's Appeal, 91 Pa. 308. The court said corporations, like natural persons, must do without conveniences when they have not the money to pay for them. If the ordinary revenues of the city are not sufficient to meet its legitimate wants, and if it must continually take upon itself new obligations for that purpose, it is clear that bankruptcy and financial ruin must occur sooner or later, and when these do occur, it must learn *volens volens*, to live within its revenues.

That it is necessary, under the revenue law, to borrow money in anticipation of the city's revenue, will not justify the city in incurring indebtedness for such purpose, after it has reached the debt limit. Fuller v. Chicago, 89 Ill. 282.

<sup>52</sup> Where the legislature is allowed to



deemed the duty of the court to declare the law as it is written.<sup>53</sup> It must be

remembered that the debt limit provisions are not a limit on the power of taxation to

contract debts beyond the constitutional limit only in case of war, invasion, or insurrection, ordinary expenses of the government do not fall within the exception, and it will not be held that these expenses are excepted from the inhibition of the Constitution on the theory or the supposition that a different ruling will lead to injurious consequences. *Nougues v. Douglass*, 7 Cal. 65.

In support of the position that the constitutional limitation does not apply to debts for the necessary running expenses of a county, it was urged that a contrary ruling would produce conflict between different parts of the Constitution itself; that such construction would disable certain counties from incurring debts for the payment of officers' fees and other necessary running expenses, so that the business of such counties would not be efficiently transacted, and that they would, to a great extent, be shorn of their usefulness. That thus the beneficent constitutional provisions relating to county organization and government would, as to certain counties, be largely, if not completely, neutralized. It was also urged that serious public disasters would result from the stoppage of the wheels of county government because of inability to incur debts. In *People ex rel. Seeley v. May*, 9 Colo. 404, 12 Pac. 838, the court, in replying to these suggestions, said that the validity of the constitutional provisions does not depend upon the ability of the counties to create indebtedness; nor do the apprehended consequences necessarily follow from the inhibition against further liability. The constitutional provision simply prohibits indebtedness beyond a certain sum. It does not limit the amount of taxes the county authorities shall levy to defray county charges for a given year. The members of the constitutional convention were not dealing with the subject of county expenses or expenditures, provided the county pays as it goes. Their purpose was to protect the municipal credit, and to relieve the people from the oppressive burden that always results from a large corporate indebtedness. If the running expenses are necessarily heavy, or if the people are inclined to extravagance, and indulge in what might be termed "municipal luxury," still the credit remains good, and the evils against which the convention legislated, do not exist, provided these expenses, whether necessary or unnecessary, economical or extravagant, are paid when incurred.

Replying to the contention that a rigid construction of the Constitution would occasion inconvenience to city officials in administering its governmental affairs, the court, in *Law v. People*, 87 Ill. 385, said that no inconvenience had been experienced by the state under this restriction, but that on the contrary, for nearly one third of a century, there had been an almost unprecedented career of prosperity. It had

grown vastly in population, wealth, and material greatness. The state had paid a vast debt with its interest, and all of its expenses, and no reason was perceived why the great municipality of Chicago, under the same prudence, economy, and financial ability, should not be able to manage its financial affairs with like results.

Where a city had reached the debt limit, and authorized a contract for the construction of a capitol for a sum not exceeding \$300,000, and provided that payments should be made in bonds of the state, redeemable in thirty years, it was held that this could not be done. *Nougues v. Douglass*, supra.

<sup>53</sup> In *McAleer v. Angell*, 10 R. I. 688. 36 Atl. 588, the court said: "We are aware of the fact that to hold that a town which has reached its debt limit is incapable of contracting any additional indebtedness may so cripple it for the time being as to seriously interfere with the management of its municipal affairs, and while it is proper for the court to take into account the consequences which may result from its decision in a doubtful case, yet, where the law is plain and unambiguous, no such consideration can be allowed to have weight in the determination of the question. It is the plain and imperative duty of the court to declare the law as written, leaving it to the general assembly to make such changes as new circumstances may require."

Where a county is already indebted in a sum exceeding 5 per cent of the value of the taxable property therein, it cannot incur a further indebtedness for building a courthouse, or for any other purpose; and a tax levied to pay such further alleged indebtedness is void. The court said that arguments of convenience, of policy, or of present necessity, should not be allowed, by loose construction, to weaken the force or limit the extent of a constitutional prohibition so necessary and so beneficently intended. *Hebard v. Ashland County*, 55 Wis. 145, 12 N. W. 437.

Under a constitutional limitation that cities shall not incur any indebtedness exceeding in any year the income and revenue provided for it for such year, without the assent, etc., when the revenue for the given year has been determined, and such revenue collected and expended before the expiration of the fiscal year, the city cannot, for the purpose of providing for pressing wants of the municipality during the residue of such year, incur debts and liabilities to be met with and discharged from the revenues of a subsequent year. It was urged that it was a plain duty of the government to provide for that without which the government could not exist as an active entity, but the court deemed it to be a solecism to say that the duty to contract debts and liabilities on behalf of the city exists in a case where the Constitution expressly inhibits it. *Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912.

raise money to defray necessary expenses on a cash basis.<sup>54</sup>

That the adoption of a rigid rule to keep debts within the debt limit may cause great hardship to persons who have in good faith furnished labor and materials to the municipality is held not to justify any departure therefrom.<sup>55</sup> He who contracts with a municipality, whereby indebtedness is created, must at his peril take notice of the

financial condition of the city, and whether the purposed indebtedness is in excess of the constitutional limit. Any other rule would place the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory.<sup>56</sup>

Where the provision forbids incurring liability "in any manner or for any purpose," it can make no difference whether

An expenditure in excess of the debt limit for a new courthouse cannot be authorized on the theory that it was not the purpose of the Constitution to disable the fiscal court from providing for the courts and the people a sufficient courthouse, where the county has occupied the old courthouse for years, and the proposition is to incur an indebtedness for a new and more imposing building, on the ground that the county has outgrown the old one. *Lawrence County v. Lawrence Fiscal Ct.* 130 Ky. 587, 113 S. W. 824.

<sup>54</sup> To the argument that the constitutional limitation of county indebtedness could not have been intended to include expenditures for necessary county expenses, because the rate fixed was so low that the county officials would be seriously embarrassed and crippled in the management of county affairs, and unable to meet the ordinary expenses of the county, it has been answered that the limitation imposed by the Constitution is a limitation of indebtedness, and not a limitation of the amount that may be raised by taxation to meet the necessary current expenses of the county. It is simply a declaration that the county within certain limits shall live within its income, and not that its income shall be more or less. *People ex rel. Seeley v. May*, 9 Colo. 80, 10 Pac. 641.

<sup>55</sup> The ruling of the court on the question whether a warrant is worthless because issued for an obligation beyond the debt limit cannot be controlled by the fact that to declare it to be void will be a hardship to the plaintiff. It is the duty of persons dealing with counties and the county officials, as well as the county officials themselves, to take notice of the limitations prescribed by the Constitution. *Barnard & Co. v. Knox County*, 105 Mo. 382, 13 L.R.A. 244, 16 S. W. 917.

The fact that to consider certificates of indebtedness after a city had reached the constitutional debt limit as debts of the city, and therefore invalid, would work hardships on the holders hereof, will not warrant the court in holding them bad. *Law v. People*, 87 Ill. 385. The court said: "The liberty of the citizen and his security in all his rights in a large degree depend upon a rigid adherence to the provisions of the Constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, :37 L.R.A. (N.S.)

would usurp the place of the Constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights."

In *Wolcott v. Lawrence County*, 26 Mo. 272, it is said that if any effect is to be given to the law at all, its plain directions must be followed, and to allow a manifest departure from them would not only be a violation of an established rule that governs the relations of principal and agent, but would remove all of the restrictions which the law has imposed upon the county courts in contracting debts to be paid by the county.

That a ruling that a county had no power to contract for the remodeling of a courthouse will work great hardship, inasmuch as the work contracted for was done according to contract, and was worth the price agreed upon to be paid, and was accepted and used by the county, does not authorize the court to relieve against it. *Book v. Earl*, 87 Mo. 246.

That the work of building a courthouse was worth the price agreed to be paid, and was accepted and used by the county, will not enable the court to grant relief to the builder thereof, in the face of the debt limit provision. *Anderson v. Ripley County*, 181 Mo. 46, 80 S. W. 263.

<sup>56</sup> *French v. Burlington*, 42 Iowa, 614.

Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with knowledge too that all other persons dealing with the municipality have the same rights to compensation, and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract matures into a claim against the city, and if others whose claims have accrued subsequent to his are able to intercept these funds, he is in the same condition as any creditor who deals with one whose assets are exhausted before he presents his claim. In dealing with the municipality, he must rely upon the integrity of its officers that they will

the debt be for necessary current expenses or for something else.<sup>57</sup> A constitutional provision that the aggregate amount of indebtedness of any county "for all purposes" shall not exceed a certain amount includes debts incurred by operation of law as well as by contract, so that, the constitutional limitation having been reached, a debt for the statutory fee of an officer or a statutory liability in connection with

any other municipal employment or expense, is as much inhibited as is indebtedness for labor performed or materials furnished under contract.<sup>58</sup> The prohibition being against the incurring of indebtedness in any manner or for any purpose, beyond a certain per centum of the taxable property, all legislation in conflict therewith must yield, and it makes no difference whether the legislation authorizes the building of

not incur any liabilities during the year in excess of the income and revenues provided for that year, and as a prudent man he will ascertain not only the amount of that income, but also the amount of the claims already existing, and of those that are likely to be incurred. *Weaver v. San Francisco*, 111 Cal. 319, 43 Pac. 972.

In *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641, the court said: "We have neither the right nor the disposition, by judicial interpretation, to take away the wholesome restriction upon municipalities thus imposed by the Constitution. Of course, in giving effect to this radical change from the pre-existing condition of things, it will not be strange if some shall be found to suffer. But it must be remembered that all are presumed to know the law, and that whoever deals with a municipality is bound to know the extent of its powers. Those who contract with it, or furnish it supplies, do so with reference to the law, and must see that limit is not exceeded. With proper care on their part and on the part of the representatives of the municipality, there is no danger of loss."

<sup>57</sup> *Springfield v. Edwards*, 84 Ill. 626.

If a city has reached the debt limit, it cannot incur other liabilities on the ground that they are ordinary or current expenses of the city government. *Prince v. Quincy*, 105 Ill. 215.

A debt cannot be made, even for current expenses, beyond the constitutional limit, no matter how urgent. *Laporte v. Game-well Fire Alarm Teleg. Co.* 146 Ind. 466, 35 L.R.A. 886, 58 Am. St. Rep. 359, 45 N. E. 588.

A provision forbidding municipalities to become indebted in any manner or for any purpose, beyond a certain amount, is applicable to outstanding warrants issued for current city expenses. *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628.

A general assembly is inhibited, in absolute and unqualified terms, from making appropriations or authorizing expenditures for the support of the government or its institutions in time of peace, in excess of the total tax then provided by law and applicable to such appropriation, unless such general assembly shall provide for levying a sufficient tax, within constitutional limits, to pay the same within such fiscal year. *Re General Assembly*, 13 Colo. 316, 22 Pac. 464.

If the general assembly passes acts making appropriations or authorizing expenditures in excess of constitutional limits. 37 L.R.A. (N.S.)

such acts are void, and create no indebtedness against the state. *Ibid.*

Debts to provide for casual deficiencies of the revenue cannot be contracted by the state in excess of the limit prescribed in § 3, art. 11, Const. A casual deficiency of the revenue is one that happens by chance or accident, and without design or intention to evade the constitutional inhibition. *Ibid.*

A county cannot lawfully contract for an extraordinary expenditure beyond the debt limit. *Monroe County v. Strong*, 78 Miss. 565, 29 So. 530.

The fact that a judgment against a county, growing out of negligent conduct of its officers or agents, constitutes a liability regardless of its indebtedness, does not require the adoption of the rule that necessary expenses of a county are also excepted from the debt limit provision. *People ex rel. Seeley v. May*, 9 Colo. 404, 12 Pac. 838. The court said that it is clear that the language under consideration deals with indebtedness that is reasonably anticipated as a result of voluntary action by the legislature or county authorities,—such indebtedness as springs from express or implied contracts. Involuntary liability, arising *ex delicto*, is a subject that is not contemplated by the provision.

<sup>58</sup> *Ibid.*

In *Potter v. Douglas County*, 87 Mo. 239. it was held that the claim of a sheriff for the keeping of prisoners committed to another county by the sheriff of the defendant county, as commanded by law, was an obligation which the county must pay, although it had reached the constitutional debt limit. It was said that to hold otherwise would be destructive of peace and good order, and that the inhibition of the Constitution was leveled against the incurring of indebtedness in the ordinary way by the action of the county court, the financial agent of the county. Here the indebtedness was involuntarily incurred by the command of the law.

But the last-mentioned case was overruled in *Barnard & Co. v. Knox County*, 105 Mo. 382, 13 L.R.A. 244, 16 S. W. 917, in which it was held that a provision of the Constitution prohibiting the incurring of indebtedness in any manner or for any purpose, applied even to a debt imposed by law. The court said: "This strong and comprehensive language admits of no distinction between debts created by a county court and debts created by law. In a sense all county debts are created by law, for the counties possess those powers, and those

waterworks, the erection of libraries, schools, or hospitals.<sup>59</sup> So, an indebtedness for the burial of the indigent dead is not taken out of the operation of the constitutional provision forbidding the incurring of any indebtedness or liability for any purpose exceeding, in any one year, the revenue provided for that year, etc., on the theory that the obligation is imposed by law.<sup>60</sup> And an act making it obligatory upon counties to pay a reward for the discovery of artesian wells has been held invalid, where it appears that the county at the time has reached its debt limit.<sup>61</sup>

#### **b. Torts.**

The courts are in harmony on the proposition that debt limit provisions do not apply to obligations sounding in tort.<sup>62</sup>

only, which are conferred upon them by the Constitution and laws of the state. While it is the duty of the county court to care for paupers and insane persons, and to build bridges and repair roads, still the county court is governed by the statute in the performance of these duties. Debts incurred for such purposes may be called debts created by law as well as debts incurred by the county clerk for books and stationery." The debt in this case was for such supplies.

The obligation to pay the salary of a health officer of a city is a debt within the meaning of the Constitution. *Norton v. East St. Louis*, 36 Ill. App. 171.

The Federal limit imposed upon county indebtedness includes indebtedness incurred by operation of law as well as that arising from express contracts, and therefore a warrant issued by a county in payment of the salary of the county clerk is within the prohibition of the act; and it is a good defense to an action upon such a warrant, that, at the time the services were performed and the warrant issued as an evidence thereof, the indebtedness of the county was above the maximum limit fixed by the provisions of the act. *D County v. Gillett*, 9 Okla. 593, 60 Pac. 277.

<sup>59</sup> *East Moline v. Pope*, 224 Ill. 386, 79 N. E. 587.

<sup>60</sup> *Pacific Undertakers v. Widber*, 113 Cal. 201, 45 Pac. 273.

<sup>61</sup> *McRae v. Cochise County*, 5 Ariz. 26, 44 Pac. 299.

Where the amount offered as a reward for the discovery of an artesian well, together with the expense of taking proof of the compliance with the terms of the law by the claimant of the reward, is made an obligation to be paid by the treasurer of the county on the warrant drawn for such reward and costs, it creates a debt against the county within the meaning of the debt limit statute. *Ibid*.

A township cannot, under an act authorizing it to sink artesian wells for public

Where an action for damages against a city is not based upon failure to grade its streets or to make gutters, but for the doing of the grading and making of gutters in a careless, negligent, and unskilful manner, it is no defense that, at the time of the injuries and long prior thereto, the city was indebted beyond the constitutional limit.<sup>63</sup> And it is no defense to an action for injuries received from a defective sidewalk, that the city had no money in its treasury with which to make the necessary repairs, and that it was indebted beyond the constitutional limit.<sup>64</sup> An action against a city for failure to put the necessary machinery in motion, and to prosecute in good faith and with reasonable diligence the means afforded to it, under its charter, to raise and collect the funds by an assessment of the property affected by a street

purposes, and to issue bonds therefor, incur an indebtedness beyond the constitutional limit. *Dring v. St. Lawrence Twp.* 23 S. D. 624, 122 N. W. 664.

<sup>62</sup> In the trial of an action for tort, a city cannot resist the claim although it is already indebted to an amount in excess of the debt limit. *Bloomington v. Perdue*, 99 Ill. 329.

That a city has reached its limit of indebtedness is no defense to an action for damages for personal injury. *Lorence v. Bean*, 18 Wash. 36, 50 Pac. 582.

The liability of a municipality for the want of fidelity of those who act for it is not within the constitutional and statutory limitations in regard to the creation of indebtedness. *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.

The language of the Constitution that a city should not be allowed to become indebted in any manner or for any purpose, to an amount exceeding in any year the income and revenue provided for that year, etc., said the court in *Conner v. Nevada*, 188 Mo. 148, 107 Am. St. Rep. 314, 86 S. W. 256, shows that it is an indebtedness incurred by assent, agreement, or contract. The word "debt" has a well-recognized meaning in law, distinguished from liability for damages. After a claim for damages is reduced to a judgment, it becomes, in a technical sense, a debt, but it is a debt imposed by law, not one assumed by contract.

<sup>63</sup> *Bartle v. Des Moines*, 38 Iowa, 414.

<sup>64</sup> *Rice v. Des Moines*, 40 Iowa, 638.

A judgment against a town for damages resulting from dangerous and unsafe highways, although a debt, cannot properly be said to be a debt within the meaning of the Constitution, providing that no town shall incur any indebtedness beyond a certain amount, the prohibition evidently being against debts voluntarily created in the ordinary manner. *McAleer v. Angell*, 19 R. I. 688, 36 Atl. 688.

improvement, is an action *ex delicto*, and the municipality cannot escape liability therefor, under the plea that its indebtedness has reached the constitutional limit.<sup>65</sup> A city's liability for damages arising out of an erroneous assessment is not a debt

within the meaning of the Constitution.<sup>66</sup> Money paid into a city treasury under a void tax sale does not become the absolute property of the city, and its repayment is not the incurring of a debt within the meaning of the Constitution.<sup>67</sup>

<sup>65</sup> Little v. Portland, 26 Or. 235, 37 Pac. 911.

But unliquidated damages to landowners from a public improvement constitute a debt against a city, within the meaning of a constitutional provision that the debt of any county, city, borough, township, school district, or other municipality, or incorporated district shall never exceed 7 per cent upon the assessed value of the taxable property therein, and that such municipality or district shall not incur any new debt, or increase its indebtedness to an amount, exceeding 2 per cent upon such assessed valuation of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law. Keller v. Scranton, 200 Pa. 130, 86 Am. St. Rep. 708, 49 Atl. 781. This is not a liability arising from tort. The court said: "It is true that the Constitution does not exempt municipalities, how great soever their indebtedness, from liability for wrongful and tortious acts. But it does not authorize the voluntary assumption of obligation to pay money by the scheme of a tort. The distinction between real or unpremeditated torts, and voluntary acts under the technical name of torts, done by agreement for the accomplishment of a purpose prohibited to be done by contract, is clear and substantial. And that is what we have here. The taking or injury to land by eminent domain is not a tort in the sense of a wrongful act. When the broad distinction of actions into those *ex contractu* and those *ex delicto* was established, damages from the exercise of eminent domain were unknown. When they came into existence, they did not strictly fit into either class, but, as they were certainly not founded on express contract with the landowner, they were put in the only other class, as torts. But when, as in the present case, the act which is called a tort is done under a contract, and the assumption of the consequent damages is an express term of such contract, we have a perfectly clear case outside of the principle that makes municipalities liable for their wrongful acts without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration in the present."

The amount owing by a city to the owners of private property taken for public use is indebtedness, to be taken into consideration in ascertaining the debt limit, and the amount with interest may be approximated by taking the assessed value of the property at least as the measure of the awards. Levy v. McClellan, 196 N. Y. 178, 80 N. E. 569.

37 L.R.A. (N.S.)

The awarding of damages to owners of land taken for a public road has been held, however, not to be the creation of a debt within the meaning of the constitutional debt limit provision, but in the nature of a sale for cash, the commissioners having no power to draw any orders for the payment of the damages, unless there is a fund on hand for their payment or a tax levy has been made for that purpose. Highway Comrs. v. Jackson, 165 Ill. 17, 45 N. E. 1000.

<sup>66</sup> Ft. Dodge Electric Light & P. Co. v. Ft. Dodge, 115 Iowa, 568, 89 N. W. 7.

<sup>67</sup> Phelps v. Tacoma, 15 Wash. 367, 46 Pac. 400. For a case announcing the same principle, see Richards v. Klickitat County, 13 Wash. 509, 43 Pac. 647.

Taxes unlawfully assessed and paid under protest do not constitute a debt of a city, even within the meaning of a constitutional provision forbidding municipalities from becoming indebted in any manner or for any purpose beyond a certain amount. Thomas v. Burlington, 69 Iowa, 140, 28 N. W. 480. The court said that the city did an act it had no right to do, and by wrongful action received or seized money the property of the plaintiff. It did not become the money of the city by such wrongful seizure or enforced payment. The money belonged to the plaintiff as fully as it did prior to the payment. The plaintiff was seeking to recover his own property. There could not be a debt or debtor unless there was a creditor, and while, in a certain sense, the plaintiff might be regarded as the creditor of the city, he was not such in contemplation of the Constitution. He was not a voluntary creditor, but an involuntary creditor. He became such by compulsion. The Constitution, in providing that the city cannot become indebted in such a manner, implied an assent on the part of the creditor, and thus it is that the prohibited indebtedness is incurred, that is, it is created by the voluntary act of both parties. Beck, J., in a dissenting opinion, considered the provision of the Constitution broad enough to cover the obligation of the city to repay the amount collected, saying that it is the duty of taxpayers to resist by proper proceedings the collection of illegal taxes. The majority of the court, however, thought this to be an inadequate protection; that, when the tax is levied, an apparent lien is created on the taxpayer's property, and thereby his title is clouded. This cannot be removed except by an action, which takes time. In the meantime, he may be unable to sell or mortgage his property for legitimate purposes. The only efficient and sufficiently speedy remedy in such cases may be the payment of the taxes.

**VII. Refunding transactions.**

The question whether refunding bonds increase the debt of a state or municipality, within the meaning of debt limit provisions, has produced some conflict in the decisions, but the general disposition of the courts

has been to hold that they do not, the result of a refunding issue being declared merely to change the form of an existing indebtedness.<sup>68</sup> All of the courts hold that the exchange of the new obligations for the old does not add to the existing debt.<sup>69</sup> But

In *McCracken v. San Francisco*, 16 Cal. 591, a charter provision that a city should not become indebted beyond the sum of \$500,000 except in a specified manner was held not to apply to a claim against the city for money paid by mistake. The court said that the liability of the city in this respect is independent of the restraining clauses of the charter, and arises from the obligation to do justice,—to restore that which belongs to others,—which rests upon all persons, whether natural or artificial, and that it might well be doubted whether it would be competent for the legislature to exempt the city any more than private individuals, from liability under circumstances of this character.

The restriction can in any event apply only to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts or trespasses or mistakes. *Ibid.*

<sup>68</sup> Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely exchange the form of an existing indebtedness. *Huron v. Second Ward Sav. Bank*, 49 L.R.A. 534, 30 C. C. A. 38, 57 U. S. App. 593, 86 Fed. 272; *Fairfield v. Rural Independent School Dist.* 54 C. C. A. 342, 116 Fed. 838; *Hamilton County v. Montpelier Sav. Bank & T. Co.* 84 C. C. A. 523, 157 Fed. 19; *Butler v. Lewiston*, 11 Idaho, 393, 83 Pac. 234; *Cedar Rapids v. Bechtel*, 110 Iowa, 196, 81 N. W. 468; *Farson v. Sinking Fund Comrs.* 97 Ky. 119, 30 S. W. 17; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Re Menefee*, 22 Okla. 365, 97 Pac. 1014; *Hirt v. Erie*, 200 Pa. 223, 49 Atl. 796; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, rehearing denied in 13 S. D. 342, 83 N. W. 335; *Miller v. School Dist. No. 3*, 5 Wyo. 217, 39 Pac. 879; *Blanton v. McDowell County*, 101 N. C. 532, 8 S. E. 162; *McCreight v. Camden*, 49 S. C. 78, 26 S. E. 984; *Los Angeles v. Teed*, 112 Cal. 319, 44 Pac. 580; *Re State Bonds*, 81 Me. 602, 18 Atl. 291.

The old indebtedness is not extinguished by the refunding transaction, and a new indebtedness incurred thereby; but the old indebtedness still exists, being evidenced by a different obligation. *Klein v. Kinkcad*, 16 Nev. 194.

The debt limit provision, the object of which was to prevent the creation of indebtedness, should not be so construed as to prevent the reduction of indebtedness by the refunding of bonds. *Ewert v. Mallory*, 16 S. D. 151, 91 N. W. 479.

A statute authorizing the refunding of

indebtedness does not authorize the creation of an indebtedness, within the meaning of the Colorado Constitution, the bonds being merely the legal evidence of the debt. *Geer v. Ouray County*, 38 C. C. A. 250, 97 Fed. 435.

The fact that the debt of the county exceeds the constitutional limit at the time refunding bonds are issued will not, in itself, invalidate them, since they do not create or increase the debt of the county, but simply change its form. *Lake County v. Keene Five-Cents Sav. Bank*, 47 C. C. A. 464, 108 Fed. 505.

The issuance of bonds in compromise of an old debt, at the rate of 50 cents on the dollar, is simply a new form of the old debt, which was reduced 50 cents to the dollar in the change of form. *Bank of Columbia v. Taylor County*, 112 Ky. 243, 65 S. W. 451.

A levy of taxes for the payment of interest on county funding bonds cannot be defeated on the ground that they exceeded the amount for which the county could lawfully become indebted, where there may have been simply a change in the form of an indebtedness which was incurred before the limitation was imposed, and all the facts concerning the indebtedness, the time when it arose, and the circumstances under which it was created, do not appear. *Maish v. Arizona*, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193.

If a county owes a valid and enforceable indebtedness, refunding bonds issued under authority of an act of the legislature, for the purpose of taking up such enforceable indebtedness, are not invalid because they may exceed the debt limit. In such case, the refunding bonds are valid, because they represent a valid indebtedness. In suits, therefore, upon refunding bonds representing prior indebtedness, it is necessary, in order to sustain the defense of invalidity, to show that the indebtedness merged in and represented by the refunding bonds was itself invalid and nonenforceable, either in whole or in part. *Etna L. Ins. Co. v. Lyon County*, 44 Fed. 329.

Under a statute authorizing money to be taken from a permanent school fund and invested in city bonds, money to the amount thereof to be transferred to the general fund of the city, to be at once used in the reduction of outstanding general fund warrants,—the indebtedness of the city is not increased. *State ex rel. Winston v. Rogers*, 21 Wash. 206, 57 Pac. 801.

<sup>69</sup> An exchange of bonds does not increase the indebtedness of a school district. *Taylor v. School Dist.* 97 Fed. 753.

Bonds exchanged for a fundable debt in the method prescribed by law neither in-

a distinction has been made between a sale of the refunding bonds, where the money received therefrom is placed in the treasury for the purpose of canceling the old obligations, and the exchange of the one for the other. It is said that where a city is indebted beyond the constitutional limit, it cannot issue and sell bonds for the purpose of putting into the treasury money with which to take up and pay former obligations, because after the new bonds are

sold, and before the old bonds can be called in, the indebtedness of the city would be increased; but the city may provide for the exchange of the new bonds for the old, the new bonds not to be delivered until the old bonds are exchanged therefor, and can old bonds be exchanged therefor, and can the Supreme Court of the United States, <sup>71</sup> and of the courts of some other jurisdictions. <sup>72</sup> But the doctrine has been justly

crease nor diminish the debt of a municipality, but merely change its form. Independent School Dist. v. Rew, 55 L.R.A. 304, 49 C. C. A. 198, 111 Fed. 1.

The issuance of a funding bond in exchange for valid warrants is in no sense the creation of a debt. It merely changes the form of the obligation. Lake County v. Stanley, 24 Colo. 1, 49 Pac. 23.

In Poughkeepsie v. Quintard, 136 N. Y. 275, 32 N. E. 764, it was held that a provision in a statute authorizing the extension of the bonded debt of a city, by the exchange of new bonds for old bonds, is not in conflict with a charter provision forbidding "any pecuniary obligations whatever on the part of the city, which should not be payable in the current year, and which cannot be discharged from the income of the same year," since this is not the borrowing of money within the meaning of the charter. The court said that there was a new creditor, but the same old debt. That the municipal liability was not increased, but merely suffered to remain, and that not a dollar of new or added debt resulted.

Where the express provision of a bond ordinance is that refunding bonds shall be issued only to the holders of outstanding warrants in exchange and as a substitute therefor, the indebtedness of the city is not increased thereby, as the transaction operates only as an exchange of one evidence of indebtedness for another. Morris & Whitehead v. Taylor, 31 Or. 62, 49 Pac. 680.

<sup>70</sup> Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189; Reynolds v. Lyon County, 121 Iowa, 733, 96 N. W. 1096.

<sup>71</sup> In Doon v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220, in referring to the difference in effect between the sale and exchange of refunding bonds for the purpose of extinguishing the old debt, the court said: "There is a wide difference in the two alternatives which this statute undertakes to authorize. The second alternative, of exchanging bonds issued under the statute for outstanding bonds, by which the new bonds, as soon as issued to the holders of the old ones, would be a substitute for and an extinguishment of them, so that the aggregate outstanding indebtedness of the corporation would not be increased, might be consistent with the Constitution. But under the first alternative, by which the treasurer is authorized to sell the new bonds and to apply the pro- 37 L.R.A. (N.S.)

ceeds of the sale to the payment of the outstanding ones, it is evident that if (as in the case at bar) new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and if new bonds equal in amount to the old ones are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit. But it is none the less true that it has been increased in the interval; and that unless those officers do their duty, the increase will be permanent. It would be inconsistent alike with the words, and with the object, of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or the honesty of their officers."

<sup>72</sup> The sale of refunding bonds increases the indebtedness of state. State ex rel. Jones v. McGraw, 12 Wash. 541, 41 Pac. 893.

Although the purpose of a school district in issuing bonds was to use the money derived from their sale in taking up and canceling its outstanding indebtedness, they nevertheless constitute an additional indebtedness of the district. State ex rel. Atkinson v. Ross, 43 Wash. 290, 86 Pac. 575. The court in this case refused to recede from its established position on the question, although saying that it might be a somewhat technical view of the matter and opposed to the weight of authority.

The fact that the sale of new bonds for the purpose of applying the proceeds in satisfaction of a matured debt will only temporarily increase the city's indebtedness will not authorize their issuance, where it has already reached the constitutional limit, and where the language of the Constitution is that a debt shall never exceed a specified percentage of the assessed valuation of taxable property. Birkholz v. Dinie, 6 N. D. 511, 72 N. W. 931.

The court said: "If the action which the

criticized,<sup>73</sup> and can scarcely be said to be supported by the weight of authority. And in this connection the singular example has been set of a lower Federal court refusing to be bound by the decision of the Supreme Court.<sup>74</sup>

The assumption in the cases holding that the sale of the bonds increases the debt for a short interval is extremely technical,<sup>75</sup> and is, in fact, unsound; for if a municipality has cash in the treasury with which to meet all its outstanding obligations, it can hardly be said to be indebted in the constitutional sense. The cash in the

treasury produced from the sale of refunding bonds, even while the old obligations are outstanding, is an asset to offset the liability which the outstanding bonds evidence. Instead of doubling the liability as the Supreme Court supposes, the assets and the old obligation simply balance, and the indebtedness evidenced by the new bonds merely equals that of the old, or, in other words, is the same. The form of the obligation only is changed. This has been very clearly pointed out in a South Dakota case.<sup>76</sup> And the fact that the funds received on the sale of refunding bonds may

city officials proposed to take was a mere exchange of new city bonds for old city bonds, we would hold such action to be legal upon the facts in this record. Nor do we consider it necessary that an exchange of bond for bond should be made. We think that the mere execution of refunding bonds may be authorized even beyond the debt limit, and that they may then be put on the market and sold, on the condition that they are not to be delivered until an equal amount of the old bonds are surrendered. The resolution might provide that simultaneously with the delivery of the refunding bonds and the payment of the cash therefor, there should be at hand an equal amount of the old bonds to be then and there extinguished by the use of the cash so received, and delivered up to the city as part of the same transaction."

<sup>73</sup> In *Huron v. Second Ward Sav. Bank*, 49 L.R.A. 534, 30 C. C. A. 38, 57 U. S. App. 593, 86 Fed. 272, in referring to the distinction between an exchange and sale of refunding bonds, the court considered it to be more nice than real.

<sup>74</sup> In spite of the decision in the *Doon Case*, the majority of the court in *Pierre v. Dunscomb*, 45 C. C. A. 499, 106 Fed. 611, refused to follow it, the court saying that the contention that the indebtedness was temporarily increased by the sale of the bonds had been repeatedly examined and held untenable. Caldwell, J., in a dissenting opinion, referred to this as judicial insubordination, saying: "The attitude of the majority of the court on this question is an unseemly one. It is a distinct avowal that they will not be bound by the decisions of the Supreme Court of the United States, unless those decisions accord with their views of the law. If such judicial insubordination should be indulged by all inferior courts, the country would speedily be precipitated into a condition of judicial anarchy. The suggestion that the judgment of the Supreme Court in the *Doon Case* is entitled to any less consideration because there was a strong dissent is wholly untenable. The judgment of the majority of the court has the same conclusive and binding force as if it expressed the unanimous judgment of the court. This rule, so essential to a due and orderly administration of justice, has never before been doubted."

37 L.R.A. (N.S.)

In *Lawrence County v. Jewell*, 41 C. C. A. 109, 100 Fed. 905, refunding bonds were held valid, although at the time issued the municipality had exceeded its debt limit, and notwithstanding that the sale of the bonds temporarily increased the amount of the debt while the funding operation was in progress, and notwithstanding that the bonds were sold at a discount of 10 per cent.

<sup>75</sup> *Reynolds v. Lyon County*, 121 Iowa, 733, 96 N. W. 1096. Replying to the criticism that this construction is purely technical, in that the object is not to create a new indebtedness or increase the old, but merely to change its form and decrease the interest, the court said that the difficulty with this suggestion is that a new debt is, for the time being, created, and that one day's continuance of it in addition to that evidenced by the old bonds is as much within the dominion of the letter and spirit of the Constitution as that of a year. It would not do to say that officers may be relied upon to use proceeds derived from the sale of the bonds to wipe out existing obligations. The very object of this article of the Constitution is to protect the interests of the people against their own improvidence and extravagance. If such bonds are not within the prohibition, it would be within the power of dishonest officials, by indirection, to circumvent the fundamental law, and through diversion of the proceeds of new bonds saddle both them and the outstanding debts as burdens on the people.

<sup>76</sup> *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78. The court said that the argument that the indebtedness is instantly increased by the delivery of funding bonds, unless an equal amount of outstanding obligations is thereby extinguished, is without force, where available resources or assets may be considered in determining when additional indebtedness is created. The delivery of funding bonds, when sold at par, operates as an exchange of paper promises to pay for an equal amount of money instantly available for the extinguishment of an equal amount of other promises to pay. Assuming that this money remains in the treasury until used for the purpose intended, there is no moment of time when the financial condition of the city is in any



be misappropriated does not furnish a reason for adopting a different rule.<sup>77</sup>

It has been held in a number of cases that the recitals in refunding bonds that they have been issued in conformity to law will estop the municipality issuing them from questioning their validity on the ground that they increase the debt beyond the constitutional limit.<sup>78</sup> But that question is without the scope of this note.

But whichever doctrine be adopted, refunding bonds, to the extent that their proceeds have been used to extinguish

prior indebtedness, do not increase the indebtedness of a municipality, within the meaning of the debt limit provision.<sup>79</sup>

It has been held that the issuance of new bonds for the purpose of funding a city debt is not the creation of a new indebtedness, within the meaning of the constitutional debt limit provision, where the new bonds are issued to provide for the payment of interest already due, or where coupons are attached for the payment of future interest when it shall become due.<sup>80</sup>

Of course, to render the refunding bonds

substantial manner affected. Notice to holders of matured obligations stops the running of interest, and the city, with its proceeds of funding bonds on hand, is in as good position as it would be if in possession of the evidence of its paid obligations duly canceled. Opinion adhered to on rehearing, 13 S. D. 342, 83 N. W. 335.

<sup>77</sup> Ibid. The court pointed out that the method of exchanging new obligations for the old would be open to the same objection. Should the officer authorized to exchange new for old bonds, disregarding his official duty, accept money instead of outstanding obligations, and should the bonds thus placed upon the market fall into the hands of bona fide purchasers, the city debt would be increased or innocent parties made to suffer. Extravagant or corrupt officers may successfully employ either method to increase taxation or defraud bona fide creditors. Such creditors should never be made to suffer by reason of the misappropriation of funds actually received by officers of the municipality.

The rule laid down in the last-mentioned case was adhered to in *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474, in which it is said that the law of this subject should be regarded as settled in that jurisdiction. To the same effect is *Walling v. Lummis*, 16 S. D. 349, 92 N. W. 1063.

In *Palmer v. Helena*, 19 Mont. 61, 47 Pac. 209, it was held that the issue and sale of new bonds by a city, for the purpose of refunding a like amount of old bonds, does not create a new debt.

<sup>78</sup> But the fact that the debt of a city was temporarily increased by refunding prior obligations will not render the refunding bonds in the hands of innocent purchasers invalid, where, by exchanging new bonds for the old obligations, they would have been legal, the refunding bonds reciting that they had been issued in conformity to law. *Huron v. Second Ward Sav. Bank*, supra. The court said that if, upon any theory, the bonds of the municipality could be valid, an innocent purchaser has a right to presume that they are so, and that the recitals in them are true, and after he has completed his purchase, the presumption is conclusive on the corporation.

<sup>79</sup> *Ætna L. Ins. Co. v. Lyon County*, 82 Fed. 929.

The fact that the new bonds are issued 37 L.R.A.(N.S.)

before the old are all paid and canceled does not increase the debt of the state to the extent that the old obligations are outstanding at the time the new bonds are issued, where the money received from the sale of the new bonds is not only placed in the treasury, but actually appropriated to the payment of the old bonds, since the outstanding bonds are to be deemed paid in effect. *Robertson v. Tillman*, 39 S. C. 298, 17 S. E. 678.

Obligations executed by a city for the purpose of funding its outstanding indebtedness do not increase the indebtedness of the city, where, when delivered, the old debts are taken up and extinguished. *Tyler v. Jester*, 97 Tex. 344, 78 S. W. 1058.

<sup>80</sup> *Powell v. Madison*, 107 Ind. 106, 8 N. E. 31. The court said that interest is the premium allowed by law for the use of money. It is accessory or incident only to the principal debt upon which it accrues. The principal is a fixed sum, and the interest, as the accessory or incident, is necessarily an accruing one. The obligation to pay interest is in many instances imposed by law; and whether so imposed or resulting from a special contract, such an obligation becomes an incidental part of the contract for the payment of the principal sum, and continues to run until such principal sum is fully paid, or such contract is otherwise discharged, the principal sum being in all cases the basis upon which accruing interest runs. After interest has accrued, the parties may by agreement change its character to that of principal, and then interest upon the amount so transformed may commence to run.

Since § 10 of the Constitution of the United States declares, among other things, that no state shall pass an *ex post facto* law, or law impairing the obligation of contracts, a constitutional debt limit provision could not have any retrospective effect upon an existing indebtedness of a municipal corporation at the time of its adoption. For the same reason, such a provision does not impair, and was presumably not intended to impair, the obligation of any of the contracts into which municipal corporations had already entered, whether for the payment of a principal sum of money or of interest which had accrued, or might thereafter accrue thereon. Ibid

legal, the obligations of which they are to take place must have been legal. It has been held that a refunding bond issue is illegal, if part of the debt funded is unlawful because made in excess of the constitutional limit.<sup>81</sup> And where the original obligation was contingent or has lapsed, it has been held that the new bonds create an additional debt.<sup>82</sup>

In New York it has been held that a debt created by a city for the purchase of grounds for a market, represented by a single instrument, is not a funded debt, within the meaning of a statute forbidding a municipal corporation to contract any "funded debt" except in a specified manner.<sup>83</sup> But it is unnecessary to draw this distinction in reference to provisions limiting the amount of indebtedness, for manifestly if the obligation to be canceled were represented by a single instrument, which was to be replaced by a single instrument, the rule would be the same as if the transaction were divided into so many parts or shares.

### VIII. Miscellaneous obligations.

#### a. In general.

A statute authorizing a county to levy a special tax for the purpose of paying the interest and principal of indebtedness al-

ready authorized has been held not to create a new indebtedness within the meaning of a section of the Constitution limiting a county's indebtedness, since its purpose is simply in aid of the original act in its due administration.<sup>84</sup> And it has been held that a provision in a charter that "the common council shall not make, or permit to accrue, any debt or liability which in the aggregate, with all the former debts or liabilities, exclusive of the funded debts, shall exceed . . . [a certain sum] over and above the annual estimated revenue of the city at the time of incurring such debt or liability," does not mean that the floating debt of the city, prior to the passing of the charter, is to be taken into consideration in making up the indebtedness, but applies to debts thereafter created.<sup>85</sup> A constitutional provision that no county shall contract any debt by loan in any form, and that indebtedness contracted in any one year shall not exceed the rate of the taxable property in such county specified, and that the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of the Constitution, should not at any time exceed twice the amount specified, it has been declared, is not to be regarded as a limitation of county indebtedness by loan only.<sup>86</sup> Certificates of indebtedness for temporary loans bearing inter-

<sup>81</sup> Leavitt v. Somerville, 105 Me. 517, 75 Atl. 54.

<sup>82</sup> But bonds of a state to relieve the state from its obligation to guarantee bonds of a railroad create a new debt, there having been no absolute debt previous thereto. Williams v. Louisiana, 103 U. S. 637, 26 L. ed. 595.

So, an issue of bonds to extinguish an obligation of the state to indorse or guarantee bonds of a railroad company which had lapsed because of failure of the company to construct its road within the required time create an indebtedness of the state, within the meaning of the Constitution. State v. Clinton, 28 La. Ann. 393; State ex rel. Citizens' Bank v. Funding Board, 28 La. Ann. 249.

<sup>83</sup> Ketchum v. Buffalo, 14 N. Y. 356, Selden, J., said: "The term 'fund' was originally applied to a portion of the national revenue set apart or pledged to the payment of a particular debt. A 'funded debt,' therefore, was a debt for the payment of the principal or interest of which some fund was appropriated. . . . The term 'funding,' however, has been sometimes applied in this country to the process of collecting together a variety of outstanding debts against corporations, the principal of which was payable at short periods, and borrowing money upon the bonds or stocks of the corporation to pay them off; the principal of such bonds or stocks being made payable at 37 L.R.A. (N.S.)

periods comparatively remote. But I am not aware that, even in common parlance, the term has ever been made use of to describe an ordinary debt growing out of a transaction with one individual and represented by a single instrument, as in this case. I think it is essential to the idea of a funded debt, even under the broadest use of that term, that the debt should be divided into parts or shares, represented by different instruments, so that such parts or shares may be readily transferable."

<sup>84</sup> Sisk v. Cargile, 138 Ala. 164, 35 So. 114.

<sup>85</sup> Soule v. McKibben, 6 Cal. 142.

<sup>86</sup> People ex rel. Seeley v. May, 9 Colo. 80, 10 Pac. 641.

But where the original charter of a city gave the council the power to borrow on the credit of the city, not to exceed \$20,000, and also to appropriate money, and to provide for the payment of all debts and expenses of the city, and by an amendment it was provided that no debt beyond the amount authorized shall be incurred unless the question of contracting the same should be submitted to the people, it was held that this statute put a limit to the creation of municipal liabilities in a specified manner, that is, by borrowing money, and did not prohibit the creation of a debt for necessary buildings. Rice v. Keokuk, 15 Iowa, 579.

To raise a sum of money by the pledge or hypothecation of stocks held by a city is to borrow it, and the person from whom

est, intended to be paid out of the revenue of the current year, but not so stated in the certificates, and upon which money was loaned to the city to meet its expenses, have been held invalid, where issued when the city has reached its debt limit.<sup>87</sup>

The fact that a statute authorizing the construction of a state capitol provides that the entire cost shall not exceed a specified amount, which would be in excess of the debt limit, it has been held, does not make the act unconstitutional, since such an act does not authorize the expenditure of the sum of money, but only indicates the amount within which the work is to be constructed, and furnishes a guide in the adoption of a plan for the building. The act is valid, for the commissioners are authorized to contract and to expend only within the debt limit, although a plan may be adopted by them which may require in its execution a sum in excess of the debt limit.<sup>88</sup>

The Maine Constitution, which limits the indebtedness of towns and cities, does not

apply to trust funds, since it is expressly provided that the section shall not be considered as applying to any fund received in trust by a city or town.<sup>89</sup>

An implied liability for the value of services as attorney at law is within the inhibition of the constitutional provision forbidding the incurring of any indebtedness or liability exceeding in any year the income and revenue provided for it for such a year.<sup>90</sup>

Indebtedness contracted or incurred for necessary and lawful purposes, by any political or municipal corporation or any subdivision of the territory of Oklahoma, created and existing under and by virtue of the organic act and the laws of the territory of Oklahoma, prior to the taking of the first assessment for the purpose of territorial and county taxation, was held valid, if issued within 4 per centum of the value of said taxable property as ascertained when said first assessment was made, and warrants may be issued in evidence thereof.<sup>91</sup>

the money is obtained loans it, and the purpose of the transaction cannot be disguised by calling it "furnishing" and "returning" the money. *Baltimore v. Gill*, 31 Md. 375.

<sup>87</sup> *Law v. People*, 87 Ill. 385. The court said that the framers of the Constitution could not have used the term "indebtedness" in the sense that the sum must be due, to be indebtedness, as this is not the generally received meaning of the word, and to apply such a meaning would remove all limit on the amount of indebtedness that might be incurred, except to the extent of the credit of the municipality. Such debts, declared the court, are usually created on time, and if such are not prohibited, then, if persons could be found to purchase such paper, the indebtedness could be increased even beyond the value of all the property in the city. Hence such could not have been the meaning attached to the language by those who adopted the provision.

A proviso that the debt limit provision shall not be considered as applicable to temporary loans to be paid out of money raised by taxation during the year in which they are made will not permit a loan temporary in its inception to be carried over to another year. *Blood v. Beal*, 100 Me. 30, 60 Atl. 427. It was the contention in this case that the temporary loan may be paid at any time, provided that it is paid out of taxation raised during the year in which the loan was made. But the court said that it would be unsafe to assume that any sum of money that had been collected through taxes, and turned into the city treasury, should be regarded as a credit upon such loan until it was either actually paid or specially set apart, by a vote of the city council, for the special purpose of application to such payment.

Where a statute authorizes the creation,  
37 L.R.A. (N.S.)

under certain circumstances, of a funded debt in a certain amount, and prohibits the creation of a second funded debt until the first has been paid, where it amounts to 1 per cent of taxable property, and the language of the section is that no second loan shall be made "as above provided" until the first is paid, this does not interfere with the incidental power of the county to which it applies to make temporary loans to meet temporary emergencies. *Miller v. Dearborn County*, 66 Ind. 162.

<sup>88</sup> *Koppikus v. State Capitol Comrs.* 16 Cal. 248.

<sup>89</sup> *Ayer v. Bangor*, 85 Me. 511, 27 Atl. 523.

The use of a trust fund appropriated to the support of a public library, for the purpose of erecting a city hall or building, does not increase the municipal indebtedness within the meaning of the Constitution, since the municipality is absolutely liable for the fund, whether it is invested or used for the purpose proposed or not. *Ibid.*

<sup>90</sup> *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612. To the same effect is *Buck v. Eureka*, 119 Cal. 44, 50 Pac. 1065, although the point was not necessary to the decision, in the earlier report of the case.

<sup>91</sup> *Hoffman v. Pawnee County*, 3 Okla. 325, 41 Pac. 566, followed in *Sauer v. McMurry*, 4 Okla. 447, 46 Pac. 576.

A newly organized county in this territory has the power to incur a valid indebtedness, and issue warrants as an evidence thereof, prior to the making of an assessment of the taxable property therein for the purposes of territorial and county taxation, to meet the ordinary and necessary expenses of carrying on and conducting the function of county government; and the incurring of such indebtedness is not in

Sums charged for mileage and *per diem* of the commissioners, and the expenses of county surveyors, it has been held, should not be added to the contract price in arriving at the amount of indebtedness incurred on account of the construction of a bridge, since necessary services of county officers, as such, devoted to a project which the county has in hand, are a part of their ordinary duties, within the meaning of the constitutional provision that "no county shall incur any indebtedness or liability for any single purpose, to an amount exceeding ten thousand dollars (\$10,000), without the approval of a majority of electors thereof, voting at an election to be provided by law."<sup>92</sup>

Overdrafts on a fund over which the common council has no control except to pay regular demands upon it have been held to constitute a debt against the city, within the meaning of the debt limit provision of the Constitution.<sup>93</sup>

It has been held that no indebtedness within the meaning of the Constitution is created by a statute requiring the payment of local salaries of a public service commission, where the money for the payment of the same is to be raised by taxation in the manner in which other moneys are raised by taxation, for other government purposes.<sup>94</sup>

An act providing for the refunding of taxes illegally collected was held void because not providing for ways and means of payment of the current interest and of the

principal when due, as required by the Constitution.<sup>95</sup>

A contract for work on a school building, it has been held, cannot be said to be invalid because the indebtedness of the district, added to the indebtedness which it is proposed to incur, would exceed the debt limit.<sup>96</sup>

And it has been held that a bonded indebtedness exceeding the debt limit of a school district is void only as to the amount exceeding the limit;<sup>97</sup> and that a provision that no municipal corporation "shall hereafter create or assume an aggregate indebtedness" beyond a certain amount operates prospectively only.<sup>98</sup>

A provision forbidding a corporation to become indebted in any manner or for any purpose prohibits an indebtedness in the form of a bond, note, or any kind of obligation, whether it be in writing or by parol, express or implied.<sup>99</sup>

#### *b. Purchase of equity of redemption.*

It seems that the debt limit provisions cannot be evaded by the purchase of the equity of redemption in property only, where the full value of the property is such that it cannot be bought without carrying the municipality beyond the amount allowed by the Constitution. It was held that where the price of an electric lighting plant which a village desires to acquire cannot be purchased outright, because it is beyond the debt limit, the village cannot,

violation of § 4 of the act of Congress of July 30, 1886, which prescribes, among other things, that no county shall ever become indebted in excess of 4 per centum of the value of the taxable property therein, to be ascertained from the last assessment for territorial and county taxes previous to the incurring of such indebtedness. *Hall Lithographing Co. v. Roger Mills County*, 8 Okla. 378, 58 Pac. 620; *Roger Mills County v. Rowden*, 8 Okla. 406, 58 Pac. 624; *Hoffman v. Pawnee County*, 3 Okla. 325, 41 Pac. 566; *McMurtry v. County Comrs.* 6 Okla. 60, 55 Pac. 1069.

<sup>92</sup> *Jenkins v. Newman*, 39 Mont. 77, 101 Pac. 625.

<sup>93</sup> *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341. "In other words," said the court, "the council had no right to divert the money belonging to funds such as the school fund and the like, to pay overdrafts on other funds, and consider it as a debt paid, when attempting to ascertain its financial condition in relation to the debt limit. It would seem to be very clear that when money is raised for a special purpose, under an express limitation to a particular use, it cannot lawfully be used for any other purpose. Any diversion of it to other purposes, in order to increase the debt limit, cannot be tolerated. The debt remains

in point of law, and must be considered just as substantial as though it had never been paid. Borrowing the money from the prohibited fund does not extinguish the debt. Any other holding would commit us to the palpable absurdity of saying that a person may pay his debts by taking money from one pocket and putting it in the other."

<sup>94</sup> *Gubner v. McClellan*, 130 App. Div. 716, 115 N. Y. Supp. 765.

<sup>95</sup> *State ex rel. Blackmore v. Graham*, 25 La. Ann. 625.

An ordinance of a municipal corporation, which provides for the payment of money by the town without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of the Constitution. *Murphy v. East Portland*, 42 Fed. 308.

<sup>96</sup> *Peck-Williamson Heating & Ventilating Co. v. Board of Education*, 6 Okla. 279, 50 Pac. 236.

<sup>97</sup> *McPherson v. Foster Bros.* 43 Iowa, 48, 22 Am. Rep. 215.

<sup>98</sup> *Tiffin v. Griffith*, 74 Ohio St. 219, 77 N. E. 1075.

<sup>99</sup> *Mosher v. Independent School Dist.* 44 Iowa, 122, cited with approval in *Windor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476.

by causing the plant to be mortgaged for the amount above the debt limit, thereafter purchase the equity, although it is provided that the village shall not assume and agree to pay the mortgage, since this is a transparent scheme to avoid the Constitution.<sup>100</sup> The court said that the mortgage debt was nevertheless a debt of the village, since the village would have to pay the debt for which the property was pledged, or have it taken away.

In Massachusetts a city desiring to purchase property to the amount of \$228,000, being unable to do so on account of the constitutional debt limit provision, arranged with the owners that they should mortgage the property, worth \$202,000, to third parties, payable with interest after three years from the conveyance to the city, with the privilege reserved in the mortgages to the owners, their grantees and assigns, to pay the mortgages and interest at maturity, or earlier if they should so desire. The city was to pay \$24,000 for the purchase of the equity in the property, which sum it could pay without extending its liability beyond the debt limit. The mortgages were to be placed on the property before it was conveyed to the city, and it was arranged that the property should be conveyed subject thereto, but it should not be mentioned therein, and that the deeds should contain a statement that the city was not to be liable in any way for the payment of the mortgages or the interest thereon. It was held that this transaction was in reality a sale of the property and created an indebtedness to the full amount.<sup>1</sup> "It is true," said the court, "that no action could be maintained against the city for the balance of the purchase price, and that in that sense the

city would not be indebted for such balance. But the property when conveyed will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers would ultimately be obliged to pay it as contemplated. In a sense, therefore, . . . the city would be indebted for the sums secured by the mortgages. Certainly no account of its assets and liabilities would be correct which omitted this property from the one, and the amount for which it was mortgaged from the other."

### c. Interest.

It is generally held that interest is not to be taken into consideration, although expressly reserved in the contract, in determining whether a city has reached its debt limit.<sup>2</sup> The indebtedness created by the issuance of bonds is the face value of the bonds. The term "indebtedness" as used in the Constitution was not intended to include future interest. The lawmakers, it has been said, were not looking at the incident of the indebtedness, but to the indebtedness proper.<sup>3</sup> Interest coupons do not constitute indebtedness within the meaning of the constitutional debt limit provision, and the fact that they may be detached from the principal obligation does not change their character. If the bonds when issued are within the debt limit, they cannot be rendered illegal because, by lapse of time, interest is to become due.<sup>4</sup>

Interest is not a debt within the meaning

<sup>100</sup> Evans v. Holman, 244 Ill. 596, 91 N. E. 723.

<sup>1</sup> Browne v. Boston, 179 Mass. 321, 60 N. E. 934.

If the city had itself mortgaged the property, and had stipulated in the mortgage that it should not be liable, and that the mortgagee should look to the land alone, such a transaction would be within the debt limit provision, and would not be upheld. *Ibid.*

The object of the statute is to protect the taxpayer by confining the indebtedness of the city within a prescribed limit. The manner in which the indebtedness is created is immaterial, if its result is to subject the city to a present liability, direct or indirect, which the taxpayers will eventually be called upon to meet. *Ibid.*

For mortgage debt as part of indebtedness, see note to Eddy Valve Co. v. Crown Point, 3 L.R.A. (N.S.) 684.

<sup>2</sup> Carlson v. Helena, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233.  
37 L.R.A. (N.S.)

<sup>3</sup> Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441.

<sup>4</sup> Durant v. Iowa County, 1 Woolw. 69. Fed. Cas. No. 4,189.

Interest coupons attached to bonds do not constitute indebtedness within the meaning of the Constitution. *Blanchard v. Benton*, 109 Ill. App. 569. The court said that interest on municipal indebtedness is a mere incident of property, and not to be reckoned as part of an indebtedness.

That interest is allowed on warrants does not make them void on the theory that the interest creates a debt beyond the constitutional limit. *State ex rel. Ash v. Parkinson*, 5 Nev. 15. "If it be true," said the court, "that the issuance of a warrant creates no debt, and that no debt within the purview of the Constitution pre-existed. . . . how can the addition of interest make that an unconstitutional debt which was not so before? Interest constitutes no part of the original demand; it is simply a statutory allowance for delay. If the money be in

of the Constitution, until it is earned and becomes due.<sup>5</sup> The court said that any other construction would lead to most startling results. Many business men and corporations could be forced to the wall if the interest they had agreed to pay on loans made was to be considered a present indebtedness. Men who had reported their financial standing to obtain credit could be called to account for not having taken into consideration their interest obligations which were to become due at some time in the future. There would be no end to the complications that might arise, and not the least would be the overturning of municipal obligations already incurred. Interest rests upon much the same grounds as contracts for light and water. There may exist an obligation to pay, but under the Constitution, the indebtedness as to interest comes into existence each year as the obligation matures. It cannot be said to be a present indebtedness, under any reasonable construction of the Constitution. But it would seem that after the interest has been earned, it would become an indebtedness,<sup>6</sup> and although it would not be invalid if the principal obligation were within the debt limit when entered into, it would nevertheless have to be taken into consideration in determining whether the debt limit has been reached.

the treasury, then no interest accrues; if not, the party holding the warrant is compensated for waiting until there is. It may be said that the allowance of interest presupposes a debt, for that there can be no interest except upon some principal; but upon the theory of the cases . . . there is a debt, but not a debt repugnant to the Constitution, as it is only contingent, — a debt existent, but payable only upon the collection of revenues. In this view, as the interest follows the principal; that being contingent, so the interest."

<sup>5</sup> *Herman v. Oconto*, 110 Wis. 660, 86 N. W. 681.

<sup>6</sup> Accrued interest on corporate indebtedness is a debt within the meaning of the Constitution. *Stone v. Chicago*, 207 Ill. 492, 60 N. E. 970.

The debt of an individual, corporation, state, etc., when the word is taken in the sense that it ordinarily conveys to the popular mind, is the principal and accrued interest on a given date. Unearned interest is not in such a sense a part of the debt. *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803.

The debt of a municipal corporation, within the meaning of that provision of the Constitution which prohibits such a corporation from incurring a debt which exceeds 7 per centum of the assessed valuation of all the taxable property within the municipality, is to be ascertained by adding to the principal of all outstanding indebted-

And if the principal obligation is invalid, it would naturally follow that the interest would also be unlawful.<sup>7</sup>

#### d. Judgments.

Judgments rendered against municipalities are evidence of debts which must be taken into consideration in determining whether the debt limit has been reached;<sup>8</sup> but it has been held that county warrants given in satisfaction of judgments against the county are not rendered invalid by the fact that, at the time the judgments were obtained, the county had reached the debt limit. The question was held to be whether the debt limit had been reached at the time the contract was made for which the judgments were rendered.<sup>9</sup> The mere fact that the aggregate of judgments against a township exceeds the debt limit is not conclusive of the validity of the demands upon which the judgments are founded.<sup>10</sup> A judgment against a municipal corporation is not in itself the creation of a debt, but only the evidence of a pre-existing indebtedness.<sup>11</sup>

In a number of cases it has been held that a judgment cannot be resisted on the ground that it was rendered for a debt beyond the debt limit,<sup>12</sup> but this doctrine rests on estoppel, which is beyond the scope of this note.

ness, the amount of all accrued interest that may be past due and payable on the day the amount of the debt is to be fixed. In ascertaining the amount of such debt, future interest, which is not due on the day it becomes necessary to fix the sum of the indebtedness, is not to be counted. Unearned interest is not, within the true intent and meaning of the Constitution, a part of the debt of the municipality. *Ibid*.

<sup>7</sup> In *Law v. People*, 87 Ill. 385, it was held that a certificate of indebtedness being void because issued after the city had reached its debt limit, the interest must be equally void, and the levy of a tax to pay it was as effectually prohibited as incurring the principal debt. The court said that the interest is as much a debt as the principal on which it accrues.

<sup>8</sup> Judgments against a city constitute debt within the meaning of the constitutional debt limit provision. *Stone v. Chicago*, 207 Ill. 492, 60 N. E. 970.

<sup>9</sup> *Wilder v. Rio Grande County*, 41 Fed. 512.

<sup>10</sup> *Plains Twp's Appeal*, 21 Pa. Super. Ct. 68.

<sup>11</sup> *Edmundson v. Independent School Dist.* 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671; *Thompson v. Independent School Dist.* 102 Iowa, 94, 70 N. W. 1093.

<sup>12</sup> It is no defense to an application for a writ to compel the payment of a judgment against a town, that the contract upon which it was founded was void because,

**IX. Coincidence of boundaries of municipalities.**

The limitation of indebtedness placed upon corporations, enumerated in a Constitution, applies to each standing as a separate and distinct political division, and not to another and larger municipality of which they form but an integral part.<sup>13</sup> So, it has been held that, in determining

whether a municipal corporation has reached its debt limit, the state debt is not to be considered;<sup>14</sup> and that a county debt is no part of the debt of a city within its borders, or *vice versa*.<sup>15</sup> If a school district is a distinct and independent corporation, it is held that its indebtedness is distinct from that of the larger corporation of which it forms a part, otherwise not,<sup>16</sup>

when entered into, the town had exceeded its debt limit, since a judgment bars not only every defense that was raised, but every defense that might have been raised. *Smith v. Ormsby*, 20 Wash. 396, 72 Am. St. Rep. 110, 55 Pac. 570.

In an action to enforce the collection of bonds or coupons issued in payment of a judgment entered by default against a municipal or quasi municipal corporation, the judgment conclusively estops the corporation from making the defense that the indebtedness evidenced by the judgment was in excess of the amount which the corporation had the power to create, under the limitations of the Constitution of the state in which it was incorporated. *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567.

A judgment, and the issuance of mandamus to compel the levy of a tax to pay for the same, are "conclusive upon the question whether the levy ordered was in excess of the statutory power of the school district. *Holt County v. National L. Ins. Co.* 25 C. C. A. 469, 49 U. S. App. 376, 80 Fed. 686. <sup>13</sup> *Straw v. Harris*, 54 Or. 424, 103 Pac. 777.

The constitutional prohibition that "no county, city, school district, or other municipal corporation, shall become indebted," etc., applies to each corporation singly, and not to two or more in the aggregate. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

<sup>14</sup> *Lancaster School Dist. v. Robinson-Humphrey Co.* 64 S. C. 545, 42 S. E. 998.

<sup>15</sup> In *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733, the court said *arguendo* that the Iowa Constitution recognizes counties and other political and municipal corporations as being distinct entities. Although none can incur an indebtedness in excess of 5 per centum of the value of taxable property within its limits, yet the same territory may be included within the limits of different corporations, as those of a county, city, town, and school district, and be subject to taxation for the debt of each.

In *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682, it was held that a county debt was no part of the debt of the city, of which county the city was a part.

In computing the indebtedness of a county to ascertain whether it has exceeded the constitutional limit, the debt of a city forming part of it is not to be included. The constitutional provision is to be taken distributively, and not collectively. *Adams v. East River Sav. Inst.* 136 N. Y. 52, 32 N. E. 623. The court said that when a coun-

ty containing, as the county of Kings does, a city of more than 100,000 inhabitants, desires to create an additional debt, the 10 per cent limitation is not reached until the county debt equals 10 per centum of the valuation of all the real estate in the county, including, of course, the real estate in the city which forms a part of the county; but in ascertaining when the limitation is reached in such a case, the debt of the city cannot be charged against the county any more than its proportionate share of the state debt or the debt of the several towns within its limits.

<sup>16</sup> The indebtedness inhibited by the Constitution is that contracted by the city for its own purposes, and does not refer to the indebtedness of a school district, an independent and distinct corporation organized for a special purpose not within the province of the city government proper. The precedents generally are to that effect. *Valley v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

Where by statute a school district is made a body politic and corporate, separate and distinct from the city, governing itself, a bonded debt for school purposes is no part of the debt of the city, although the school district is composed entirely of the territory of the city. *Todd v. Laurens*, supra. The court thought the law would be subserved by allotting such proportion of the debt to the city as its proportion of the property assessed for taxation might require.

Interest-bearing promissory notes executed by the trustees of a school city, which is part of the civil city, in the name of the school city, do not constitute an applied liability of the civil city, to be taken into consideration in determining the debt limit of the city, on the theory that the trustees were not authorized by law to contract the indebtedness for which the notes were given, where the civil city is not shown in any manner to have authorized the execution of such notes, or in any way to have been instrumental in contracting the indebtedness. *Heinl v. Terre Haute*, 161 Ind. 44, 68 N. E. 450.

Where a school district is formed by uniting several common school districts, the amount of the indebtedness of the common school districts cannot affect the indebtedness of the high school districts, unless their aggregate exceeds 15 per centum of the value of all the taxable property of the entire territory. *Welch v. Getzen*, 55 S. C. 156, 67 S. E. 294.

Notwithstanding the boundaries of the

and this, it would seem, is the rule applicable to all cases.<sup>17</sup>

Section 5 of article 10 of the South Carolina Constitution of 1895 provides that whenever there shall be several political divisions or municipal corporations covering or extending over the same territory or portions thereof, possessing the power to levy a tax or contract a debt, then each of

such political divisions or municipal corporations shall so exercise its power to increase its debt under the foregoing 8 per cent limitation, that the aggregate debt over and upon any territory of the state shall never exceed 15 per cent of the value of all taxable property in such territory, as valued for taxation by the state.<sup>18</sup>

school corporation coincide with the boundaries of the city, the indebtedness of the former cannot be considered in ascertaining whether the indebtedness of the latter exceeds the constitutional limitation. *Hyde v. Ewert*, 16 S. D. 133, 91 N. W. 474.

In *Richmond v. Powell*, 101 Ky. 7, 27 S. W. 1, it is held that a provision in the Constitution forbidding any municipality from becoming indebted in any manner or for any purpose, in an amount exceeding the income for the year, without the assent of two thirds of the voters, etc., applies to an indebtedness created by the city council of a city of the fourth class for school purposes.

The last-mentioned case (101 Ky. 7) was distinguished in *Ex parte Newport*, in which it is pointed out that the power and authority of school boards in cities of the fourth class are entirely unlike that exercised by school boards in cities of the second class, and that the bonds in that case were issued by the city itself.

The decision in the *Powell Case*, that the Constitution applies to all indebtedness including that created for school purposes, although containing a provision that a tax rate of cities and towns, etc., "for other than school purposes," shall not exceed a certain rate, was approved in *Com. v. Louisville & N. R. Co.* 105 Ky. 206, 48 S. W. 1092.

<sup>17</sup> That a city within a township is indebted up to the constitutional limit will not prevent the township from appropriating a sum of money in aid of a railroad, on the theory that this will increase the indebtedness of the city beyond the debt limit. *Irwin v. Lowe*, 89 Ind. 540. The court said that the city was an integral part of the township, but that it was not the township; nor was the township the city. They were distinct corporations, with distinct powers, privileges, and rights. The debt of the township which included the

city within its limits was not the debt of the city, in the sense in which that term is used in the Constitution.

Where bonds issued for the construction of free gravel roads are payable out of a particular fund to be raised by special taxes assessed upon the taxable property of a taxing district, the mere fact that the boundaries of a taxing district and of a township are the same, and that the property within these boundaries is liable to be assessed with the benefits according to its value, does not make the bonds the debt of the township. *Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124.

But where the park board of a city is not a distinct municipal corporation, its indebtedness is that of the city, within the meaning of the debt limit provision of the Constitution. *Orvis v. Park Comrs.* 88 Iowa, 674, 45 Am. St. Rep. 252, 56 N. W. 294.

A magisterial district cannot, by subscription to works of internal improvement, become indebted up to 5 per cent of its taxable property, and, in addition, the county up to 5 per cent of its whole taxable property; but such district subscription, for the purpose of the limitation upon county indebtedness fixed by § 8, article 10, of the Constitution, is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation. *Neale v. County Ct.* 43 W. Va. 90, 27 S. E. 370.

<sup>18</sup> *Todd v. Laurens*, supra.

But in respect to this 15 per cent limitation, the state debt is not to be apportioned to any such political division or municipal corporation as a part of the debt to be estimated in ascertaining whether or not such limitation has been reached. *Lancaster School Dist. v. Robinson-Humphrey Co.* supra.

H. C. S.



**NEW HAMPSHIRE SUPREME  
COURT.**

EDGAR O. FOGG

v.

BOARD OF EDUCATION OF LITTLETON  
et al.

(76 N. H. 296, 82 Atl. 173.)

**School — duty to transport pupils.**

Although under a statute requiring school districts to provide such schools as will give all the scholars of the district as nearly equal advantages as may be practicable, and authorizing expenditure of a portion of the school money for transporting pupils to and from school, a pupil living too far from a school to walk has no absolute right to transportation, yet the

district must furnish him such transportation as it can without substantially decreasing the school advantages of the other scholars in the district.

(January 2, 1912.)

**T**RANSFER by the Superior Court for Grafton County for the opinion of the Supreme Court, upon exceptions by plaintiff after dismissal, of a petition for mandamus to compel defendants to furnish to plaintiff's son some means of education or some means of transporting him to some school in the district. Sustained.

Plaintiff, who lives more than 4 miles from the nearest school, has a son of nine years of age. The distance being too great for him to walk, and the defendants de-

**Note. — Schools: duty of public to furnish free transportation to pupils.**

In the absence of a statute specially enjoining the duty of providing free transportation for school children upon township trustees, such trustees are under no duty to furnish free transportation to pupils, to and from school, under a statute providing merely that "it shall also be cause for transfer, if the nearest school to any child entitled to school privileges shall be more than 1 mile from the residence of such child, and there be a school in an adjoining corporation within  $\frac{1}{2}$  mile, unless free transportation is provided;" nor are such trustees authorized to provide such transportation, under a statute authorizing them to levy a special tax, in their respective townships, "for the construction, renting, or repairing of schoolhouses, for providing furniture, school apparatus, and fuel therefor, and for the payment of other necessary expenses of the school, except tuition,"—although 150 children of school age in the township live over 1 mile from the school building, 100 over 2 miles, 30 over 3 miles, and several over 4 miles, so that, unless free transportation is provided to and from school, many of them will be unable to attend, and some will be transferred, at the expense of the township, to some other school corporation. State ex rel. Beard v. Jackson, 168 Ind. 384, 81 N. E. 62; Nelson v. State, 168 Ind. 491, 81 N. E. 486.

And a town is not bound to provide transportation to and from school for the children of school age of lighthouse keepers living on a small island within the limits of the town, but about a mile distant from the mainland, on which the schoolhouse is located,—especially where access from the island to the mainland is always inconvenient, and at certain seasons of the year impossible. Newcomb v. Rockport, 183 Mass. 74, 66 N. E. 587.

Nor, in the absence of a statute expressly providing that school funds may be used for the purpose of hauling children to and from school, and in the absence of a vote

by the people of the school district authorizing such use, have the school directors any right or authority to use school funds for hauling the children to and from school, although some of them live  $3\frac{1}{2}$  miles from the schoolhouse, under a statute providing merely that it shall be their duty to establish and keep in operation a sufficient number of schools for the accommodation of all children in the district, "and shall secure for all such children the right and opportunity to an equal education in such free schools." Mills v. School Directors, 154 Ill. App. 119.

A statute, however, providing for an allowance to the parents or guardians of pupils residing 3 or more miles from the schoolhouse, of a limited compensation for conveying their children to school, to be paid out of public funds, is not unconstitutional on the ground that it diverts money raised by taxation to private and individual uses. School Dist. No. 3 v. Atzenweiler, 67 Kan. 609, 73 Pac. 927.

Nor is an act containing such provision in one of its sections, while all the other sections thereof relate to the subject of depopulated school districts, unconstitutional on the ground that it contains two subjects.—the one general subject of the act being schools. Ibid.

But under most, if not all, of the statutes providing for the free transportation of pupils, such transportation is a matter of sound discretion with the proper school authorities, and not a matter of right. Thus, under a statute providing that a town may appropriate money "for conveying pupils to and from public schools, . . . the same to be expended by the town committee in its discretion," a town is not under any obligation to make such an appropriation, nor, if it does, is the school committee bound to act. Newcomb v. Rockport, 183 Mass. 74, 66 N. E. 587.

And under a statute authorizing a board of school directors to furnish transportation for pupils of schools which, in the discretion of the board, have been closed by reason of small attendance, while a board may discharge its duty to furnish suitable

clining to convey his son, and finding it impracticable to provide a school in the district, plaintiff brought this action.

Further facts appear in the opinion.

Mr. Edward J. Cummings, for plaintiff:

If the school board are unable to so arrange the schools as to give all the scholars reasonably equal advantages, they may, by providing conveyance, render such advantages as equal as practicable. But if the amount of expenditure permitted for that purpose is insufficient to provide the necessary transportation, the remedy is to be found in an additional number of schools which will require less expenditure for the conveyance of scholars.

State v. Hall, 74 N. H. 61, 64 Atl. 1102.

and adequate school facilities and accommodations for all of the school children of their district, by hiring children of a sub-district transported to another school at a cost per pupil not to exceed the cost per pupil of maintaining a school in the sub-district in which they reside; they are not obliged to do so, but may either provide a school in the subdistrict, or provide reasonable school facilities in another district, in the manner pointed out by the statute. *Re West Fallowfield School Dist.* 29 Pa. Co. Ct. 600.

So, under a statute providing that "said schools shall be within the limits of said town, and at such places, and held at such times, as in the judgment of the board of directors will best subserve the interests of education and give all the scholars of the town as nearly equal advantages as may be practicable; and said school board may use a portion of the school money, not exceeding 25 per cent thereof, for the purpose of conveying scholars to and from such schools," the question of transporting scholars is left to the discretion of the school directors, and they cannot be compelled by mandamus to transport pupils living two and one quarter miles from the school, where they have exercised their best judgment and discretion in locating the schools for the town, and in conditionally declining to provide transportation for such pupils until it can be ascertained by experience whether the distance is too great for them to travel. *Carey v. Thompson*, 66 Vt. 665, 30 Atl. 5.

And in Iowa, under a statute providing that "when there will be a saving of expense, and children will also thereby secure increased advantages," the board of directors of the district township "may arrange with any person outside the board for the transportation of any child to and from school in the same or in another corporation, and such expenses shall be paid from the contingent fund," a board will not be required by mandamus to provide transportation for a child at the cost of the district,—at least in the absence of a showing that the board has actually found that a

Messrs. William H. Mitchell and Smith & Smith, for defendants:

There was no abuse of discretion in this case:

*Carey v. Thompson*, 66 Vt. 665, 30 Atl. 5.

Walker, J., delivered the opinion of the court:

"The school board of every district shall provide schools at such places within the district, and at such times in each year, as will best subserve the interests of education, and will give to all the scholars of the district as nearly equal advantages as may be practicable. They may use a portion of the school money, not exceeding 25 per cent, for the purpose of conveying scholars to and from the schools." Pub.

saving of expense would be effected, and increased advantages secured, by the transportation of the child, or that a saving of expense or increased advantages would, in fact, be effected thereby,—but the remedy, upon the board's refusal to make such an arrangement as is contemplated by the statute, is by appeal to the county superintendent. *Queeney v. Higgins*, 136 Iowa, 573, 114 N. W. 51.

Under the section of the New Jersey school law providing that "whenever in any district there shall be children living remote from the schoolhouse, the board of education of such district may make rules and contracts for the transportation of such children to and from school," the failure of the board of education to provide transportation for children living remote from the schoolhouse is not the failure to "provide suitable school facilities and accommodations for all children residing in the district and desiring to attend the public schools therein," within the meaning of the section authorizing the county superintendent of schools, for such failure, to transmit to the custodian of the school moneys of the school district an order directing him to withhold from the district all moneys in his hands to the credit of such school district, received from the state appropriation or from the school tax, until such suitable facilities or accommodations shall be provided. *Board of Education v. Atwood*, 74 N. J. L. 638, 65 Atl. 999, affirming 73 N. J. L. 315, 62 Atl. 1130.

And under a statute providing that when a school has been discontinued on account of small attendance, it shall be the duty of the township trustee to provide and maintain means of transportation for all such pupils as live at a greater distance than 2 miles, and for all pupils between the ages of six and twelve that live less than 2 miles, and more than 1 mile, from the schools to which they may be transferred as a result of such discontinuance, a township trustee cannot be compelled to cause such children to be taken from and returned to their several homes, but he fulfils his duty by causing a proper conveyance to be

Stat. chap. 92, § 1. One contention of the plaintiff is that the last sentence of this statute is mandatory, and not permissive, and that upon a true construction of the statute the word "may" should be given the force of "must," when there are scholars who live at a greater distance from an established school than it is reasonable for them to walk. The argument in effect is that, if there is a single scholar who is unable to walk from his home to the nearest school on account of the distance, the school board has no discretion in the matter, but is obliged to transport him to and from school, at an expense, if necessary, not exceeding the statutory limit. It is said that the object of the statute is to provide for such an arrangement of schools in the town district as well "give to all the scholars of the district as nearly equal advantages as may be practicable." But this statutory language necessarily implies that the board is invested with a large discretion in the establishment of schools, and that entire equality of privilege in attending school is not required. Manifestly, if it were, its attainment would be impossible. The degree of inconvenience which different scholars experience in going to and from school must vary according to the location of their homes. Some must walk a mile or two, while others are only obliged to walk as many rods. It might be said that this is a great inequality of privilege, but no one would deny that it is an inequality that could not be avoided in the present system

of town schools. As much inequality of privilege must exist, not alone in this but in many other respects, in providing for public education, it is apparent that a discretionary power must be lodged in someone, or in some board of officials, to determine the numerous questions of convenience and suitability of school advantages, as they arise. But this discretion is not a captious one; it is not equivalent to unlimited power in the matters to which it pertains. In the language of the statute, it is such a discretion "as will best subserve the interests of education" in the town, and as will "give to all the scholars of the district as nearly equal advantages as may be practicable."

These limits upon the discretionary power of the board, in regard to the times and places for maintaining schools, doubtless also apply in the decision of questions of transportation. In the original statute authorizing the expenditure of money for the transportation of pupils, it was expressly provided that the money should be "expended under the order and at the discretion of the officers charged with the prudential affairs of the district." Laws 1878, chap. 55, § 4. And the same idea seems to be implied in our present permissive statute upon that subject. But, as above suggested, the discretion vested in the school board must be exercised for "the interests of education," and for the "equal advantage" of all the scholars in the town, so far as that "may be practicable." One question, therefore, presented to the school board of Little-

driven over a route so established and maintained as to bring the conveyance within reasonable distance of the dwelling place of each pupil, whereby all the children can be gathered in one wagon and delivered to the schoolhouse within a total time of one hour and fifteen minutes, and returned in about the same time, while to drive to each home would either require a second wagon, team, and driver, or would require three hours in the morning and the same in the evening, for the trip, thus necessitating an unreasonably early start in the morning and afternoon, and keeping some of the children from five to six hours per day in the wagon. *Lyle v. State*, 172 Ind. 502, 88 N. E. 850.

Under the New Hampshire statute involved in *Fogg v. Board of Education*, it was held, in *State v. Hall*, 74 N. H. 61, 64 Atl. 1102, that the facts that a parent or guardian resides so far from the place where the school is taught that the child in his custody and control cannot reasonably be required to walk, and that no conveyance has been provided by the school board, constitute a defense to an indictment under a statute providing that "every person having the custody and control of a child between the ages of eight and fourteen years, . . . residing in a school

district in which a public school is annually taught, shall cause such child to attend the public school all the time such school is in session, unless," etc.—as the parent or guardian is under no legal obligation to convey the children under his care.

And in *Harris v. Salem School Dist.* 72 N. H. 424, 57 Atl. 332, an action by a pupil against a town school district which had undertaken to transport pupils from a discontinued district to a school at the center of the town, for injuries alleged to have resulted from the defendant's negligence in failing to provide a suitable conveyance and to convey the plaintiff in a proper manner, the court said: "If it was the duty of the defendants to provide the plaintiff with transportation to and from school (a question not considered), it was a public duty from which the district derived no benefit or advantage . . . ; and the right of the plaintiff to be transported was one he enjoyed in common with other scholars in the district, and was also public."

As to power to require carriers to give reduced rates to classes of persons, including school children, see note to *Com. v. Interstate Consol. Street R. Co.* 11 L.R.A. (N.S.) 973.

A. C. W

ton in reference to the transportation of the plaintiff's son, was whether it was practicable, in promoting the interests of education in that town, to hire a team and a driver to bring him to school in the morning and to carry him home in the afternoon of every school day during the term of perhaps ten or twelve weeks; in other words, whether the money required for that purpose, if so used, would not so far diminish the facilities for general education in the town as to be deemed impracticable for that reason.

If, for instance, the money required to pay for the transportation of one pupil from a remote part of the district might be used to substantially increase the educational advantages of a hundred other pupils in the town, as by adding a week or two to the length of the school year, it is evident that the aggregate educational advantages derived from the public school system in the district would be enhanced by expending the money in that way. It might appear that it was not practicable to furnish transportation for one scholar, when it would occasion a substantial curtailment of school advantages to all the other scholars in the town, because the interest of the public in the intelligence of the people generally is paramount to the special interest or desire of a single individual. The expense of transporting one scholar might be so much in excess of the average expense of educating all other scholars in the district as to result in a gross and unreasonable inequality of expense and a consequent lowering of the degree of efficiency in all the schools of the town. Such a result would not "best subserve the interests of education," in its public governmental aspect, and for that reason it might be deemed impracticable to expend the money in that way. The pupils' equality of privilege under the statute is limited or modified by its practicability, which involves a consideration of its effect upon the success of the school system in the district as a whole.

The primary purpose of the maintenance of the common-school system is the promotion of the general intelligence of the people constituting the body politic, and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends. Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so. Pub. Stat. chap. 93, § 6; *State v. Hall*, 74 N. H. 61, 64 Atl. 1102; *State v. Jackson*, 71 N. H. 552, 60 L.R.A. 739, 53 Atl. 1021. While most people regard the public schools as the means of

great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship. Knowledge and learning generally diffused through a community being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to promote this end, it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools." Const. art. 82 [83]. In accordance with this injunction, the state has always maintained for its protection, and at great expense, a common school system, which long ago became one of the most important governmental agencies.

"The statute in question forms a part of the laws relating to our common-school system, and must be read as a part of those laws. The duty of providing for the education of the children within its limits, through the support and maintenance of public schools, has always been regarded in this state in the light of a governmental duty resting upon the sovereign state. It is a duty not imposed by constitutional provision, but has always been assumed by the state, not only because the education of youth is a matter of great public utility, but also and chiefly because it is one of great public necessity for the protection and welfare of the state itself. In the performance of this duty, the state maintains and supports at great expense, and with an ever watchful solicitude, public schools throughout its territory, and secures to its youth the privilege of attendance therein. This is a privilege or advantage, rather than a right in the strict technical sense of the term." *Bissell v. Davidson*, 65 Conn. 183 190, 191, 29 L.R.A. 251, 32 Atl. 348, 349. See also *Leacock v. Putnam*, 111 Mass. 499, 501.

If, as seems to be clear, the fundamental purpose of the public-school system is the protection and improvement of the state as a political entity, the school board of Littleton may have believed that the interest of the public in education as a whole in that town would be unduly or unreasonably sacrificed or retarded by furnishing transportation for the plaintiff's son for the entire school year. In view of this public or governmental interest, they may have found that it was not "practicable" to incur the expense of such transportation. If a pupil's home is located several miles from a school, in a rough, mountainous, and uninhabited part of the town, it is not probable that the

legislature intended that a considerable part of the public-school money should be expended in providing daily conveyance for him to attend school. The inconvenient location of his home is his misfortune, which the state does not attempt to overcome for his benefit by substantially reducing the efficiency of all the schools in town. The rule of equality of advantage in his case prescribed by the legislature would be impracticable, unless the interest of the public in the education of its youth is to be subordinated to the interest of a single individual.

In Massachusetts towns are authorized by § 15, chap. 25, Revised Laws, to appropriate money "for conveying pupils to and from the public schools . . . the same to be expended by the school committee in its discretion." In *Newcomb v. Rockport*, 183 Mass. 74, 66 N. E. 587, it was held that under this statute a town is not obliged to make such an appropriation, and, if it does, the school committee is not bound to act. In *Davis v. Chilmark*, 199 Mass. 112, 85 N. E. 107, the same result was reached. The plaintiff lived with his family on an island upon which no school was kept, situated about 4 miles from the island of Martha's Vineyard, where there were adequate school accommodations for the plaintiff's children. The court not only held that the town was not obliged to maintain a school on the island inhabited by the plaintiff, but that it was not obliged to furnish transportation for his children to Martha's Vineyard for school purposes. What arrangement, if any, should be made for their education, was deemed to be a matter within the discretion of the school committee, as appears from the remarks of the court: "There are no regular means of communication between the island upon which he has fixed his residence and the main island upon which the public schools of the town are situated, and such communication is often difficult and sometimes impossible. Doubtless the peculiar circumstances here existing might appeal to the discretion of the town or of the school committee, and lead them to make such arrangements as might be found to be reasonably practicable, with perhaps some sacrifice also on the part of the petitioner himself, to facilitate the attendance of his children upon the public schools. . . . But we can only pass upon the question of law raised by the report. Petition dismissed."

In Vermont, a similar result has been reached under § 6, No 20, Acts of 1892, which provides that "said schools shall be within the limits of said town, and at such places, and held at such times, as in the judgment of the board of directors will

best subserve the interests of education and give all the scholars of the town as nearly equal advantages as may be practicable: and said school board may use a portion of the school money, not exceeding 25 per cent thereof, for the purpose of conveying scholars to and from such schools." In construing this statute, the court say, in *Carey v. Thompson*, 66 Vt. 665, 666, 30 Atl. 5: "The directors are authorized by this provision to use a portion of the school money, not exceeding a certain per cent, for the transportation of scholars. The permissive form of the provision is not conclusive as to the nature of the enactment. It is to be construed as imposing an imperative duty, if such was the purpose of the legislature. That purpose is to be gathered from the language of the act, the nature of the subject-matter, and the ends sought to be accomplished. The end sought here is equality of school privileges: but the statute clearly recognizes the fact that entire equality is impossible of attainment, and that much must be left to the discretion of those in whose hands the administration of the law is placed. The difference in the number of scholars to be provided for, in the means available for the various demands of the work, in the proximity of schools and the condition of roads, and in the ages and strength of scholars, are such as to induce a belief that absolute rules would be more likely to work injustice than the exercise of official discretion. We think it was obviously the intention of the legislature to leave the question of transporting scholars to the discretion of the school directors." It was alleged in the petition for mandamus that the directors "have neglected to support a school within 2½ miles of the relator's house, and have refused to use any part of the school money of the town for the purpose of conveying his children to and from any school, and have under no attempt whatever to give his children school advantages equal to those enjoyed by the other scholars of the town." These facts were substantially admitted in the answer, but the petition was dismissed for the reason above suggested.

The conclusion cannot be successfully resisted that the plaintiff's son has no absolute right under the statute to be carried to and from school at public expense, though the distance may be too great for him to walk. Both principle and authority support that result. It is a privilege or advantage which may be accorded to him in the discretion of the school board, governed by a due consideration of the interests of the public in the success of the common-school system and the equality of privilege granted to the individual, so far as it is reasonably

practicable. The school board cannot legitimately determine the question without taking into consideration these two important facts; one alone cannot furnish the rule for their guidance to the exclusion of the other. And any action on their part upon the subject of the transportation of pupils, which shows they have disregarded them or unduly minimized their importance, would be illegal and subject to revision. If the expense of transporting a single pupil for some part of the school year would afford him some substantial benefit, and at the same time would not unreasonably diminish the schooling advantages of the other pupils in the district, the expense should be incurred. The board could not legitimately decline to furnish him any transportation under those circumstances.

As we understand the reported facts upon which the court denied the petition, the defendants' refusal to furnish transportation for the plaintiff's son was based upon the ground that the expense incident to such transportation would materially diminish the general effectiveness of the town system of education by reducing the amount of money otherwise available for that purpose. But in order to equalize school privileges so far as may be practicable, the legislature has plainly indicated a purpose that a part of the school money should be used for transporting pupils. "One general purpose of the law abolishing school districts was to gather the children together into larger schools, where they might receive better instruction for longer terms. The conveyance was intended as a substitute for school accommodations in a neighborhood where the scholars were too few to render the maintenance of a separate school reasonable or profitable." *State v. Hall*, 74 N. H. 61, 64 Atl. 1102. Money expended for the conveyance of a pupil, which does not unduly or substantially diminish the general school advantages of the town, should be so expended; for that was the evident intention of the legislature in providing for such an equality of school advantages as is practicable.

The plaintiff lives a little over 4 miles from the school nearest to his home. It is conceded that it is unreasonable to expect or require his boy to walk that distance to attend school, and that the plaintiff is not obliged to convey him to school. The only objection raised by the defendants to providing conveyance as authorized by the statute is the expense. But it is apparent that the expense for a few weeks during the year would not substantially decrease the schooling advantages of all other scholars in the town, while it would afford the plaintiff's son some opportunity for acquiring an education. It may not be expedient to afford

him advantages equal to those enjoyed by other scholars, but there is no valid reason why he should not be accorded such advantages as may be practicable. The action of the board, under the facts disclosed by the case, in practically denying him the means of attending a public school for any part of the school year, is unauthorized and illegal. It was evidently the result of giving too much weight to the interests of education in general, or too little to the equality of advantages granted to the individual scholars, or to both errors combined. As above suggested, both these elements must be duly considered by school boards in determining the question of the transportation of pupils. We are of the opinion that the mere matter of the expense does not justify the board in refusing to furnish any transportation for the plaintiff's son during any part of the school year.

It may be that the petition ought to have been brought in the name of the son, instead of the father; if so, the defect can be remedied by an amendment.

Exception sustained.

All concur.

#### UTAH SUPREME COURT.

MARY E. R. WEBBER, Resp't.,

v.

SALT LAKE CITY, Appt.

(— Utah, —, 120 Pac. 503.)

#### Limitation of action — action created by statute — constitutional power.

1. A right to damages for injuries to abutting property by the change in the grade of a street, which is given by a Constitution, does not depend upon a statute passed to harmonize the statutory law with the Constitution, and is not given by the statute, within the meaning of a statutory provision that actions for liability created by statute must be brought within a specified time after the cause of action accrues.

#### Highway — removal of trees — liability.

2. A city is not, under a Constitution making it liable for property damaged for public use, liable for the diminution in value of abutting property by the removal

*Note. — Measure of damages for injury to or destruction of trees or shrubbery not valuable for timber or firewood.*

This note is supplemental to a note on same subject attached to *Cleveland School Dist. v. Great Northern R. Co.* 28 L.R.A. (N.S.) 757, and the earlier notes there referred to.

The measure of damages for destruction of sugar tree farm where sugar is principal

of useful and ornamental trees from the street the fee of which is in itself, which becomes necessary in making a lawful and careful change in the grade of the street.

(December 28, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Salt Lake County in favor of plaintiff in an action brought to recover damages for injury to abutting property alleged to have been caused by a change of grade in the street. Modified and affirmed.

The facts are stated in the opinion.

Messrs. H. J. Dininny and P. J. Daly, for appellant:

Section 282 is clearly a statutory provision, for before it was passed no such law was in force, and plaintiff had no common-law remedy for consequential damage caused by a change of grade of a street.

Swift & Co. v. Newport News, 105 Va. 108, 3 L.R.A.(N.S.) 404, 52 S. E. 821; People ex rel. New York v. Stillings, 134 App. Div. 480, 119 N. Y. Supp. 298; affirmed in 200 N. Y. 525, 93 N. E. 1128; Re Grade Crossing Comrs. 138 App. Div. 349, 122 N. Y. Supp. 922; 201 N. Y. 32, 94 N. E. 188; Kimball v. Salt Lake City, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395; Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 479, 107 Pac. 1061.

Plaintiff was not required to file her claim with the city council.

Brown v. Salt Lake City, 33 Utah, 234, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 93 Pac. 570, 14 Ann. Cas. 1004; Dawes v. Great Falls, 31 Mont. 9, 77 Pac. 310.

If in making a certain street conform to the established grade it becomes necessary to remove trees, or if they become injured in doing the work, if done with reasonable care, the lot owner has no legal cause for complaint.

paying product of farm is the reduction in value of farm. Kilby v. Erwin, 84 Vt. 266, 78 Atl. 1021.

And in Missouri & N. A. R. Co. v. Phillips, 97 Ark. 54, 133 S. W. 191, where an orchard was destroyed by fire, it was held that testimony as to value of trees was properly admitted for purpose of enabling jury to arrive at the difference in value of land.

Where a landlord, unlawfully, without the consent of or acquiescence of the tenant, enters upon the demised premises, and makes an unnecessary and improper trimming of peach trees the limbs of which are full of peaches, the measure of damage is the actual loss. Morris v. Hazel, — Del. —, 77 Atl. 766.

Where the grantees in a timber deed wrongfully cuts trees undersized, the measure of damages is the difference between the 37 L.R.A.(N.S.)

Morris v. Salt Lake City, 35 Utah, 484, 101 Pac. 373; Kemp v. Des Moines, 125 Iowa, 643, 101 N. W. 474; Chase v. Oshkosh, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; Tate v. Greensboro, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; Castleberry v. Atlanta, 74 Ga. 170; Atlanta v. Holliday, 96 Ga. 554, 23 S. E. 509; Scott v. Marshall, 110 Mo. App. 183, 85 S. W. 98; Baker v. Normal, 81 Ill. 109; Wilson v. Simmons, 89 Me. 259, 36 Atl. 380; Colston v. St. Joseph, 106 Mo. App. 714, 80 S. W. 590; Landry v. Lake Charles, 125 La. 210, 51 So. 120; Southern Bell Teleph. Co. v. Francis, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 19 So. 1; Gallaher v. Jefferson, 125 Iowa, 331, 101 N. W. 124; Mt. Carmel v. Shaw, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 39 N. E. 584; Hildrup v. Windfall City, 29 Ind. App. 592, 64 N. E. 942; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757; Miller v. Detroit, Y. & A. R. Co. 125 Mich. 171, 51 L.R.A. 955, 84 Am. St. Rep. 569, 84 N. W. 49.

Messrs. Howat & Macmillan, for respondent:

The liability of the defendant to answer to the plaintiff for damages done to her property by change of the grade of the street was created by the constitutional provision, and not by statute.

Montgomery v. Maddox, 89 Ala. 181, 7 So. 433; Kimball v. Salt Lake City, 32 Utah, 257, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395.

The claim of the plaintiff for damages was one that had to be presented to the city council for allowance or rejection, before suit could be maintained thereon.

Kimball v. Salt Lake City, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395; Hempstead v. Salt Lake City, 32 Utah, 261, 90 Pac. 397.

value of the land before and after the wrong was committed, for, as was said in the latter case cited, "it could not be merely the value of the fallen trees, as, if undersized or very small, they might have no appreciable value." Williams v. Elm City Lumber Co. 154 N. C. 306, 70 S. E. 631, Ann. Cas. 1912 A, 917; Jenkins v. Montgomery Lumber Co. 154 N. C. 355, 70 S. E. 633.

Where sapling and young trees are destroyed by poisonous smoke, fumes, and gases from smelter, the measure of damage is the difference in the value of the land before and after the injury. Doak v. Mammoth Copper Min. Co. 192 Fed. 748.

And in Hunter v. Pennsylvania R. Co. 45 Pa. Super. Ct. 408, the same rule was applied where young trees and sprouts were destroyed by fire started from sparks of engine.

J. H. B.

It is proper to take into consideration the depreciation in value of the abutting property caused by the destruction of shade trees in the street.

McEachin v. Tuscaloosa, 164 Ala. 263, 51 So. 153; Seaman v. Washington, 172 Pa. 467, 33 Atl. 756; Cook v. Ansonia, 66 Conn. 413, 34 Atl. 183.

Frick, Ch. J., delivered the opinion of the court:

Respondent brought this action for the recovery of consequential damages, alleged to have been sustained to her premises abutting upon a public street in Salt Lake City. She alleges that the damages, were caused by appellant in making a change in the grade of the street in front of her property. A trial to the court, without a jury, resulted in findings and judgment in favor of respondent, from which appellant prosecutes this appeal.

It is conceded on all sides that the appellant had the legal authority to make the improvement in the street; that it was properly made; and that the liability in this case arose, either by virtue of the provisions of our Constitution, or by virtue of a certain statute to which we shall refer hereafter.

This case, so far as the question of a change of an established grade is concerned, falls squarely within the decisions of this court in *Kimball v. Salt Lake City*, 32 Utah, 253, 10 L.R.A.(N.S.) 483, 125 Am. St. Rep. 859, 90 Pac. 395; *Hempstead v. Salt Lake City*, 32 Utah, 261, 90 Pac. 397; and *Felt v. Salt Lake City*, 32 Utah, 275, 90 Pac. 402. In view of the rule laid down in the cases just referred to, the change of grade in this case was clearly a change of an established grade, and, as the evidence is sufficient to sustain such a finding, no further discussion of that question is necessary.

One of the principal errors assigned is that the court erred in overruling appellant's demurrer to the complaint. The demurrer is based upon the ground that the alleged cause of action is barred by the "provisions of §§ 312, 313, and 2877 of the Compiled Laws of 1907." Section 312 in effect provides that certain enumerated claims against a city shall be presented to the city council for allowance within thirty days after the injury or damages sued for arose, and, unless so presented, the right to prosecute the action is barred. It is made to appear from the record that the street improvement which respondent alleges caused the damages in question was completed on April 13, 1908; that claim for damages was duly filed with the city council on May 8, 1908; and that this ac-

tion was commenced May 10, 1909. Appellant's counsel insist that the claim in this case was not one which was required to be lodged with the city council under the provisions of § 312, supra, but that the claim in suit is one which falls within the provisions of subd. 1 of § 2877, supra, which, so far as material here, provides: "An action for liability created by . . . the statute of this state, other than a penalty or forfeiture, . . . shall be begun within one year." Counsel therefore contend that the right to bring this action was complete on April 13, 1908; that, inasmuch as it was unnecessary to file a claim, the filing of one could not extend the time within which an action must be begun, and as this action was not begun until May 10, 1909, the cause of action was barred by the provisions of § 2877, supra. Whether the foregoing contention is sound or not depends upon whether the liability set forth in this action is one created by statute. Appellant's counsel assert that this action is grounded on § 282, Comp. Laws, Utah 1907, which is to the effect that damages resulting to abutting property and the improvements thereon, by reason of changing an established grade of a street, may be recovered in an action brought for that purpose. As we pointed out in *Kimball v. Salt Lake City*, supra, which was an action like the one at bar, § 282, just referred to, was adopted in 1896, after the Constitution of this state had been adopted, and said section was evidently passed for the purpose of harmonizing the statutory law of this state with § 22 of article 1 of the Constitution, which provides that "private property shall not be taken or damaged for public use without just compensation." Appellant's counsel concede that this constitutional provision is self-executing, and to make it available required no legislative aid. The right to recover consequential damages for injury to private property by reason of making public improvements therefore does not rest upon § 282, supra, but is based upon the provision quoted from § 22 of article 1 of our Constitution.

As we have pointed out, the constitutional provision existed when § 282 was adopted. Moreover, the right to recover damages would continue precisely the same, although § 282 were repealed. If a right or liability—call it what you will—therefore existed before § 282 was adopted, such right or liability was not created by that section. Again, if the right or liability will continue in full force and effect, although that section were repealed, such right is not even exercised by virtue of that section. In other words, for the purposes of an action like



the one at bar, the provisions of § 282 are not controlling or even material.

From what has been said, it follows that this action is not based upon § 282. Even though it be conceded, therefore, that the provisions of subd. 1 of § 2877, *supra*, are applicable to § 282, yet, as this action is based upon the constitutional provision to which we have referred, this action is not affected by § 2877.

With respect to what is the limit within which actions for consequential damages to abutting property, which are caused by lawfully constructing or operating a steam railroad in a public street by authority of the city, must be commenced, we held, in *O'Neill v. San Pedro, L. A. & S. L. R. Co.* — Utah, —, 114 Pac. 127, that such actions fall within the provisions of § 2883, Comp. Laws 1907, and hence are not barred, if commenced within four years from the time the cause of action accrued. The right to recover in the *O'Neill* Case, as in the case at bar, was based upon § 22 of article 1 of our Constitution. In so far as the statute of limitations is concerned, therefore, we can see no material difference between actions for consequential damages to abutting property, caused by the lawful interference by a railroad company by using a public street, which interference is based upon the authority of the city, and such interference by the city itself. In either case, if the improvement which causes consequential damages, whatever it may be, is authorized by law, and is executed with due and proper care, the abutting owner is nevertheless entitled to recover for such consequential damages, by reason of the constitutional provision referred to, and not otherwise.

Nor is this action barred by the provisions of § 312, *supra*. This is so for the reason that, if it was necessary to file a claim in an action like this, then the claim was filed within the time provided by statute. In view, therefore, that the claim was filed in time, the question of whether the respondent was legally required to file one or not becomes entirely immaterial in this case; and hence we express no opinion upon that point.

There are a number of assignments relating to the admission and exclusion of evidence. If it were assumed that, with regard to some of the errors complained of, the court had technically erred, yet the errors, if any, are entirely harmless; and hence require no further consideration.

The next assignment relates to the damages which were allowed by the court, and even counsel for respondent concedes that this is a question "worthy of serious consideration." At the trial respondent, over appellant's objections, was permitted

to show that in lowering the grade of the street in front of her lot and dwelling house, in which she lived appellant removed a row of shade trees which respondent had planted and cared for, and which were growing in the street; that said trees were both ornamental and useful, and the removal of which materially affected the market value of her property. It is conceded by counsel for respondent that the fee to the street on which the improvements were made is in the city; that in lowering the grade of the street the city proceeded lawfully; that it made the improvement with due care; and that in lowering the grade it was necessary to dig up and remove the trees in question. The court, after finding that in the year 1888 respondent had erected a dwelling house upon her lot, and had planted shade trees in front thereof in the street in question, further found that in changing the grade of the street aforesaid, respondent's "real estate was damaged and diminished in market value in the sum of \$2,006.25; \$1,000 of such damages and diminution in the value being caused by the destruction of said shade trees planted in said street by the plaintiff [respondent], as aforesaid." Appellant now urges that the court erred in admitting and in considering the evidence regarding the destruction of said trees, and in allowing respondent any amount as damages therefor. The question is therefore squarely presented whether a city, while proceeding lawfully and properly in changing an established grade of a public street, is liable in damages for the removal of shade or ornamental trees which were planted and are growing in the street, and the removal of which was necessary and unavoidable in changing the grade of the street the fee to which is in the city.

It is contended by counsel for respondent that, under § 22 of article 1 of the Constitution of this state, to which we have referred, the city is liable for whatever diminution of value was caused to respondent's lot, with the dwelling thereon, by the removal of the trees in question. In other words, if, by reason of the removal of the trees, respondent's property was made worth less than it was with the trees standing in the street, she is entitled to recover such difference as consequential damages. The question is not free from difficulty; nor are the courts in perfect harmony with respect to the allowance of damages under such or similar circumstances. Upon a careful examination of the constitutional and statutory provisions of the different states upon which some of the decisions are based, and of the reasons that have induced the courts to decide particular cases in a particular

way, the diversity of opinion among the courts is, we think, more apparent than real.

The decisions, roughly speaking, may be divided into three classes. In the first class, it is held that the question of whether, in removing trees without the owner's consent, it is necessary to remove them from the public street, where they were planted by the abutting owner, is one of fact, subject to review by the courts, and if, upon such a review, it be found that the trees were wantonly, unnecessarily, or negligently removed the city is liable; but if it be found that it was necessary to remove them, either as an obstruction, or in making a necessary and lawful improvement in the street, such as laying a sidewalk, or grading, or changing the grade, then the city is not liable, and the owner has no redress. *Frostburg v. Wineland*, 98 Md. 239, 64 L.R.A. 627, 103 Am. St. Rep. 399, 56 Atl. 811, 1 Ann. Cas. 783, and *Wilson v. Simmons*, 89 Me. 242, 36 Atl. 380, are fair illustrations of the doctrine promulgated in the first class.

The cases coming within the second class hold that the question of whether an improvement in a public street and the removing of trees growing therein are necessary or not is in its nature legislative, and is one for the city authorities to determine, and when properly determined by such authorities their action is not reviewable by the courts. It is accordingly held, therefore, that, unless the city acts wantonly or negligently in removing the trees, the property owner has no cause of action against the city for removing them; nor can he review the question as to whether it was necessary to do so. The following well-considered cases sustain the foregoing doctrine: *Chase v. Oshkosh*, 81 Wis. 313, 15 L.R.A. 553, 29 Am. St. Rep. 898, 51 N. W. 560; *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L.R.A. 267, 45 Pac. 266; *Tate v. Greensboro*, 114 N. C. 392, 24 L.R.A. 671, 19 S. E. 767; *Baker v. Normal*, 81 Ill. 108, followed in *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L.R.A. 580, 46 Am. St. Rep. 311, 30 N. E. 584; *Kemp v. Des Moines*, 125 Iowa, 640, 101 N. W. 474; *Castleberry v. Atlanta*, 74 Ga. 170; *Atlanta v. Holliday*, 96 Ga. 546, 23 N. E. 509; *Landry v. Lake Charles*, 125 La. 214, 51 So. 121; *Murray v. Norfolk County*, 149 Mass. 328, 21 N. E. 757; *Miller v. Detroit*, Y. & A. R. Co. 125 Mich. 171, 51 L.R.A. 955, 84 Am. St. Rep. 569, 84 N. W. 49.

Judge Dillon, in speaking of the effect of the doctrine maintained by the foregoing cases, says: "The title or interest of the abutting owner in the shade trees must yield to the power of the city to grade the street, or to build sidewalks, or otherwise improve it. For any injury resulting there-

from, the abutting owner has no redress." 2 Dill. Mun. Corp. 5th ed. § 721.

In *Castleberry v. Atlanta*, 74 Ga. 170, the supreme court of Georgia, in speaking of the correlative rights of an abutting owner and the municipality with regard to shade trees growing in a public street, says: "We think that shade trees on the city's sidewalks and streets belong to the city, and in grading the streets and sidewalks they may be removed, if necessary to the grading. There was no error in charging to that effect, and in charging that damage resulting from their being killed must have been caused by neglect and carelessness in the work. While there is a degree of convenience and comfort about the shade trees on sidewalks fronting a house, yet these must yield to the control of the city authorities over the public walks; and the court certainly went to the extreme of the law, when it authorized damage for negligently and carelessly killing them."

In *Landry v. Lake Charles*, 125 La. 214, 51 So. 121, the supreme court of Louisiana, in passing upon the right of the municipality to remove shade trees growing in a public street, says: "The municipality, for the purpose of improving the sidewalk, has the authority to remove trees without having to pay for their value, provided the removal is not wanton. Ornamental trees inspire a commendable sentiment, which moves the owner nearly always properly to consider them valuable. But the municipality, when an improvement becomes necessary, cannot, in the nature of things, be made to pay a considerable amount for shade trees."

In *Miller v. Detroit*, Y. & A. R. Co. 125 Mich. 171, 51 L.R.A. 955, 84 Am. St. Rep. 569, 84 N. W. 49, Mr. Justice Grant, in speaking for the majority of the court, says: "It is established beyond controversy that municipal authorities have the entire control over their highways, streets, and sidewalks, and may remove shade trees, whenever they are an obstruction to the use of the highway for public travel, without compensation to the owner."

The supreme court of Michigan, however, holds to the rule that before shade trees may be removed by the city the abutting owner must be notified to remove them, and upon his failure so to do the city may do so. This requirement was at one time statutory in Michigan, but the statute has apparently been repealed. Mr. Justice Hooker dissents from the proposition that the owner is entitled to notice, and contends that the city has the right to remove the trees without notice; his contention being based on the fact that the statute referred to is no longer in force in Michigan.

The supreme court of Illinois, in *Baker*

v. Normal, 81 Ill. 108, says: "The town, under its charter, has the control of the streets, may improve them and adorn them. It may permit its citizen to improve and adorn that part of the street in front of his lot, but the improvement and adornment does not thereby become the property of the citizen. The planting of a shade tree in a street by a citizen, by permission of the village or city authorities, is a gratuity to the public, and the citizen has no more right to control the shade tree so planted than he would have had it been planted by the city authorities."

In *Murray v. Norfolk County*, 149 Mass. 328, 21 N. E. 757, the rule prevailing in Massachusetts is stated in the headnote as follows: "If trees standing within the lot limits of the street become an obstruction by reason of its widening, the town officers have the right to remove them, without making compensation to the abutting property owner."

It is, however contended by respondent's counsel that many of the foregoing cases are not in point in this case, because in those cases the actions were not, like in the case at bar, brought to recover damages, but were brought to prevent the removal of trees. It is manifest, however, that the courts in those cases denied the relief, not because the action was equitable, but because the abutting property owner had no rights to vindicate under the circumstances. It is quite true that the courts might have denied equitable relief in those cases, when there was in fact a legal cause of action; but the courts in the equity cases certainly had the power to determine the question of whether the claimant had any rights, legal or equitable, in the subject of the action. Indeed, it would seem obvious that, in determining whether a claimant has the right to invoke the aid of a court of equity, the court must possess the undoubted power to determine whether any of his legal rights were invaded. If the claimant, in no event, has a legal right with regard to the subject of the suit, neither a court of equity nor of law can legally interfere in his behalf. Such is the status of the cases in which the proceedings were equitable, and, in our judgment, and in the judgment of all the courts and text writers who have cited the cases to which we have referred, the cases are treated as authoritative upon the question of the right to recover for the removal of shade trees by the abutting owner. In our opinion, those cases have the same force and effect as precedents as those cases in which the action was one at law for damages. For the foregoing reason, we made no discrimination in referring to the cases.

We think that the doctrine promulgated in 37 L.R.A. (N.S.)

and enforced in the cases which we have last cited is based upon sound principles, and, in our judgment, the doctrine is sustained by the great weight of American authority. Counsel for respondent assert (and this assertion is not questioned by counsel for appellant) that the cases to which we have just referred are not based upon constitutional provisions like those of § 22, art. 1, of our Constitution. This assertion was, no doubt, inadvertently made. In view, however, that the assertion is seriously made, and is not questioned, we have made a thorough search of the Constitutions and statutes of the several states from which we have cited cases, to determine whether or not the assertion is correct. From the research we have made, we have become satisfied that if counsel had carefully examined either the constitutional or statutory provisions prevailing in the states referred to they would have discovered that in nearly all, if not all, of them provisions are found which require that just compensation must be made for damaging, as well as for taking, private property which is to be devoted to public use. For instance, in Wisconsin the statute provides that compensation must be made for both the land actually taken and for damages sustained to other lands, not taken, caused by the taking. 1 Stat. (Wis.) 1898, p. 683, § 925. The same is true in Iowa. McClain's Anno. Code (Iowa), p. 158, § 635. In Louisiana the subject is covered by article 156 of the Constitution of 1879 of that state, which, in substance, is the same as ours. The same is true of California, as appears from § 14 of article 1 of the Constitution of that state. The same matter is covered by § 13 of article 2 of the Constitution of Illinois, which is the same as our own. Indeed, Illinois was one of the first, if not the first, states of the Union where the subject of making compensation for damaging private property for public use was provided for in the Constitution. While in Georgia there is no constitutional provision regulating the subject, yet in the Code of that state of 1910 (§ 3627) it is provided that private property cannot be taken for public use without making "just compensation to the owner for the interference with his exclusive rights." This certainly includes damages for any substantial interference with a property right, and is not limited to the actual taking of property. In Michigan the matter is controlled by statute, and in North Carolina we have been unable to find either a constitutional or a statutory provision concerning the subject. For obvious reasons, we have limited our research to those states which we have cited cases.

It is, however, also insisted by respondent that the question is not whether the abutting owner has any property in or may recover the value of the trees, as such, when necessarily and lawfully removed by the city. It is insisted that the question is, what, if anything, of value have the trees added to the abutting property? In other words, will the removal of the trees affect the salable or market value of the abutting property in case of their removal? If their removal does so affect the property, then counsel contend that it is an element which should be considered in determining the damages that should be allowed the abutting owner. Three cases are referred to,—namely, *Seaman v. Washington*, 172 Pa. 481, 33 Atl. 759; *McEachin v. Tuscaloosa*, 164 Ala. 263, 51 So. 153, and *Cook v. Ansonia*, 66 Conn. 429, 34 Atl. 187,—in which the damages have been allowed in accordance with counsel's contentions. We have carefully examined those cases and the special constitutional and statutory provisions on which they are based. Section 8 of article 16 of the Constitution of Pennsylvania, so far as material here, provides: "Municipal and other corporations, and individuals, vested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements." Section 235 of the Constitution of Alabama, as adopted in 1901, and on which the decision in *McEachin v. Tuscaloosa*, supra, is based, is practically a transcript of the provisions we have quoted from the Constitution of Pennsylvania. The *McEachin* Case was decided in December, 1909, and is concededly based upon the constitutional provision aforesaid. Notwithstanding said provision, however, two of the justices of the supreme court of Alabama filed a strong dissenting opinion, in which the law is stated as, in the absence of special statutory provisions, we contend it to be. This is recognized by the majority of the court, as appears from 164 Ala. 266, where it is said: "We would make no war upon the opinion of Justice Sayre, as concurred in by the chief justice, if § 235 of the Constitution did not exist." The constitutional provision of Alabama is also found in the Constitution of 1875 of that state, and was under consideration in *Montgomery v. Maddox*, 89 Ala. 181, 7 So. 433, where, at page 186, Mr. Justice Somerville, in referring to the particular language of the Alabama Constitution, says: "I do not discover precisely this same language in the Constitu-

tion of any other state, except those of Alabama and Pennsylvania." Neither have we been able to do so. While in the Pennsylvania case nothing is said with regard to the constitutional provision, yet it is clear that the decision is based upon that provision. This conclusion is almost unavoidable, for the reason that the whole matter is disposed of in one sentence, and not a single case is cited in support of the rule. This disposes of the Pennsylvania and Alabama cases.

In disposing of them, it is not necessary for us to determine whether the constitutional provisions referred to in those states were properly construed or not. It is sufficient for us to know that those courts have given them a broad and liberal construction. This is apparent from the language used in the Alabama case to which we have referred.

The case of *Cook v. Ansonia*, 66 Conn. 429, 34 Atl. 187, is also based upon a special statute in force in Connecticut. This statute is set forth in the case of *Platt v. Milford*, 66 Conn. 320, 34 Atl. 82. In the *Cook* Case, the statute is referred to as having been construed in the *Platt* Case, and for that reason the rule, as announced in the *Cook* Case, was applied. In view of the special constitutional and statutory provisions prevailing in the states of Alabama, Pennsylvania, and Connecticut, which, by those courts at least, are held to be broader than our own, we are of the opinion that those cases should not be permitted to control the question in this state. In our research we have found one other case which holds to the same rule that is adopted in the three states last referred to; namely, the case of *Walker v. Sedalia*, 74 Mo. App. 70. The rule in that state is, however, expressly based upon the fact that in Missouri the fee to the street is in the abutting owner. From this fact the court deduces a property right in the abutting owner in the trees growing in the street, for which he is entitled to recover when the removal thereof diminishes the market or salable value of his property. It is, however, frankly conceded by the court in that case that the rule is otherwise where the fee of the street is in the municipality. In announcing the rule, the Missouri court relies on no decisions, except those of that state. It will also be noted that both in Pennsylvania and in Alabama the fee to the street is in the abutting owner. It is also true that in no case cited from the four states referred to, where the rule contended for by respondent's counsel has been adopted, is the de-

cision based upon the general law as the same is declared by the courts, but is based entirely upon local provisions, either constitutional or statutory. It may also be said that in a number of the cases which we have cited, in which a recovery for trees growing in the public streets is denied, the fee is in the abutting owner, but this fact, standing alone, was not considered controlling; nor do we think it should be. It is worthy of remark, however, that no case has been found, where the fee was in the city, that a recovery for the removal of shade trees was allowed when such removal was lawfully made.

So far as we know, we have referred to about all the cases in which the relative rights of the municipality and the abutting owner to shade or ornamental trees planted and growing in the public streets are directly considered. We confess our inability to understand how the abutting owner, who is a mere licensee of the municipality, in the absence of an express statute, can acquire a property right in trees which he may enforce, as against the municipality, in case it becomes necessary to remove them in making a public improvement in the street, when such improvement is made in a careful and lawful manner. In the case at bar, the soil had to be removed in front of respondent's premises to a depth of about 2½ feet at one side and to about 5½ at the other. This difference in depth resulted from the fact that the premises are situated on the slope of a hill, and for the further reason that, in order to pave the street properly, the natural grade had to be reduced. It is self-evident that in making the surface of a street hard and smooth by an artificial pavement the grade in many places must be reduced from the natural grade. This is necessary in order to make it possible for teams to haul loaded vehicles up the grade, where the surface has been made hard and smooth. In this case the soil had to be removed, and with it removed the trees could not remain where they grew.

It is contended by counsel, however, that, inasmuch as respondent could and did recover damages which were caused to her property by reason of removing the soil, for the same reason, and upon the same principle, she should be permitted to recover for the removal of the trees. The fallacy of this contention lies in the assumption that respondent recovered for the removal of the soil. The true ground upon which her recovery is based is that in removing the soil her retaining wall was destroyed, and the convenient ingress and egress to and from her property was prevented. In this way, 37 L.R.A. (N.S.)

there was a substantial interference with the use of her property which reduced the market or salable value thereof. If she is permitted to recover for the removal of the trees growing in the public street, however, then she could do so, although she had in no way been hindered in the use and occupation of her property. In removing the soil, so as to interfere with the use of her property, she suffered a direct and substantial injury. In removing the trees, however, the city only removed that in which respondent had no property right as against the city, and that which in no way interfered with the use of her property, or in having access thereto. No doubt, as against anyone who unlawfully interfered with the trees, respondent, as an abutting owner, could recover for any injury she might have sustained. This is so, however, because, as against a wrongdoer, her right as a mere licensee of the city would be quite sufficient to sustain her action. Not so as against the city, because, as against it, she has no rights, so long as the city, in interfering with the trees, acted pursuant to law and in a careful manner. While the precise question here presented was not involved in the case of *Morris v. Salt Lake City*, 35 Utah. 474, 101 Pac. 373, and while the decision in that case is not controlling here, yet all that we there said with regard to the rights of the abutting owner in shade trees growing in a public street is applicable here.

After a careful consideration of the decisions of the courts of last resort and of the constitutional and statutory provisions upon which the decisions rest, we are forced to the conclusion that the respondent is not entitled to recover any damages for the removal of the trees, for the reason that such damages, under the circumstances, are *damnum absque injuria*. The court therefore erred in admitting the evidence and considering the same, and in allowing the sum of \$1,000 as damages for the removal of the trees in question. In view, however, that the specific amount allowed by the court for the trees is stated in the findings, and there being no cross appeal and no cross assignment of error by respondent, it is not necessary to remand this case for a new trial.

The judgment entered by the trial court for the sum of \$2,006.25 is modified by deducting therefrom, as of the date the judgment was entered, the sum of \$1,000 allowed for the trees, and as so modified the judgment is affirmed. Neither party to recover costs.

McCarty and Straup, JJ., concur.

Petition for rehearing denied.

## KANSAS SUPREME COURT.

GEORGE H. PAUL COMPANY, Appt.,

v.

T. W. SHAW.

(86 Kan. 136, 119 Pac. 546.)

**Vendor and purchaser — execution of deed — contractor.**

1. Where a contract has been made for the sale of real property and its conveyance by warranty deed, the purchaser ordinarily has a right to insist that such deed shall be executed by the person with whom he contracted.

**Same — objection to warranty — correction.**

2. Where a vendor, as a performance on his part of a contract for the conveyance

Headnotes by MASON, J.

*Note. — May purchaser of property be required to accept deed of third person.*

Whether or not a purchaser of lands may be required to accept the deed of a third party as a performance of the contract of sale depends upon its terms.

Thus, where the vendor has bound himself to convey, a third person cannot be substituted for the vendor against the wish of the vendee. See *Hussey v. Roquemore*, 27 Ala. 281 (where the agreement was to "make a valid deed"); *Smith v. Addleman*, 7 Blackf. 119 (where the agreement was "to sell and convey" a certain lot, upon payment for which there was to be made to the purchaser "a good and sufficient deed"); *Blackman v. Park*, 157 Cal. 607, 137 Am. St. Rep. 153, 108 Pac. 686; *Taylor v. Porter*, 1 Dana, 421, 25 Am. Dec. 155; *George v. Conhaim*, 38 Minn. 338, 37 N. W. 791; and other cases infra.

The acceptance of such deed may involve the trouble of an inquiry to ascertain whether the title conveyed by it is good, and this inquiry the purchaser is under no obligation to make. *Hussey v. Roquemore*, 27 Ala. 281.

One to whom another (himself having only a contract therefor) has agreed to convey land is not obliged to accept the deed of one to whom his vendor has in the meantime conveyed his interest therein and who has procured title thereto. *Royal v. Denison*, — Cal. —, 38 Pac. 39.

So, also in *Reynolds v. Smith*, 6 Blackf. 200, a contract to convey by good and sufficient deed in fee simple was held not to be performed by the tender of a full covenant deed from the vendor to the purchaser and a quitclaim of one who had bid in the lands on execution sale, and to whom the vendor had conveyed the lands by deed of general warranty, the court saying: "Whether the deed from Lockwood conveyed a good title to the land or not, the defendant was not bound to inquire. He had made no contract with Lockwood for 57 L.R.A. (N.S.)

of real property, tenders a warranty deed from another person, the vendee, in order to avoid the effect of the tender on the ground that the deed does not include the warranty of the person with whom he contracted, must make that specific objection, and allow a reasonable opportunity for it to be met.

**Specific performance — absence of warranty — tender.**

3. In an action by the vendor for the specific performance of a contract for the sale of real property, an allegation in the answer that he plaintiff has never tendered a deed executed by himself is met by allegations in the reply that no previous objection had been made upon that ground to the deed which he had tendered, and that he had at all times been, and was still, able and willing to furnish such a deed.

(December 9, 1911.)

the purchase of the land, nor with Patton for a conveyance from Lockwood. His agreement was to pay the money for which the suit was brought, in consideration of a deed, with full covenants, to be made by Patton. Such a title as he contracted for he had a right to demand, secured by the covenants of the vendor, and free from blemish. The terms of the contract would be essentially varied if a third person, without consent, were substituted to do that which one of the contracting parties had bound himself to perform."

And one who contracts to purchase land is not liable to a suit for specific performance in the name of one who did not make the contract, and who was not the owner of the property at the time the contract was made, but who subsequently acquired the title for the purpose of conveying it. *McGovern v. Hern*, 153 Mass. 308, 10 L.R.A. 815, 25 Am. St. Rep. 632, 16 N. E. 861.

So, where the agreement provides that the conveyance shall be made by the vendor himself, without mention of his heirs, and no conveyance is made or tendered by him in his lifetime, the vendee is not bound to accept a conveyance from his heirs. *Spindle v. Miller*, 6 Munf. 170.

One contracting to purchase land from the administrator of a decedent's estate is not bound to accept a deed from the decedent's heirs. *Newman v. Bank of Watson*, 70 Mo. App. 135.

One who has contracted to purchase property from a firm, both members of which died pending the full performance of the contract, is not bound to accept the deed of the devisee of one of them, to whom the heirs of the other have conveyed their interests, but is entitled to a deed from the heirs as well. *Wollenberg v. Rose*, 45 Or. 615, 78 Pac. 751.

And see also *Re Bryant*, L. R. 44 Ch. Div. 218, 59 L. J. Ch. N. S. 636, 63 L. T. N. S. 20, 38 Week. Rep. 469, where it was held that one entering into a contract with testamentary trustees who were found, upon

**A**PPEAL by plaintiff from a judgment of the District Court for Sedgwick County in defendant's favor in an action on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. E. L. Foulke and C. A. Matson for appellant.

Messrs. R. L. Holmes and Charles G. Yankey, for appellee:

In a contract for the sale of real estate, providing for the purchasers giving a warranty deed, the contract is not complied with by tendering a warranty deed executed by some stranger to the contract.

Steiner v. Zwickey, 41 Minn. 448, 43 N. W. 376; Bigler v. Morgan, 77 N. Y. 312; Hussey v. Roquemore, 27 Ala. 281; Crabtree

v. Levings, 53 Ill. 526; McVey v. Payne, 19 Ky. L. Rep. 168, 39 S. W. 419; Rudd v. Savelli, 44 Ark. 145; George v. Conhaim, 38 Minn. 338, 37 N. W. 791; Weitzel v. Leyson, 23 S. D. 367, 121 N. W. 868; Royal v. Dennison, — Cal. —, 38 Pac. 39.

Mason, J., delivered the opinion of the court:

The George H. Paul Company, a corporation, sued T. W. Shaw upon a promissory note. Shaw answered, alleging in substance, among other things, that the note had been given as part payment for a tract of land in Texas, under a written contract by which the plaintiff had agreed to convey it to him, giving a warranty deed

investigation of the title, to have no power of sale until the death of an existing tenant for life, was not bound to accept a conveyance from the tenant for life under the powers of the Settled Land Acts.

And in *Re Head*, L. R. 45 Ch. Div. 310, 59 L. J. Ch. N. S. 604, 63 L. T. N. S. 21, 38 Week. Rep. 657, it is doubted whether one entering into a contract with trustees who had no present power of sale could be required to take a title made with the concurrence of the beneficiaries. But the rule is otherwise where the beneficiaries are bound to concur at the date of the contract. *Re Baker* [1907] 1 Ch. 238, 76 L. J. Ch. N. S. 235, 96 L. T. N. S. 110.

"A purchaser is not bound to receive a deed executed by attorney, unless there is some very strong reason for it. That mode of execution multiplies his proofs if he has occasion to support his title, for he is obliged to prove the execution of the power as well as of the deed; and he may be embarrassed by the loss or destruction of the power, or it may be revoked by the death of the principal before its execution by the agent." *Dawson v. Shirley*, 6 Blachf. 531.

A provision in the contract that the vendor will "convey or cause to be conveyed" does not indicate a purpose to enable him to relieve himself by the substitution of such other persons as he may choose to take the relation of grantor and covenantor. *Miner v. Hilton*, 15 App. Div. 55, 44 N. Y. Supp. 155; *Gottschalk v. Meisenheimer*, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79.

A contract to convey or cause it to be done is the same in legal effect as a contract to convey by the obligor, unless it is stipulated that the title is to be made by a third party; and therefore the purchaser of lands under such a contract is not bound to accept a conveyance from one to whom the property has been conveyed by his vendor. *Gaar v. Lockridge*, 9 Ind. 92.

But in *Batemen v. Johnson*, 10 Wis. 1, an agreement to make, execute, and deliver "a good and sufficient deed of conveyance" of the premises was held to be performed by the tender of a good and sufficient deed of the premises executed by the parties in 37 L.R.A. (N.S.)

whom the legal title to the premises then was.

And where the contract provides that the vendor, "its successors or assigns," will convey, a deed from one to whom the vendor had conveyed the premises is sufficient. *Herrick Improv. Co. v. Kelly*, 65 Wash. 16, 117 Pac. 705.

Where the purchaser is entitled to a deed with covenants of general warranty, he cannot be compelled to accept the conveyance of a third person. See *Rudd v. Savelli*, 44 Ark. 145 (where the vendor gave a title bond to make "a deed of the conveyance in fee of the legal title"); *Crabtree v. Levings*, 53 Ill. 526 (where the agreement was to convey by deed of warranty certain lands described as then owned and occupied by a third person); *Barnett v. Morrison*, 2 Litt. (Ky.) 68 (where the vendor covenanted to convey with warranty); *Steiner v. Zwickey*, 41 Minn. 448, 43 N. W. 376 (where the vendor did not in terms expressly agree to convey, but did stipulate that the conveyance should be by warranty deed); *Buswell v. O. W. Kerr Co.* 112 Minn. 388, 128 N. W. 459, 21 Ann. Cas. 837 (where the vendor was required to furnish a warranty deed); *Walter v. DeGraaf*, 19 Abh. N. C. 406 (where the agreement was to convey by full warranty deed, free and clear of all encumbrances); *Weitzel v. Leyson*, 23 S. D. 367, 121 N. W. 868 (agreement to convey by warranty deed); *Gottschalk v. Meisenheimer*, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79 (where the vendor agreed to "execute or cause to be executed . . . a good and sufficient warranty deed"); *McVey v. Payne*, 19 Ky. L. Rep. 168, 39 S. W. 419; and other cases more fully set out infra.

This is on the theory that the purchaser is entitled to the personal covenants of the vendor as the future security for his title. *Crabtree v. Levings*, 53 Ill. 526.

The value of the covenants of warranty depends upon the responsibility of the covenantor. *Steiner v. Zwickey*, 41 Minn. 448, 43 N. W. 376; *Bigler v. Morgan*, 77 N. Y. 312.

"It is reasonable to suppose that usually when a vendee takes a contract containing

and furnishing an abstract of title, upon the execution of notes for the balance of the purchase money; that he had been induced to enter into the contract by false representations as to the character of the property; that the plaintiff had failed to comply with the terms of the contract in these respects, among others: That the title was defective, that the plaintiff did not own the property, and that the only deed tendered was executed by a stranger to the contract. A reply was filed, which included a general denial and allegations to the effect that the deed tendered would have conveyed a merchantable title; that the defendant made no objection to the deed or abstract until the filing of his answer, but refused

to examine either; and that the plaintiff had at all times been, and was still, able and willing to cause a deed to be made to it by the owner of the land, and then to execute a warranty deed to the defendant, and would have done so if the defendant had so requested. Upon these pleadings the court rendered judgment for the defendant, and the plaintiff appeals.

The plaintiff understands that the trial court held the contract to be void because the vendor had no title to the property, and a reversal is asked upon the strength of decisions that one who is not the owner of real estate may make a valid agreement for its sale and conveyance. *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac.

a provision for conveyance with covenants of warranty, he has in view the responsibility of his vendor, unless something appears to the contrary in the contract." *Miner v. Hilton*, 15 App. Div. 55, 44 N. Y. Supp. 155.

While the deed of a third party conveying title would be substantial performance of the covenant to convey, yet where the contract is to convey "by warranty deed with the usual full covenants," the purchaser is clearly entitled to the vendor's personal covenants, and is not bound to accept in lieu thereof the covenants of another party. *Bigler v. Morgan*, 77 N. Y. 312.

Upon the same principle, one who contracts to purchase land and to assume an encumbrance thereon does not put himself in a position to bring an action for breach of contract by tendering for execution a deed running to a third party subject to the encumbrance, the vendor having a right to the benefit of his personal assumption of the encumbrance. *Burns v. Freling*, 98 Mo. App. 267, 71 S. W. 1128.

But the rule does not apply where the contract is for a special warranty deed. *Herrick Improv. Co. v. Kelly*, 65 Wash. 10, 117 Pac. 705.

The tender of a general warranty deed executed by one of three obligors on a title bond is not a sufficient performance of a covenant to make lawful title, although he has acquired by deed of warranty the title of his co-obligors, the purchaser having the right to be secured by the covenants of all three. *Clark v. Redman*, 1 Blackf. 379.

The rule that where a vendor agrees to convey with covenants of warranty or by warranty deed sufficient in form, he cannot satisfy his promise by passing the title through another, is not rendered inapplicable by the fact that at the time the contract was entered into the legal title did not rest in the name of the vendor, but in that of his co-owner, since it may well be presumed that the inducement of the contract was the promised covenants of warranty. *Gottschalk v. Meisenheimer*, 62 Wash. 299, 113 Pac. 765, 115 Pac. 79.

Reference may also be made in the pres- 37 L.R.A. (N.S.)

ent connection to *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L.R.A. (N.S.) 156, 44 So. 642, 15 Ann. Cas. 237, in which it is held that an undisclosed principal cannot enforce against the purchaser a contract made with his duly authorized agent to purchase land, where it contains a personal covenant on the part of the agent to warrant the title.

But in *De Chaumont v. Forsythe*, 2 Penr. & W. 507, an agreement to sell and convey by good warranty deed was held to be sufficiently performed where the vendor, who had only a life estate in the property, conveyed it in fee simple with general warranty to a son who, with the other remaindermen, executed a deed of release to the purchaser, since the covenant ran with the land and so inured to the purchaser's benefit.

And though, under a vendor's contract to convey with warranty, the vendee ought not to be compelled to accept the conveyance of a third person, the circumstances of such third person's having conveyed is no objection where, in addition to that conveyance, the heirs of the vendor have been decreed to warrant the title. *Barnett v. Morrison*, 2 Litt. (Ky.) 68.

A contract to execute to the purchaser a good and sufficient deed with covenants against the vendor's own acts is performed by a tender by one who has purchased the property, subject to the contract of sale, of his own deed together with an assignment of the vendor's deed to him containing such a covenant. *Gaven v. Hagen*, 15 Cal. 208.

Where the agreement provides that the conveyance shall be by quitclaim deed, the purchaser may be required to accept a deed from a third party to whom his vendor has conveyed the land. *Meyers v. Markham*, 90 Minn. 230, 96 N. W. 335, 787.

Where the vendor contracts to give a quitclaim deed, the tender of a deed from his successor is not a substantial breach of his obligation where there is nothing to show that the object of the parties will not be as well subserved by such a deed as the medium of transmitting the title as it will by one from the vendor. *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196.

E. S. O.



498, 1 Ann. Cas. 906; *Krbut v. Phares*, 80 Kan. 515, 103 Pac. 117; *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640; 29 Am. & Eng. Enc. Law, 667.

The defendant, however, disclaims any reliance upon the proposition that the plaintiff committed a fraud in making the contract without at the time having the title. He defends the judgment by this reasoning: The contract called for a warranty deed from the plaintiff, and provided that, if it failed to furnish a deed and abstract as specified, the defendant should be relieved of liability; the plaintiff tendered no deed except one made by another person; therefore it failed to perform its part of the agreement, and thereby lost all claim against the defendant.

The contract did not say in so many words that the plaintiff was to execute a deed. It did, however, recite that the plaintiff had sold and agreed to convey the land to the defendant, and by its terms the plaintiff agreed to "give" the defendant a warranty deed. This fairly implied that the deed was to be signed by the plaintiff, and gave the defendant a right to insist that, however good the title might be upon the record or in fact, he should be protected against any subsequently developed defect, by the personal guaranty of the plaintiff. 29 Am. & Eng. Enc. Law, 701.

But the objection to a deed, that it is executed by one person rather than by another, is of such a special character, and so readily remedied, that before a vendee can upon that ground justify the refusal of a tender, he should in fairness to the vendor call attention to the matter, make a specific requirement, and allow a reasonable opportunity for it to be met. It is said of such a situation in a headnote to *Bigler v. Morgan*, 77 N. Y. 312: "An objection to the form of a deed, capable of being remedied if suggested, as that it does not contain covenants of warranty to which the grantee is entitled, is waived by failing to specify it when the deed is offered." And in *Backman v. Park*, 157 Cal. 607, 613, 137 Am. St. Rep. 153, 108 Pac. 686, 688: "The vendor entered into a contract to make a conveyance within a given time. She made tender of full and complete title, and the tender was refused. True, the title tendered was not her own, and it is recognized that the vendee might have insisted upon title de-raigned through the vendor. But their failure to object upon this ground was a waiver of the irregularity."

Such an objection may not be absolutely waived by the failure to make it at the time a deed is tendered (*Linscott v. Moseman*, 84 Kan. 541, 114 Pac. 1088); but ordinarily it

can be made available as a ground of rejecting a tender, only when it has been seasonably suggested. This necessarily results from the principle underlying the familiar rule that he who assigns one reason for his conduct cannot afterward justify it for another (*Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997), which is often applied where specific objections have not been made to a proffered title. *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Prichard v. Mulhall*, 140 Iowa, 1, 118 N. W. 43; *Papin v. Goodrich*, 103 Ill. 86; *Reynolds v. White*, 134 App. Div. 248, 118 N. Y. Supp. 979; *Logan v. Bull*, 78 Ky. 607; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

In such a situation as that here presented, one who gives no reason at all for refusing a deed is in no better position than if he had given an untenable one. The plaintiff alleges that until the answer was filed it had received no notice of a requirement that the warranty deed it was to deliver should be one executed by itself. It at first demurred to the portion of the answer which alleged that the deed it had tendered was not of that character. The demurrer does not appear to have been acted upon, but in its reply, filed thirty-six days later than the answer, the plaintiff offered to procure title and execute a deed, and alleged that it had at all times been able and willing to do so. No definite time of performance had been fixed, and under the circumstances the offer to furnish the kind of deed suggested by the answer was made without unreasonable delay. The omission to produce and tender such a deed was not important, especially in view of the fact that the deed was to be delivered in exchange for the deferred-payment notes, and that the defendant was contesting the enforcement of the contract upon other grounds.

It results from these views that the defendant's motion for judgment on the pleadings must be overruled. It should perhaps be added that the plaintiff can only recover on the theory that, considering its petition and reply together, its action is substantially one for the specific performance of the contract. It cannot recover upon the note and retain full title to the land, whatever may be the attitude or conduct of the defendant. *Linscott v. Moseman*, 84 Kan. 541, 114 Pac. 1088; 29 Am. & Eng. Enc. Law, 720.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concur.

## MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,  
v.  
UNITED STATES EXPRESS COMPANY,  
Appt.

(114 Minn. 346, 131 N. W. 489.)

**Tax — express earnings — interstate commerce — leaving state.**

1. Carriage of shipments by an express company from a point in this state to another point in this state does not constitute interstate commerce, even where the shipments are forwarded over a line of railroad that for a part of its route lies outside of the state. A proportionate part of the earnings from such shipments, based on the number of miles of the route within the state, constitutes a part of the company's gross earnings, upon which the state is entitled to assess taxes, under Revised Laws 1905, § 1019.

**Same — local property.**

2. The state has a right to impose a tax upon property within its borders, regardless of the fact that such property may be employed by its owners in interstate commerce. **Same — property or earnings tax.**

3. The gross-earnings tax provided by Revised Laws, §§ 1013-1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state.

**Same — interstate commerce — interference.**

4. A tax upon the property, within the state, of an express company engaged in interstate commerce, based upon its gross earnings within the state on interstate shipments, is not a regulation or interference with interstate commerce.

**Same — money orders — tax on issuance.**

5. Receipts of an express company from the sale of money orders within this state are earnings of such company within the state, whether such money orders are redeemed within or without this state, and should be included in the gross earnings of

Headnotes by BUNN, J.

Note. — The position taken by the Minnesota supreme court in the above case on the constitutionality of the tax as affected by the commerce clause of the Federal Constitution—except as to the tax upon money orders, the objection to that tax not having been pressed in argument—has been authoritatively ratified, and settled by the affirmation of its judgment by the United States Supreme Court. 223 U. S. 335, 56 L. ed. —, 32 Sup. Ct. Rep. 211. The latter court accepted the decision of the state court as conclusive so far as the construction of the Minnesota statute was concerned.

The general subject of corporate taxation 37 L.R.A. (N.S.)

such company in estimating the tax upon its property within the state.

**Same — constitutionality.**

6. Revised Laws, §§ 1013-1019, as thus construed, do not violate either the Constitution of the United States or the Constitution of this state.

**Limitation of actions — claim for taxes.**

7. The right of the state to recover taxes on the property of defendant for the year 1899 did not accrue prior to May 1, 1900, and was not barred March 1, 1906, when the Revised Laws of 1905 went into effect.

**Same — statutory abrogation.**

8. Section 980, Revised Laws 1905, abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property within the state subject to taxation, including the property of express companies.

**Action — for taxes — failure to list.**

9. When earnings within the state for any year are omitted from the annual returns of the company, and not included in the amount of gross earnings upon which the taxes for such year were based, the state may recover taxes based on such omitted earnings in an action brought for that purpose.

(May 19, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Ramsey County in favor of the state in an action brought to recover taxes alleged to be due on account of taxable gross earnings omitted by defendant from its report for taxation. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Frank B. Kellogg, C. A. Severance, and Robert E. Olds, for appellant:

The statute has no application to earnings derived from interstate business.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520; Carson v. Smith, 5 Minn. 78, Gil. 61, 77 Am. Dec. 539; State ex rel. Loring v. Benedict, 15 Minn. 202, Gil. 153; Faribault v. Misener, 20 Minn. 396, Gil. 347; Ames

as affected by the commerce clause of the Federal Constitution is discussed at length in the note to Sandford v. Poe, 60 L.R.A. 641. The question whether transportation between points in the same state, over a route part of which is in another state, constitutes interstate commerce, is treated in the note to Missouri, K. & T. R. Co. v. Leibengood, 28 L.R.A. (N.S.) 985. It is important in this connection to observe the distinction between that question and the ultimate question as to the power of the state to tax the earnings from such transportation.

v. Lake Superior & M. R. Co. 21 Minn. 241; Hastings & D. R. Co. v. Whitney, 34 Minn. 538, 27 N. W. 69; Green v. Knife Falls Boom Corp. 35 Minn. 161, 27 N. W. 924; Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; State ex rel. Marr v. Luther, 56 Minn. 162, 57 N. W. 464; Funk v. St. Paul City R. Co. 61 Minn. 439, 29 L.R.A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 387, 31 L.R.A. 553, 65 N. W. 652; State v. Moffett, 64 Minn. 292, 67 N. W. 68; Traverse County v. St. Paul, M. & M. R. Co. 73 Minn. 417, 76 N. W. 217; State v. Northern P. R. Co. 95 Minn. 43, 103 N. W. 731.

If construed as applicable to earnings derived from interstate business, the statute would contravene the Constitution of the United States.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 211, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232.

Commerce between points in Minnesota, but passing through another state in transit, is interstate.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224; Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10.

The receipts from money-order business are not taxable.

American Bankers' Asso. v. American Exp. Co. 15 Inters. Com. Rep. 15; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 57 L.R.A. (N.S.)

1247; Cooley, Taxn. 259; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 595, 598-600, 39 L. ed. 759, 824-826, 15 Sup. Ct. Rep. 673; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Messrs. George T. Simpson, Attorney General, and George W. Peterson, Assistant Attorney General, for the State:

The taxes for the year 1899 are not outlawed.

Pine County v. Lambert, 57 Minn. 203, 58 N. W. 990; State v. Sage, 75 Minn. 448, 78 N. W. 14; State ex rel. Slingerland v. Norton, 59 Minn. 424, 61 N. W. 458; State v. Western U. Teleg. Co. 111 Minn. 21, 124 N. W. 380, 126 N. W. 403; State v. Foster, 104 Minn. 410, 116 N. W. 826; League v. Texas, 184 U. S. 158, 46 L. ed. 478, 22 Sup. Ct. Rep. 475; Megins v. Duluth, 97 Minn. 26, 106 N. W. 89; State v. Barnes, 108 Minn. 233, 122 N. W. 11.

The omitted earnings can be taxed and power exists to collect the same.

State v. Minnesota & I. R. Co. 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426; State v. Northwestern Teleph. Exch. Co. 107 Minn. 390, 120 N. W. 534; Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 200, 36 L. ed. 674, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 424, 32 L. ed. 229, 232, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Com. v. Delaware & H. Canal Co. 21 W. N. C. 406, affirmed in 22 W. N. C. 525; Com. v. New York, L. E. & W. R. Co. 21 W. N. C. 410; United States ex rel. Kellogg v. Lehigh Valley R. Co. 115 Fed. 373; Campbell v. Chicago, M. & St. P. R. Co. 86 Iowa, 587, 17 L.R.A. 443, 4 Inters. Com. Rep. 203, 53 N. W. 351; Seawell v. Kansas City, Ft. S. & M. R. Co. 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002; State ex rel. Railroad Comrs. v. Western U. Teleg. Co. 113 N. C. 213, 22 L.R.A. 570, 18 S. E. 389.

Bunn, J., delivered the opinion of the court:

Defendant is an express company organized under the laws of New York, and doing business in this state and throughout the United States. This action was brought by the state to recover the sum of \$9,719.66, being taxes alleged to be due on account of gross earnings never reported by defendant. Defendant admitted that it had failed to include in its returns to the proper state officials the items of gross earnings on which the complaint alleged taxes were payable, and claimed that such items were not taxable.

A constitutional amendment passed in 1896 (Const. art. 9, § 17) authorized a gross earnings tax upon express companies. The legislature in 1897 passed an act (Laws 1897, chap. 309, p. 575, § 6) providing for 3 per cent tax upon the gross earnings of such companies. The rate was increased to 5 per cent in 1899, and to 6 per cent in 1901. The statutes as they are now, and were at the time the action was commenced, provide in substance that every express company shall annually, between January 1st and February 1st, make and file with the state auditor a statement which shall contain, among other facts, "the entire receipts . . . for business done within this state, including its proportion of gross receipts for business done by such company within this state, in connection with other companies." The auditor, between March 1st and April 1st, determines the gross receipts of every such company, and on or before March 15th "shall assess upon each company a tax of 6 per cent upon its gross receipts for business done between points within this state for the preceding calendar year, as determined by the auditor, which shall be in lieu of all taxes upon its property." Revised Laws 1905, §§ 1013, 1015, and 1019.

The facts were stipulated. The items of gross earnings which the company failed to include in its returns to the state auditor, and which the state claims are taxable, are as follows:

First. Earnings on through shipments consigned from a point in Minnesota to another point in Minnesota, but forwarded over lines of railroad partly without the state of Minnesota. Ninety-one per cent of this mileage is in Minnesota. The amount of the back taxes claimed on these earnings is \$2,991.29, based upon the total earnings of such shipments, without any deduction based upon the portion thereof earned without the state.

Second. "Interstate transfer business;" that is, earnings on interstate shipments received by defendant at a point in Minnesota, carried over its lines to a second point in Minnesota, the transportation by defendant being performed wholly within the state, but the transportation of such shipments while out of the state, and also within the state, but beyond defendant's lines, being performed by other connecting companies. The amount of back taxes claimed on such earnings is \$504. 47.

Third. Earnings from the issuance of money orders sold and issued by defendant at points in Minnesota. These money orders designate no place of payment, but are payable at any office of the company. Eighty per cent of them are returned through banks

and clearing houses to the main office of defendant in New York. No part of the revenue from this service is paid to railroad or other transportation companies. No shipments of money are connected with the issuance and redemption of money orders. The amount of back taxes on the earnings derived from this class of business is \$5,788.15.

Fourth. Miscellaneous items, not reported for taxation, representing omitted earnings on intrastate express business handled between points in Minnesota by defendant during 1899. The amount of back taxes on these earnings is \$434.75.

The trial court decided for the state, holding that the earnings embraced in each of the four classes were taxable, and that plaintiff was entitled to judgment for \$9,719.66, the full amount claimed. Judgment was entered, and defendant appealed.

We will consider the different classes of earnings separately in the order above stated.

1. Defendant claims that a tax upon these earnings is a tax upon interstate commerce. We think that the case of *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, is decisive against defendant's contention, at least as to the proportion of the earnings derived from the carriage within this state. The facts in that case are substantially identical with the facts in this. As here, the point of shipment and the point of destination were both within the state; but the route passed through a portion of another state. It was held that this was not interstate commerce, and that the state of the points of shipment and destination could tax earnings on such shipments. It perhaps does not appear as clearly as it might whether the recovery in that case was allowed for the entire earnings, or for a proportion thereof based upon the mileage within the state; but we interpret the decision as allowing a recovery of taxes upon that proportion of the earnings derived from the carriage wholly within the state. This seems to us the safer rule, and avoids any question of taxing interstate commerce, and we adopt and apply it to this case. Nine per cent of the taxes recovered on this class of earnings should be deducted from the amount of the recovery.

Defendant also contends that the language of the statute shows it was not the intention of the legislature to tax such earnings. This contention is based upon the wording of the provisions that the gross receipts business done within this state shall be returned by the company, and that the tax shall be assessed upon its "gross

receipts for business done between points within this state." The intent of the legislature was clearly to avoid taxing interstate business; but we are unable to see how confining the tax to receipts from business done "between points within this state" indicates an intention to exclude from taxation, or, more correctly speaking, to exclude from the measure of taxation, earnings "between points within this state" in cases where the shipments pass out of the state *en route*. To so construe the language would be to add a new term to the act.

2. So-called "interstate transfer" business. Carriage of shipments from points in this state to points without this state is undoubtedly interstate commerce, though the carriage without the state is wholly by connecting companies. There is no doubt that it was the intention of the legislature, as expressed in the act, to include this class of earnings within the state in the gross receipts upon which the tax is based. They are earnings from business done "between points in this state." The provision that there shall be included by the company in its return "its proportion of gross receipts for business done by such company within this state, in connection with other companies," is not, we think, entirely colorless, but bears out the conclusion that the act shows an intent that the state shall be entitled to include such earnings in figuring the taxes to be paid by the company.

The question is whether the legislature had power to include earnings from such shipments. If the gross earnings tax law is to be construed as a tax upon gross earnings, admittedly a tax upon the earnings from interstate shipments is an interference with interstate commerce; but if such law does not authorize a tax upon gross earnings, if it is a tax upon the property of the corporation within the state, its gross earnings within the state being merely a measure or method of arriving at the value of its property for taxation, it is equally clear that there is no interference with interstate commerce, and the legislature has not acted beyond its power.

There is nothing in the Constitution or laws of the United States which forbids the state to tax property which is within its borders, merely because it is employed in interstate or foreign commerce. *State v. Northwestern Teleph. Exch. Co.* 107 Minn. 390, 120 N. W. 534; *Pullman's Palace Car Co. v. Pennsylvania*. 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

It has long been settled by the decisions of this court that the gross-earnings-tax laws were not intended to change the char-

acter of the tax, but, for the purpose of certainty, were intended to change the method of computation. The amount required to be paid remains a tax upon the property, and not against the corporation. The gross earnings tax is a system by which the amount of tax upon the property is determined. *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *Todd County v. St. Paul, M. & M. R. Co.* 38 Minn. 163, 36 N. W. 109; *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 417, 76 N. W. 217; *Minneapolis & St. L. R. Co. v. Koerner*, 85 Minn. 149, 88 N. W. 430; *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66; *State v. Northwestern Teleph. Exch. Co.* 107 Minn. 390, 120 N. W. 534.

It is true that this court has never construed this particular law; but we are not able to see why the decisions on the railroad tax laws and on the telephone tax law should not rule this case. It is pointed out that the title to the act used the expression "Taxation of Express Companies," and that the Revised Laws uses the term "Tax upon Its Gross Receipts," though this latter language was not in the act itself. But what the tax is called is not material. The act for this tax was passed on the same day and pursuant to the same constitutional amendment as the law providing for a gross-earnings tax upon telephone companies, which was construed to be a property tax. It is quite clearly a part of the same general scheme of taxation,—the system of using gross earnings as a method of arriving at the amount of the tax upon the property. The gross-earnings system, as applied to railroads, had been in force many years at the time this constitutional amendment was adopted, and when the laws were passed applying the system to telephone and express companies. The railroad tax laws had received the construction of the courts that the tax was not upon gross earnings, but on property. It seems fair to assume that the legislature had this construction in view, and did not intend to tax the gross earnings of express companies, but did intend to extend a system of taxation that had proved satisfactory.

The decisions of this court, if followed, lead clearly to the conclusion that the law in question provides for a property tax, and is not, therefore, a tax upon interstate commerce when applied to the receipts for business within the state, though the shipments come from or go to a point outside the state. We do not feel justified in departing from the doctrine of these decisions, because of the recent decisions of the United States Supreme Court relied on by defend-

ant. It is by no means clear that the court has rendered any decision on the subject that is contrary to those of this court. The earlier cases established the principle that a tax upon the earnings from interstate commerce is an interference with such commerce, but do not hold that a gross-earnings system of taxation cannot be construed as a tax upon property. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 926; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Alabama* (*Western U. Teleg. Co. v. Seay*), 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161. In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, it was held that a tax upon the capital stock of the Pullman Company, on a basis of assessing such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run, was, in substance and effect, a tax upon property. In *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, the state statute required railroad companies to pay an annual tax for the privilege of exercising their franchise in the state, the amount to be determined by the amount of their gross receipts. It was provided that, where a railroad lay partly within and partly without the state, the tax should be equal to the proportion of its gross receipts within the state; its amount to be determined by dividing the gross receipts of the company by the total number of miles operated, thus ascertaining the average gross receipts per mile, and then multiplying the result by the number of miles operated within the state. It was held that this was not a tax upon gross receipts, but resort to the receipts was to obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. The law was held not to be a regulation of interstate commerce.

Statutes applying similar methods of taxation to telegraph companies and to express companies have been sustained, as essentially property taxes, and not an interference with interstate commerce. *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305. In 37 L.R.A. (N.S.)

*McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242, where the court had under consideration a railroad gross-earnings-tax law of the territory of Dakota, though the question of interference with interstate commerce was not decided, Mr. Justice Peckham clearly intimates that the act was not a tax upon gross earnings, but provided a different method of taxation upon the property of the company. His language is in point: "When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

In *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638, a gross-earnings-tax law of Texas was held to violate the commerce clause of the Constitution. The majority of the court, speaking through Mr. Justice Holmes, while expressly stating that "by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, . . . it is not open to attack as inconsistent with the Constitution," holds that the act there in question was not a property tax, but a direct tax on gross receipts. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, is followed, and *Maine v. Grand Trunk R. Co.* distinguished. The *Galveston Case* is really the only utterance of the United States Supreme Court that appears at all inconsistent with the cases in this court holding that the gross-earnings tax is a tax upon property, and even here the doctrine is fully recognized that some gross-earnings-tax laws should be so construed. The act under consideration in the case at bar is, we think, fairly distinguishable from the act considered in the *Galveston Case*. Our Constitution, under which the act was passed, authorizes the imposition of a tax "upon the property within the state" of express companies, by taxing the gross earnings. The act provides that the tax "shall be in lieu of all other taxes upon the property of any express company . . . paying the same."

Giving due weight to the cases of the Supreme Court referred to and others we have not referred to, taking into consideration the language of the constitutional amendment and of the act itself, viewed in the light of the construction that had been

placed upon the railroad tax laws before this act was passed, we feel that no other course is open but to adhere to our former decisions.

3. Receipts from money orders sold by defendant at points in Minnesota. This item is divided into earnings on money orders redeemed without the state and those redeemed within the state. It cannot be seriously claimed, and we do not understand defendant to claim, that taxation of these earnings violates the commerce clause of the Constitution. *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 992. The fees for all money orders issued within the state are paid in this state. The orders are redeemable at any office of the company within or without the state. No transportation of money is involved. As far as the validity of the tax is concerned, there seems to be no material distinction between the orders that are redeemable within Minnesota and those redeemed elsewhere. The company is engaged in a banking business in the state, the earnings from which are not taxed at all unless under this act.

It is argued by defendant that, to the extent that defendant is engaged in business other than the express forwarding business, it cannot be regarded as an express company within the meaning of the statute. The statute defines an express company as a corporation that is engaged in the business of conveying articles by express; but it by no means follows that a corporation that is also engaged in other business is not still an express company, and liable to pay taxes on the property used in such other business. It was and is a well-known fact that express companies sell and redeem money orders. Defendant's charter authorized it to do a banking and exchange business. No reason is apparent why the legislature should exempt from taxation the property employed in such business. The statute does not confine the tax to earnings from transportation. It says that the company shall return a statement of its "entire receipts for business done within this state;" that the auditor shall determine the "gross receipts of such company," and shall assess a tax upon its gross receipts for business done between points within this state. We think that the selling of money orders within the state is business done within the state, within the fair meaning of the language of the act.

The point is made that taxing these receipts violates the provisions of the Federal Constitution and the state Constitution, requiring that taxes must be uniform and levied without discrimination and guaranteeing the equal protection of the laws and due process of law. The argument is 37 L.R.A.(N.S.)

that the classification is unreasonable and arbitrary, in that the receipts from similar business carried on by others than express companies are not taxed. We are not willing to grant the truth of the premise. It is true that receipts from the sale of exchange by banks are not taxed directly, but the system of taxation applied to banks is not the gross earnings system, and it is not right to say that a bank pays no tax on the receipts from its exchange business, or upon the property used in that business. Defendant points out the similarity in this respect between this case and the corporation tax case decided by the Supreme Court of the United States, since its brief and argument in this case were made. As that decision upholds the validity of the corporation tax law, it is needless to discuss further the constitutional objections urged here by defendant. We hold that the state was entitled to assess a tax upon the receipts from defendant's sale of money orders within the state.

4. Miscellaneous items of earnings in 1899, not reported for taxation. The only point urged here is that the statute of limitations bars a recovery of these items. This point applies also to the taxes for 1899 included in the previously considered items. The act provided that the auditor shall make the assessment on or before March 15th of each year upon the gross receipts for the preceding year, and shall deliver to the state treasurer for collection a draft upon the company for the amount assessed. The company has sixty days after demand by the state treasurer in which to pay the tax, before any penalty accrues. It is clear in our opinion that no cause of action accrued to recover these taxes until sixty days after demand by the state treasurer, which would be May 1, 1900, at the earliest. *State v. Sage*, 75 Minn. 448, 78 N. W. 14; *Rev. Laws 1905*, § 4071. At this time the limitation was six years, but before this six years expired, on March 1, 1906, the Revised Laws of 1905 went into effect. Section 980 of the Revised Laws abrogated the statute of limitations as to the right of the state to enforce the assessment and collection of taxes upon all property subject to taxation.

Defendant argues that § 980 is merely a re-enactment of § 82, chap. 2, Special Laws of 1902, which, according to the title of the chapter, concerned only the taxation of real estate; but the title was omitted, and the body of § 82 incorporated in the revision as a general provision, under chapter 11, entitled "Taxes." Section 980 is not now subject to the limitations in the original title to chapter 2. *State v. Barnes*, 108 Minn. 230, 122 N. W. 11. Defendant's com-

tention that § 980 relates only to the assessment of taxes upon property as such, and not to a tax based upon gross earnings, is not substantiated by the language of that section, which is clearly broad enough in its terms to include all taxes due the state. As we have held in this and in many other cases, a gross-earnings tax is a tax upon property. We hold that § 980 does apply to gross-earnings taxes, and that there is no limitation of time upon the right of the state to enforce collection of such taxes.

5. Defendant makes the further point that none of the omitted earnings can now be taxed, or the taxes now collected, for the reason that no provision is made in the laws for making a reassessment or a subsequent assessment on omitted earnings. It would be manifestly wrong if this power did not exist, and we are of the opinion that it does. Rev. Laws, 1905, § 1585. The cases of *State v. Minnesota & I. R. Co.* 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, and *State v. Northwestern Teleph. Exch. Co.* 107 Minn. 390, 120 N. W. 534, were brought to recover taxes on omitted gross earnings for prior years, and proceeded to final judgment on the theory that such taxes could be recovered, though it is true that the point made by defendant in this case was not raised in either of the cases cited. We hold that the state may recover taxes on earnings for prior years not reported by the company.

Our conclusion on the whole case is in accord with that reached by the trial court, except as to 9 per cent of the taxes under the first item. We hold that 9 per cent of the taxes assessed on earnings on this class of business should be deducted from the judgment.

Remanded, with directions to modify the judgment in accordance with this opinion.

Affirmed by the Supreme Court of the United States, February 19, 1912, 223 U. S. 335, 56 L. ed. —, 32 Sup. Ct. Rep. 211.

#### MINNESOTA SUPREME COURT.

HANS L. ERICKSON, Resp't.,  
v.

GEORGE ROBERTSON, Admr., etc., of  
BARBARA ERICKSON, Deceased, Appt.

(116 Minn. 90, 133 N. W. 164.)

**Evidence — to vary date of instrument.**

1. Parol evidence that a written instrument bearing date on one day was executed on a different day is competent.

Headnotes by SIMPSON, J.  
37 L.R.A. (N.S.)

**Husband and wife — consent to devise — consideration.**

2. A written consent by the husband to the devise by the wife of her real property does not require a consideration to support it.

**Same — void agreement — effect.**

3. Such consent by the husband is valid and effectual, though given in furtherance of a void written agreement between husband and wife, by which each, in terms, released all interest in the other's real property; the wife having performed her part of the agreement.

(November 17, 1911.)

**A**PPEAL by defendant from a judgment of the District Court for Mower County in plaintiff's favor and from an order denying a motion for new trial in a proceeding to have the homestead of plaintiff's deceased wife set apart to him. Reversed.

The facts are stated in the opinion.

Messrs. Greenman & Greenman, for appellant:

The statute prohibits only contracts directly between husband and wife.

McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404; Jorgenson v. Minneapolis Threshing Mach. Co. 64 Minn. 489, 67 N. W. 364; Sokolowski v. Ward, 98 Minn. 177, 107 N. W. 961.

**Note. — Sufficiency of husband's consent to wife's will.**

Generally, before the passage of modern statutes, a married woman could not devise realty even with the husband's consent, but she was competent to dispose of personalty by a will to which the husband consented. This note does not deal with the power of the wife to devise the several kinds of property, but is concerned only with the question what amounts to a sufficient consent by the husband to the wife's will, assuming that such consent is required.

It has been held that where the consent of the husband that the wife should make the will in question, and his assent to its probate, is shown, it is sufficient to pass her personal estate. *George v. Bussing*, 15 B. Mon. 558. The court said: "The doctrine is well settled that the wife may dispose of her separate estate by will, and may make a will in pursuance of a power given her for that purpose. It is also the settled doctrine that she may, with the consent of her husband, make a will to dispose of her personal estate. The principle upon which the power of the wife to make a will in such a case is founded, seems to be this, — that the husband may waive the interest in her property which the law confers upon him, and empower the wife to dispose of it by will. The grant of such a power is implied from his consent that the will should be made. A general assent that she may make a will is not sufficient. It must



The consent of the surviving spouse in writing, indorsed on the will, unrevoked prior to the death of testator, was as effective as if he had signed a deed to the premises on the day of and prior to her death.

*Radl v. Radl*, 72 Minn. 81, 75 N. W. 111. Messrs. French & Sasse for respondent.

Simpson, J., delivered the opinion of the court:

The respondent, Hans L. Erickson, filed a petition in the probate court of Mower county, asking that the homestead of his deceased wife be set apart and descend to him during his lifetime. The appellant here, administrator with the will annexed of the estate of Barbara Erickson, deceased,

be proved that he has consented to the particular will which she has made, and his consent should be given when it is proved. The reason for this is that he may revoke his consent, at any time during his wife's life, or after her death, before probate. . . . The consent of the husband that the wife should make this will is fully established by the proof, as well as his assent to the probate. When the will is made, as it was in this case, in pursuance of the wishes and with the express consent of the husband, very little testimony will be required to make out the continuance of the consent after her death."

And the will of a married woman is entitled to probate where, immediately after its execution, the husband signed an instrument reciting: "I James Cooper . . . hereby acknowledge that the sums . . . are the separate estate of my wife, Sarah Ann Cooper, to will and dispose of as she may think proper," and after the wife's death, during his illness, he expressed his intention to prove the will, but died before doing so. *Re Cooper*, L. R. 6 Prob. Div. 34.

And in *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330, where the chattels in question belonged to the wife before marriage, and the evidence tended to show the assent of the husband, before and during the marriage, that the wife should dispose of such property by will, and that the will in question was proved without objection, and the husband was present when the inventory was made, and pointed out the articles which belonged to the wife, and suffered the executor to take them away, it was held that the facts showed sufficient consent on his part.

And where the husband by marriage agreement relinquished all rights which he might possess in case he survived his wife, and covenanted that she should have full power to dispose of her property by will, it was held that a will executed by her entitled her representative to administer the personalty, although the husband withheld his consent to such will. *Newlin v. Freeman*, 23 N. C. (1 Ired. L.) 514. 37 L.R.A. (N.S.),

objected to such application, on the ground that Barbara Erickson, during her lifetime, had by will devised all her real property, including the homestead, to her children; that the respondent, in writing indorsed thereon, had consented to the execution of such will and the devising of the real property; and that the will had been duly admitted to probate.

Upon a hearing in probate court an order was made denying the petition. An appeal having been taken to the district court from that order, a trial was had upon the issues made by the petition and objections. The district court made its findings of fact and conclusions of law and direction for judgment, reversing the order of the probate court, and directing that the homestead be

So, in *Osmond's Estate*, 161 Pa. 543, 29 Atl. 266, where the wife's will, disposing of certain personalty, was read to the husband, and he expressed himself satisfied with it, in her presence, before she executed it, and received a certain amount of money from her at the time, he was held estopped after the wife's death from claiming against the will.

And the fact that the wife's will was executed in the handwriting of the husband has been held sufficient in some cases to show his assent thereto.

Thus, in *Grimke v. Grimke*, 1 Desaus. Eq. 366, it was held that a husband's assent to his wife's making a will of personal estate, manifested by its being in his handwriting, was a sufficient authority to support the will, although it was not republished after his death.

And in *Smellie v. Reynolds*, 2 Desaus. Eq. 66, where the husband drew a will for his wife, disposing of the property he got with her in marriage, including slaves, nominated himself an executor, had it executed by his wife, kept it in his possession until the wife's death, and sometime thereafter had it proved, and paid some legacies, and received back part of the property bequeathed to him in the instrument, it was held valid.

In *Reed v. Blaisdell*, 16 N. H. 194, 41 Am. Dec. 722, it was held that the verbal consent of the husband that the wife might dispose of a note which was her separate property, by will, was sufficient.

But in *McGowan v. Jones*, R. M. Charl. (Ga.) 185, it was held that a parol assent, unaffirmed by any act, analogous to an agreement before marriage, was insufficient to give validity to the wife's will, which apparently included property in the nature of realty.

And in *Myers v. Eggner*, 6 Houst. (Del.) 342, it was held that the fact that the husband signed a will of his wife's in the presence of two witnesses to it, before they had signed, was not sufficient to show that it was made with the consent of the husband, in writing, in the presence of two witnesses as required by statute.

set apart as asked in the petition of the respondent. The case is brought to this court by an appeal from an order denying a new trial.

As errors are assigned two findings of fact, as not being sustained by the evidence, —the rulings admitting oral evidence upon which the findings of fact complained of are in part based, and the refusal of the trial court to substitute for its conclusion of law as found the conclusion that the order of the probate court be affirmed. The findings of fact so questioned are to the effect: That on October 31, 1901, and at the time the will of Barbara Erickson was made, the respondent, Hans L. Erickson, and Barbara Erickson, being then husband and wife, entered into an agreement in writing purport-

ing to convey and release, each to the other, the interest which each held in the other's real property; that to carry out the agreement so made, and as a part thereof, the will of Barbara Erickson, disposing of her real property, was drawn and executed, and the consent thereto of Hans L. Erickson was written thereon and signed by him, and at the same time the will of Hans L. Erickson was drawn and executed, and the consent thereto of Barbara Erickson indorsed thereon; and, further, that Hans L. Erickson never consented in writing to the testamentary disposition of the land owned by Barbara Erickson, unless such consent is embodied in these writings so made.

Upon these findings the court bases its conclusion that the consent of Hans L. Er-

Some cases hold that a general assent by the husband that the wife may make a will is insufficient.

Thus, it has been held that, although a husband assented to the wife's making a will and knew that she had made one, where it did not appear that he knew the contents of the will, such assent was insufficient, as without a knowledge of the contents it could not be said to have been made with his consent. *Willock v. Noble*, L. R. 7 H. L. 580, 44 L. J. Ch. N. S. 345, 32 L. T. N. S. 419, 23 Week. Rep. 809.

And in *Rex v. Bettesworth*, 2 Strange, 891, it was held that a general consent in articles before marriage that the wife should have the power to make a will and dispose of her leasehold estate was not sufficient, but that a consent to the particular will must be proved.

And where an act provides that a married woman may, with the assent of her husband, dispose of her personal estate by will, there must be a special authority to make the particular will in question, and a consent that the wife might do as she pleased with the rest of the property if he got a stated amount is insufficient. *Kurtz v. Saylor*, 20 Pa. 205.

And where a husband made a voluntary conveyance in remainder of personal property to his wife, and gave her power to dispose of such property by will, her will must operate as his will, and an instrument executed by her is not a good execution of the power, although the husband was in the adjoining room when she was executing it and expressed no dissent from the proceedings, it not appearing that he had any precise knowledge of its contents or that he assented to its probate, although his conversations showed a willingness that the property should go as designated by the will. *Perry v. Gill*, 2 Humph. 218.

It has been held that where there is an express agreement that a married woman may make a will, slight proof is sufficient to make out a continuance of that consent after the death of the wife. *Brook v. Turner*, 2 Mod. 170; *George v. Bussing*, supra.

And where the husband consented that

the wife might make a will, and after her death expressed satisfaction that she had appointed a certain person as executor, and seemed to be satisfied in the main with the will, and recommended a coffin maker to the executor, and a goldsmith to make the rings, and a herald painter for making the escutcheons, it was held a good assent though he afterward opposed the probate of the will. *Brook v. Turner*, supra.

So, where a husband agrees in articles of separation that the wife shall be considered as a *feme sole*, free from his control or restraint, and agrees in writing that a will of personalty executed by the wife shall be proved, it is equivalent to a previous authority to her to make a will. *Re Wagner*, 2 Ashm. (Pa.) 448.

And the assent of the husband after the wife's death has in some cases been held sufficient.

Thus in *Elliott v. North* [1901] 1 Ch. 424, 70 L. J. Ch. N. S. 217, 49 Week Rep. 247, it was said not to be necessary to the validity of a testamentary disposition of property of which the wife had no power to dispose without her husband's consent, that his assent should be given during her lifetime, but that his assent given thereafter would be sufficient. But in this case the husband's assent, after the wife's death, to the grant of letters of administration with the will annexed, was held not to amount to a consent to the wife's will as disposing of property of which she had no power of disposal without his consent, for the reason that as a matter of construction, the will did not include that property.

Where a statute empowers a married woman to make a valid will if the husband "give his consent thereto, expressed in writing, and indorsed thereon," the requirements of the statute are not satisfied where the husband does not indorse his consent until after the death of the wife. *Smith v. Sweet*, 1 Cush. 470. The court said: "It follows, then, that at the death of Mrs. Sweet, the estate descended to her heirs, in the same manner that it would have done had no will ever been written. For we are of opinion

ickson to the terms of Barbara Erickson's will is null and void, and that he might, after her death, elect to take his share in her property under the statute.

1. The evidence, while far from conclusive on the point that all the three writings referred to were executed at the same time, nevertheless sufficiently sustains the findings of fact of the trial court to that effect. It appears from the evidence that the lot here involved, constituting the homestead, was conveyed to Barbara Erickson by deed dated and acknowledged October 1, 1901. The written agreement between herself and her husband was dated October 1, 1901, and the two wills, with the consents indorsed thereon, were dated October 31, 1901. On the other hand, the agreement and the wills were witnessed by the same parties, and Hans L. Erickson testified that they were all drawn and executed on the same day, and the consent of Hans L. Erickson, indorsed on his wife's will, refers to a contract releasing his interest in the property of Barbara Erickson, entered into between himself and his wife, "dated on this date." There is an apparent inconsistency between the dates and the recitals of the instruments. A mistake might well have been made in dating the agreement. The trial court was clearly justified, under the evidence, in finding that such was the fact, and that the agreement was made at the same time the wills were drawn.

2. The testimony of Hans L. Erickson that the three instruments, the contract and the two wills, were signed on the same day, was properly received. This testimony is not open to the objection that it tended to vary the terms of a written instrument.

that the assent of the husband, after the death of the wife, cannot retroact upon the will in such manner as to render it valid. A will, under this statute, is the joint act of the husband and wife, and must be performed during their joint lives. Were it otherwise, these consequences would seem to follow, viz.: There is no will, in contemplation of law, until the assent of the husband is indorsed; of course, there are no means provided by law to compel the production of the writing, for probate. In the meantime, the estate descends to her heirs, at the death of the wife, and passes, perhaps, from them into the hands of strangers, without notice. The estate is, apparently, indefeasible at the time of the descent and conveyance, and yet it is tainted with a secret vice which may destroy it; for the husband, at any time within twenty years, may assent to the will, prove it, and defeat the estate. We cannot adopt a construction of the statute from which these consequences might follow, in the absence of any explicit declaration of such intention by the legislature."

37 L.R.A. (N.S.)

The effect of the oral evidence tending to show that the contract dated October 1st was in fact signed October 31st was to identify it as the contract referred to in the consent indorsed on the will. This did not vary the contents or modify the agreement of the written contract.

3. A more serious objection is the one assigned to the conclusion reached by the trial court, from the facts found, that the consent of Hans L. Erickson to his wife's will is void. The consideration of this question requires a more detailed statement of the contents of the three writings.

(a) The agreement between Hans L. Erickson and Barbara Erickson in terms provides that Hans L. Erickson agrees to cause to be conveyed to his wife a described half block of land, to complete the buildings thereon, and to pay the taxes thereon. It gives to the wife all the household furniture, and provides that, in case she survives him, she shall have a life annuity of \$75. He further releases all of his right of dower, homestead, and other interest in the property and estate of the wife. In consideration of the agreements and stipulations entered into by Hans L. Erickson, Barbara Erickson agrees to release all of her right of dower, homestead, and other interests in and to the property and estate of Hans L. Erickson.

(b) On the same day, as found by the trial court, Hans L. Erickson made his will, devising all his real estate to his children, subject to provisions therein contained in favor of his wife, Barbara Erickson. These provisions carried out the terms of the written agreement between himself and his wife, —that is, a life annuity of \$75 was be-

In *Ex parte Fane*, 16 Sim. 406, where the husband proved his wife's will generally, it was held valid as to funds disposed of therein, over which she had no power of disposal without his consent.

But since the amendment of the probate practice in England, to the effect that the probate of the will of a married woman shall take the form of ordinary grants of probate, without any exception or limitation, the fact that the husband proves his wife's will in general form is held not to constitute an assent to the will as a disposition of property requiring his consent for such disposal. *Re Atkinson* [1899] 2 Ch. 1, 68 L. J. Ch. N. S. 404, 47 Week. Rep. 469, 80 L. T. N. S. 505.

And in *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. 666, where the wife's will, under which the husband took no interest, was valid in part, the fact that the husband signed a petition for his appointment as executor, and also signed a bond, was held not to amount to "the husband's written consent" required by statute.

J. T. W.

queathed her, and money set apart to complete the buildings, if not completed before his death. The wife, Barbara Erickson, indorsed thereon her consent to and acceptance of the provisions of this will.

(c) At the same time Barbara Erickson made her will devising all her real property to her daughter. Attached to this will was this acceptance, duly executed by Hans L. Erickson: "I, Hans L. Erickson, husband of Barbara Erickson, of Mower county, Minnesota, the testatrix within named, thereby consent to and accept the provisions of the within and foregoing last will and testament of the said Barbara Erickson, and in consideration of a contract heretofore entered into between myself and the said Barbara Erickson dated on this date, release all of my right to dower, homestead, and other interests in and to the property and estate of the said Barbara Erickson. Given under my hand and seal this 31st day of October, A. D. 1901."

The general plan attempted to be carried out by these writings is apparent. Prior to the marriage of Hans L. Erickson and Barbara Erickson, each had been married, and each had children by such former marriage. In addition to the home acquired in the village of Austin, the property here involved, the husband owned a farm, and the wife had some property of small value. The parties evidently desired and agreed that the title to the home should be vested in the wife, and that the property of each should descend to his or her children. In such plan there was no fraud or illegality. The only question arises as to the validity of the means adopted to carry it out. The written agreement between the husband and wife, by which each released to the other interests in real property, was void, being contrary to the statutes of the state. *Rev. Laws, 1905, § 3609; Re Rausch, 35 Minn. 291, 28 N. W. 920; Phillips v. Blaker, 68 Minn. 152, 70 N. W. 1082; Betcher v. Rinehart, 106 Minn. 380, 118 N. W. 1026.*

It does not follow, however, that the consent of the husband to the will of the wife, disposing of her real estate, is void, even though such consent is given in performance of the void agreement. No consideration was required to support the consent of the husband to the testamentary disposition by the wife of her real property. Such disposition is permitted by the statutes, if consented to, in writing, by the husband. The only part of the written agreement between the husband and the wife which the wife was required to perform was that she should release all right of dower, homestead, and other interest in and to the property and estate of the husband. This she did. She assented to the will of the husband, de-

vising to his children his real property. It does not appear that this consent was ever in any way revoked by her, or that she in any way asserted any interest in his estate. Therefore, if we treat the consent of the husband to the disposition of the wife's property as conditioned upon her performance of her part of the written agreement between them, such condition was fully satisfied. The written agreement having been fully performed by the wife, the consent of the husband to the terms of her will, though such consent was conditioned upon the agreement, is valid and effectual. Such consent was never revoked. The only attempt made to revoke the same, or to renounce the terms of the will, was after the death of the wife and the admission of her will to probate. If the consent of the husband to the wife's devise of her real property was an agreement requiring a consideration to support it, then a different case would be presented. A somewhat similar situation was presented in *Jorgenson v. Minneapolis Threshing Mach. Co. 64 Minn. 489, 67 N. W. 304*. There a question was raised as to the validity of a deed by a husband and wife to a third party, made in pursuance of a void plan and agreement to transfer real property from the husband to the wife. The court held that, even though this agreement between husband and wife for the transfer of the property to the wife was void, nevertheless the conveyance to a third party, made in performance of such agreement, not being prohibited by the statute, was valid.

The conclusion of law of the court below not being sustained by the findings of fact, the motion of the appellant for a new trial should have been granted.

Reversed.

#### NEW YORK COURT OF APPEALS.

MATTHEW WALSH, Reapt.,

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appt.

(204 N. Y. 58, 97 N. E. 408.)

Release — settlement of action against one joint tortfeasor — effect.

1. The settlement of an action against one of two joint tortfeasors does not bar an action against the other, unless it is shown to have been made under circumstances

Note.—As to the effect of a covenant not to sue one joint tortfeasor as a release of other, see *Musolf v. Duluth Edison Electric Co. 24 L.R.A. (N.S.) 451*, and note.

As to the effect, in release of one joint

which operate to discharge the other wrongdoer.

**Appeal — evidence — earning capacity — indefiniteness.**

2. Permitting a person injured by another's negligence to state his earning capacity so indefinitely as to leave it uncertain whether it represents the value of his services or partly the profits of his business is not reversible error if there is independent evidence as to the value of his services and the jury are instructed to allow nothing for loss or profit.

(Cullen, Ch. J., and Gray and Haight, JJ., dissent.)

(January 9, 1912.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Niagara County in plaintiff's favor in an action brought to recover damages for personal injury alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Alfred L. Becker, with Messrs. Hoyt & Spratt, for appellant:

The damages allowed were based on incompetent evidence.

Gombert v. New York C. & H. R. R. Co. 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382.

The plaintiff by settling with the Erie Railroad Company, a joint tortfeasor, released this defendant.

Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106, 19 A. & E. Ann. Cas. 771; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Eames v. Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Irvine v. Millbank, 56 N. Y. 635, 15 Abb. Pr. N. S. 378; Knickerbacker v. Colver, 8 Cow. 111; Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330; Ruble v. Turner, 2 Hen. & M. 38; Bronson v. Fitzhugh, 1 Hill, 185; Cushman v. De Mallie, 46 App. Div. 379, 61 N. Y. Supp. 878.

Messrs. Dudley, Gray, & Noonan, for respondent:

The evidence upon the question of damages was entirely competent.

tortfeasor, of reservation of right as against others, see Eden v. Fletcher, 19 L.R.A. (N.S.) 618, and note.

As to right to show by extraneous evidence that payment of judgment against, 37 L.R.A. (N.S.)

Kronold v. New York, 186 N. Y. 40, 78 N. E. 572.

The defendant was not freed from liability because the plaintiff "settled" his suit against the Erie Railroad Company.

1 Enc. Pl. & Pr. p. 77; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; Daniels v. Hallenbeck, 19 Wend. 408; Ostrom v. Greene, 161 N. Y. 353, 55 N. E. 919; 2 Enc. Ev. 164; Snow v. Chandler, 10 N. H. 92, 34 Am. Dec. 140; Line v. Nelson, 38 N. J. L. 360; Ellis v. Esson, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Mitterwallner v. Supreme Lodge, 109 App. Div. 70, 95 N. Y. Supp. 1090; Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113.

Werner, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries, and it presents two questions upon which there has thus far been some difference of judicial opinion. The first question is whether the plaintiff should be precluded from maintaining this action because he compromised or settled another suit which he brought against the Erie Railroad Company on account of the same accident. The second question is whether the trial court made erroneous rulings in admitting evidence designed to establish the plaintiff's earning capacity prior to the casualty in which he was injured. All the other questions which have arisen in the case are either conclusively disposed of by the unanimous affirmance at the appellate division, of the judgment entered upon the verdict, or by rulings which, although reviewable in this court, present no errors which in our opinion would justify the reversal of the judgment. A brief statement of the facts will disclose the pertinence of the two questions which survive for our consideration.

On the 30th day of May, 1907, the plaintiff was injured on the tracks of the defendant at Suspension Bridge by a car belonging to the Erie Railroad Company, which was part of an Erie train that was being moved on what was known as the "Erie transfer track." There were seven of these tracks, and all were the property of the defendant. By an arrangement between the two corporations, the Erie Railroad Company used the seventh or most southerly track for the transfer of cars. To the north of all these tracks was the station of the de-

or consideration for release of, alleged joint tortfeasor, was not a satisfaction of claim. see Ryan v. Becker, 14 L.R.A. (N.S.) 330, and note; Fitzgerald v. Union Stock Yards Co. 33 L.R.A. 983, and note.

fendant, and several hundred feet south of the tracks and running parallel therewith there was a street known as North avenue. From this street, over a rough piece of land belonging to the defendant, there were two well-defined paths which led to and across the tracks of the defendant and to its station. The physical situation in that neighborhood was such that this path was much more convenient for the local patrons of the defendant's railroad than any of the adjacent streets which afforded passage to and from its station, and the evidence submitted to the jury warranted the finding that for more than twenty years these paths had been used daily by hundreds of persons, many of whom were patrons of the defendant, and that this use was acquiesced in if not expressly authorized by the defendant. On the day of the accident the plaintiff, who was then a resident of Niagara Falls, had been in Buffalo and returned to Niagara Falls on one of the defendant's trains which arrived at some time between 10 and 11 o'clock in the evening. He alighted at the Suspension Bridge station, not on the northerly side of the train looking toward the station, but on the southerly side, which led to the stretch of seven tracks. These he proceeded to cross toward the easterly one of the two paths above described. This was blocked by an Erie train, the rear car of which was about opposite the path. The plaintiff started to walk around this car, and it was while attempting to do this that the car was suddenly shunted against him and caused the injuries of which he complains.

After the accident the plaintiff brought an action against the Erie Railroad company, which was later settled by the payment to the plaintiff of the sum of \$7,000. Then this action was brought upon a complaint in the usual form, and in the answer thereto the defendant alleged that "the plaintiff for a good and valuable consideration equaling or exceeding in value and amount all the damage and injury suffered or alleged to have been suffered by the plaintiff as set forth in the complaint, to him in hand paid by the Erie Railroad Company, released and forever discharged both said Erie Railroad Company and this defendant of and from all claims," etc., arising out of the personal injuries which are the subject of the action. At the trial the plaintiff testified, on the direct examination, that he had settled the action against the Erie Railroad Company, and had received from it at the time of the settlement the sum of \$7,000. He was shown a paper which he admitted having signed, and identified it as "the paper of settlement." On the cross-examination of the plaintiff he reiterated

what he had testified to concerning the settlement with the Erie Railroad Company, and also admitted that in the action against that company he had sworn to a complaint in which he had alleged "that said occurrence and injury," referring to the same occurrence and injury involved in this action, "were due solely to the carelessness and negligence of the defendant," the Erie Railroad Company. At the close of the plaintiff's case, there was a motion for a nonsuit, and at the conclusion of all the evidence a motion for a direction of a verdict against the plaintiff on the ground, *inter alia*, that according to the plaintiff's own evidence he had settled his case against one of the two parties who were charged as joint wrongdoers, and that this settlement was conclusive upon him in the case at bar. These motions were denied, and the exception to these rulings present the question: Did the plaintiff's compromise of his cause of action against the Erie Railroad Company operate to discharge the defendant, its joint tortfeasor?

It is elementary law that one who has been injured by the joint wrong of several parties may recover his damages against either or all; but, although there may be several suits and recoveries, there can be but one satisfaction. *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330; *Thomas v. Rumsey*, 6 Johns. 26; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628, 635. The reason of the rule is that while there may be many perpetrators of a wrongful act, each of whom is separately liable, yet the act and its consequences are indivisible, and the injured person is, therefore, limited to a single satisfaction. The early English cases and some of the later cases in our sister states literally follow the logic of this rule to the conclusion that any kind of a settlement, release, or satisfaction, even though expressly limited to certain parties and reserving all rights as against the others, operates to discharge all who participate in the wrong. The idea underlying this rule is that the primary intention to release is the thing to be carried out, and all inconsistent reservations must be ignored as repugnant to the purpose of the release, which was to destroy the debt or obligation. It is one of those harsh, although strictly logical common-law, rules which has had to make way for the modern tendency to substitute justice for technicality wherever that is possible; for now the English courts are holding that the general words of a release, which are limited by specific reservations, are to be construed as a covenant not to sue the party to whom the instrument is given, thus effectuating the intention of the parties without affecting the joint liability. The

authorities bearing upon this modern relaxation of the ancient rule were very succinctly, yet comprehensively, reviewed by Judge Haight in the case of *Gilbert v. Finch*, 173 N. Y. 455, 466, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, 136, and the conclusion of this court was thus stated in the paragraph of the opinion in that case: "It thus appears that the decisions of this court are in accord with the English rule and in harmony with our statute in reference to joint debtors. Code Civ. Proc. §§ 1942, 1944. They give force and effect to the intention of the parties to the instrument, which, we think, is more just, and the wiser and safer rule. Where the release contains no reservation, it operates to discharge all the joint tortfeasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged."

As we understand the position of the appellant and of our associates who are opposed to the affirmance of this judgment, it is that the rule announced in *Gilbert v. Finch* has no application, because the plaintiff proved that he had "settled the action against the Erie Railroad," but did not prove that the "paper of settlement" contained any provision preserving the plaintiff's right of action against the defendant in this action. It is urged that the word "settled," as used in this connection, imports a discharge or release, which is the equivalent of a release under seal, and that, in the absence of testimony tending to qualify or limit its extent and effect, it must be presumed to mean a settlement by which the defendant is discharged. We think that no such presumption should be based upon a word which has a variety of meanings, and which, as applied to legal proceedings or disputes between men, is defined as an adjustment of differences or accounts, or as coming to an agreement. Webster's Int. Dict. It is a term which is loosely and indiscriminately used to describe all sorts of compromises as well as technical discharges and releases. In most cases its accurate meaning and legal effect can only be determined in view of the particular transaction to which it is applied. In the case at bar the plaintiff evidently used it in a colloquial sense to indicate that he had adjusted his differences with the Erie Railroad Company. He was under no obligation to make any proof on the subject of payment by any settlement with the Erie Railroad Company. These were matters of defense which it was the duty of the defendant to plead and prove. The plaintiff's general reference to the subject left the defendant's duty just where the law had placed it. To 37 L.R.A. (N.S.)

defeat the plaintiff's claim the defendant was bound to prove that the former had not merely settled with the Erie Railroad Company, but that it had been done under circumstances which operated to discharge the defendant. Under the rule adopted by this court in *Gilbert v. Finch*, supra, this was not a case for presumption based upon an unexplained and equivocal use of a word, but for proof of facts upon which the definite assertion of a release of the defendant could be predicated.

Thus far we have proceeded upon the printed record which indicates no effort on the part of the plaintiff to offer in evidence the document which he had identified as being "the paper of settlement." To this we are now permitted to make an addendum which, we think, conclusively disposes of this question. In the course of the oral argument, the plaintiff's counsel, when pressed with the suggestion from the bench that his client should be bound by the admission that he had settled with the Erie Railroad Company, replied that he had in court the original stenographer's minutes of the trial, which showed that the so-called "paper of settlement" had been offered in evidence by him, and that it was objected to by counsel for the defendant, whereupon it had been withdrawn. Counsel for the defendant who argued this appeal consented that these minutes might be taken by the court as part of the record. These minutes fully sustain the statement of plaintiff's counsel. Thus we have a case in which the plaintiff's offer to prove by documentary evidence the exact terms of the settlement with the Erie Railroad Company was met by the objection of the defendant, which is now in court contending that, because there was no definite proof of the terms of the arrangement with the Erie Railroad Company, the plaintiff's unexplained use of the word "settled" raises against him the legal presumption that he released and discharged the defendant. We have tried to make it clear that, even without this addition to the record, there would be no warrant for the presumption that the plaintiff's use of the word "settled" imported a strict release discharging both the Erie Railroad Company and the defendant. Much less should we indulge in such a presumption in the face of proof disclosing the plaintiff's effort to place before the court the documentary evidence which would have shown precisely what the transaction was. If in these circumstances there were any ground for presumption, we think it would naturally be that the defendant would not object to evidence which would operate to end the litigation and discharge it from liability. Be that as it may, the defend-

ant should not be permitted to profit by its objection to the very proof which it now insists should have been made, and which it could have furnished if it had chosen to do so.

It is further urged that the plaintiff's admission as to the allegation of his complaint in the action against the Erie Railroad Company, to the effect that the accident which caused the plaintiff's injuries was due solely to the negligence of the Erie Railroad Company, should now preclude a recovery against the defendant. That evidence was, of course, competent as an admission, but it was nothing more, and was not conclusive. It was an admission, moreover, which was open to the explanation that it had no reference to this defendant's connection with the accident, for it was merely the usual allegation in a complaint charging a defendant with negligence and asserting the plaintiff's freedom from contributory negligence. The defendant asked for no instructions to the jury relative to this feature of the trial, and we do not find any exception which presents the question.

The other question which we are called upon to consider is whether the trial court erred in receiving, over defendant's objections, evidence tending to show the plaintiff's earning capacity prior to the accident. Upon this branch of the case the record is peculiar. On his direct examination the plaintiff testified that he was in the business of selling men's furnishings in a store conducted by himself without the aid of clerks. He was asked what his services were worth in that business, and he answered, "Between \$150 and \$200 a month." He stated in detail his duties as a salesman, and his counsel expressly disclaimed that he was asking for the profits or returns on invested capital, and insisted that he was asking only for the value of his services. Thus the record stood when the plaintiff was cross-examined. In answer to questions put to him by defendant's counsel, he reiterated that he had been earning \$150, and then he added, "I took out \$150 a month. That included the profit on my goods. That included what I was making in the business." Then he was asked, "And that is why you were worth \$150?" and his answer was: "No, sir. I did the buying myself and stayed there myself all the time. And it was because I was making that, that I reckoned my services worth \$150." At this point the defendant's counsel asked that the testimony on that branch of the case be stricken out, and that he be permitted to further examine the witness. Having been granted this privilege, the following question was then propounded to the

plaintiff: "Mr. Walsh, you say you took out \$150 a month, and that is why you say your services were worth that much. Now will you state fully what your capital was there, and what your earnings were?" This was objected to. The court stated that he might answer under objection. Before the witness could answer, he was asked the further question: "Was \$150 a month the entire amount of the profit you made there, or not?" This was also objected to "as not the proper method of proving the value of the man's services." The objection was overruled, the defendant's counsel excepted, and the plaintiff answered, "No, sir." He was then asked the further question: "In figuring your services worth \$150 per month, do you include in that your profits on the capital invested?" Defendant's counsel interposed the same objection, which was overruled and followed by an exception. Then the witness answered, "No, sir." The difficulty with this chapter of the trial is not that there is any uncertainty or ambiguity as to the legal rule under which evidence upon this subject is either admissible or inadmissible, but that neither of the respective counsel presented the matter so sharply as to render it clear which of these two alternatives should have been invoked by the trial court. The rule is that evidence of profits of business, which are uncertain and fluctuating in character and amount, is not admissible to prove loss sustained by reason of personal injuries, but that loss of services which have a certain and definite value may be proved. Therefore, the first inquiry in each case is whether the loss sought to be recovered consists of profits which may not be proved, or earnings which may be proved. That is a question which depends upon the evidence in each instance, as is illustrated in *Kronold v. New York*, 186 N. Y. 40, 78 N. E. 572, where we held that a man engaged in the business of selling Swiss embroideries, with a small amount of invested capital, which was merely an incident or vehicle to the performance of services which were practically personal in their nature, could recover for loss of earnings; and in the cases of *Weir v. Union R. Co.* 188 N. Y. 416, 81 N. E. 168, 11 Ann. Cas. 43, and *Gombert v. New York C. & H. R. R. Co.* 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382, where the converse of the rule was applied because it appeared that the losses sought to be recovered were the uncertain and fluctuating increment of capital invested, although in each of the two latter cases the business was comparatively small. A man is not precluded from recovering for loss of earnings, simply because he is in business, but



he must not be permitted to prove profits under the guise of earnings. This point is clearly illustrated in *Masterton v. Mt. Vernon*, 58 N. Y. 391, 396, where the plaintiff, a dealer in teas, which was a business requiring expert knowledge and skill, was permitted to prove his profits from year to year. There the rule was thus stated: "The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures, in which the plaintiff, if uninjured, would have been engaged."

It is conceded that in the case at bar the plaintiff's own evidence is not so clear as it might have been had his counsel hewn more closely to the line which separates earnings from profits. His own testimony upon this subject is far from satisfactory. It is so equivocal that it is difficult, if not impossible, to decide whether the loss to which he testified falls under one head or the other. And it may be added that the cross-examination did not dissipate this uncertainty. There are two answers, however, to the criticism which may be made upon this part of the evidence: (1) It was supplemented by the testimony of a competent witness, who stated very clearly what the plaintiff's earnings as earnings were worth. (2) Among the last words in the judge's charge to the jury we find this instruction: "And, if you come to the question of damages, you are not to take into consideration the profits of his retail store business." Although this last question is not free from doubt, we are of the opinion that the defendant was not prejudiced by the rulings. The remarks of counsel during the taking of evidence on this subject, and the closing admonition of the trial judge, must have made it unmistakably clear to the jury that the value of plaintiff's earnings might be included in any verdict which they should find in his favor, but that profits of his business must be excluded.

The judgment should, therefore, be affirmed, with costs.

Cullen, Ch. J., dissenting:

I dissent from the decision about to be made. It was unnecessary in this case to show that a release or any written instrument had been delivered to the Erie Railroad Company. It was sufficient to show by parol a satisfaction by that company. This could be just as well effected by an

oral agreement and receipt of consideration as by any written instrument. The plaintiff testified: "I brought an action against the Erie Railroad first. I settled the action against the Erie. I received at the time I made that settlement \$7,000. . . . I brought a suit against the Erie for this accident, and I say I settled with the Erie; yes, sir. . . . When I settled with them at that time, I did not understand it just as I alleged in the complaint, yet I settled with them." There is not a word of further testimony to limit the effect of this bald statement, and the question is, What does it on its face and unqualified by other evidence import? I think it imports a satisfaction of the claim. It is true that the plaintiff might have received money from the Erie Company upon an agreement that would not operate to discharge the defendant in this action, but, if that was the case, it was incumbent on the plaintiff to show that such was the agreement. If the testimony or admission of a party was that he had been paid the claim in suit, it would import that he had been paid the whole claim and in a manner that would operate to discharge it. If the claim had been paid only in part or by a note, the failure to pay which revived the original claim, the claimant would be bound to state the fact. The proposition, however, seems to be settled in this state by authority. In *Barrett v. Third Ave. R. Co.* 45 N. Y. 628, the question was similar to that which has arisen in this case. On the submission of the case to the jury the court was requested to charge that, "if they [the jury] believed there had been a settlement with the Harlem Railroad Company for the injury claimed in this action, no matter how slight the consideration, this action could not be maintained." This court said: "The request was proper in terms, and should have been complied with, if there was any evidence of such settlement." 45 N. Y. P. 636. In *Dahlstrom v. Gemunder*, 198 N. Y. 449, 455, 92 N. E. 106, 108, 19 Ann. Cas. 771, which was also the case of an alleged satisfaction by one of two joint tortfeasors, Judge Hiscock, writing for the court, said: "Plaintiff further admits that the action so brought against the said Hey was settled and compromised for the sum of \$1,750. . . . If the claim has been settled—that is, satisfied—there is nothing to be reserved as a basis for prosecution of another liable for the same claim,"—citing cases. That "settlement" imports satisfaction is evidenced by the use of the word in judicial opinions rendered in scores of cases in this and other states. In *Nassoly v. Tomlinson*, 148 N. Y. 326, 331, 51 Am. St. Rep. 695, 42 N. E. 715, 716, Judge Vann said: "We

think that the undisputed evidence shows conclusively that the offer was made in settlement of the claim, and that the plaintiff so understood it, when, by using the check, he accepted the offer." In *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, upon which reliance is placed in the opinion of my brother Werner, the claim was for a certain sum and the instrument itself reserved the right. This fact is emphasized in the opinion there rendered by Judge Haight, and it also appeared in many of the cases cited by him in this and other states. *Irvine v. Millbank*, 56 N. Y. 635; *McCullis v. Hawes*, 38 Me. 566; *Ellis v. Eason*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Sloan v. Herrick*, 40 Vt. 327. See also *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534. In the present case the damages were unliquidated, and \$5 would have amounted to a satisfaction as well as \$5,000.

The real ground on which the case is to be affirmed, however, seems to be because it appears in the stenographer's minutes, though not in the printed record, that the "paper" of settlement when offered in evidence by the plaintiff was objected to by counsel for the defendant and thereupon withdrawn. The instrument is not produced before us, and we are entirely ignorant of its contents, yet we are to speculate that the contents of the instrument would have been unfavorable to the defendant and have shown that the agreement was of a character that would not discharge the defendant. In my judgment such speculation is entirely unwarranted. It would never be tolerated in the action of a jury, and much less should it be indulged in by a court of law. What was the ground of the objection to the instrument we do not know. We do know, however, that, after the objection was made by the defendant, the plaintiff voluntarily withdrew it. What is the presumption from this conduct—that the instrument was competent evidence and the defendant wrongfully kept it out, or that the plaintiff in withdrawing the offer conceded that the objection was well founded? Plainly the latter. If so, on what theory can we indulge any presumptions against the defendant for its refusal to admit incompetent evidence?

I also think the evidence offered to prove the value of the plaintiff's services was incompetent and in violation of the rule we have laid down in the cases cited by my brother Werner. What the plaintiff should have been permitted to prove, and only what he should have been allowed to prove, was the fair and reasonable salary of a man employed to do his work. This was the rule declared in *Masterton v. Mt. Vernon*, 37 L.R.A. (N.S.)

58 N. Y. 391. It is reiterated in *Weir v. Union R. Co.* 188 N. Y. 416, 81 N. E. 168, 11 Ann. Cas. 43, and *Gombert v. New York C. & H. R. R. Co.* 195 N. Y. 273, 133 Am. St. Rep. 794, 88 N. E. 382; to wit, "the compensation usually paid to persons doing such business for others." Taking the view of the case most favorable to the respondent, what he was allowed to do was to fix most arbitrarily what part of his income he thought due to his services. Such a rule would open the door to evidence, which in the cases referred to has been condemned. A banker in the receipt of a very large income from his business might think, and not wholly without reason, that, after allowing interest on his capital at a very liberal rate, the remainder of his income was due to his exceptional ability. This is a very different thing from "the compensation usually paid to persons doing such business for others." True, the business before us is a comparatively small affair, but the principle involved is the same in the two cases.

Vann, Willard Bartlett, and Chase, JJ., concur with Werner, J. Gray and Haight, JJ., concur with Cullen, Ch. J.

#### NORTH DAKOTA SUPREME COURT.

LIZZIE LOWERY et al., Appts.,

v.

MARTHA HAWKER et al., Respts.

(— N. D. —, 133 N. W. 918.)

#### Will — omission of children — effect.

1. The unexplained omission of children in a will does not necessarily invalidate the instrument, even though such will may be ineffectual as to such persons. Their remedy is to appear in the proceedings and de-

Headnotes by BRUCE, J.

#### Note. — Remedy of pretermitted heirs.

Many of the states have statutes which provide in substance either that the birth of a child to a testator after the execution of a will shall revoke it if such child is not provided for or intentionally excluded, or that such a child—and in some states any child or the issue of a deceased child—not provided for or intentionally excluded, shall take the same share of the estate as if the testator had died intestate.

While the construction and effect of such statutes has been considered in a large number of cases, in only a few of them is the character of the remedies available to pretermitted children for the assertion of the rights thus conferred upon them ex-

mand a distribution of the estate, which, as to them, shall be uninfluenced by the provisions of the will.

**Same — probate — issues.**

2. On the probate of a will, the due execution and publishing of the will, the sound and disposing mind of the testator, and his freedom from duress, menace, fraud, or undue influence, and the fact as to whether the instrument is in fact his last will and testament, are the only issues before the court.

**Same — effect of probate.**

3. The mere probating of a will is not final and conclusive as to the validity and construction of the instrument. Such matters may be discussed and adjudicated at any time before the final distribution of the estate.

(December 7, 1911.)

pressly discussed. This note includes only those which directly pass upon the question, and does not assume to catalogue the different actions and proceedings in which such a right has been sought to be enforced. A partial catalogue of this sort may be found in the opinion in *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696.

**Right or duty to contest probate.**

A pretermitted child cannot contest the probate of the will upon that ground, his rights being independent of the will, and not affected by it. *McIntire v. McIntire*, 64 N. H. 609, 15 Atl. 218; *Re Gall*, 5 Dem. 374.

Although the effect of the birth of a child after the execution of a will may be to render its provisions inoperative, except those relating to the appointment of an executor, the probate of the will cannot be defeated thereby. *Bunce v. Bunce*, 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 659.

But see *dictum* in *Re Gall*, 5 Dem. 374, to the effect that where a will is revoked by a marriage and birth of issue, the probate may be contested on that ground.

A pretermitted child whose birth subsequent to the execution of the will operates as an implied revocation thereof is not bound to resist its probate, where the probate of the will has the effect to establish only its execution and render it admissible as an instrument of evidence, but does not give validity to a title based upon it. *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164. But compare *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696, under heading "By writ of entry, or ejectment," *infra*.

**Setting aside probate.**

His remedy is not by a proceeding to set aside the will (*Branton v. Branton*, 23 Ark. 569; *Schneider v. Koester*, 54 Mo. 500), as the only issue that can be tendered and tried in such a proceeding is whether the writing produced is the will of the testator or not. *Cox v. Cox*, 101 27 L.R.A. (N.S.)

**A**PPEAL by plaintiffs from an order of the District Court for Bottineau County affirming an order of the County Court admitting to probate the will of Mark Hawker, deceased, and appointing the defendant widow executrix thereof. Affirmed.

**Statement by Bruce, J.:**

Mark Hawker, now deceased, devised and bequeathed his entire estate to his wife and minor son, but omitted to provide in his will for his children and for the children of a deceased child by his first wife. It did not appear upon the face of the will that such omission was intentional, neither did it so appear from any of the evidence which was introduced by the widow and petitioner, Martha Hawker, when she applied to the

Mo. 168, 13 S. W. 1055. In this case the court said: "The probate of the will does not render its provisions effective, or render one or any of its provisions valid. If any such provisions are in violation of law, the law will not carry them into effect; nevertheless, the testator made them; they are his will and on probate; whether they are or not is the only question to be decided. And, in this case, the establishment of the instrument as the will of the testator in no way impairs the rights of the plaintiff as heir at law; if he has been pretermitted therein, as he claims, he can enter, defend his possession, or bring his action of ejectment, as the case may be, whenever he chooses. The probate of the will does not stand in his way on that issue. But in the very nature of things that issue cannot be tried in a proceeding designed by the law to ascertain the single fact whether a certain paper is or is not the will of the deceased."

Where a will, though rendered by statute ineffectual as to a pretermitted child, is not void, a proceeding in which it is sought to have the will annulled and any proceeding had in the courts of the administration of the estate vacated and set aside is not a proper remedy. *Re Barker*, 5 Wash. 390, 31 Pac. 976.

But see *Hughes v. Hughes*, 37 Ind. 183; *Morse v. Morse*, 42 Ind. 365; and *Myers v. Barrow*, 3 Ohio C. C. 91, 2 Ohio C. D. 52, which hold that where the birth of a child after the execution of a will making no provision therefor has the effect to revoke it, the pretermitted child or those claiming through him may proceed to have the probate revoked and the will set aside.

The effect of the probate being only to establish the proper execution of the will and to make it available as evidence, but not to establish the title conveyed by it, it is not necessary for a posthumous child, or those claiming through him, to impeach the will before maintaining an action to recover possession of the real estate. *Evans v. Anderson*, 15 Ohio St. 324, reversing 2 Ohio Dec. 502. But compare *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310,

county court to have said will admitted to probate. The will, among other things, provided for the appointment of the said Martha Hawker as executrix without bond. On the hearing before the county court, the appellants herein (the children and the children of a deceased child by a former wife of the said deceased), appeared in person or by counsel, and, after hearing the proof, the county court admitted the will to probate, and appointed said Martha Hawker executrix thereunder. From this order an appeal "upon questions of law alone" was taken by appellants herein to the district court of Bottineau county, and on such appeal the latter court entered a judgment or order to the effect that "it is hereby ordered that the said order of the

county court of Bottineau county admitting to probate the purported will of the said decedent, Mark Hawker, and appointing Martha Hawker as executrix thereof, be, and the same is hereby, affirmed in so far as it admits said will to probate; the said will to govern in the distribution of the property and estate of the said Mark Hawker, deceased, in so far as the respondents Martha Hawker and respondent Mark Languenett Hawker, the youngest son of said Mark Hawker, deceased, are concerned, but subject to the rights of each and all of the plaintiffs herein in and to said estate as may hereafter be established by the said county court." From the latter judgment or order this appeal is taken, and the following are the principal assignments of

23 N. W. 696, under heading "By writ of entry, or ejectment," *infra*.

It is not necessary that the probate be revoked to enable a pretermitted child to obtain full and appropriate relief, where the estate consists of personal property only and is in the possession of the executor. *Bunce v. Bunce*, 27 Abb. N. C. 61, 20 N. Y. Civ. Prov. Rep. 332, 14 N. Y. Supp. 659.

#### Statutory remedy as exclusive.

The remedy provided by such statutes by application to the probate court is not exclusive.

Thus in *Gage v. Gage*, 29 N. H. 533, it is said: "Whatever, then, may be the powers of the judge of probate to settle the contributions of devisees and legatees, in order to equalize the burden of such unexpected claims against the estate, they in no way affect either the amount of the claim of the person omitted, or his remedy for it in the case of the real estate. As to the personal estate, if he claims a part of that, he must apply to the probate court; the account of administration must be there settled, and the person omitted can claim, as he would in the case of an intestate estate, only by virtue of a decree of that court. But the heirs of real estate are not confined to their remedies in the probate court. They may apply to that court, and have their shares assigned to them. But if that is not done, they may have their remedy, at common law, against anyone who interferes with their rights."

So, also, in *Bunce v. Bunce*, 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 659, it is held that a pretermitted child is not relegated to the surrogate court for relief, but may maintain an action against the parties in interest to have his share paid over by the executor.

The remedy afforded by the statute of a summary proceeding for contribution, upon petition and due notice given to legatees and devisees, heirs, executors, and administrators, while appropriate in all cases, does not preclude the maintenance, under proper circumstances, of ejectment, partition, or a

bill in equity for contribution. *McCracken v. McCracken*, 67 Mo. 590. *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828.

And see also in this connection *Branton v. Branton*, 23 Ark. 569, and *George v. Robb*, 4 Ind. Terr. 61, 64 S. W. 615, under heading "By proceedings in equity," *infra*; also *Re Barker*, 5 Wash. 390, 31 Pac. 976, under heading "By intervening in administration," *infra*.

—as confirming remedy to pursuit of proceeds of sale made by executor or devisee.

The remedy, given against devisees by a statute providing that whenever a testator shall leave a child born after the making of the will, unprovided for and unmentioned in such will, "every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will," does not operate to subject the estate of such child to a power of sale contained in the will, or to confine his remedy to a pursuit of the proceeds of the sale. He is entitled by the plain terms of the statute to recover the same portion of the corpus of the estate to which he would have been entitled to had his father died intestate. *Smith v. Robertson*, 89 N. Y. 555, affirming 24 Hun. 210.

A statute making a will absolutely inoperative as to an omitted child, and providing that he shall be entitled to such share and portion of the estate as if the ancestor had died intestate, and shall be entitled to recover of the devisees and legatees in proportion to the amount of their respective shares, and which vests the probate court with power to decree such distribution, and provides further that a writ of scire facias shall issue against the devisees or legatees in case they refuse to pay, but which contains nothing to indicate that it was intended to remit the child solely to the action in the probate court

error: "(4) That the said county court erred in appointing Martha Hawker executrix of the purported will of said decedent, Mark Hawker; (5) that the district court erred in entering the order appealed from herein on the grounds and for the reason, among other things, that, said appeal being upon questions of law alone, said district court could only rule upon the questions of law raised and presented for decision, and should have either affirmed the order of the county court in admitting the will to probate, or reversed the same without qualification; (6) that the district court erred in not entering an order re-

versing the order of the county court admitting said will to probate and directing the said county court to enter an order denying probate to said will."

Messrs. Noble, Blood, & Adamson, for appellants:

At the time the court heard the evidence upon the question of whether or not the paper offered for probate as the will of decedent should be admitted to probate as such, all matters affecting the validity of the will, and the persons entitled to participate in decedent's estate, should have been heard and passed upon by the court.

against the devisees or legatees, does not preclude an omitted child or grandchild from recovering land from a purchaser of the devisees or legatees, or from purchasers under a power of sale contained in the will. *Rowe v. Allison*, 87 Ark. 206, 112 S. W. 395.

So, also, in *Robeno v. Marlatt*, 136 Pa. 35, 20 Atl. 512, it is said that to require pretermitted children to look only to the proceeds of the sale made by the devisees would be denying them that interest in their parent's estate which the statute declares they are entitled to; namely, "such purparts, shares, and dividends of the estate, real and personal, of the deceased as if he had died without any will."

That the shares of children who are not mentioned in the will of their father, and who are therefore entitled by statute to the same shares in his estate "as if he had died intestate," are not affected by a power of sale contained in the will, see also *Smith v. Olmstead*, 88 Cal. 582, 12 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Worley v. Taylor*, 21 Or. 589, 28 Am. St. Rep. 771, 28 Pac. 903.

#### By proceedings in equity.

The fact that the statute authorizes the probate court to decree a distribution of testator's estate in such a case does not take away the jurisdiction of a court of chancery to entertain a bill to establish the right of a pretermitted heir, it being the peculiar province of the court of chancery to afford relief when it is to be raised by contribution from different persons, or to divers persons out of a common fund. *Branton v. Branton*, 23 Ark. 569; *George v. Robb*, 4 Ind. Terr. 61, 64 S. W. 615.

He may assert his rights in an action to quiet title (*Rowe v. Allison*, 87 Ark. 206, 112 S. W. 395), and without first proceeding to set aside the probate of the will (*Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164).

#### By writ of entry, or ejectment.

Or he may assert his right by a writ of entry. *Gage v. Gage*, 29 N. H. 533.

It has been held in some cases that a 37 L.R.A. (N.S.)

pretermitted heir may maintain ejectment. *McCracken v. McCracken*, 67 Mo. 590; *Smith v. Robertson*, 89 N. Y. 555.

As the omitted child takes title by descent and becomes a tenant in common with the devisees, ejectment will lie to recover its share in the real estate, if there be no pending administration. *Pearson v. Pearson*, 46 Cal. 609.

But in *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696, it was held that a pretermitted child who, being of full age, has appeared in proceedings resulting in the judgment establishing the will, cannot maintain ejectment to recover land thereby devised, the court saying: "To allow such omitted child to take under the statutes of descent, when the testator has, by will in form, disposed of all his estate, both real and personal, and such will has been admitted to probate, so that the devisees' right to the land has become as complete at law as a conveyance to him from the testator would have been, there must necessarily be a partial or absolute revocation of both the will and the probate. If this can be done at all in a case like this, where the will has been admitted to probate,—of which we express no opinion,—it would seem that it should be done in some direct proceeding, or proceeding calling into exercise the equitable powers of the court, and not by collateral attack in an action at law to try the naked legal title." This conclusion is based on the argument that as the probate of the will is made, by the Wisconsin statute, "conclusive as to its due execution," as well in respect to real estate as personal property, and the heir having appeared in the probate proceedings, thus giving to that court complete jurisdiction, he can no longer have any standing in an action of ejectment to try the naked legal title, unless his right to do so is in some way saved by the statute; that the Wisconsin statute does not save such right, but relegates a pretermitted child to the remedies provided therein in the nature of settlements and partitions between several claimants, and assignments and distributions of the estate, notwithstanding it also secures to the claimant "a remedy by any proper action." That ejectment is not a

Newman v. Waterman, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696; Appleby v. Watkins, 95 Minn. 455, 104 N. W. 301, 5 Ann. Cas. 471; State ex rel. Martin v. Ueland, 30 Minn. 277, 15 N. W. 245; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Castro v. Richardson, 18 Cal. 478; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Foulke v. Zimmerman, 14 Wall. 113, 20 L. ed. 785.

The decree admitting a will to probate confirms the title in the devisee, which title immediately assumes the dignity and validity of a conveyance from the testator, where

proper action under any circumstances is denied by the court, which distinguishes cases in which a pretermitted child has been allowed to maintain an action of ejectment, upon the ground of differences in the statutes of the states in which such decisions were made.

As to when ejectment is not a proper remedy, see Hill v. Martin, 28 Mo. 78, under heading "By proceeding for partition," *infra*.

#### By proceeding for partition.

In some instances it has been held that a pretermitted heir may assert his right by instituting an action for partition (Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828; Gage v. Gage, 20 N. H. 533); or he may come in as a defendant and claim his rights in a partition suit instituted by the devisees under the will (Thomas v. Black, 113 Mo. 66, 20 S. W. 657).

But where there are equities to be adjusted between the parties, as where some of the children are omitted and others are not, and the statutes provide that an omitted child shall be accountable for advancements made by the testator in his lifetime, partition or ejectment is not a proper remedy; but the child should resort to the proceeding provided by the statute to obtain contribution from the devisees. Hill v. Martin, 28 Mo. 78.

As to the right to this remedy in the state of Washington, see Re Barker, 5 Wash. 390, 31 Pac. 976, under heading "By intervening in administration," *infra*.

#### By intervening in administration.

In the state of Washington it is held that the remedy of the pretermitted child is simply to move the court to proceed with the administration of the parent's estate, and as a part of such administration to decree and set over to the child the portion to which the child would have been entitled if the parent had died intestate, the court saying: "Under the rules established in the courts of many of the states it would not be necessary for her to go into the probate court at all, as she could, by a direct proceeding for partition, assert her rights as tenant in common with others who

the probate court has authority to construe the will.

Spofford v. Smith, 59 N. H. 366; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Woodruff v. Taylor, 20 Vt. 65; Redmond v. Collins, 15 N. C. (4 Dev. L.) 430, 27 Am. Dec. 208; Deslonde v. Darrington, 29 Ala. 92; Anderson v. Green, 46 Ga. 361; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Hall v. Cogswell, 183 Mass. 521, 67 N. E. 644.

The fact of the omission by a testator to provide in his will for any of his children or for the issue of any deceased child raises

were entitled to any interest in the estate of her said mother. But in this state it has been held that, as a general rule, an heir cannot assert her rights to the property of her ancestor, excepting in pursuance of a proper decree of distribution of the probate court in which such estate is entitled to be administered. Hence it follows that here the proper relief to be sought by the petitioner is to so move the proper probate jurisdiction that a speedy termination of the administration of her mother's estate may be had, and the proper decree of distribution rendered therein." Re Barker, 5 Wash. 390, 31 Pac. 976.

#### By action on executor's bond.

A posthumous child unprovided for by its parent's will is not remitted to an action against the legatee to whom the executor has delivered the bequeathed property before the birth of the child, but may maintain an action on the executor's bond for its share of the estate. Waterman v. Hawkins, 63 Me. 156.

#### Miscellaneous.

A pretermitted child may recover from each devisee, or from the purchasers under a devisee, the portion which such devisee is bound to contribute, without making other devisees parties. Haskins v. Spiller, 1 Dana, 170.

Where lands have been sold for the payment of debts, the personal estate being insufficient for the purpose, a pretermitted child cannot recover against a purchaser under the executors, without paying or tendering his proportional part of the deficiency of the personal estate. Kolb v. Komp, 3 Yeates, 164.

A statutory provision that a pretermitted child "may recover the proportion of the estate to which it would be entitled, from the devisees and legatees in proportion to and out of the part devised and bequeathed to them by such will," does not mean that a suit cannot be brought until after the estate is distributed, and that no right of action accrues until such distribution has been made. Bunce v. Bunce, 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 650.

E. S. O.

a prima facie presumption that such issue were not intentionally omitted.

*Parsons v. Balson*, 129 Wis. 311, 109 N. W. 136; *Schultz v. Schultz*, — N. D. —, 125 N. W. 555.

Messrs. Bowen & Adams, for respondents:

The probate of a will consists only in proving its due execution and attestation and the disposing mind of the testator. The proceedings for probate involve simply the making of a will.

*Re Cobb*, 49 Cal. 600; *Re Pforr*, 144 Cal. 121, 77 Pac. 825; *Re Barker*, 5 Wash. 390, 131 Pac. 976; *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055; *Re Murray*, 141 N. C. 588, 54 S. E. 435; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753; *Re Lamb*, 122 Mich. 239, 80 N. W. 1081; *Mears v. Mears*, 15 Ohio St. 90; *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 20 So. 98; *Montrose v. Byrne*, 24 Wash. 288, 64 Pac. 534; *Bliss v. Macomb* Probate Judge, 129 Mich. 127, 88 N. W. 390; *Niemand v. Seemann*, 136 Iowa, 713, 114 N. W. 48; *Lindemann v. Dobossy*, — Tex. Civ. App. —, 107 S. W. 111; *Clearspring Twp. v. Blough*, 173 Ind. 15, 88 N. E. 511, 89 N. E. 369; *Re Noyes*, 40 Mont. 178, 105 Pac. 1013; *Re Hobbins*, 41 Mont. 39, 108 Pac. 7; *Taylor v. Hilton*, 23 Okla. 354, 100 Pac. 537, 18 Ann. Cas. 385; *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632.

A will is not invalid because of its omission to mention children of the testator, and such omission furnishes no ground for objecting to the probate of the will.

*Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632; *Doane v. Lake*, 32 Me. 268, 52 Am. Dec. 654; *Schneider v. Koester*, 54 Mo. 500; *Pearson v. Pearson*, 46 Cal. 609; *Appleby v. Watkins*, 95 Minn. 455, 104 N. W. 301, 5 Ann. Cas. 471; *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276; *Schultz v. Schultz*, — N. D. —, 125 N. W. 555.

Bruce, J., delivered the opinion of the court:

The appellants maintain that on an appeal upon questions of law alone the district court is a court of appellate jurisdiction merely, and that, although the said court has the power to reverse or affirm the judgments of the county court, it has no power to change or to modify them. They also maintain that because the respondents at the time of the hearing of the petition to probate the will failed to offer proof to overcome the statutory presumption raised by § 5119, Rev. Code 1905, that the omitted children were unintentionally omitted, the county court should have refused the pro-

bate of the will. They also assume that the unexplained omission of children by the testator from his will renders such will utterly invalid, and that the appellants and all of the heirs of the said deceased were entitled to share in his estate in the same manner and to the same extent as if he had died intestate. The respondents, on the other hand, maintain that at the hearing of the petition to probate the will evidence to overcome the statutory presumption raised by § 5119, Rev. Code. 1905, would have been immaterial, and that the only questions at issue were the due execution of the will, the sanity of the testator, and his freedom from duress, menace, or fraud and undue influence. They further maintain that the testator's omission of the children from his will does not render the will invalid, but merely raises the question whether such omission was or was not intentional; the statutory presumption being that said omission was not intentional. They maintain that, since appellants were duly cited to appear and show cause why the petition for the probate of said will should not have been granted, the finding of the county court and the admitting of the will to probate was final upon this point, although it is admitted that the proponents of the will failed to introduce testimony tending to show that said omission was intentional, or that any share or shares of the appellants, or any of them, had been advanced to them. The questions, then, for determination by this court, appear to be: Was the order of the county court erroneous, which admitted the will to probate and appointed Martha Hawker executrix thereunder, for the reason that there was no evidence before the said county court to overcome the statutory presumption raised by § 5119, Rev. Code 1905? Was the hearing on the petition to probate the will the proper and only time and place for the proponents of the will to offer such testimony, or should they, or could they, have waited until the hearing of the petition for final distribution, or until the filing or hearing of a petition filed before that time by some or all of the appellants, asking that they be allowed to share in the testator's estate?

We are of the opinion that the probating of a will is not final as to the validity and construction of the instrument, and that such matters may be discussed and adjudicated within a year from the probating of the will (§8014, Rev. Code. 1905), or, in fact, at any time before the final distribution, as was done in the case of *Schultz v. Schultz*, — N. D. —, 125 N. W. 555. A will is a will, even though it merely provides for the appointment of an executor. *Bunce v.*

Bunce, 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 659; Schneider v. Koester, 54 Mo. 500; Doane v. Lake, 32 Me. 268, 52 Am. Dec. 654; Trotter v. Trotter, 31 Ark. 145; Branton v. Branton, 23 Ark. 569; Re Pforr, 144 Cal. 121, 77 Pac. 825; Cox v. Cox, 101 Mo. 168, 13 S. W. 1055; Re Murray, 141 N. C. 588, 54 S. E. 435; Ainsworth v. Briggs, 49 Tex. Civ. App. 344, 108 S. W. 753; Re Lamb, 122 Mich. 239, 80 N. W. 1081; Mears v. Mears, 15 Ohio St. 90; Woodruff v. Hundley, 127 Ala. 640, 85 Am. St. Rep. 145, 29 So. 98; Montrose v. Byrne, 24 Wash. 288, 64 Pac. 534; Bliss v. Maccomb Probate Judge, 129 Mich. 127, 88 N. W. 390; Lindemann v. Dobossy, — Tex. Civ. App. —, 107 S. W. 111; Clear-spring Twp. v. Blough, 173 Ind. 15, 88 N. E. 511, 89 N. E. 369; Re Hobbins, 41 Mont. 39, 108 Pac. 7. Section 5119, Rev. Code 1905, upon which appellants rely, merely provides that "children omitted succeed as in intestacy. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." In construing this statute, this court, in the case of Schultz v. Schultz, supra, held that "the fact that the lawful issue of a testator is omitted from his will merely raises a prima facie presumption that such issue was not intentionally omitted, and such presumption is rebuttable by extrinsic proof;" and, although in that case the court did not directly pass upon the question before us, it everywhere took the position that a will is a will whether children are omitted or not. The same is true of Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276. See also Brown v. Brown, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632; Doane v. Lake, 32 Me. 268, 52 Am. Dec. 654; Schneider v. Koester, 54 Mo. 500; Pearson v. Pearson, 46 Cal. 609. In Brown v. Brown, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632, the only particular in which the Nebraska statute differed from our own was on the question of the burden of proof. It provided that "when any testator shall omit to provide in his will for any of his children or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child or the issue of such child shall have the same share in the estate of the testator as if he had died intestate." In it, after the probating of the will, and after the final report of the ad-

ministrator had been filed, the omitted children were allowed to file a petition in the county court, and to assert their rights. It has, in fact, been held in more than one case that this is practically the only mode of procedure, and that an omitted child cannot appear and contest the probating of a will on the ground of his omission, as his rights are independent of the will, and are not affected by it, and we so hold. See McIntire v. McIntire, 64 N. H. 609, 15 Atl. 218.

The question has been thoroughly discussed in Washington, where the county courts, like ours, have the power not merely to probate, but to construe and to pass upon the validity of, wills. "This question," the court said in *Re Barker*, 5 Wash. 390, 31 Pac. 976, "has received much discussion in the courts, and under the various statutes of the different states the courts have held differently as to what was such naming of or providing for children as would prevent their avoiding the will. This court has lately considered the question, and has come to the conclusion that under our statute (§ 1465, Gen. Stat.) there must be some substantial provision for the children of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children. See *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598. We are satisfied with the conclusion to which we arrived in that case, and it is conclusive upon the question under consideration. It follows that the will was ineffectual as against the petitioner. Such being the fact, what was her remedy? In our opinion it was simply to move the court to proceed with the administration of the estate of her mother, and, as a part of such administration, to decree and set over to her the proportion to which she would have been entitled if her mother had died intestate. Under the rules established in the courts of many of the states, it would not be necessary for her to go into the probate court at all, as she could, by a direct proceeding for partition, assert her rights as tenant in common with others who were entitled to any interest in the estate of her said mother. But in this state it has been held that as a general rule an heir cannot assert her rights to the property of her ancestor excepting in pursuance of a proper decree of distribution of the probate court in which such estate is entitled to be administered. Hence it follows that here the proper relief to be sought by the petitioner is to so move the proper probate jurisdiction, that a speedy termination of the administration of her mother's estate may be had, and the proper decree of distribution



rendered therein. . . . The will, though ineffectual as to her, was not void; hence the administration of the estate had been properly set on foot by the probating of said will, and should continue until the estate is finally closed. The only effect that the failure to name the children in said will could have upon the proceedings would be to compel a determination thereof without regard to any extension provided for by the terms of the will, and a distribution that, as to them, should be uninfluenced by any of the provisions thereof." The statute of Washington is even stronger than our own. It provides: "If any person make his last will and die, leaving a child or children or descendants of such child or children in case of their death, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as he shall regard such child or children or their descendants not provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." See also *Bunce v. Bunce*, 27 Abb. N. C. 61, 20 N. Y. Civ. Proc. Rep. 332, 14 N. Y. Supp. 659; *Branton v. Branton*, 23 Ark. 560; *Trotter v. Trotter*, 31 Ark. 145.

If there were, at any time, any doubt upon the subject, it would seem to have been absolutely removed by § 5120, Rev. Code 1905, which reads as follows: "When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child or the issue of a child omitted in a will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated. In such case, such specific devise, legacy, or provision may be exempted from such apportionment, and a different apportionment consistent with the intention of the testator may be adopted." As is well said by counsel for respondent, this section assumes that there is a will, and that this will is valid. If there were no will, there would be no necessity for either §§ 5119 or 5120. All of the heirs of the deceased would inherit in accordance with the statutes of distribu-

37 L.R.A. (N.S.)

tion set out in chapter 42 of the Civil Code. There being a will, and this will coming under the provisions of § 5119, the estate must be distributed in accordance with it, as construed according to §§ 5119 and 5120.

The appellants cite *Newman v. Waterman*, 63 Wis. 612, 53 Am. Rep. 310, 23 N. W. 696, as supporting their contention, but in that case the court expressly refused to consider the question now before us; and in the subsequent cases of *Moon v. Evans*, 69 Wis. 667, 35 N. W. 20, and *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089, it allowed pretermitted children to petition the probate court for their shares of the decedents' estate, after the respective wills had been admitted to probate. Even the *dictum* of the case of *Newman v. Waterman* does not go further than to hold that the attack upon the title of the devisees to the property should be made in the probate, and not in the circuit, court. See note to *Brown v. Brown*, 115 Am. St. Rep. 508, 580.

We are of the opinion that the order of the district court was substantially correct, and that it should be affirmed. It did not as a matter of fact modify or change in any manner the order of the county court from which the first appeal was taken. It merely construed that order and gave to it the meaning which, irrespective of such modification or construction, the law would have implied and would have given to it.

The judgment of the District Court is affirmed.

Goss, J., being disqualified, did not participate. Hon. Chas. A. Pollock, Judge of the Third Judicial District, sat in his place.

## OREGON SUPREME COURT.

JOSEPH GIACONI, Resp't.,

v.

CITY OF ASTORIA, Appt.

(— Or. —, 113 Pac. 855.)

**Municipal corporation — Liability for injury to highway improvement — defective plans.**

1. Where, by statute, municipal corporations are liable for injury to private prop-

*Note. — Municipal liability for defective plan of street construction as distinguished from other defects.*

This note supplements the one on the same question in 67 L.R.A. 253.

It has been stated rather generally in some instances that, while the city may be held liable for injuries resulting from the

erty through their acts or omissions as public corporations, a city if found negligent is liable for injury to private property by the sliding thereon of soft earth because of an attempt by it to bring a highway to grade, by dumping earth upon the unstable foundation at the sloping bottom of a gulch crossing it, although it committed the preparation of the plans which were adopted and followed to a competent engineer, if he made no inspection to ascertain the actual conditions before preparing his plans; and it is immaterial that the property injured is not adjacent to the street.

**Trial — negligence of municipal corporation — question of fact.**

2. The question of the negligence of a municipality which, in attempting to bring a street to grade, dumps earth upon the unstable sloping bottom of a gulch crossing it, so as to force the soft mud onto private land to its injury, is one of fact.

**Municipal corporation — measure of care in street improvement.**

3. A municipal corporation in executing plans for a street improvement must observe such care to avoid injury to private prop-

erty as a reasonably careful and prudent man in like circumstances would use if the responsibility for damages rested upon him. **Master — independent contractor — injurious plan.**

4. A municipality cannot, by letting the execution of the work to an independent contractor, escape liability for injury to private property by soft earth forced thereon, by attempting to bring a street to grade by dumping earth onto the unstable, sloping bottom of a gulch which crossed the street.

**Adjoining landowners — lateral support — overloading parcel.**

5. That different parcels of land owe to each other the duty of lateral support when in their natural condition does not require the owner of one to furnish such support for the other, when its owner attempts to construct upon it an embankment of earth for beyond its capacity to withstand.

(Moore, J., dissents.)

(October 10, 1911.)

negligent execution of a plan for street improvement, it cannot be held liable if the injury results from a danger inherent in the plan adopted. *Hays v. Columbia*, 159 Mo. App. 431, 141 S. W. 3, citing with approval a *dictum* in *Gallagher v. Tipton*, 133 Mo. App. 557, 113 S. W. 674.

In *Kemp v. Des Moines*, 125 Iowa, 640, 101 N. W. 474, involving a suit by an abutting owner to enjoin the city from lowering the grade of the street, the court declared that it could not consider whether the determination of the city to grade any particular street is reasonable or unreasonable, although it does have the power to say that the city must take reasonable care to do the work so ordered, in a manner to avoid unnecessary injuries to private property; but it was intimated that where the proposed change of grade is manifestly unreasonable or unnecessarily destructive of the abutter's property, the court should enjoin the execution of the plan.

Certainly, where there is no negligence and the plan adopted is merely an error of judgment, the city cannot be held responsible. *Kelsey v. New York*, 123 App. Div. 381, 107 N. Y. Supp. 1089.

The Illinois appellate court is inclined to the view that it is only where the improvement conforming to the plan is so manifestly dangerous and unsafe that the court can say as a matter of law that it is unsafe, that the city can be held responsible for injuries. *Healy v. Chicago*, 131 Ill. App. 183.

So, in *Breckman v. Covington*, 143 Ky. 444, 136 S. W. 865, essentially holding that the city can be held liable for personal injuries upon its sidewalks by reason of a defective plan, where and only where the plan was obviously dangerous, the court upheld the action of the trial court in direct-

ing a verdict for the defendant upon the ground that it could not be said, as a matter of law, that the plan of the construction was dangerous and unsafe.

And in *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 373, involving an action for the destruction of shade trees by cutting the roots in laying a sidewalk, and quoting extensively from *Kemp v. Des Moines*, supra, the court subscribes to the doctrine that the law authorizes the city authorities to exercise their own judgment in establishing sidewalk grades and in formulating plans for such an improvement, and that although the city may be responsible for damages resulting from the negligent execution of the plans, irrespective of whether or not the plans are proper, it cannot be held responsible for the results of a defective plan, unless it appears that the plan was conceived in bad faith, or that it was oppressive or so clearly unreasonable as to inflict needless injury.

Generally as to the right of a municipality to cut or trim trees within limits of highway, see notes to *Rosenthal v. Goldsboro*, 20 L.R.A. (N.S.) 809, and *Lagrange v. Overstreet*, 31 L.R.A. (N.S.) 951.

Where, in planning a viaduct over a railroad, the city enlists the services of experts in the work who have all the knowledge and skill that experience in such work naturally gives them, and the work has been carried on and completed as planned and specified, the city should not be held liable for personal injuries alleged to have resulted from a defect, unless the structure was so manifestly dangerous that all reasonable minds must agree that it was unsafe. *Watters v. Omaha*, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750.

The location of catch-basins in the street

**A**PPEAL by defendant from a judgment of the Circuit Court for Clatsop County in plaintiff's favor in an action brought to recover damages for injury to his property alleged to have been caused by defendant's negligence in the construction of a public work. Affirmed.

The former opinion in this case, which was decided March 7, 1911, is no longer of any importance by reason of the action of the court in setting it aside.

**Statement by Burnett, J.:**

This is an action at law brought to recover damages for the injury alleged to have been caused to the plaintiff's real property by the negligence of the defendant in grading a street within the municipal boundaries. The answer pleaded the general issue, and alleged affirmatively that the work was done by the city in a careful manner, through the agency of its contractor, and that what happened was the result of a pure accident, without fault or negligence on the part of the defendant. This new matter was in turn traversed by the reply. By consent of the parties, the cause was tried before the court without a jury. The substance of the findings of fact returned by the court is here given:

The defendant is a municipal corpora-

and the materials with which they are covered are matters for the sound discretion of the city authorities, and when they adopt a plan for the construction of such basins which is not inherently dangerous, and maintain them in a reasonably safe condition for travel, they have discharged their duty to the traveling public. *McCourt v. Covington*, 143 Ky. 484, 136 S. W. 910.

It is held that a city cannot be held responsible for defects in a Building Code adopted by its board of aldermen. *McGuinness v. Allison Realty Co.* 46 Misc. 8, 93 N. Y. Supp. 267, affirmed without opinion in 111 App. Div. 926, 97 N. Y. Supp. 1141. This action was brought for personal injuries resulting from the collapse of a building in the course of construction, and the city was sought to be made a party defendant upon the ground that its Building Code was defective, and it was pointed out that the aldermen acted in their capacity as legislators, and that since the city had no direct supervisory or mandatory control over the conduct of the board of aldermen, the city could not, where the Code was inadequate, make it adequate through any of its administrative officers.

This note does not include the cases of injuries to abutting property, resulting from the mere fact of change of the street grade; and it should be noted that the cases of pollution of water and other damage resulting from defective or improper sewer system are also excluded.

Generally as to damage to abutting own-

tion, having power to improve and repair streets within its boundaries. Irving avenue has been and at all the times mentioned was a duly dedicated street, accepted by the defendant as such, but has never been improved. It runs practically east and west through that portion of the city laid out by John M. Shively, and generally known as "Shively's Astoria." North of Irving avenue, parallel therewith and divided therefrom and from each other by tiers of city blocks, are Grand avenue and Franklin avenue, in the order named. Crossing Irving avenue and running practically north and south, and parallel with each other and divided by tiers of blocks, are Eighteenth and Nineteenth streets, both of which lie on a steep and precipitous hillside, between which, and including a portion of each, was a gulch or canyon, from which water flowed in perennial springs, and in which the earth was soft, swampy, and unstable, of all which the defendant city had at all times notice and knowledge.

Plaintiff owned real property lying in the second tier of blocks northerly from that part of Irving avenue included between Eighteenth and Nineteenth streets, and had and maintained thereon, prior to the occurrences described in the pleadings, three dwellings. All that part of Irving avenue

er by first grading and improvement of street, see the note in 23 L.R.A. 658. And as to the liability of a municipality for injury to abutting property from changing the grade of a street, under a constitutional provision against "damaging" private property for public use without compensation, see the note in 36 L.R.A. (N.S.) 1194, and other notes there referred to.

As to liability of municipal corporation for nuisance caused by change of highway grade under legislative authority, see the note in 1 L.R.A. (N.S.) 129.

As to liability of railroad companies to abutting owner for damages from change of grade of highway necessary to carry it across track, see the note in 26 L.R.A. (N.S.) 226.

As to liability of municipal corporation for damming back surface water by grading of street, see the note in 29 L.R.A. (N.S.) 126.

As to liability of municipal corporation for injury to lateral support in making street improvements, see the note in 12 L.R.A. (N.S.) 696.

As to the duty of abutting owner to preserve lateral support to highway, see the note in 20 L.R.A. (N.S.) 287.

As to the liability of municipal corporations for injuries inflicted by the negligence of employees while engaged in the repair or construction of highways, see the notes in 6 L.R.A. (N.S.) 1090, and 30 L.R.A. (N.S.) 1161.

L. A. W.

included in and lying east of Eighteenth street was wholly unimproved, and was in a state of nature. Except that portion included in the gulch, already mentioned, the same lay on the steep, precipitous hillside, at an elevation of about 180 feet above plaintiff's real property. The part in the gulch was about 50 feet in depth below the ordinary elevation of ground surrounding it, and was fully 35 feet below the established grade of the avenue in question. The gulch was about 250 feet in width, its surface being comparatively level east and west, but sloped to Grand avenue, a distance of about 300 feet, where it met an abrupt descent of about 15 feet to the level of plaintiff's property. By reason of the fact that the soil in the gulch was of such unstable character, and by reason of the steep slope thereof, it was incapable of sustaining any weight, and was wholly insufficient as a foundation for the fill for Irving avenue, and it was wholly unsafe to attempt to fill in that avenue at that place. An examination of the same would have disclosed to any careful and prudent person that those grounds were thus insufficient, and that an attempt to make a fill in the gulch, to bring the same up to the established grade of the street, would cause it to sink and slide, and force and drive the soft soil down upon the blocks in which plaintiff's real property was situated. The defendant, however, did not make any examination of the land whatever, but adopted and passed a resolution declaring its intention to improve Irving avenue by grading the same, to full width of the avenue, to the established grade, and directed the city surveyor to prepare plans and specifications for the construction of the improvement in accordance therewith. Pursuant to said resolution, the city surveyor, without making any examination of the ground whatever, and without any request on the part of the defendant that he should make an examination, prepared and filed such plans and specifications for the proposed improvement, by which it was provided that the gulch between Eighteenth and Nineteenth streets should be filled with earth to the established grade of Irving avenue at said point, and to the full width thereof, requiring a fill in said gulch of 35 feet in height by 50 feet in width and about 250 feet in length, which plans and specifications were adopted by the city. The defendant did not provide for taking care of or confining any of the waters in the soft and swampy ground in the gulch, and made no provision for draining the same, but simply required the fill to be placed on top of the unstable, soft soil already mentioned, without providing any foundation for the fill, or

any means to prevent it from sliding down the hillside.

On September 6, 1907, the city duly adopted and passed an ordinance to improve Irving avenue, but the ordinance did not provide any plan for the improvement, or any part thereof, other than it required that portion of the avenue to be improved by grading the same to its full width and to the established grade by filling in earth in the fill to the full width of the street, to bring the same to the established grade, and required the work to be done in accordance with the plans and specifications theretofore made by the city surveyor and mentioned above. The ordinance further provided that the improvement should be let to the lowest bidder, as by the law required, and that the work should be done under the supervision, direction, and control of said defendant, and in accordance with the plans and specifications made by the city surveyor. The city subsequently entered into a contract with one W. A. Goodin to make the improvements, and the terms of the contract required Goodin to make said fill between Eighteenth and Nineteenth streets as aforesaid, but under the control and direction of the defendant. On October 10, 1907, the contractor entered upon and proceeded to make the improvement, and in accordance therewith, and under the direction of the defendant, placed on top of the soft soil in the gulch, for the purpose of permitting the water back and south of the fill to discharge itself through the fill and gulch, a small wooden box or flume, and a small, thin sheet-iron pipe, and then carelessly and negligently placed on top of the soil, without providing any foundation therefor or either thereof, a large amount of dirt and earth, all of which was done in accordance with the plans and specifications and under the direction of the defendant. Immediately upon this dirt and earth being placed on the soft soil and on top of the box flume and iron pipe, the same, together with the earth and clay, were forced down into the soft soil, and the box flume and iron pipe became wholly destroyed, of all of which the defendant had full notice and knowledge, but nevertheless continued, under the protest and objection of the plaintiff, to place thereon additional dirt, and thereupon the soft soil was forced from beneath the fill, and the ground, together with said fill, moved down upon the property of the plaintiff, doing great damage to him, of all of which the defendant had full knowledge and notice; but nevertheless the defendant thereafter, and after the dirt which had been placed in the fill had been forced down upon the property, still continued to place thereon addi-

tional dirt amounting to many thousands of yards, whereby the buildings of plaintiff were forced from their foundations and smashed and broken, and his real property was covered by dirt and other *débris*, to the great damage and injury of the plaintiff. In order to prevent the total destruction of his buildings, the plaintiff was required to and did remove from said premises a large quantity of earth and other *débris*, and was compelled to and did incur large expense for the repairs of his buildings. The court found that the conduct of the defendant was negligent, and assessed damages for the plaintiff in the sum of \$975. Afterwards, at the request of the defendant, the court made additional findings to the effect that the city surveyor mentioned was at all times stated in the complaint, and long prior thereto had been, a competent and skilful engineer, with many years' experience in devising plans for improvements for municipal purposes, and that the plaintiff's property, described in his complaint herein, at no place or point abuts on Irving avenue, or is less than 350 feet distant from that avenue. On these findings the court rendered judgment for the plaintiff, from which the defendant appeals.

Messrs. A. W. Norblad and J. F. Hammon, for appellant:

Municipal corporations exercising a power under a valid authority of the state to open, grade, and close streets are not liable at common law for the consequential damages which almost unavoidably ensue to the owners of the adjacent property from such undertakings. They are only responsible for a failure to exercise reasonable care and skill in the execution of the powers granted.

Shearm. & Redf. Neg. § 283; Dill. Mun. Corp. § 987; Callender v. Marsh, 1 Pick. 418; 18 Am. & Eng. Enc. Law, 2d ed. 544; Smith v. Washington, 20 How. 135, 15 L. ed. 858; Gross v. Lampasas, 74 Tex. 195, 11 S. W. 1086; 28 Cyc. 1078; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Champion v. Crandon, 84 Wis. 405, 19 L.R.A. 856, 54 N. W. 777; Reardon v. San Francisco, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317.

The contractor is alone responsible to third persons for the negligence of himself and for that of his servant or subcontractor in the execution of a public work.

Shearm. & Redf. Neg. § 298; Road Dist. No. 4 v. Pelton, 129 Mich. 31, 87 N. W. 1029; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Whitson v. Ames, 68 Minn. 23, 70 N. W. 793; Rait v. New England Furniture & Carpet Co. 66 Minn. 76, 68 N. W. 729; Dane v. Cochrane Chemical Co. 164 37 L.R.A. (N.S.)

Mass. 453, 41 N. E. 678; Berg v. Parsons, 156 N. Y. 109, 41 L.R.A. 391, 66 Am. St. Rep. 542, 50 N. E. 957; Miller v. Merritt, 211 Pa. 127, 60 Atl. 508; Hackett v. Western U. Teleg. Co. 80 Wis. 187, 49 N. W. 822; City & Suburban R. Co. v. Moores, 80 Md. 348, 45 Am. St. Rep. 345, 30 Atl. 643; Heidenwag v. Philadelphia, 168 Pa. 72, 31 Atl. 1063; Strauss v. Louisville, 108 Ky. 155, 55 S. W. 1075; Eby v. Lebanon County, 166 Pa. 632, 31 Atl. 332; Stephensville, N. & S. T. R. Co. v. Couch, 56 Tex. Civ. App. 336, 121 S. W. 189; Missouri Valley Bridge & I. Co. v. Ballard, 53 Tex. Civ. App. 110, 116 S. W. 93; Aldritt v. Gillette-Herzog Mfg. Co. 85 Minn. 206, 88 N. W. 741; Roemer v. Striker, 142 N. Y. 134, 36 N. E. 808; Bloomington v. Wilson, 14 Ind. App. 476, 43 N. E. 37.

Messrs. C. W. Fulton and G. C. Fulton, for respondent:

A municipality, in the construction of public works, is bound to exercise the same caution and prudence as a discreet and cautious individual would if the whole loss and risk were to be his own.

Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; Perry v. Worcester, 6 Gray, 544, 66 Am. Dec. 431; Leavenworth v. Casey, McCahon (Kan.) 124; New York v. Bailey, 2 Denio, 433; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Kavanagh v. Brooklyn, 38 Barb. 232; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; Elliott, Streets, § 483; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; King v. Kansas City, 58 Kan. 334, 49 Pac. 88; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; Tate v. St. Paul, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158; 5 Thomp. Neg. 1901, § 5912; Province v. Seattle, 59 Wash. 681, 110 Pac. 619; Davis v. Silverton, 47 Or. 177, 82 Pac. 16.

If it becomes apparent during the progress of the work that the plan adopted is defective, the city will be guilty of negligence if it pursues the same.

Elliott, Streets, 2d ed. §§ 473, 474; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; 15 Am. & Eng. Enc. Law, 1149; Seifert v. Brooklyn, 101 N. Y. 143, 54 Am. Rep. 664, 4 N. E. 321; Tate v. St. Paul, 56 Minn. 527, 45 Am. St. Rep. 501, 58 N. W. 158.

A municipality is not liable for errors in judgment in devising a plan for a public work, but is liable where the lack of care and skill in devising the plan is so great as to constitute negligence.

Elliott, Streets, §§ 474, 495; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; Gould v. Topeka, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; Powers v. Council Bluffs, 50 Iowa, 197; Blyhl v. Waterville, 57 Minn.

115, 47 Am. St. Rep. 596, 58 N. W. 817; Conlon v. St. Paul, 70 Minn. 216, 72 N. W. 1073; Seaman v. Marshall, 116 Mich. 327, 74 N. W. 484; Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320; King v. Kansas City, 58 Kan. 334, 49 Pac. 88.

Appellant had the right at any time before the improvement was completed, in fact it was its duty, to change the plans at any time when it became apparent either that the improvement could not be made in accordance therewith, or that it was necessary and beneficial to the public or to prevent injury and destruction to private property.

State ex rel. Crowder v. Miles, 138 Ind. 692, 38 N. E. 400; Lake Erie & W. R. Co. v. Walters, 13 Ind. App. 275, 41 N. E. 465; Erie use of Erie Paving Co. v. Erie, 171 Pa. 610, 33 Atl. 378.

The duty of the municipality cannot be avoided or the liability shifted by the employment of an independent contractor to perform the work.

Elliott, Streets, 633; Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Logansport v. Wright, 25 Ind. 512; Pearson v. Zable, 78 Ky. 170; Cabot v. Kingman, 166 Mass. 403, 33 L.R.A. 45, 44 N. E. 344; Sewall v. St. Paul, 20 Minn. 511, Gil. 459; 1 Thomp. Neg. 647; Robbins v. Chicago, 4 Wall. 657, 677, 18 L. ed. 427, 432; Louisville v. Shanahan, 22 Ky. L. Rep. 163, 56 S. W. 808.

A municipal corporation is liable in damages where, in making a street, it so negligently and carelessly places earth on a steep hillside, on soft swampy ground, wholly insufficient to sustain such earth, thereby injuring and damaging lands below.

5 Thomp. Neg. § 5912; Keating v. Cincinnati, 38 Ohio St. 141, 43 Am. Rep. 421; Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; Hendershott v. Ottumwa, 46 Iowa, 658, 26 Am. Rep. 186; Broadwell v. Kansas, 75 Mo. 213, 42 Am. Rep. 406; Elliott, Streets, § 495; Provine v. Seattle, 59 Wash. 681, 110 Pac. 618.

Burnett, J., delivered the opinion of the court:

"The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons, as far as applicable, and a new trial granted." L. O. L. § 159. This being an action at law, the facts as disclosed by the court's findings are thus established beyond our power to gainsay. We cannot rehear the cause upon the issues of fact, or give further attention to the testimony in any event, than to ascertain if there is any 37 L.R.A.(N.S.)

evidence tending to support the findings of fact. Astoria R. Co. v. Kern, 44 Or. 538, 76 Pac. 14; Flegel v. Koss, 47 Or. 366, 83 Pac. 847; Seffert v. Northern P. R. Co. 49 Or. 95, 88 Pac. 962, 13 Ann. Cas. 883; Courtney v. Bridal Veil Box Factory, 55 Or. 210, 105 Pac. 896.

We have carefully examined the testimony, and, in our judgment, there is ample to justify the findings of fact. Indeed, there is little dispute as to what really occurred. The defendant contends on various grounds, in effect, that the judgment was not the proper legal conclusion to be drawn from the premises disclosed by the facts as determined by the court. In this state an action may be maintained against a corporate town in its corporate character, and within the scope of its authority, for an injury to the rights of the plaintiff arising from some act or omission of such public corporation. L. O. L. § 358. This statute clarifies the discussion, as affected by many of the precedents cited by the defendant, where, for want of such legislation, the courts were powerless to afford relief against injury inflicted under the ostensible exercise of governmental power. The principal contention for the defendant is that, within the meaning of Brand v. Multnomah County, 38 Or. 79, 50 L.R.A. 389, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209, and other like precedents, the grievances of which the plaintiff complains were consequential injuries resulting from the exercise of the city's governmental function of improving its streets. Herein is involved the distinction between the legislative and administrative powers of the city. The issue in this aspect of the case is whether the city acted wholly within its sphere as a governmental agent, wherein it is immune in respect to mere errors of judgment, or whether what it did was in its ministerial capacity, to which the consequences of negligence and maladministration will attach. In the leading case of Perry v. Worcester, 6 Gray, 544, 547, 66 Am. Dec. 431, the court, speaking by Chief Justice Shaw, lays down the rule that the exercise of the governmental function exonerates a municipality from liability for such damage as necessarily results from the act. "But," says the learned judge, "this presupposes that the public work thus authorized will be executed in a reasonably proper and skilful manner, with a just regard to the rights of private owners of estate. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and unskilful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is

done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316, the court holds that the ordinance of the common council directing a public improvement is judicial in its nature, and extends immunity from private action for damages to those who perform the duty; but there this immunity ends. The further prosecution of the work is purely of a ministerial character, and the city is bound to see that it is done in a safe and skillful manner. *Aschoff v. Evansville*, 34 Ind. App. 25, 72 N. E. 279, teaches that a municipal corporation is liable for the negligent discharge of ministerial duties arising by necessary implication, even in connection with governmental functions. In *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168, the rule is laid down that passing an ordinance declaring a street to be opened is legislative, but the process of opening and improving the street is ministerial, in respect to which actionable negligence may be predicated. *McKenna v. St. Louis*, 6 Mo. App. 320, classes making and improving of streets as a ministerial duty. It is said, in *Sadler v. New York*, 185 N. Y. 408, 419, 78 N. E. 272, 276, that "no liability is incurred" for a structure erected "in the exercise of governmental powers, . . . unless, by negligence and lack of care in the performance of the work, . . . a direct injury is thereby occasioned." The same conclusion is established in *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175. The supreme court of Minnesota, in *Kobs v. Minneapolis*, 22 Minn. 159, holds the municipality liable for turning an annual quantity of water from the street upon plaintiff's premises. Although the city had right under its governmental functions to abate the nuisance of standing water, yet, says the court, "the act of removal was a ministerial one, in the performance of which the defendant was legally bound to take all such reasonable care and precaution against possible and contingent injuries to others as a discreet and cautious individual would and ought to exercise under like circumstances, were the whole loss or risk to be his alone." In *Augusta v. Little*, 115 Ga. 124, 41 S. E. 238, the court says: "The adoption by a municipal corporation of a plan for grading the streets and sidewalks of a city is a quasi judicial act, and if the plan adopted be erroneous the city cannot be held liable to a private person, who is injured thereby. If the execution of this plan—the construction of the pavement—be unskillful or negligent, the city would be liable; for the construction would be a ministerial duty." The case of *Miles v. Worcester*, 154 Mass. 511, 13 L.R.A. 841, 26

Am. St. Rep. 264, 28 N. E. 676, states the rule thus: "If a city in adapting a lot of land to schoolhouse purposes builds and maintains a retaining wall between the lot and land of an adjoining owner, and by the action of the elements, or otherwise, without his fault, the wall comes upon his land and continues there, it becomes a nuisance, for which the city is responsible to such owner." In *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571, the rule is thus stated: "If the act which is done by a municipal corporation would be tortious, if done by a natural person, the corporation is held liable for it to the same extent and for the same reasons that the natural person would have been." The supreme court of Iowa, in *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 Am. Rep. 182, says: "It is equally well settled that if, in making changes in the natural surface of streets, the city is negligent in construction, so that the adjacent lots are injured by reason of such negligence, the city is liable for such injury." The same court further says, in *Hume v. Des Moines*, 146 Iowa, 624, 645, 29 L.R.A.(N.S.) 126, 125 N. W. 846, 854, that "as the city had power to grade and gutter its streets, it is not liable for defective plans, for in adopting them it acts in a judicial capacity. But it is liable if it negligently carries out such plans, or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor." Finally, on this point, the supreme court of Maryland, in *Thillman v. Baltimore*, 111 Md. 131, 73 Atl. 722, states the rule thus: "Although the powers granted a municipality by its charter to open, grade, and pave streets . . . are discretionary, any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the right of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible." The following authorities are helpful on this branch of the case: *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *Valparaiso v. Adams*, 123 Ind. 250, 24 N. E. 107; *O'Donnell v. White*, 23 R. I. 318, 50 Atl. 333; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Davis v. Silvertown*, 47 Or. 171, 82 Pac. 16.

An examination of the cases discloses that the courts of some states, notably Indiana and Maryland, attribute negligence to a city in the adoption of defective plans.

Most of the courts, however, confine negligence to the execution of the plans. In sound reason, it can matter little in many cases whether negligence be predicated of careless execution of a practical plan for public improvements, or of a vicious and impractical plan itself. Governmental powers should be exercised in accordance with the principles of natural justice and common sense. A municipality ought not to be upheld by the courts in the heedless adoption, under the guise of legislation, of some crude scheme which cannot be accomplished without the infliction of direct, as distinguished from consequential, injuries upon some of its citizens. To hold otherwise would be a long step towards sanctioning the ruthless exercise of arbitrary power. Immunity for mere error of judgment in matters of governmental cognizance ought not to be overturned or impaired; but when public works are planned with such carelessness as to amount to absence of judgment the reason of the rule fails, and the application thereof fails with it.

It is contended, on the question of negligence, that, the city having employed a competent engineer, in the person of the city surveyor, to draw plans and specifications, it has gone as far as required in the matter of diligence, and cannot be held liable for the result. This presupposes that, however competent the engineer may have been, it was his duty, as the servant of the city, for whose conduct the city was responsible, to act in a careful and circumspect manner in drawing the plans. The rule is thus stated in the case of *Lion v. Baltimore City Pass. R. Co.* 90 Md. 266, 47 L.R.A. 127, 44 Atl. 1045: "The employment of a competent engineer to direct the work is not the fulfilment of a duty to avoid doing injury to another, when, notwithstanding the engineer's competency, the work as constructed does cause injury. The test of liability is not the fitness of the engineer, but the efficacy of the work."

In its brief, the appellant lays great stress on the case of *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317, in which the facts were greatly like the ones in the case at bar; but that case is easily distinguished from the present one on two grounds. First, the court held that there was no sufficient pleading of negligence on the part of the municipality; and, second, in California, at that time, there was no statute like ours, quoted above, granting a cause of action to a person injured by the acts of a municipality in its corporate character. *Miles v. Worcester*, supra, is more applicable to the case at bar, and is founded on better logic. From the weight and reason of the precedents, 37 L.R.A. (N.S.)

the rule may be thus stated: A municipal corporation is not liable for mere consequential injuries resulting from ordinarily careful administration of a reasonably prudent plan of street improvement devised by the municipality in its governmental capacity; but, in the execution itself of any public works, the city acts ministerially, or, in the words of the statute, "in its corporate character and within the scope of its authority," and for its negligence or maladministration in that relation, resulting in an injury to the rights of another, it is liable in the same way and for the same reason as a natural person or private corporation would be under the same circumstances of executive management.

We conclude that negligence may be imputed to a municipality in the execution of a plan of public improvement devised by it in its legislative capacity. Negligence is a question of fact. In the case of *Palmer v. Portland R. Light & P. Co.* 56 Or. 262, 108 Pac. 211, this court declared the rule that it is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered as one of law for the court. The precedents are so thoroughly collated by the opinion of Justice King in that case that further citation on this point is unnecessary.

The standard of care to be observed by the city in such cases is such that a reasonably prudent and careful man in like circumstances would use, if the responsibility for damages rested upon him. All would most likely agree that a wide and level *pedregal* would be a safe foundation for a fill of the character and dimensions described in the city ordinance. None would probably contend that a steep declivity of shifting sand would be suitable for that purpose. But between these extremes the question is one of fact, which must be decided by the jury, or the court, acting in the capacity of a trier of the facts. The right of the city to decree by ordinance that Irving avenue should be improved by filling it to the established grade may be well admitted; and it may be further conceded that the terms of the ordinance itself would not constitute sufficient proof of negligence on the part of the city. But, when the ordinance, whatever its terms may be, is to be applied in practice, a ministerial duty on the part of the city arises, involving care and prudence of administration. It thus became a question of fact, in the case at bar, whether the city, in carrying out the project of improving Irving avenue, acted as a reasonably careful and prudent individual would act in that situation, under like responsibility, in piling many thousands of yards of earth



upon a hillside where the ground was soft and swampy, without providing any other foundation or making any effort to retain it in place. This issue of fact was submitted to the court, instead of a jury, as a trier of the fact, and has been determined against the defendant. We cannot disturb this conclusion of fact, for which there is authority in the testimony.

The defendant further urges, however, that the work was let to an independent contractor, who alone is answerable for the injury resulting to the plaintiff, if he has any cause of action at all. The general rule is that an employer is not liable for the acts of an independent contractor, for the reason that the latter is not subject to the control of the employer. To this rule, however, there are certain well-recognized exceptions. Among these exceptions are cases in which the injuries are the necessary consequence of executing the work in the manner provided for in the contract, or subsequently prescribed by the employer, and those in which the injuries are caused by the violation of some absolute, nondelegable duty, which the employer is bound to discharge. In *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298, the rule is thus stated, in effect: If the injury occurs necessarily in ordinary methods of doing the work, the principal is liable, although he employed a contractor; but, if it happens solely by neglect of the contractor, he alone is responsible. Where the work is done according to agreement by a contractor, the city is liable for damages arising from the performance of the work in the manner required by the contract. *Sewall v. St. Paul*, 20 Minn. 511, 524, Gil. 459. A city is liable for the doing of that which it has directly authorized, or which necessarily results from the doing of that which it was contracted or directed to have done, although it is done by a contractor, unless what is done is that which the city not only had the right to do, but to do it in the manner it did it. *Chicago v. Norton Mill Co.* 97 Ill. App. 651. In the case of the *City & Suburban R. Co. v. Moores*, 80 Md. 348, 354, 45 Am. St. Rep. 345, 347, 30 Atl. 643, 644, the rule is thus stated: "The person for whom the work is done may still be liable, if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work." In *Jacobs v. Fuller & H. Co.* 67 Ohio St. 70, 65 L.R.A. 833, 65 N. E. 617, it is held that the employer is liable for injuries which might be reasonably apprehended from the nature of the undertaking, although it was let to a contractor. Again, 37 L.R.A. (N.S.)

in *Thomas v. Harrington*, 72 N. H. 45, 65 L.R.A. 742, 54 Atl. 285, it is stated that an employer is liable for injury which is the direct result of the work contracted for, although it is performed by a contractor. In the apt words of Lord Chief Justice Campbell, in *Ellis v. Sheffield Gas Consumers Co.* 2 El. & Bl. 767, "if the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself." See also *Deford v. State*. 30 Md. 179; *Thillman v. Baltimore*, 111 Md. 131, 73 Atl. 722; *Hole v. Sittingbourne & S. R. Co.* 6 Hurlst. & N. 488, 30 L. J. Exch. N. S. 81, 3 L. T. N. S. 750, 9 Week. Rep. 274; *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845. The work in question lies properly within both the exceptions noted, at least within the first. It is plain that for injuries resulting from work performed by the contractor in the manner directed by the city the latter cannot escape responsibility: neither can it be exonerated from liability for what might reasonably have been expected from the manner in which it contracted for the work to be done, although performed by an independent contractor.

The defendant also contended at the argument that the premises of the plaintiff were liable for lateral support, but that would not justify the negligent application of a load far beyond the capacity of the soil to withstand; neither does the evidence in the case nor the findings of fact justify the conclusions that this was an inevitable accident. The court has found the facts that the execution of the work was negligent, and was the superinducing cause of the damage.

The judgment of the court below was not erroneous as charged, and should be affirmed. It is so ordered.

Moore, J., dissents.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

M. L. DANIELS et al.

v.

COUNTY COURT OF RANDOLPH COUNTY, Plff. in Err.

(69 W. Va. 676, 72 S. E. 782.)

Highway — abandonment — barriers.

1. Where an old road or way becomes dan-

Headnotes by MILLER, J.

*Note.* — *Duty to provide barriers against abandoned highway.*

For the general question of liability for defects in streets and highways, see notes to

gerous to travel, is abandoned or a new location established, public authorities in charge of the work must put up barriers or warnings to protect persons traveling thereon, acting upon the belief, justified by appearances, that the old way is still open, and it is negligence not to do so.

**Same — night travel — care.**

2. While persons traveling on a public highway in the nighttime are required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness, they have the right, in the absence

of knowledge to the contrary, to act on the assumption that such highway is in a reasonable safe condition for travel by night as well as by day, and are not bound to anticipate dangerous defects therein without some notice or other precaution taken for their protection.

**Same — erection of barrier.**

3. Where a highway containing a plain well-beaten track is discontinued, it is the duty of the public authority responsible therefor, to give such notice or warning, or erect such barriers as will prevent its use by travelers by night as well as by day,

Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 513, as to municipal corporations, and James v. Wellston Twp. 13 L.R.A.(N.S.) 1219, as to townships.

As to the duty of a town or municipality to provide barriers to protect travelers from obstructions outside the highway, see Shea v. Whitman, 20 L.R.A.(N.S.) 980, and note.

The present note only includes cases where a road has been abandoned, not those where a road is temporarily closed during repairs or alterations.

In Schuenke v. Pine River, 84 Wis. 669, 54 N. W. 1007, a town was held liable where it changed a roadway across a river, building a new bridge, and did not maintain a sufficient barrier or notice to prevent travelers taking the old road, as a consequence of which plaintiff and his team broke through the old bridge, the old route being the most direct, and telephone poles running along it, instead of the new one. In answer to the contention that the town was not obliged to maintain such a barrier, the court said: "We think the only sensible and just answer to this question is that such duty continued as long as the old track was allowed to remain in such condition that, to a stranger thereto, it presented the appearance of a traveled highway." It was also held in answer to a contention to the contrary, that failure to maintain such a barrier constituted a defect in the highway though the accident occurred at a place remote therefrom.

In Barber v. Essex, 27 Vt. 62, where the town was held liable for injury to a traveler who drove onto the old road at night, it not being barred to prevent it, the court recognizes a difference between the duty to fence such an abandoned roadway and to fence other dangerous places contiguous to the highway, saying: "And it is obvious that towns may be required to fence travelers out of the old highway, when they have broken it up recently, and provided a new one, without involving the absurdity of requiring them to fence travelers into the road, in all cases."

In Munson v. Derby, 37 Conn. 298, 9 Am. Rep. 332, where a highway was abandoned and another constructed near and nearly parallel thereto, it was held that failure of the town to guard the point of divergence, by a railing or otherwise, so as to prevent travelers mistaking the old road for the new, constituted a defect in the ex- 37 L.R.A.(N.S.)

isting highway, within the statute, for which the town would be liable to one injured by taking the old road.

In Fritz v. Watertown, 21 S. D. 280, 111 N. W. 630, it is held that the fact that a city had by ordinance abandoned a certain street would not relieve it from liability for injuries to a pedestrian because the sidewalk was out of repair, where the city did nothing toward abandoning it after passing the ordinance, and its use was permitted as before.

And in Bills v. Kaukauna, 94 Wis. 310, 68 N. W. 992, where a road was abandoned and a barbed-wire fence placed across it, which would not ordinarily be noticed at night, and the surface of the roadway was such that one not knowing that the old road had been abandoned would be likely to take it, instead of the new one, it was held that the town was liable for the loss of plaintiff's horse, which was killed by being driven against the fence at night.

Chapman v. Cook, 10 R. I. 304, 14 Am. Rep. 686, while not strictly in point, is closely analogous, plaintiff being injured in driving off on a private way which she mistook for a public way turning off farther on, and it being contended that the town was liable for not taking measures to prevent the private way being mistaken for the public road. The court, however, held that the town was not liable, saying: "That the private way which the plaintiff took left the street in the same direction and at the same angle with it as the public way which she designed to take would not, in our judgment, add to the liability of the town, nor would the fact that in other respects the private way where it departs from the street resembled the public way beyond. It is not the duty of the town to point out private ways. . . . Neither do we think that the knowledge that the private way is dangerous can add to the liabilities or the duty of the town. Its dangers are not the dangers of the public way. Its defects are not the defects of the street. It does not affect the safety of the person who is traveling in the public way, and while he is traveling upon it. The town cannot stop the private way or prevent any person who will from traveling there, however dangerous it may be. If he will go there voluntarily, he goes at his own risk."

R. L. S.

and in the absence of such notice travelers have the right to presume that such highway has not been discontinued or obstructed.

**Evidence — sufficiency.**

4. A case in which the evidence of prior knowledge of the discontinuance of or defects in an old road is not sufficient to show, as matter of law, contributory negligence of plaintiffs, injured while traveling thereon in the nighttime.

(November 7, 1911.)

**E**RROR to the Circuit Court for Randolph County to review a judgment in plaintiffs' favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. H. G. Kump, for plaintiff in error:

The court should have set aside the verdict of the jury, because the same was contrary to the law and the evidence, and was excessive.

*Shriver v. County Ct.* 66 W. Va. 685, 26 L.R.A.(N.S.) 377, 66 S. E. 1062; *Elliott, Roads & Streets*, 2d ed. § 637; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211; *Meeks v. Ohio River R. Co.* 52 W. Va. 99, 43 S. E. 118.

Mr. Samuel T. Spears, for defendants in error:

Defendant was liable for the injury to plaintiffs.

*Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *Niblett v. Nashville*, 12 Heisk. 684, 27 Am. Rep. 755; *Franklin Turnp. Co. v. Crockett*, 2 Sneed, 271; *Memphis v. Lasser*, 9 Humph. 757; *Burnham v. Boston*, 10 Allen, 290; *Hill v. Boston*, 122 Mass. 349, 23 Am. Rep. 332.

Miller, J., delivered the opinion of the court:

Plaintiffs recovered against defendant, on the verdict of a jury, a judgment for \$304.50, damages for personal injuries alleged to have been sustained by Mrs. Daniels, while traveling with her husband over a public road. The correctness of that judgment is brought in question by the present writ of error.

The demurrer to the declaration, in two counts, we think was properly overruled. The action of the court thereon is assigned as error here, but does not seem to be seriously relied upon. The negligence of the defendant, alleged to have resulted in the injuries sustained by the wife, is that it permitted the public road, known as the Files creek road, at a place where it crosses Files creek in said county, to become and remain out of repair; that at a short time

prior to the date of her injuries very high waters in said Files creek had washed, excavated, and dug away a large portion of said road, where the same crossed said creek, producing a steep and perpendicular descent into said creek, rendering the road impassable, and exceedingly dangerous to persons using the same, particularly in the nighttime; that some time thereafter, and before Mrs. Daniels sustained her alleged injuries, the surveyor of said road pretended to change the location thereof where it crossed said creek, and to abandon that portion of the old road where it crossed said creek, and where the washout occurred, but had left the old road washed, excavated, and dug out as aforesaid, open to the use of the public, and had neglected to erect any guard, fence, or barrier, so as to give warning and notice that such pretended change had been made, as it is alleged it was his duty to do, whereby and by reason whereof, it is alleged, said plaintiffs, together with their two children, then lawfully on said road and in the exercise of due care, in the nighttime, suddenly and without any warning or notice of any kind, that said public road was so out of repair, were precipitated over said descent and into said creek, whereby and by reason whereof the plaintiff Carrie Daniels sustained the injuries of which the plaintiffs complain.

The facts are few, and there is little, if any, material conflict in the evidence. The accident occurred on the night of August 31, 1907, about 9 o'clock. The evidence is that the night was very dark. The plaintiffs were on their way from Beverly to the home of the father of M. L. Daniels, who lived on Files creek, within some 300 yards of the place of the accident. Plaintiffs lived at Elkins, and, so far as the record shows, they knew nothing of the condition of the road at this crossing. They had heard of high waters occurring about July 17th, and that the roads had been washed out in places, but did not know of the condition of this road, or that any portion of it had been abandoned and a new location made. The old road, the abandoned part, ran south from Beverly, in the direction in which plaintiffs were traveling, around the foot of a hill to the point where it crossed the creek. This new road was made by simply laying down the fence inclosing an adjoining meadow, removing some rocks in the way, and by making fills in one or two places. After it was opened, the evidence shows the public generally used the new way, the old one being abandoned because impassable where it crossed the creek.

Defendant denies negligence, but the principal defense is contributory negligence on the part of plaintiffs.

The evidence of the road surveyor, and of one or two other witnesses, tends to show that some rubbish washed in the road by the flood, and some brush and a pole put up across the abandoned way served as a barrier to travel on the abandoned way; but other witnesses, including the road surveyor of an adjoining section, who did the work of opening the new way, say there was no barrier or pole erected across the old way. The evidence makes it quite certain that on the night of the accident there was no pole there and no barrier or warning sufficient to obstruct the passage of the plaintiffs over the abandoned road. The evidence is that it was old and worn, and easily seen, while the new way could not be seen in the darkness, by persons traveling in vehicles.

The authorities seem to be quite uniform in holding that where an old and dangerous road or way is abandoned for a new one established, public authorities in charge of the work must put up barriers or warnings to protect travelers, acting upon the belief, justified by appearances, that the old way is still open, and that it is negligence not to do so. 2 Elliott, Roads & Streets, 3d ed. § 801; *Bills v. Kaukauna*, 94 Wis. 310, 68 N. W. 992, and cases cited; 37 Cyc. 291, and notes; 28 Cyc. 1403-1405, and cases cited in notes.

But were plaintiffs guilty of contributory negligence, barring recovery? Contributory negligence, when it depends on facts and testimony, is a question for the jury. *Snoddy v. Huntington*, 37 W. Va. 111, 16 S. E. 442. Our decisions say, however, that where the facts and evidence show as matter of law, that plaintiff was guilty of contributing to his injuries, the court should, on motion of defendant, exclude all the evidence from the jury. *Slaughter v. Huntington*, 64 W. Va. 240, 241, 16 L.R.A. (N.S.) 459, 61 S. E. 155, and cases cited. The rule is also well settled in this and other states that a traveler on a public highway cannot close his eyes to open and patent defects and dangers. If plaintiffs had been traveling in the daytime, with the new way and the dangers of the old plainly in sight, as the evidence shows they were, the authorities say they could not recover. Travelers on a highway must use their senses, and are not permitted to shut their eyes to open and obvious defects and dangers in the way. For injuries thus sustained, due to negligence on their part, damages for injuries sustained cannot be recovered. *Hysell v. Central City*, 68 W. Va. 769, 70 S. E. 767, and cases cited.

What is the rule, however, where persons are using a public road in the nighttime? It is well stated, with copious citations, in 37 L.R.A. (N.S.)

28 Cyc. 1431, as follows: "A person traveling on a street or public way in the nighttime is required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness; and ordinary care in the nighttime may call for greater caution than in the daytime. In exercising ordinary care a traveler at night, in the absence of knowledge to the contrary, has the right to act on the assumption that the street or way is in a reasonably safe condition for travel by night as well as by day, and is not bound to anticipate that he will encounter excavations, without having some notice thereof by lights, or without other precautions taken for his protection. A failure to use prudence commensurate with obvious conditions constitutes negligence."

Tested by this rule can we say as matter of law that plaintiffs were guilty of negligence precluding recovery? Unless we can do so, the question then being one of mixed law and fact for jury determination, on proper instruction by the court, we should not disturb the verdict and judgment of the court below. As particularly pertinent to the case at bar, it was decided in Wisconsin, in *Bills v. Kaukauna*, supra, that "where a highway containing a plain and well-beaten track is discontinued, it is the duty of the town to give such notice or warning, or erect such barriers, as will prevent its use by travelers by night as well as by day; and in the absence of such notice travelers have a right to presume that such a highway has not been discontinued or obstructed."

To reverse the judgment below, defendant relies on the admissions of plaintiffs that on the night of the accident in question they knew that floods had prevailed in Files creek and in other creeks, some two weeks previous, and that the roads had been washed in some places; and that before reaching the place of the accident, Mrs. Daniels had suggested to her husband that he had better walk ahead and see if there were any washouts, and to which he replied, that the roads had been used, that wagons had gone over it, and that it was all right. He proved, however, that he had no reason to believe this road, if damaged by the floods, had not been repaired in the meantime, or that it was unsafe.

Mrs. Daniels' testimony is as follows:

Q. Now, Mrs. Daniels, it was dark when you left Beverly, or about so?

A. Yes; it was getting dark I remember.

Q. And you told your husband you thought it was dangerous to go, or he had better not go?

A. I don't remember about that.

Q. You said something before you got well started on the road?

A. While we were on the road I mentioned to him perhaps there was some danger. I don't remember whether it was after we were going up that road, or not.

Q. And he still thought it was merely a woman's weakness, and that you were afraid?

A. He didn't pay any attention to me I know.

Q. Now then you got up to the ford of Files creek there?

A. Yes.

Q. This left-hand prong that comes down by the Beverly road. Do you remember now whether you told him again that he had better get out and see if it was safe?

A. No, I didn't say anything to him. He made the remark to me that there was the fence. He says, "It is all right. Here is the fence that goes along the road."

Q. Then you were looking out for difficulties when you saw that?

A. When we saw that we just drove on.

Q. But you must have been looking for difficulties when he said, "All right, there is the fence."

A. That is what he said.

Q. But you were looking out for difficulties.

A. I was uneasy, I admit, but I don't think he was.

Q. He was very willing to take the risk. Now, Mrs. Daniels, how far was that below the ford that he remarked, "There is the fence?"

A. I don't remember. He says, "There is the fence that goes around, and it is all right." I don't know whether the fence is still there or not.

We do not think this evidence sufficient to show negligence on the part of the plaintiffs, or either of them. True they had heard of high waters in the creeks, and Mrs. Daniels appears to have had some apprehensions that the road might be dangerous; but her husband, familiar with the road, and knowing that some two weeks had elapsed, after the high waters had subsided, and who appears to have been driving cautiously, had the right to assume, as the authorities hold, that if the road had been damaged, it had, in the mean time, been made reasonably safe for travel by night as well as in the daytime; or if rendered dangerous, and any part of it had been abandoned for a new location, that some sign or warning would be given to protect travelers upon the road.

For the reasons given we are of opinion to affirm the judgment.

37 L.R.A. (N.S.)

## ARKANSAS SUPREME COURT.

HENRY WALDSTEIN, Appt.,  
v.

R. L. WILLIAMS, Sheriff, et al.

(— Ark. —, 142 S. W. 834.)

### Judgment — revival — notice — publication.

1. The legislature may provide for constructive service of notice of an application for a scire facias to revive the lien of a personal judgment, since the scire facias is merely a continuation of the original action.

### Same — continuance of lien.

2. The entry of a judgment reviving a judgment lien, after the lien expires, upon a scire facias issued before such expiration, relates back to the date of the issuance of the scire facias, and continues the lien without lapse.

(January 1, 1912.)

**A**PPEAL by plaintiff from a decree of the Garland Chancery Court dismissing the complaint in an action brought to enjoin the sale of a certain lot alleged by plaintiff to be his property. **Affirmed.**

### Note. — Service of notice in proceedings to revive a judgment.

#### In general.

Service of the writ upon defendants is essential to the validity of a judgment upon scire facias to review a judgment though the service may be constructive in case of nonresidents. 23 Cyc. 1454.

Some cases recognize, in revivor proceedings, the old rule applied generally to writs of scire facias, that two returns of *nil* are equivalent to one of scire feci. Brown v. Wygant, 163 U. S. 618, 41 L. ed. 284, 16 Sup. Ct. Rep. 1159; Dunlevy v. Ross, Wright (Ohio) 287.

Other cases point out a distinction, however, to the effect that in the case of revivor upon two returns of *nil*, the defendant may afterward present any defense he may have had to the judgment by audita querela or motion, while if the return is scire feci he will be concluded by the judgment of revivor. Barrow v. Bailey, 5 Fla. 9; Walker v. Hood, 5 Blackf. 266; Kratz v. Preston, 52 Mo. App. 251.

### Mode and sufficiency of service, generally.

Where some mode of constructive service is provided and recognized as sufficient, it must be strictly followed.

Thus in *The Treasurers v. Tarrant*, 1 Hill. L. 7, under a statute requiring that, where rules or process to revive proceedings at law cannot be served because of absence of the parties from the state, it shall be sufficient to post such rules or process upon the courthouse door of the district of their last

## Statement by Wood, J.:

This was a proceeding in the Garland chancery court to enjoin the sale of a certain lot in the city of Hot Springs, alleged to be the property of appellant. The facts are substantially as follows: The appellees, on the 30th day of June, 1904, recovered judgment against Nettie W. Brooks in the Garland circuit court. On the 1st day of June, 1907, they sued out a writ of scire facias to revive the lien of the judgment. This was done by constructive service pursuant to the statute (§§ 4445, 4446, Kirby's Digest); it appearing that the judgment debtor was a nonresident. On the 16th day of June, 1908, the court entered the following: "It being further consid-

ered, ordered, and adjudged that the lien of said judgment be and the same is hereby revived and continued for the space of three years next after the 1st day of July, A. D. 1907." On the 27th day of June, 1907, or three days before the lien of the judgment would have expired, the appellant claims that he purchased the land from the judgment debtor. The appellant contends that the lien of the judgment had expired, and that same had never been properly revived, and that appellees, the owners of the judgment, therefore, could not enforce the same against the land.

Mr. James E. Hogue, for appellant:

A personal judgment itself, or the lien

residence, it was held that the posting of a mere notice that a scire facias has issued is insufficient.

And in *Sibley v. Miller*, 3 Ind. Terr. 688, 64 S. W. 577, it is held that where the statute provides for service in revivor proceedings, when defendant cannot be found, by posting notice thereof on the courthouse door for four weeks, service by publication in a newspaper instead is insufficient.

In *Atwood v. Hirsch Bros.* 123 Ga. 734, 51 S. E. 742, under a statute requiring that a scire facias "be served by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," it is held that the service must be personal, and that leaving a copy at his most notorious place of abode is insufficient.

And in *Jones v. George*, 80 Md. 294, 30 Atl. 635, where defendants, who had removed from the county more than seventeen years before the scire facias was issued, had no actual notice of proceedings to revive a judgment, until after judgment of *fiat* rendered upon two returns of *nil*, the judgment was stricken out, and they were allowed to plead to the scire facias.

See also *Bickerdike v. Allen*, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740, holding that a provision for constructive service to revive a judgment against a resident of the state is constitutional.

Where the statute required that a citation to revive a judgment be served on the defendant or his representative, a citation issued to his widow "personally and as tutrix," and served on her, was not sufficient. *Hopgood v. Dawson*, 23 La. Ann. 179.

And in *Phillips v. Wait*, 106 Ga. 589, 32 S. E. 842, it is held that service of a copy of a petition to revive a judgment, without service of a copy of the scire facias, is not sufficient.

In *Andrews v. Buckbee*, 77 Mo. 428, it is held that service of a scire facias to revive a judgment should be made in the manner provided for service by summons.

In *Wilson v. McCormack*, 10 Okla. 180, 61 Pac. 1068, under a Code provision that service of notice of an application to revive

a judgment must be served in the same manner as a summons, service by an attorney of record was held to be insufficient, as it should be served by the sheriff or someone authorized by him to do so.

In *Gruble v. Wood*, 27 Kan. 535, it was held that, where the statute provided for service of notice of revivor proceedings in the same manner as a summons, the service of an ordinary summons on defendant was insufficient.

But in *Schultz v. Hine*, 39 Kan. 334, 18 Pac. 221, this case was distinguished and the service of a summons was held sufficient where it contained the nature and terms of the order or judgment applied for.

## Directing process to other county.

In *Dickinson v. Allison*, 10 Ga. 557, it is held that while the common-law rule that two returns of *nil* is sufficient basis for the revival of a judgment is not applicable here, nevertheless the court rendering the judgment is the only one having jurisdiction to issue process to revive it, and may direct the scire facias to the sheriff of any county in the state, whose duty it is to serve and return it to the county from which it issued.

And in *Misner v. Misner*, 41 Ohio St. 678, it is held that revivor proceedings are merely additional to the original action, and therefore the court having jurisdiction of the original action may issue summons to any county in the state to effect a revivor.

But in *Walker v. Hood*, 5 Blackf. 266, it was held that, there being no statutory provision authorizing process to issue from one county to another, a scire facias to revive a judgment, issued by the court rendering the judgment and directed to the sheriff of another county by whom it was served, was invalid.

## Service on nonresident of state.

The rule adopted in *WALDSTEIN v. WILLIAMS*, that personal service is not necessary to revive a judgment even against a nonresident, though supported by some of

of a personal judgment, cannot be revived upon a constructive service.

19 Enc. Pl. & Pr. 275; Hubbard v. Bolls, 7 Ark. 442; Hanly v. Adams, 15 Ark. 232; Hicks v. State, 3 Ark. 313; McCourtie v. Davis, 7 Ill. 298; 35 Cyc. 1156.

Messrs. Greaves, Martin, & Wootton, for appellees:

The proceedings to revive the judgment are ancillary and subservient to the original action, and the notice and procedure

required to revive are within the discretion of our legislature.

Brown v. Byrd, 10 Ark. 534; Rice v. Moore, 48 Kan. 590, 16 L.R.A. 198, 30 Am. St. Rep. 318, 30 Pac. 10; 2 Freeman, Judgm. §§ 444, 445.

The lien when once revived dates back to the day the scire facias was issued, and continues a lien against not only the judgment debtor, but against innocent third persons as well.

Watkins v. Wassell, 15 Ark. 74; Trapnall

the cases, does not seem to be in accord with that adopted in most of the cases.

Thus it is held that the revivor of a judgment without personal service will not affect the running of the statute of limitations as to a nonresident of the state. Owens v. Henry (Owens v. McCloskey) 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693; Rice v. Moore, 48 Kan. 590, 16 L.R.A. 198, 30 Am. St. Rep. 318, 30 Pac. 10; Weaver v. Boggs, 38 Md. 255; Hepler v. Davis, 32 Neb. 556, 13 L.R.A. 565, 29 Am. St. Rep. 457, 49 N. W. 458. In Brown v. Wygant, 163 U. S. 618, 41 L. ed. 284, 16 Sup. Ct. Rep. 1159, the court distinguished Owens v. Henry, 161 U. S. 642, 40 L. ed. 837, 16 Sup. Ct. Rep. 693, upon the ground that the defendant was a nonresident.

And this is true although the original judgment was upon a note containing a power to confess judgment, as that power was exhausted by entry of the original judgment. Betts v. Johnson, 68 Vt. 549, 35 Atl. 489.

In Robb v. Anderson, 43 Ill. App. 575, it was held that a judgment by default on two returns of *nihil*, upon writs of scire facias to revive a judgment against one who had ceased to be a resident of the state where the judgment was rendered, would not support actions against the defendant in another state.

In Bickerdike v. Allen, 157 Ill. 95, 29 L.R.A. 782, 41 N. E. 740, it is held that a statutory provision for service of a scire facias to revive a judgment by mailing a copy to defendants' address, and publication, is constitutional as to defendants, who are residents of the state, though the proceeding is regarded as being one *in personam* when the original suit was *in personam*. The court says, however, that such service would not be valid as to a nonresident of the state.

In Mudge v. Livermore, 148 Iowa, 472, 123 N. W. 199, which was a proceeding against one who had become a nonresident, it is held that relief by way of revivor or an action on a judgment cannot be awarded save on personal service.

And in Mitchell & R. Furniture Co. v. Sampson, 45 Fed. 111, proceedings to revive a judgment rendered against a partnership and the individual members *in solido*, by appointment of a *curator ad hoc* for the partnership only, were held to have no binding force on former members of the firm who had removed from the state. 37 L.R.A. (N.S.)

However, in Crawford v. Foster, 28 C. C. A. 576, 56 U. S. App. 231, 84 Fed. 939, where a statute provided for service, in a proceeding to revive a judgment upon an absent or nonresident adverse party by publication, as in an original action, or in such manner as the court should direct, personal service in another state of a copy of an order, reciting that unless defendant appear and show cause within fifteen days from the service of the copy the judgment would be revived, was held sufficient.

And in Bertron v. Stuart, 43 La. Ann. 1171, 10 So. 295, it is held that a proceeding to revive a judgment is one quasi *in rem*, and therefore may be made binding on a nonresident by the appointment of a *curator ad hoc* upon whom service can be made.

And in Comstock v. Holbrook, 16 Gray, 111, personal service of a notice of a scire facias to revive a judgment, issued by a Federal circuit court, was held to be sufficient although made outside of the district.

In Davis v. Davis, 164 Fed. 281, the court recognized that where the statute of a state provides that two returns of *nihil* shall be equivalent to personal service in writs of scire facias to revive a judgment entered on personal service, and, by the practice of that state scire facias is held to be a continuation of the original suit, a judgment on such writ would ordinarily be entitled to full faith and credit in another state. Such credit was denied in that case, however, on the ground that the statute of limitations had run against the judgment when the scire facias was issued. But on appeal. 98 C. C. A. 494, 174 Fed. 786, that judgment was reversed because it appeared that the judgment had only become dormant, because of the passing of the period when it would no longer be a lien on real estate without revival, and not dead by virtue of the statute of limitations. The court also apparently recognizes that if the judgment debtor were not a resident of the state when the judgment was revived, such fact would be a defense when properly pleaded, but that it was not available on demurrer, when it did not so appear in the record.

Generally, as to sufficiency of constructive service to sustain a judgment *in personam* against a nonresident, see note in 50 L.R.A. 577. And as to sufficiency of such service to support a judgment *in personam* against a resident, see note in 35 L.R.A. (N.S.) 292.

R. L. S.

v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Hershy v. Rogers, 45 Ark. 397; Lawson v. Jordan, 19 Ark. 300, 70 Am. Dec. 596.

Wood, J., delivered the opinion of the court:

I. Counsel for appellant says, in his brief, that the pivotal point upon which this case turns is: "Can a personal judgment be revived upon a constructive service?" More accurately stated, the question is: Can the lien of a personal judgment be revived by constructive service? Appellant contends that it was necessary, before a revivor of the lien of the judgment could be had, that the judgment debtor be served with notice of the scire facias in person; that personal service, in other words, is as essential in the revival of the lien of the judgment as it was in the first place to obtain the original judgment. The original judgment was rendered after personal service upon the judgment debtor herein, and that judgment, under the statute, remained in full force for ten years (§ 4442, Kirby's Dig.), and was a lien on the real estate of the judgment debtor in this state for three years from the date of the judgment (Kirby's Dig. §§ 4438, 4439).

It was entirely within the province of the legislature to enact as to how long the lien of a judgment should be continued, and as to the service necessary to be obtained upon the judgment debtor in order to revive such lien. It is not necessary under the statute that the same service should be had upon the judgment debtor in reviving the lien that was had upon him when the original judgment was obtained. The legislature has enacted that "if the defendant cannot be found the court shall make an order briefly setting forth the nature of the case and requiring all persons interested to appear and show cause why such judgment or decree should not be revived and the lien continued," and, further, that "a copy of such order shall be put up at the courthouse door of the county in which such judgment or decree may have been rendered, four weeks before the commencement of the term of the court at which the parties are required to appear," and, further, "if, upon service or publication of the scire facias as required in the preceding section, the defendant or any other person interested, do not appear and show cause why such judgment or decree shall not be revived, the same shall be revived, and the lien continued for another period of three years, and so on from time to time, as often as may be necessary." Sections 4445, 4446, and 4447, Kirby's Dig. These

sections were duly complied with by the appellees in the proceedings to revive the judgment lien against their judgment debtor, Mrs. Brooks.

We are of the opinion that the service was sufficient, and that the court was not without jurisdiction to render the order and judgment reviving the lien. In Brown v. Byrd, 10 Ark. 533, this court said: "The courts, both of England and the United States, seem to have held with great uniformity that scire facias on a judgment to procure execution against a party thereto is not an original suit, but a continuation of the former action, and that the execution thereon is an execution on the former judgment." In other words, the proceedings under the statute to revive the lien of the judgment are only subsidiary to the original action. They do not constitute a new action, but only a continuation of the old one. Rice v. Morris, 48 Kan. 590, 16 L.R.A. 198, 30 Am. St. Rep. 318, 30 Pac. 10; Irwin v. Nixon, 11 Pa. 419, 51 Am. Dec. 559, and note. See 2 Freeman, Judgm. §§ 444, 445. Service in the manner prescribed by the statute is all that was necessary.

II. Where a scire facias to revive a judgment lien issues before the lien expires, and the judgment of revivor is not entered until after, the judgment reviving the lien, when entered, relates back to the date of the issuance of the scire facias, and continues the lien of the judgment without lapse. The judgment creditor, in such case, has his lien unbroken against the judgment debtor and all others who claim under him, for the scire facias operates against all such persons as a *lis pendens*. Trapnall v. Richardson, 13 Ark. 544, 58 Am. Dec. 338; Watkins v. Wassell, 15 Ark. 74. See also Lawson v. Jordan, 19 Ark. 300, 70 Am. Dec. 596, and Hershy v. Rogers, 45 Ark. 309. In the latter case Judge Cockrill, speaking for the court said: "The lien of a judgment upon real estate commences upon the day of the rendition of the judgment, and continues for three years, subject to be further continued or revived by suing out a scire facias and taking judgment for that purpose." Section 4448, Kirby's Dig. provides: "If a scire facias be sued out before the termination of the lien of any judgment or decree, the lien of the judgment revived shall have relation to the day on which the scire facias issued."

Under this statute and the authorities above cited, there can be no doubt that the appellees, at the time of the alleged conveyance of the lot from Mrs. Brooks to appellant, had a lien on the same under their judgment, which they can enforce, and the



decree of the Chancery Court so holding, and dismissing the complaint of appellant for want of equity, is correct, and the same is affirmed.

### CONNECTICUT SUPREME COURT OF ERRORS.

JAMES E. COMSTOCK

v.

TOWN OF WATERFORD, Appt.

(85 Conn. 6, 81 Atl. 1059.)

#### Tax — notice — want of — waiver.

1. Want of statutory notice of an addition to a tax list is waived by appealing to the assessors for relief on learning that the addition has been made.

Same — severable cottages — to whom taxable.

2. Cottages placed on real estate by lessees, supported by posts set in the

*Note. — To whom are improvements removable by tenant at expiration of term taxable.*

The question whether the burden of the tax must ultimately rest upon the lessor or upon the lessee, irrespective of the question to whom it should be assessed in the first instance, is not within the scope of the present note, but is covered in the note to *La Paul v. Heywood*, 32 L.R.A. (N.S.) 368.

In some instances improvements removable by the tenant at the end of the term have been held assessable to him as personal property.

Thus where the lessee of a mine agreed to construct the necessary buildings, and, upon complying with the conditions of the lease, should have the right to remove the same, they were held in *Re Maplewood Coal Co.* 213 Ill. 283, 72 N. E. 786, the personal property of the lessee and subject to assessment as his property, until, by a noncompliance with the terms of the lease, he should forfeit his rights, when by reason of the forfeiture the buildings would become a part of the realty.

It seems that the clause in the lease giving a lessee power to remove improvements erected by him makes such improvements personal property and as such taxable to him.

So, buildings erected by a lessee under lease of land silent as to taxes, giving him the right of removal, were held in *East Tennessee, V. & G. R. Co. v. Morristown*, — Tenn. —, 35 S. W. 771, personal property taxable to the lessee, and not to the lessor. The court said: "But the right of removal as to buildings and structures that might be erected upon the leased property, secured to the lessee in the instrument of lease, prevented such buildings and structures from becoming technically improvements upon the real estate, and made these per- 37 L.R.A. (N.S.)

ground, are assessable for taxation to the lessor, under a statute providing that any interest in real estate listed for taxation shall be set in the list of the person in whose name the title to such interest stands on the land records of the town, although the lessees have a contract right to remove them at the expiration of the term.

(December 19, 1911.)

**A**PPEAL by defendant from a judgment of the Superior Court for New London County in plaintiff's favor in an action brought to set aside proceedings by the board of relief adding property to plaintiff's tax list. Reversed.

The facts are stated in the opinion.

Messrs. Charles A. Gallup and C. L. Avery, for appellant:

The property assessed was, for the purpose of taxation, real estate.

Sanford's Appeal, 75 Conn. 592, 54 Atl. 739; *Milligan v. Drury*, 130 Mass. 430;

sonal property. . . . The personal character may be given to the building by contract, and it is held that when the erection is under a contract that the building may be removed by the builder, it will be regarded as personalty."

Under statutes to the effect that all lands within the state, owned by individuals or by corporations, shall be liable to taxation, and the term "land" shall include the land itself and all buildings and structures erected upon or affixed to the same, erections by the lessee must be deemed to partake of the nature of realty. Improvements removable by the tenant at the end of the term have been held assessable to him as realty.

Thus, under such a statute buildings resting upon sills laid upon the top of the ground, erected by the lessee and removable by him at the expiration of the term, upon condition that he pay the rents and taxes as stipulated by the lease, were held in *Milligan v. Drury*, 130 Mass. 428, taxable to him as realty in the state where the land was located, notwithstanding that he had paid taxes on them as personalty in another state, where he was domiciled.

So, where a building was erected by a bank upon land leased from a church, the lease giving the lessor an option at the end of the term to pay for the building so erected or to renew the lease for a further term; and giving the lessee the right if so renewed to remove the building at the expiration of the term, it was held in *People ex rel. Van Nest v. Tax & A. Comrs.* 80 N. Y. 573, by reason of such a statute as above indicated that the building was real estate of which the bank was the owner, and it was taxable to the lessee bank as real estate.

And so, where a benevolent society leased to parties lands for a specified term, with covenants of renewal from term to term, the lessor having the privilege at the expiration of any term to resume possession

People ex rel. New York Edison Co. v. Wells, 135 App. Div. 646, 119 N. Y. Supp. 1057, affirmed in 198 N. Y. 607, 92 N. E. 1097; Sprague v. Lisbon, 30 Conn. 20; Detroit United R. Co. v. State Tax Comrs. 136 Mich. 102, 98 N. W. 997; Patterson v. Delaware County, 70 Pa. 382; Ex parte Makepeace, 31 N. C. (9 Ired. L.) 91; Doe v. Tenino Coal & I. Co. 43 Wash. 526, 86 Pac. 938; Newport Illuminating Co. v. Tax Assessors, 19 R. I. 632, 36 L.R.A. 266, 36 Atl. 426; John P. Squire & Co. v. Portland, 106 Me. 238, 30 L.R.A. (N.S.) 576, 76 Atl. 679, 20 Ann. Cas. 603; Andrews v. The Auditor, 28 Gratt. 115.

Messrs. Abel P. Tanner and John J. Lawless, for appellee:

The cottages were personal property.

Parker v. Redfield, 10 Conn. 490; Curtiss v. Hoyt, 19 Conn. 165, 48 Am. Dec. 149; Landon v. Platt, 34 Conn. 523; Linahan v. Barr, 41 Conn. 473; Morey v. Hoyt, 62 Conn. 559, 19 L.R.A. 611, 26 Atl. 127;

upon paying the lessees the appraised value of the buildings erected by them upon the premises, the lessees covenanting to pay as rent a certain percentage on the value of the land alone, and to erect thereon buildings as specified, it was held in People ex rel. Muller v. Board of Assessors, 93 N. Y. 308, that the buildings were properly assessed to the lessees as real estate, and did not come within the letter of a statute exempting all the real and personal property of the lessor.

So, where a certain church owning real estate exempt from taxation under statute, leased it for sixty years to a life insurance company, by the terms of the lease the lessee to erect a substantial building on the land according to plans approved by the lessor, and to pay all taxes and assessments on the property, the lessor at the end of the term to pay for the building a price to be fixed by appraisers, it was held in Russell v. New Haven, 51 Conn. 259, that the building was taxable to the lessee as real estate. "We think [says the court] this case is clearly within the distinction taken in Parker v. Redfield, 10 Conn. 490. In that case, which related to this same property, it was held that buildings erected on the land by the lessees under an agreement that they might be removed at the end of the term were the property of the lessees and were taxable. Had there been an agreement in this lease that the lessees might remove the building, that case might have been directly in point. But, instead of such an agreement, the agreement is that the lessor shall purchase the building. That circumstance, however, does not change the legal aspect of the case. The principle applicable to the two cases is precisely the same in reference to the mere question of taxation. An agreement to purchase recognizes the right of property in the lessee, as 37 L.R.A. (N.S.)

Field v. Guilford Water Co. 79 Conn. 72, 63 Atl. 723; Sanford's Appeal, 75 Conn. 592, 54 Atl. 739; Prince v. Case, 10 Conn. 381, 27 Am. Dec. 675; Russell v. Richards, 10 Me. 429, 25 Am. Dec. 254; Hilborne v. Brown, 12 Me. 162; Tapley v. Smith, 18 Me. 12.

The assessment was void for want of notice to the plaintiff.

Meyer v. Trubee, 59 Conn. 426, 22 Atl. 424.

Roraback, J., delivered the opinion of the court:

The appeal presents two questions: First, whether the assessment in question was void for want of notice to the taxpayer; second, whether the property assessed was, for the purpose of taxation, real estate.

It appears that the plaintiff, who was a resident of the town of Waterford, filed with the assessors of the town a tax list showing that he was the owner of the land upon

completely and as clearly as does the agreement that he may remove the building."

In State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S. W. 998, the lessee's interest in a building under a lease from a charitable organization exempt from taxation, which provided that the building should not become a part of the realty, but shall remain the personality of the lessee, was held taxable to him, whether as personality or realty it was not necessary to inquire. It was further held that such interest must be assessed to the lessee, and could not be reached under an assessment against the lessor. In this connection attention is called to the inadvertent omission of the word "not" from the statement of this case in the note in 32 L.R.A. (N.S.) 370.

In La Paul v. Heywood, 32 L.R.A. (N.S.) 368, it is declared in general terms that where a lease is silent as to the payment of taxes, improvements which are removable by the tenant at the end of the term are taxable to him, and not to the landlord. As stated in the note appended to that case, however, the question was not as to the party to whom the improvements should be taxed, but whether the burden of the tax must ultimately rest on the lessor or on the lessee.

The case of People ex rel. International Nav. Co. v. Barker, 153 N. Y. 98, 47 N. E. 46, affirming 15 App. Div. 628, though not strictly in point, is included for the purposes of comparison. In that case a shed erected by the lessee upon a pier, pursuant to a lease from the city requiring its erection, and providing that it was to become the property of the city on the expiration of the lease, was held to be the property of the city as soon as it was erected and affixed to the realty, and hence was not assessable for taxation as property of the

which four cottages then stood, but did not include these cottages in the list. Subsequent to the filing of this list, the board of assessors of Waterford added these cottages to the plaintiff's tax list. The plaintiff was not notified of this addition, but learned of it, and appealed to the board of relief, before whom he was duly heard.

The plaintiff was entitled, under chap. 154 of the Public Act of 1905, p. 360, to written notice of the addition made to his list. This defect was waived by his appeal to the board of relief. *Quinnebaugh Reservoir Co. v. Union*, 73 Conn. 294, 299, 47 Atl. 328. On October 1, 1909, the plaintiff was the owner and had record title to a tract of land situated in the town of Waterford. On that day, and for several years prior thereto, there had been standing on this land four summer cottages, described as the "Arthur Gager cottage," the "Allen Richards cottage," the "Grace Bitgood cottage," and the "Club House." The land on which each cottage stood was leased by the plaintiff to the owner of the building by a written lease for a period of years. These leases all expressed that the land was to be used for summer cottages. The leases of the Arthur Gager cottage and the Allen Richards cottage were recorded in the land records of the town of Waterford. The other two leases were not recorded. The Gager cottage was built in the year 1903, at a cost of about \$700. The Richards cottage was built in the winter of 1905 and 1906, at a cost of about \$600. The Bitgood cottage was built in the year 1903, at a cost of about \$125. The Club House was built in 1905, at a cost of about \$700. Each of the houses was built where it now stands, of lumber and other materials brought to the place and there assembled and nailed together. They were supported upon chestnut posts set into the ground, the sills of the buildings being nailed to the tops of the posts. They were not built in sections, and were not of the description called

"portable houses." No one of the described buildings has ever been moved from the place where it was built. Photographs of these houses exhibited in this court indicated that their outward appearance was that of permanent summer cottages.

Evidence was admitted and certain facts found by the trial court based on this evidence as to the mutual understanding and agreement of the parties as to these leases. The purpose of this evidence, and the finding of the court thereon, was to show that it was not the intention of the parties that these cottages should become a part of the plaintiff's real estate. For the purposes of this case, this evidence and these facts were immaterial. The private contracts and arrangements between the lessor and his lessees as to these buildings were not binding upon the town of Waterford or its assessors. *Milligan v. Drury*, 130 Mass. 428, 430. The question here presented is not whether under the strict rules of the common law these cottages should as between the parties be termed real estate or personal property.

Our present inquiry is whether these buildings, for the purposes of taxation, come within the provisions of § 2299 of the General Statutes of 1902, which provide that "any interest in real estate listed for taxation shall be set by the assessors in the list of the party in whose name the title to such interest stands on the land records of the town in which such real estate is situated." These cottages have been permanently located upon the plaintiff's land in the town of Waterford for several years. While it is true that the lessor's interest in this real estate may be terminated, yet there is nothing to indicate that any one of the parties to these arrangements contemplates such a termination. The buildings are attached to the land in the manner adopted for permanent structures, and as such they have been so treated and used. They are not a part of the freehold for all

lessee. The court said: "The appellants rest their argument with respect to the question of ownership upon the provision of the lease above mentioned, that the shed shall become the property of the city after the expiration of the lease; which provision, as they maintain, shows that it was in contemplation of both parties that the erections should be the property of the steamship company [lessee] during the term of the lease. We think that this is an incorrect view of the situation. It is a familiar rule that when structures are erected by persons not owners of the land they become part of the realty, and as such, the property of the landowner. It requires an agreement to be expressed in order to prevent the operation of this rule. If the right

of removal is reserved to the lessee in a lease, then, in such a case, he would be regarded as an owner of real estate for the purpose of taxation. *People ex rel. Van Nest v. Tax & A. Comrs.* 80 N. Y. 573. . . . The general rule, where the lease is silent upon the subject, imposes upon the lessor the obligation to pay the taxes upon the leased property, and in this case it would be a seeming incongruity if the city, which is the taxing power, could assess its tenant for taxation. The obligation to erect the structures, as one of the conditions of the letting, and the denial of the right of removal, are considerations which irresistibly militate against the assertion of a right to assess them as property of the relator [lessee] for taxation." J. D. C.

purposes only because of a right which may never be exercised to sever them. They possess all the physical attributes of real estate. These owners have the right to occupy and use this property the same as though it were real estate. Apparently § 2299 of the General Statutes was intended to apply to a case like the one now under consideration. All of the owners of these cottages are nonresidents of the town of Waterford.

The rule is universal that every municipal jurisdiction is entitled to the benefit of all the real estate lying within its borders, for the purposes of taxation. It is well known that in most instances persons owning this kind of property are nonresidents, many of them residing beyond the boundary lines of the state. It is a general rule that personal property liable to taxation follows the domicile of the owner. General Statutes, § 2323. If, as the plaintiff now contends, such buildings are to be treated as personal property, it would often happen that there would be no way in which their owners could be compelled to contribute to the municipality where the buildings are located, for the promotion of projects which have for their object the benefit of all. The language of the statute under consideration unmistakably indicates that it was intended to treat this kind of property as real estate for the purposes of taxation. It is concisely stated in the opening language of § 2299 as follows: "Any interest in real estate listed for taxation." This court in discussing this statute stated that "it is not a provision for the listing or taxation of personal property. It means that any . . . taxable interest in real estate shall be set in the list in the name of the owner of record of such interest. . . . Such an interest, unless otherwise provided by statute, is generally not taxable separately from the freehold, although there may be exceptional cases where an interest in real estate conveyed by an instrument in the form of a lease for a term of years may for certain purposes be regarded as a fee.

"The interest in real estate which § 2299 requires to be listed in the name of the record owner is not a mere chattel interest in land, but a freehold interest properly termed real estate." Sanford's Appeal, 75 Conn. 590, 592, 54 Atl. 739.

There is error, and the judgment is set aside and the cause remanded, with direction to enter a judgment affirming the action of the board of relief.

In this opinion the other Judges concur.  
37 L.R.A. (N.S.)

## IOWA SUPREME COURT.

EVA CUMMINGS

v.

PENNSYLVANIA FIRE INSURANCE  
COMPANY, Appt.

(— Iowa, —, 134 N. W. 79.)

### Evidence — sufficiency — insurance — rider on policy.

1. Evidence that many years before a loss, insured applied to an insurer for a policy covering loss by fire and lightning, and received it, and that the insurance had been renewed from year to year since; and that the agent acknowledged, after the loss, that a lightning clause was attached to the policy,—is sufficient to carry the question whether or not it was upon the policy to the jury, although the policy is lost, and insured did not notice whether in fact it was on the policy last issued.

### Same — entries on insurance register — admissibility.

2. Memoranda on the policy register of a deceased insurance agent are not admissible in evidence to prove the contents of a policy issued by him, subsequently lost, where they cannot be verified by anyone knowing the facts recited therein to be true.

### Same — statute — professional expert.

3. Entries by an insurance agent in the policy register are not within the operation of a statute making admissible in evidence entries by a person since deceased when made in a professional capacity or in the ordinary course of professional conduct.

### Insurance — fall of building — lightning.

4. Liability for injuries to insured goods by the throwing down of the building by lightning is not taken away by a provision of the policy insuring it against fire and lightning, that if the building or any part thereof fall, except as the result of fire, all insurance shall cease.

### Same — lightning — direct loss — falling of walls.

5. Insurance against direct loss or damage by lightning includes injuries to the property by being precipitated into water

### Note. — Admissibility of insurance agent's memoranda or letters as to policies and risks.

It is said in 17 Cyc. 400, that a memorandum relating to the terms of a parol contract made at the time by a third person under circumstances showing an assent thereto by the parties, although not in itself a valid written contract, may be competent as substantive evidence tending to establish, in connection with other evidence, the terms of the contract; but if not made under the direction of both parties, or subsequently approved by them, the memorandum will be inadmissible.

A copy of an agent's daily report was held

and debris by the throwing down of the walls of the building by a lightning stroke.

(January 11, 1912.)

**A**PPEAL by defendant from a judgment of the District Court for Allamakee County in plaintiff's favor in an action brought to recover damages for destruction of and injury to merchandise by lightning. Affirmed.

Statement by Ladd, J.:

Action on insurance policy resulted in judgment as prayed. The defendant appeals.

Messrs. Douglas Doremore and Barger & Hicks, for appellant:

The insurance on the goods ceased and terminated when the building fell, even if the fall was the result of the building being struck by lightning.

Foster v. Home Ins. Co. 74 C. C. A. 445, 143 Fed. 307; Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 83 Fed. 243; Nelson v. Traders' Ins. Co. 181 N. Y. 472, 74 N. E. 421.

The goods were damaged by being precipitated and falling into the water by reason of the fall of the building contain-

ing them, and such damage was not direct damage by lightning.

Warmcastle v. Scottish Union & Nat. Ins. Co. 201 Pa. 302, 50 Atl. 941; Hartford F. Ins. Co. v. Nelson, 64 Kan. 115, 67 Pac. 440; Vorse v. Jersey Plate Glass Ins. Co. 119 Iowa, 555, 60 L.R.A. 838, 97 Am. St. Rep. 330, 93 N. W. 569; Beakes v. Phoenix Ins. Co. 143 N. Y. 402, 28 L.R.A. 267, 38 N. E. 453; German F. Ins. Co. v. Roost, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097.

Evidence was not admissible tending to show that a lightning clause was attached to the policy sued on, because the testimony was secondary, and not the best evidence, and not the best kind of secondary evidence, and no foundation for the introduction of the same was shown, the company's policy register being the best evidence of the contents of the lost policy.

1 Greenl. Ev. Lewis's ed. § 84, note 3; 2 Shinn, Pl. & Pr. p. 1043; Wilson v. South Park, 70 Ill. 46; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Bryan v. Smith, 3 Ill. 47; Conger v. Converse, 9 Iowa, 557; Higgins v. Reed, 8 Iowa, 298, 74 Am. Dec. 305; Harvey v. Thorpe, 28 Ala. 262, 65 Am. Dec. 344; Cornett v. Williams (Nash v. Williams) 20 Wall. 226, 246, 22 L. ed. 254, 257; Renner v. Bank of Columbia, 9

inadmissible in Strauss v. Phenix Ins. Co. 9 Colo. App. 386, 48 Pac. 822, for the purpose of supporting the agent's testimony that he was without knowledge of existence of other insurance at the time of the issuance of the policy; the court saying that the instrument was neither an original instrument, nor such a memorandum as could be offered in evidence to support the insurance company's case, and that if it was available at all it could only be used in order to refresh the recollection of the witness.

And an agent's report of the risk to the company was, in Phenix Ins. Co. v. La Pointe, 118 Ill. 384, 8 N. E. 353, held inadmissible on the question of notice to the company of an encumbrance upon the property, upon the ground that it constituted no part of the transaction and was therefore no part of the *res gestæ*, where it was made neither at the time of the agreement, nor in the assured's presence, but was made by an agent who had no conversation with the assured in reference to the insurance until the loss occurred.

The insurance company's book of entries of risks taken, in which an alleged oral contract for insurance is not entered, is inadmissible in an action upon the contract to prove its nonexistence. Sanborn v. Fireman's Ins. Co. 16 Gray, 448, 77 Am. Dec. 419.

It was stated in Glassner v. Johnston, 133 Wis. 485, 113 N. W. 977, that a letter written by the general agent of an insurance

company declaring that the policy delivered complied with the application would be incompetent as evidence in favor of the insurance company, since it was a mere self-serving declaration made by the defendant out of court.

In Hancock Mut. L. Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795, a letter written from a state agent to a local agent was held inadmissible upon the ground that it was written after the insured died and the obligations of the parties under the policy had become fixed, so that anything the agent might have said in the letter could have had no bearing upon those rights.

It was held in Foreman v. German Alliance Ins. Asso. 104 Va. 694, 3 L.R.A. (N.S.) 444, 113 Am. St. Rep. 1071, 52 S. E. 337, that a receipt signed by an agent of an insurance company, not as such agent, but as agent for a loan association, for repayment to him of money advanced to pay premiums for insurance on property in which the association was interested, is not admissible, in an action upon an insurance policy, upon the question of waiver or forfeiture.

The cases as to the admissibility of memoranda or records in actions having no reference to the policy are excluded. This line of cases is illustrated by Williamson v. Cambridge R. Co. 144 Mass. 148, 10 N. E. 790, holding admissible in behalf of a railroad company sued for personal injuries, a copy of the application for insurance made and signed by the plaintiff subsequently to the injury; or Com. v. Smith, 151 Mass. 491, 23

Wheat. 597, 6 L. ed. 170; *Mariner v. Saunders*, 10 Ill. 113; *Dunlap v. Berry*, 5 Ill. 327, 39 Am. Dec. 413; *Ellis v. Huff*, 29 Ill. 451; *Aspinwall v. Chisholm*, 109 Ga. 437, 34 S. E. 568; *Lewis v. Hudmon*, 56 Ala. 186; *Zalesky v. Iowa State Ins. Co.* 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; *Norris v. Billingsley*, 48 Fla. 102, 37 So. 564; *Matthews v. Union P. R. Co.* 66 Mo. App. 663; *Poignand v. Smith*, 8 Pick. 272; *Coman v. State*, 4 Blackf. 241.

The evidence was not sufficient, even if competent, to show with sufficient certainty that there was any lightning clause in fact attached to the policy sued on.

*White v. Herrman*, 62 Ill. 73; *Home Ins. Co. v. Adler*, 71 Ala. 516.

Entries of the agent in the policy register were admissible as having been made in the usual course of professional conduct and in the professional capacity of agent.

*Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710; *Lebanon County v. Reynolds*, 7 Watts & S. 330; *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216; *Ganahl v. Shore*, 24 Ga. 17; *Davenport v. Cummings*, 15 Iowa, 219; *Bean v. Lambert*, 77 Fed. 862; *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cush. 349;

*Com. v. Smith*, 151 Mass. 491, 24 N. E. 677; *Protection L. Ins. Co. v. Dill*, 91 Ill. 176; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. 443, 98 Am. Dec. 302; *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628; *Kennedy v. Doyle*, 10 Allen, 161; *Welsh v. Barrett*, 15 Mass. 380; *Beaver v. Taylor*, 1 Wall. 637, 17 L. ed. 601; *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237; *Dow v. Sawyer*, 29 Me. 117; *Lathrop v. Lawson*, 5 La. Ann. 238, 52 Am. Dec. 585; *Bank of Montgomery v. Plannett*, 37 Ala. 222; *Price v. Torrington*, 1 Salk. 285; *Doe ex dem. Patteshall v. Turford*, 3 Barn. & Ad. 890, 1 L. J. K. B. N. S. 262; *Poole v. Dicas*, 1 Bing. N. C. 649, 1 Scott, 600, 1 Hodges, 162, 7 Car. & P. 79, 4 L. J. C. P. N. S. 196; *Rawlins v. Rickards*, 28 Beav. 370; *Moshier v. Frost*, 110 Ill. 206; *Bentley v. Falker*, 24 App. Div. 560, 49 N. Y. Supp. 691; 1 Greenl. Ev. 14th ed. §§ 82, 84, 114; 1 Wigmore, Ev. §§ 734 et seq. 1 Elliott, Ev. § 872; *Abbott*, Trial Ev. 2d ed. § 44; 2 Rice, Ev. pp. 748-751; *State v. Brady*, 100 Iowa, 191, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; *Owens v. State*, 67 Md. 307, 10 Atl. 210, 302; *Curtis v. Bradley*, 65 Conn. 99, 28 L.R.A. 143, 48 Am. St. Rep. 177, 31 Atl. 594; *Hesser v. Rowley*, 139 Cal. 415, 73 Pac. 156; *Haven v. Wendell*, 11 N. H. 112;

N. E. 677, involving the admissibility of a book into which a written portion of a fire insurance policy had been copied, in a prosecution for arson; or *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237, holding entries in a policy register made in the usual course of business by an insurance agent since deceased, admissible to show the issuance of policies, in a suit between third parties.

Attention is also directed to *Lynchburg Cotton Mill Co. v. Travelers' Ins. Co.* 9 L.R.A.(N.S.) 654, 79 C. C. A. 464, 149 Fed. 954, holding that, although agents of an insurance company have no authority to waive provisions of the policy, letters written by them upon the question of the adjustment of a claim, after the company itself terminated the attempt at adjustment, are admissible in evidence in a suit upon the policy, upon the question whether a provision in the policy that suits must be brought within thirty days after the liability accrued was waived by efforts to compromise, prolonged beyond the expiration of such period.

For a similar case see *Hill v. Phoenix Ins. Co.* 14 Wash. 164, 44 Pac. 146, holding that letters from a local agent to a general agent tending to show that the company had not come to a final determination in regard to the payment of a claim are not admissible for the purpose of excusing the plaintiff from bringing his action within the time specified by the policy.

See also *Corkery v. Security F. Ins. Co.* 99 Iowa, 382, 68 N. W. 792, in which it ap- 37 L.R.A.(N.S.)

peared that the applicant for the policy instructed the agent to inspect the records in the office of another insurance company holding insurance on the property, and to issue a policy like the existing one, and that such record contained the following recital: "Mortgage clause. Loss, if any, payable to" person other than applicant for policy,—and holding that since the agent read such entry in the record it was competent evidence because of what it contained, as tending to prove knowledge on his part of the existence of a mortgage in favor of the person named in the mortgage clause.

Generally as to the admissibility of reports by an agent or employee to employer to prove a fact in issue, see the notes in 18 L.R.A.(N.S.) 231, and 25 L.R.A.(N.S.) 930.

As to train despatcher's record as evidence, see the note in 3 L.R.A.(N.S.) 1190.

As to party's book of account as evidence in his own favor, see the note in 52 L.R.A. 546.

As to admissibility of partnership books of account, see the note in 52 L.R.A. 833.

As to what is provable by books of account, see the note in 52 L.R.A. 689.

As to the admissibility, upon testimony of a bookkeeper, of entries in a party's books of account, based upon oral or written statements by others, see the note in 36 L.R.A.(N.S.) 899.

As to books of account as evidence between other parties, see the note in 53 L.R.A. 513.

L. A. W.

Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; Garden City v. Heller, 61 Kan. 767, 60 Pac. 1061; New York v. Second Ave. R. Co. 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905; Moots v. State, 21 Ohio St. 653; Anchor Mill Co. v. Walsh, 108 Mo. 282, 32 Am. St. Rep. 600, 18 S. W. 904; Perry State Bank v. Elledge, 99 Ill. App. 307; Guy v. Mead, 22 N. Y. 462; Donovan v. Boston & M. R. Co. 158 Mass. 450, 33 N. E. 583; People v. Dow, 64 Mich. 717, 9 Am. St. Rep. 873, 31 N. W. 597; Kyburg v. Perkins, 6 Cal. 674; Home Ins. Co. v. Weide, 11 Wall. 438, 20 L. ed. 197.

Mr. William S. Hart, for appellee:

Memoranda entries and reports by officers and employees of an insurance company, and between its agents and the home office, are admissible against a policy holder.

Strauss v. Phenix Ins. Co. 9 Colo. App. 386, 48 Pac. 822; Glassner v. Johnston, 133 Wis. 485, 113 N. W. 977.

Self-serving, *ex parte*, private memoranda entries or reports are not admissible, be the declarant alive or dead.

Luke v. Koenen, 120 Iowa, 106, 94 N. W. 278; T. D. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co. 140 Wis. 341, 122 N. W. 737; Avery v. Avery, 49 Ala. 195; Elsberg v. Sowards, 66 Hun, 30, 21 N. Y. Supp. 10; Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698; Sherman v. Whiteside, 190 Ill. 576, 60 N. E. 838; Frank v. Pennie, 117 Cal. 254, 49 Pac. 208.

The inadmissibility of entries and memoranda of this nature is a general rule of universal application.

Heffner v. Brownell, 82 Iowa, 106, 47 N. W. 979; Lyman v. Bechtel, 55 Iowa, 437, 7 N. W. 673; Southern R. Co. v. Allison, 115 Ga. 635, 42 S. E. 15; Newhall v. Appleton, 102 N. Y. 133, 6 N. E. 120; Burns v. Stuart, 168 Mass. 19, 46 N. E. 399.

The nature of the entries and of the transaction does not bring it within the definition of an entry "made in a professional capacity, or in the ordinary course of professional conduct."

Com. ex rel. Hensel v. Fitler, 147 Pa. 288, 15 L.R.A. 205, 23 Atl. 568; Pennock v. Fuller, 41 Mich. 153, 32 Am. Rep. 148, 2 N. W. 176; Betz v. Maier, 12 Tex. Civ. App. 219, 33 S. W. 710; Roth v. Boies, 139 Iowa, 267, 115 N. W. 930.

Appellee's proof that her original policy insured against fire and lightning is competent evidence that all subsequent renewals covered same hazard.

Fire Asso. of Philadelphia v. Yeagley, 34 Ind. App. 387, 72 N. E. 1035; Thomason v. Capital Ins. Co. 92 Iowa, 72, 61 N. W. 843; Taylor v. State Ins. Co. 98 Iowa, 521, 60 37 L.R.A.(N.S.)

Am. St. Rep. 210, 67 N. W. 577; McLaughlin v. American F. Ins. Co. 126 Iowa, 149, 106 Am. St. Rep. 344, 101 N. W. 765.

A lightning clause insuring against direct loss from lightning covers all directly consequential results, excepting those especially excepted.

Russell v. German F. Ins. Co. 100 Minn. 538, 10 L.R.A.(N.S.) 326, 111 N. W. 400; Hapeman v. Citizens' Mut. F. Ins. Co. 126 Mich. 191, 86 Am. St. Rep. 535, 85 N. W. 454.

Ladd, J., delivered the opinion of the court:

In the afternoon of June 20, 1908, a storm of unusual violence raged at Waukon. Several inches of rain and hail fell within a half hour. The waters gathered in the depression along the course of a creek bed, through which a covered sewer had been constructed, several feet deep, and flowed rapidly past the southwest corner and west side of a brick building containing plaintiff's millinery stock and fixtures. As the hail ceased falling, the west wall of the building collapsed, and most of the property mentioned was precipitated into the water and *débris*. Whether this was caused by a stroke of lightning or water undermining the wall was an issue upon which the evidence was in conflict. The millinery stock and fixtures were covered by a policy issued by the defendant, and the issues were: (1) Whether a lightning clause insuring against damages caused by lightning was attached to the policy; (2) whether the wall was struck by lightning; (3) whether the injury to the insured property by *débris* and water was the direct consequence of the lightning; and (4) whether the policy subsequently was so canceled as to avoid liability. The evidence showed conclusively that neither the defendant's agent nor the insured had any intention of canceling the policy for the period of the term elapsed, and that the policy was merely terminated because the agent thought it advisable, as the goods were taken to another location where the premium was higher, that a new policy issued instead of transferring that then existing. The last defense mentioned, then, was without merit. As said, the evidence was in sharp conflict as to whether the building was strick by lightning, and we are not inclined to interfere with the verdict of the jury.

1. The loss of the policy was sufficiently explained, and there is no controversy concerning its contents, save that plaintiff claims that a lightning clause was attached thereto, while this is denied by defendant.

The latter insists that the evidence was insufficient to carry this issue to the jury, and complains of the refusal of the court to receive in evidence a purported copy of the written portion of the policy made by the recording agent, as tending to prove that the lightning clause was not attached. The policy was issued March 27, 1908, by being countersigned by the recording agent of defendant, F. H. Robbins. On Monday, the second day after the fire, plaintiff called on him for a copy of the policy lost, and asked that it be transferred to cover her goods in their new location. Instead, Robbins issued a new policy dated June 22, 1908, for the term of one year, at a higher rate, and delivered it to plaintiff without explanation. She handed this to her attorney, who, noticing the lightning clause attached, advised her that it was all right and made no further examination at that time. A few days later, upon noticing the difference in date, he interviewed Robbins about the matter, and the latter informed him that the policy was an exact copy of that lost, except the change in date, the rate of premium, and the location of the goods insured; that, as these had to be changed, he had thought it as well to issue a new policy, and had done so without intention of canceling that previously issued. Subsequently Robbins informed Murphy that the company had demanded that the lightning clause be detached, and was permitted to do so upon giving a receipt therefor. The plaintiff had not noticed whether the lightning clause was attached to the policy lost, but testified that some seventeen or eighteen years previous she had applied to Robbins for a policy insuring her goods against fire and lightning, and received such a policy, issued by defendant, and that each year upon the expiration of the existing policy in the defendant company the agent had handed her a policy as a renewal of that which had expired. Presumably each renewal was in terms and on conditions of the policy renewed. *Thomason v. Capital Ins. Co.* 92 Iowa, 72, 61 N. W. 843. See also *Taylor v. State Ins. Co.* 98 Iowa, 521, 60 Am. St. Rep. 210, 67 N. W. 577; *McLaughlin v. American F. Ins. Co.* 126 Iowa, 149, 106 Am. St. Rep. 344, 101 N. W. 765. The evidence was sufficient to carry the issue to the jury.

2. The main contention of appellant is that the court erred: (1) In receiving the evidence of Murphy and plaintiff, for that it was not the best evidence available, it appearing that Robbins, as defendant's recording agent, kept a register containing a copy of all policies, including that lost, in his office; and (2) in refusing to receive such register so showing in evidence. *Mrs. Eddy*, who succeeded her father, F. H. Robbins, as defendant's agent at Waukon, testified that in issuing a policy a daily report

is first made out to be sent to the company, and an exact copy thereof entered into the policy register, and then the policy prepared; that in the register and daily report a description of the property, the amount for which insured, the date, and the premium, and the rate are noted, and, if a lightning clause or gasoline clause is attached to the policy, this is indicated in the policy register, and, if any change is made subsequently, this is also noted in the register and the company notified. The daily report is mailed to the company and the register retained by the agent. She testified this was as her father had taught her, and that, so far as she knew, his policy register was kept in the same way, and the entries made at about the time of the transactions, and were in accordance with what he did with the different risks; and, upon being shown what purported to be the register entry concerning the lost policy, and of each preceding policy issued to plaintiff by defendant during the ten years previous, she said these were in the handwriting of her father. The several entries were then offered in evidence, including that of the lost policy, which as apparently made when the policy was issued may be set out: "Policy No. 384; name, Miss Eva Cummins; Commencement of risk, Mch. 27, 1908; expiration of risk, Mch. 27, 1909, amount insured, \$1,100; rate, 1.32; Prem. \$14.52. \$950 on her stock of millinery goods, ladies' furnishing goods, ribbons, trimmings, fancy goods and such other goods as are usually kept for sale by dealers in that branch of business, and \$150 on her show cases, mirrors, carpets, rugs, stands, tables, racks, desks, chairs, tools, millinery holders, millinery tools, and appliances, stoves, pipe, and fuel, all while contained in the first story and in cellar of the two-story brick composition roof building known on Sanborn map of Waukon, Iowa, as number 206, block 1, sheet 2. Other short-time insurance permitted on stock in spring and fall, but in no case to exceed three fourths (3/4) of the value at time of writing. Co.'s gasoline stove permit attached to policy." On objection, the entries were excluded.

It may be conceded that, even though plaintiff can resort to secondary evidence to prove the lightning clause was attached to the policy, this must be the best attainable. Though the rule seems to be laid down broadly in England that there are no degrees in secondary evidence, the current of authority is otherwise in this country. *Harvey v. Thorpe*, 28 Ala. 250, 260, 65 Am. Dec. 344; *Cornett v. Williams* (Nash v. Williams) 20 Wall. 226, 246, 22 L. ed.



254, 257; *Wilson v. South Park Comrs.* 70 Ill. 46. And this court seems to be committed to the American doctrine. *Conger v. Converse*, 9 Iowa, 554; *Higgins v. Reed*, 8 Iowa, 298, 74 Am. Dec. 305; *Zalesky v. Iowa State Ins. Co.* 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433. But the question does not arise in this case, for the reason that the entries offered were not admissible at all. They were mere memoranda made by the agent of the company, and not verified by anyone knowing the facts recited therein. Quite generally such private entries are excluded whether made by a party to the controversy, or his agent, as in the nature of self-serving declarations. *Taylor v. Chicago, M. & St. P. R. Co.* 80 Iowa, 431, 46 N. W. 64; *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. 673; *Hoffman v. Milwaukee, M. & St. P. R. Co.* 40 Minn. 60, 41 N. W. 301; *T. D. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co.* 140 Wis. 341, 122 N. W. 737; *Conner v. Seattle R. & S. R. Co.* 56 Wash. 310, 25 L.R.A. (N.S.) 930, 134 Am. St. Rep. 1110, 105 Pac. 634; *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 822; *Southern R. Co. v. Allison*, 115 Ga. 635, 42 S. E. 15; *Newhall v. Appleton*, 102 N. Y. 133, 6 N. E. 120. And in the absence of statute the rule is not otherwise where the person making the memoranda has since died. *Luke v. Koenen*, 120 Iowa, 103, 94 N. W. 278; *T. D. Kellogg Lumber & Mfg. Co. v. Webster Mfg. Co.* 140 Wis. 341, 122 N. W. 737; *Avery v. Avery*, 49 Ala. 193. Numerous decisions hold that memoranda or entries of many items which are verified by a witness having knowledge thereof may be received in evidence, not as evidence apart from the oral testimony, but in connection therewith as memoranda made at the time and verified as correct. *State v. Brady*, 100 Iowa, 195, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; *Curtis v. Bradley*, 65 Conn. 99, 28 L.R.A. 143, 48 Am. St. Rep. 177, 31 Atl. 591. Of course there are exceptions, as the admissibility of entries of notaries and bank officials in matters of protest, presentation, and the like of negotiable instruments. *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628; *Welsh v. Barrett*, 15 Mass. 380. And possibly of the record of the movement of trains made by a train despatcher. *Donovan v. Boston & M. R. Co.* 158 Mass. 450, 33 N. E. 583. But some courts hold that even train sheets, to be admissible, must be verified by witnesses having knowledge of the facts. *Bronson v. Leach*, 74 Mich. 713, 42 N. W. 174; *Pittsburgh, C. C. & St. L. R. Co. v. Noel*, 77 Ind. 110; *Pittsburgh & I. E. R. Co. v. Cummington*, 39 Ohio St. 327. And some cases are quoted and relied upon by appel-

lant, where memoranda made by someone not connected with or interested in the controversy are held admissible.

It is enough to say that the memoranda in question are not within any of these classes, and, if admissible at all, this is by virtue of § 4622 of the Code, which provides that "the entries and other writings of a person deceased, who was in a position to know the facts therein stated, made at or near the time of the transaction, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty especially enjoined by law." The contention of appellant is that the entries were either made in a "professional capacity," or in the ordinary course of "professional conduct." If so, then a recording agent of a fire insurance company must be regarded as a professional man. He is an employee of the insurer, and not of the insured, and all exacted of him is that he act with fidelity in negotiating, as the representative of his principal, with those desiring to obtain insurance on their property. Undoubtedly such agency is an occupation or vocation, but we do not regard it professional in any sense. Indeed, insurance has been construed to be a commodity (*Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428), though issuing a policy is said not to be a transaction in interstate commerce (*Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207). A policy of insurance is merely a contract to indemnify against loss by fire entered into between the insurer and the insured for a consideration; the policy coming to the recording agent in printed form. His duties are to fill out the blanks, countersign and report to the company what he has done, and make memoranda thereof in his register. Aside from this, he may solicit business and examine the property to be insured. But all this requires no special skill or learning, and is in no sense professional within the accepted meaning of that word. "Professional" is that which pertains to a profession, and Webster's New International Dictionary defines "profession" as "that of which one professes knowledge; the occupation if not purely commercial, mechanical, agricultural, or the like to which one devotes oneself; a calling in which one professes to have acquired some special knowledge used by way either of instructing, guiding, or advising others or of serving them in some art, calling, vocation, employment; as, the profes-

sion of arms, the profession of chemist." The Standard Dictionary: "An occupation that properly involves a liberal education or its equivalent, and mental rather than manual labor; especially one of the three learned professions. (2) Hence any calling or occupation involving special mental and other attainments or special discipline, as editing, acting, engineering, authorship." The Century Dictionary: "The calling or occupation which one professes to understand and to follow; vocation; specifically, a vocation in which a professed knowledge of some department of science or learning is used by its practical application to affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly theology, law, medicine were specifically known as the professions; but, as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes."

It is apparent from these definitions that, to constitute a profession, something more than a mere employment or vocation is essential; the employment or vocation must be such as exacts the use or application of special learning or attainments of some kind, and this seems to be the conclusion of the court. Thus a chemist is a person belonging to a recognized profession. *United States v. Laws*, 163 U. S. 258, 41 L. ed. 151, 16 Sup. Ct. Rep. 998. So is a consulting engineer. *Ericsson v. Brown*, 38 Barb. 390. See *Lebanon County v. Reynolds*, 7 Watts & S. 329. A building contractor is not. *Re Whetmore, Deady*, 585, Fed. Cas. No. 17,508. Nor is a milliner a "professional artist" within the act of Congress prohibiting the immigration of aliens under contract to perform labor. *United States v. Thompson* (C. C.) 41 Fed. 28. One who operates a real estate agency is not engaged in a professional employment. *Pennock v. Fuller*, 41 Mich. 153, 32 Am. Rep. 148, 2 N. W. 176, where the court said: "Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies. A commission merchant, or any agent for the sale of any particular kind of personal

property, acts in an analogous capacity. Anyone can assume and lay down such business at pleasure, and anyone can conduct it in his own way, on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law." Nor is a sewing-machine agent so engaged. *People ex rel. Singer Mfg. Co. v. McAllister*, 19 Mich. 215. The renting of tolls is not a profession or trade. *Bellamy v. Burch*, 16 Mees. & W. 590. Debts due for board to a hotel keeper are not professional earnings. *Youst v. Willis*, 5 Okla. 170, 49 Pac. 56. See *Roth v. Boies*, 139 Iowa, 253, 115 N. W. 930; *Com. ex rel. Hensel v. Fitler*, 147 Pa. 288, 15 L.R.A. 205, 23 Atl. 568. In *State v. Hunt*, 129 N. C. 686, 85 Am. St. Rep. 758, 40 S. E. 216, *Douglas, J.*, expressed the opinion that procuring laborers to accept employment in another state by an emigrant agent is a profession; but this does not seem to have been essential to the decision, and the other judges expressed no opinion on the point. In *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710, the Texas court of civil appeals held that, within the exemption laws, an insurance agent should be regarded as engaged in a trade, but expressed no opinion as to whether he should be regarded as engaged in a profession. Insurance agents are not spoken of, in common parlance, as professional men, nor is their work to be classed as professional. It follows that the memoranda in the policy register cannot be said to have been made in a professional capacity nor in the course of professional conduct.

In *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677, the court merely held that the memoranda in the policy register, supplemented by oral testimony of the agent, was admissible notwithstanding the existence of other evidence alleged to be of better quality. The ruling in *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237, was on the theory that the entries in the policy register were made by a third person since deceased. An insurance company necessarily acts through agents, and here the action is between the original parties, one of whom is the plaintiff and the other the company for whom the agent acted in the very matters in controversy. Clearly enough, such entries were in the nature of self-serving declarations, and, when not verified by a witness knowing the facts, were not admissible in evidence.

3. The policy to which the lightning clause was attached stipulated that "if a building or any part thereof fall, except as the result of fire, all insurance by this

policy on such building or its contents shall immediately ceased." Counsel contend that, as the lightning clause is subject to the terms and conditions of the policy, defendant is not liable for that the injury occurred after the walls fell. The evident design of that clause was to obviate liability for loss by fire consequent upon or subsequent to the falling of the building insured, and we are referred to several cases deciding that in that event there is no liability under such a policy. *Foster v. Home Ins. Co.* 74 C. C. A. 445, 143 Fed. 307; *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 243; *Nelson v. Traders' Ins. Co.* 181 N. Y. 472, 74 N. E. 421. Possibly all insurance under the lightning clause, except as a result of lightning, would have ceased upon the falling of the building, and this would seem a fair interpretation of the two clauses read together. Surely, it could not have been intended in stipulating indemnity for loss by lightning and at the same time to eliminate the natural consequences of a stroke of lightning. Manifestly, the clause quoted has reference to the falling of a building consequent of causes other than those insured against, and the lightning clause is subject to the condition as so construed. See *Haws v. Fire Asso. of Philadelphia*, 114 Pa. 431, 7 Atl. 159. Moreover, the walls in falling precipitated the goods of insured in the water and *débris*, and no time appears to have elapsed between the falling of the wall and the injury upon which the claim of damages is predicated. In any event, then, the damages are within the terms of the contract.

4. If a lightning clause were attached to the policy covering plaintiff's goods, it is conceded to have been in words following: "This policy shall cover any direct loss or damage caused by the lightning (meaning thereby the commonly accepted use of the term 'lightning,' and in no case to include loss or damage by cyclone, tornado, or windstorm), not exceeding the sum insured, nor the interest of the insured in the property, and subject in all respects to the terms and conditions of this policy." Appellant contends that, even though the wall was struck by lightning, and by its fall the goods were precipitated into the *débris* and water, the damage from these was not the "direct loss or damage caused by lightning," relying upon several cases, none of which, as we think, support the contention. In *Warmcastle v. Scottish Union & Nat. Ins. Co.* 201 Pa. 302, 50 Atl. 941, the policy assumed liability for "direct loss from lightning in no case to include loss or damage by cyclone, tornado, or windstorm," and the court recognized that, "as a general

principle, the insurer is liable for all loss which results from or can be fairly attributed to the peril insured against," but proceeded to say that liability might be limited, and in that case liability for damage caused by cyclone, tornado, and windstorm was expressly excluded, and, though it might be difficult to say the amount of damages occasioned by the wind, plaintiff could only recover for that occasioned by lightning. In *Hartford F. Ins. Co. v. Nelson*, 64 Kan. 115, 67 Pac. 440, the policy stipulated for indemnity against "all such immediate loss or damage sustained by the injured as may occur by tornadoes, cyclones, and windstorms," and provided that the insurer should not be liable for any loss or damage occasioned by hail and water. Windows were broken by hail, and damages were denied because of the exception noted. See also *Beakes v. Phoenix Ins. Co.* 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453; *German F. Ins. Co. v. Roost*, 55 Ohio St. 581, 36 L.R.A. 236, 60 Am. St. Rep. 711, 45 N. E. 1097; *Vorse v. Jersey Plate Glass Ins. Co.* 119 Iowa, 555, 60 L.R.A. 838, 97 Am. St. Rep. 330, 93 N. W. 569. It will be observed that the decisions turn on an exception contained in the policies which may have found its way there because of the conclusion in *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894, holding that, in the absence of any exceptions, where injury is caused by windstorm or cyclone accompanied by lightning, the issue of whether the electric storm is the cause of the injury to property covered by a lightning clause attached to the insurance policy was for the jury. No argument would seem to be necessary in this case to demonstrate that no efficient cause intervened between the stroke of lightning and the damage to the goods from coming in contact with the *débris* and water of the flood. Certainly it might have been found that the fall of the building was caused by the stroke of lightning, and as a natural sequence that the goods were precipitated in the water and *débris*. Courts have held that the fall of a building directly resulting from an ordinary fire is within the terms of the policy against fire (*Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L.R.A. 346, 56 Am. St. Rep. 481, 65 N. W. 635), and that injury to another building from the fall of one burned may be within the policy covering the former (*Russell v. German Ins. Co.* 100 Minn. 538, 10 L.R.A. (N.S.) 326, 111 N. W. 400), and that injury resulting from water or chemicals in extinguishing the fire is a direct result of the fire, and covered by the policy. (*Geisek v. Crescent Mut. Ins. Co.* 19 La. Ann. 297; *Lewis v. Springfield F.*

& M. Ins. Co. 10 Gray, 159; Whitehurst v. Fayetteville Mut. F. Ins. Co. 51 N. C. [8 Jones, L.] 352; Cohn v. National Ins. Co. 96 Mo. App. 315, 70 S. W. 259). Loss by theft consequent upon the confusion attending a fire, or injury to goods in their removal from the building, is regarded as a direct consequence of the fire. Newmark v. Liverpool & L. L. & F. Ins. Co. 30 Mo. 160, 77 Am. Dec. 608; Mitchell v. Union L. Ins. Co. 45 Me. 104, 71 Am. Dec. 529. In Hapeman v. Citizens' Mut. F. Ins. Co. 126 Mich. 191, 86 Am. St. Rep. 535, 85 N. W. 454, horses insured against lightning were in a barn which was struck by lightning, and were burned by the fire which followed, and the insurer was held liable. In the light of these decisions, it seems unnecessary to add that the injury to the goods from water and *débris* into which they were precipitated by the falling of the wall was the direct and natural consequence of the stroke of lightning.

The judgment is affirmed.

MISSOURI SUPREME COURT.  
(Division No. 2.)

STATE OF MISSOURI, Resp't.,

v.

PATRICK WHITE, Appt.

(237 Mo. 208, 140 S. W. 896.)

**Voter — illegal registration — good faith — effect.**

A discharged convict cannot be convicted of illegally registering as a voter if he act-

*Note. — Good faith as affecting criminal responsibility for illegal registration or voting.*

As a general rule no criminal responsibility attaches for illegal registration or voting, where the voter acted honestly and the mistake was one of fact as to his qualification. But the rule that every person is conclusively presumed to know the law, and that ignorance or mistake of law will not relieve from criminal responsibility, has generally been applied to illegal voting.

In several cases, however, this rule has not been applied where the statute made it a criminal offense to wilfully vote "knowing himself not to be a qualified voter;" holding evidence admissible upon the question of wilful voting, that the voter, being in doubt, relied upon the opinion of persons learned in the law. *Com. v. Bradford*, 9 Met. 268; *State v. Savre*, 129 Iowa, 122, 3 L.R.A. (N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387. To the same effect are *obiter* statements in *State v. Sheeley*, 15 Iowa, 404; *Hamilton v. People*, 57 Barb. 625.

In a few other cases it has been held 37 L.R.A. (N.S.)

ed in good faith believing, upon advice of registration officers, that the papers given him upon his release from confinement restored his citizenship.

(November 14, 1911.)

**A**PPEAL by defendant from a judgment of the Circuit Court of the City of St. Louis convicting him of unlawfully registering as a voter. Reversed.

The facts are stated in the opinion.

Messrs. Elliott W. Mayor, Attorney General, and John M. Dawson, Assistant Attorney General, for the State:

The evidence was sufficient to sustain the conviction.

*State v. Exnicious*, 223 Mo. 68, 122 S. W. 730; *State v. Tiernan*, 223 Mo. 147, 122 S. W. 728.

Brown, J., delivered the opinion of the court:

At the December term, 1909, of the circuit court of the city of St. Louis, defendant was convicted of the crime of unlawfully registering as a voter in said city, as prohibited by § 4441, Rev. Stat. 1909, and appeals from a judgment fixing his punishment at two years' imprisonment in the penitentiary.

In the year 1901, defendant pleaded guilty in the circuit court of St. Louis city to the crime of grand larceny, and was sentenced to a term of two years in the penitentiary. Notwithstanding he was by that conviction rendered ineligible to vote, he applied to register, and did register, as a voter in said city on September 14, 1908.

There was evidence on the part of the

that it was necessary to show that accused actually knew that he was violating the law, to sustain a conviction for illegal voting, though he knew the existence of a state of facts which disqualified him in point of law and rendered his vote illegal.

In harmony with *STATE v. WHITE* it was held in *State v. Pearson*, 97 N. C. 434, 2 Am. St. Rep. 303, 1 S. E. 914, that the decision of the election officers (as to effect of pardon of one convicted of crime) in favor of the right of a party to vote, in the absence of fraud and collusion and when honestly acted upon, will secure the voter immunity from criminal liability, though it should afterwards appear that he did not have the right to vote. To the same effect are *obiter* statements in *State v. Boyett*, 32 N. C. (10 Ired. L.) 336, and *State v. Hart*, 51 N. C. (6 Jones, L.) 389.

But in *Morris v. State*, 7 Blackf. 607, it was held that the determination of the judges of the election in favor of the defendant's right to vote cannot avail him as a defense to an indictment for fraudulent voting, since they may have been imposed upon by the statements of the defendant,

state to the effect that when the defendant applied to register he was sworn to testify regarding his qualifications as a voter, and testified that he had never been convicted of bribery, perjury, or other infamous crime. There was also some evidence indicating that some of the registration officers in the precinct where defendant registered had knowledge of the fact that he had been convicted of grand larceny, but failed to call his attention to that fact when he applied to register.

Defendant testified in his own behalf that at the time of his discharge from the penitentiary, in 1902, the warden said to him: "Here is your pardon papers. Now go home and be a good citizen." That, prior to the next election after his release, he exhibited

papers received when he was discharged from the penitentiary, under the three-fourths rule, to the registration officers of his precinct, and was by said officers informed that such papers entitled him to vote. Whereupon he did register and vote at an election held in the year 1904. That in registering on September 14, 1908, he believed his citizenship had been restored, and that he was entitled to vote. There was evidence that an attorney applied to the governor to pardon defendant a short time before he registered in 1908, and that such pardon was not granted. Defendant's so-called pardon papers were not produced at the trial, and there was some evidence that they had been lost or mislaid.

Among the instructions given to the jury

or they may have mistaken the law. (The facts relied upon to sustain the conviction for fraudulent voting do not appear.)

The belief by accused that the statute prohibiting persons, convicted of felony and not pardoned, from voting, had no application to him, because he was a minor but seventeen years of age when so convicted, is no defense. *Hamilton v. People*, 57 Barb. 625. In this case the defendant offered to show that, on application for a pardon, the governor advised him that it was not necessary, because of his minority, and that he would be entitled to all the rights of citizenship on reaching his majority, and that he had also been advised by legal counsel that, never having possessed the right of voting, it could not be taken away by his conviction during his minority; but the court sustained the conviction and the exclusion of this evidence, on the ground that the offer as made was to prove an ignorance of the law by the defendant, and not that he believed and acted upon the advice of counsel that he could legally vote. It is intimated, however, that if he had proposed to prove good faith and an honest purpose to ascertain the right, and that he had believed and acted upon the advice, so as to bring the case within the rule laid down in *Com. v. Bradford*, 9 Met. 268, the evidence would have been received.

So, knowledge by a voter of his prior conviction of crime, which by law disqualified him from voting, was equivalent to knowing that he was not a qualified voter upon the principle that one is conclusively presumed to know the law. *Thompson v. State*, 26 Tex. App. 94, 9 S. W. 486. The court said: "He cannot be heard to deny such knowledge, and it was not necessary that it should be proved that he had such knowledge, because the presumption of law supplied and dispensed with such proof."

And it is no defense to the charge of illegal voting, by one disqualified because of conviction of crime, that accused had forgotten the fact of his former conviction, or that he had been advised by friends or legal counsel that there was no record of the conviction upon the court dockets; and

that he voted under that advice, honestly believing that he had a lawful right to vote, since he was conclusively bound to know and remember the fact of his former conviction, as fully as he was bound to know the legal effect of such conviction, which was to disqualify him to exercise the right of suffrage. *Gandy v. State*, 86 Ala. 20, 5 So. 420, s. c. on former appeal, 82 Ala. 61, 2 So. 465.

In *People v. Harris*, 29 Cal. 678, it was held that the act of voting more than once at the same election was not a crime unless done knowingly and with criminal intent.

So, it was held that one could not be convicted of illegal voting if, by reason of his intoxicated condition, he was not conscious at the time of having voted before at the same election. *Ibid*.

But in *State v. Welch*, 21 Minn. 22, the court declined to follow the *Harris* Case, and held that it was no defense to the charge of voting more than once at the same election that defendant was intoxicated to such an extent when he cast his second vote that he did not know what he was doing and did not remember that he voted before.

One may be convicted of voting in more than one election district for the same officer, though he acted honestly, believing himself entitled to vote in the first district, but, finding he was mistaken, voted a second time in the district where he really belonged. *State v. Perkins*, 42 Vt. 399. It was contended that defendant was not guilty because he did not wilfully cast an illegal vote. The court said: "This ground is not tenable, because the offense consists in voting in more than one town, and not in any corrupt design. After having voted in Plainfield, he was disrobed of all right to vote for the same officer elsewhere, even though his vote in Plainfield was illegal, and not entitled to be counted. His second vote was illegal whether the first was or not, and whether his action be attributable to corruption or only to ignorance. The policy of the statute is to guard against illegal voting, by throwing upon the voter the necessity of determining for himself, to

was the following: "If you find the facts in this case to be as set out in instruction No. 1, then the fact, if you find it to be a fact, that the defendant believed that he had been restored to citizenship, and had a right to register by reason of having been released from the penitentiary at the expiration of three fourths of the term for which he was sentenced to the penitentiary (if you find from the evidence that he had been sentenced to the penitentiary, and had been so released), is not a defense in his behalf in this case. The law does not permit a defendant to excuse himself for the commission of a crime, on the ground that he is ignorant of the law. Such a release from the penitentiary is not a pardon by the governor, and does not restore one

to citizenship. A qualified voter's registration was a motion for the court to set aside the defendant's vote in good faith to vote.

While it is not a fact that the defendant often has been what the law judges and under instructions,

some extent, where he belongs, and, if in doubt, compelling him to confine his vote to one place. He, of his own free will, voted in more than one town for the same officer, and this is precisely the act against which the statute has pronounced a penalty."

The belief of a woman that she had a right to vote is no defense to an indictment for knowingly voting without having a lawful right to vote, since she knew that she was a woman, and was conclusively presumed to know that the law did not extend the privilege of suffrage to women. *United States v. Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459.

And in *People v. Barber*, 48 Hun, 198, it was held in a prosecution against a female for illegal voting, under a statute making it an offense for one not duly qualified to vote who shall knowingly vote at any election, that the only questions of fact for the jury were whether the defendant was a female and had voted at the general election.

Likewise, under the following circumstances it has been held that it is not necessary to prove a criminal intent to support a conviction:

—for registering in two election districts. *State v. Caldwell*, 1 Marv. (Del.) 555, 41 Atl. 198; *State v. Lally*, 2 Marv. (Del.) 424, 43 Atl. 258. *Contra*, *State v. Walsh*, 203 Mo. 605, 102 S. W. 513;

—for furnishing the necessary registration fee to one for him to register and qualify as an elector in the election district. *State v. Collins*, 1 Penn. (Del.) 420, 42 Atl. 619;

—for inducing a voter to go into an election precinct to vote at an election. *State v. Reed*, 52 Or. 377, 97 Pac. 627;

—for falsely making a nomination paper by signing the name of a voter not in his presence and at his request, where the statute provides that it is to be signed by the voters "in person." *Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862;

—under a statute making it an offense for any person other than an inspector of elections knowingly and wilfully to put bal-

lots into a ballot. *People v. People*, 2

—for knowing that at an election not having required time; the law, and only on advice to vote was 32 N. C. (L.) 389;

—for voting knowing he was of age; since he knew the time of the election must have been years, and that he was criminal, and a violation of the law.

But a minor qualification for voting where an honest majority or from his party having known *Gordon v. State*, 575. To the 55 Ala. 181.

In *Gordon* "The whole of the voter's diligence in the election. If he when the fact his ignorance of the real facts of the election ignorant of the fact that he wanted to vote, his belief of his excuse, the

In *State v. White* it was held that, although it was not a crime, under the law, "persons illeg-

ing the qualifications of voters; and if it be true that defendant did exhibit his discharge papers from the penitentiary to the registration officers of his voting precinct, and said officers informed him that said discharge entitled him to vote, it would be a harsh rule to say that he can be convicted of a felony, because these election officers were mistaken and gave him improper advice.

If it is a fact that defendant swore falsely in order to register on September 14, 1908, then it would raise a strong presumption that he was not acting in good faith; or, if his right to vote had been challenged before he registered, this might

raise a presumption that his unlawful act in registering was intentional and deliberate; but, under the laws of our state, no one can be convicted of a felony, in the absence of proof of an intent to do a criminal act. *State v. Schilb*, 159 Mo. 140, 60 S. W. 82; *State v. Rigale*, 169 Mo. 663, 70 S. W. 150, 14 Am. Crim. Rep. 339.

The trial court erred in instructing the jury that the intent with which defendant did the act was no defense; and for that error we reverse its judgment, and remand the cause for a new trial.

Kennish, P. J., and Ferriss, J., concur.

indictment, that accused "knowingly" voted, yet on the trial it must appear from the evidence that accused either had knowledge, or in law was chargeable with knowledge, of the facts which made the vote illegal.

One voting, knowing the existence of a state of facts which disqualify him in point of law is guilty of "knowingly voting" at an election, not being at the time a qualified voter; since ignorance of the law is no excuse. *McGuire v. State*, 7 Humph. 54.

Accordingly it was held in the above case that one knowing himself to be a foreigner, who believed his declaration of renunciation and purpose to become a citizen of the United States sufficient to entitle him to vote, when in law it was insufficient, was guilty of "knowingly voting" not being at the time qualified. *Ibid*. The court said: "If the voter believe himself to be twenty-one years of age, when he is not, and vote, he does not know the existence of the disqualifying fact, and may, on that ground, be excused. But if he know that he is only twenty years of age, yet believes he is old enough, in point of law, to vote, such ignorance of the law will not excuse him. If the voter honestly believe that he has resided six months in the county before the election and the fact turn out otherwise he may be excused. But if he know that he has been only four months in the county before the election, yet he believes that to reside four months is, in point of law, residence enough, he shall not be excused. If a voter believe that he was born in the United States, and it turns out that he was born in a foreign country, he may be excused. But if he knows he is a foreigner, and has not taken the oath of allegiance to the United States, but has only made his declaration of renunciation, etc., and thinks the latter, in point of law, sufficient to entitle him to vote, this ignorance of the law shall not excuse him; for he voted knowing a state of facts to exist which, in point of law, disqualified him."

And in *State v. McGinly*, 2 Ohio Dec. Reprint, 398, it was held in a prosecution for voting, not being a citizen of the United States, that a mistake as to the law cannot excuse, but a mistake as to the facts may; 37 L.R.A. (N.S.)

that if accused honestly believed he had taken all the steps which the law required to become naturalized, and that by reason thereof he became naturalized, then he is not guilty; that on the contrary, if he misunderstood the law, as for example, supposed he had a right to vote on obtaining the first papers, or the declaration of intention, it was no defense.

In *Com. v. Aglar*, Thacher, Crim. Cas. 412, *Brightly*, Elect. Cas. 695, it was held that the act of a foreigner in voting under an honest belief, at the time, that he had the right to vote, would not amount to a wilful voting, "knowing himself to be not legally qualified" within the meaning of the statute making such voting an indictable offense, especially where it appeared he had resided in the country for many years, and, finding his name on the list of voters, had used the privilege without question.

So, to constitute a wilful aider and abettor in such an act, he too must know at the time, that the person was an unqualified voter and had no right to vote; and with such full knowledge he must have done or said something which, in the opinion of the jury, was designed and calculated to encourage the party to vote. *Ibid*.

To the same effect is *State v. Sheeley*, 15 Iowa, 404, holding evidence that accused acted in accordance with the advice of friends not shown to have been learned in the law properly excluded; however it was said that as it was possible that a doubtful question might arise in regard to the fact of citizenship, in such a case evidence that accused acted only on advice of legal counsel would be competent as tending to disprove unlawful or criminal intent, though such evidence should not be conclusive.

In *United States v. Burley*, 14 Blatchf. 91, Fed. Cas. No. 14,686, it was held that mere knowledge by accused that his certificate of naturalization had been issued without his presence in court, and without his taking the oath of allegiance, is not sufficient to warrant a conviction for using for the purpose of registering as a voter, a naturalization certificate, knowing the same to have been unlawfully issued.

So, in *State v. Macomber*, 7 R. I. 349, it

was held that an honest mistake by a voter as to his right to vote will not warrant a conviction under a statute prescribing a penalty for fraudulently voting at an election without being qualified to vote, even though he was cognizant of the facts which disqualified him to vote (defect in registration).

In *Smith v. Carey*, 5 Ont. L. Rep. 203, 2 Ont. Week. Rep. 13, it was held in an action brought to recover a statutory penalty for illegally voting, knowing that he had no right to vote on account of residence, that proof of actual knowledge by the voter that he was doing something that was forbidden was required, and not merely proof that the vote was bad and that the voter knew the facts which in law made it so, but that the voter knew he was casting it without having the right to do so. Following *Malcolm v. McNeill*, 2 Ont. Elect. Rep. 30.

To the same effect was the ruling on the claim for a penalty under a statute for wilfully voting without having the necessary qualification. *Ibid*.

So, it has been held that it is necessary to prove a criminal intent to sustain a conviction under the following circumstances:

—for wilfully voting, knowing himself not to be a qualified voter, where it was said that as the qualification in that case depended upon domicile, and that as that is often a complicated question of law and fact, that if a voter in good faith and with an honest purpose to ascertain the right should make a true statement of the facts of his case to legal counsel, the evidence of such advice and the facts upon which it was taken are competent as bearing upon the question whether he knew he had not a right to vote. *Com. v. Bradford*, 9 Met. 268;

—to the same effect is *State v. Savre*, 129 Iowa, 122, 3 L.R.A. (N.S.) 455, 113 Am. St. Rep. 452, 105 N. W. 387, holding that wilfully voting when disqualified involves either knowledge of disqualification, or a reckless disregard of whether one is qualified or not, and that upon the question of wilful voting when disqualified, evidence is admissible that the voter, being in doubt, fairly stated the facts to, and took the opinion of, persons learned in the law;

—for supporting the claim of one of his right to vote when it has been challenged, since it is the undoubted right and duty of a voter to aid those who have a right to vote, and the presumption is that, in the performance of that obligation, he had been actuated by a correct motive. *Com. ex rel. Henszey v. Sheriff*, 12 Phila. 594;

—for registering as a qualified voter in two election districts. *State v. Walsh*, 203 Mo. 605, 102 S. W. 513. *Contra*, *State v. Caldwell*, 1 Marv. (Del.) 555, 41 Atl. 198; *State v. Lally*, 2 Marv. (Del.) 424, 43 Atl. 258;

—for procuring the registration of one knowing that he is not entitled to vote in the election district at the next election; it being necessary to show that accused

knew at the time the person next elected. *L. 680, 51* *peal*, 63 N.

And in *Cas. 592, B* held to be accused com where his n qualified vo qualified to within two pects of the affecting cri in notes ref under the t ignorance or

NEW YORK

GEORGE

ERIE RAILROAD

(203 L.

Railroad — stock fall

A statute to maintain sufficient to company liab for all damage gines or cars vides no con adjoining pr falling throu

(I

*Note. — Rail to stock of breach*

The decision notation in re language of t it being the statute merely for injuries carriages, tra imports that legislature er railroad comp there was an rolling stock a railroad comp sence of a sh that where the so broad that that there mu give a right c not essential i recover; it be was unfenced, rolling stock o cause. There authorities ho cases in whic



**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Cattaraugus County in plaintiff's favor in an action brought to recover damages for the killing of plaintiff's horse alleged to have been caused by defendant's failure to maintain fences along its right of way. Reversed.

The facts are stated in the opinion.

Messrs. Dowd & Quigley, for appellant:

The injuries received by plaintiff's horses do not come within the penalty prescribed by the statute.

Beck v. Carter, 68 N. Y. 289, 23 Am. Rep. 175; Stafford v. Ingersol, 3 Hill, 38; Knight v. New York, L. E. & W. R. Co. 99 N. Y.

25, 1 N. E. 108; Lent v. New York & M. R. Co. 130 N. Y. 504, 29 N. E. 988; Donnegan v. Erhardt, 119 N. Y. 474, 7 L.R.A. 527, 23 N. E. 1051; Bateman v. Rutland R. Co. 136 App. Div. 511, 110 N. Y. Supp. 506.

Mr. M. B. Jewell, for respondent:

Negligence of the defendant to perform the duty of building and thereafter maintaining fences along the sides of its railroad renders it liable for all damages which are the direct result of the injury.

Corwin v. New York & E. R. Co. 13 N. Y. 42; Shepard v. Buffalo, N. Y. & E. R. Co. 35 N. Y. 641; Purdy v. New York & N. H. R. Co. 61 N. Y. 353; Tracy v. Troy & B. R. Co. 38 N. Y. 433, 98 Am. Dec. 54; Graham v. Delaware & H. Canal Co. 46 Hun, 386; French v. Western New York

been reached may be reconciled by a careful analysis of the various statutes upon which they are based.

The first part of the above-stated rule is illustrated by the following cases: Thus, under a statute making a railroad company liable for all injuries to animals done by its "agents, engine, or cars," where the railroad is not fenced, direct contact is necessary in order to render the company liable. Chicago & N. W. R. Co. v. Taylor, 8 Ill. App. 108 (horse frightened by cars, and ran on bridge); Stump v. Chicago & G. W. R. Co. 84 Ill. App. 28 (mule fell into trestle); Wabash R. Co. v. Gaull, 116 Ill. App. 443 (team on public road became frightened, ran on unfenced railroad right of way, and threw themselves or rolled down embankment, killing the driver); Schertz v. Indianapolis, B. & W. R. Co. 107 Ill. 577, affirming 12 Ill. App. 304 (horse frightened by train and injured either by jumping a cattle guard, or by coming in contact with a wire fence, or both); Lafferty v. Hannibal & St. J. R. Co. 44 Mo. 291 (horse, frightened by train, ran and was injured in jumping off the track); Hughes v. Hannibal & St. J. R. Co. 66 Mo. 325 (cattle drowned in uninclosed well on right of way); Seibert v. Missouri, K. & T. R. Co. 72 Mo. 565 (horse negligently killed by servants of railroad company in removing it from a trestle into which it had jumped while running ahead of a train); Foster v. St. Louis, I. M. & S. R. Co. 90 Mo. 116, 2 S. W. 138 (mule, through fright, ran into trestle or bridge); Boggs v. Missouri P. R. Co. 18 Mo. App. 274 (mule frightened at train, jumped into barbed-wire fence); Hesse v. St. Louis, I. M. & S. R. Co. 36 Mo. App. 163 (no evidence of collision offered); Dooley v. Missouri P. R. Co. 36 Mo. App. 381 (cattle prevented from fattening on account of being frightened by passing locomotives); Geiser v. St. Louis, I. M. & S. R. Co. 61 Mo. App. 450 (cattle, frightened by locomotive, ran into trestle); Logan v. St. Louis, M. & S. E. R. Co. 111 Mo. App. 674, 86 S. W. 565 (there must be evidence, either direct or circumstantial, sufficient to warrant finding of actual collision); JIMERSON v. ERIE

R. Co., which overrules Graham v. Delaware & H. Canal Co. 46 Hun, 386, and French v. Western N. Y. & P. R. Co. 72 Hun, 469, 25 N. Y. Supp. 229; Knight v. New York, L. E. & W. R. Co. 99 N. Y. 25, 1 N. E. 108, reversing 30 Hun, 415 (sufficiently set out in JIMERSON v. ERIE R. Co.); Hyatt v. New York, L. E. & W. R. Co. 64 Hun, 542, 19 N. Y. Supp. 461 (colt killed by jumping from track on approach of engine).

And the same has been held true under a statute relating to injuries to animals "by cars or locomotive or other carriages" of a railroad company whose right of way is not securely fenced and such fences properly maintained. Peru & I. R. Co. v. Hasket, 10 Ind. 409, 71 Am. Dec. 335 (horse frightened by train and jumped from culvert); Ohio & M. R. Co. v. Cole, 41 Ind. 331 (colt frightened by train ran on track and broke its leg in a cow pit); Indianapolis, B. & W. R. Co. v. McBrown, 46 Ind. 229 (horse forced upon bridge); Louisville, N. A. & C. R. Co. v. Smith, 58 Ind. 575, holding generally that it was necessary to prove that the animal was struck by the train; Baltimore, P. & C. R. Co. v. Thomas, 60 Ind. 107 (pony badly frightened, and horse frightened and ran into bridge); Jeffersonville, M. & I. R. Co. v. Downey, 61 Ind. 287 (train struck one of two mules which were tied together, and dragged both along track, killing both,—railroad company not liable for mule not actually struck by cars); Croy v. Louisville, N. A. & C. R. Co. 97 Ind. 126, holding it necessary to prove that the injured animals were actually touched by the locomotives, cars, or other carriages; Louisville, E. & St. L. R. Co. v. Thomas, 106 Ind. 10, 5 N. E. 198 (horse driven on trestlework by a train).

And a similar conclusion was reached under a statute creating liability for damages "done by the agents, employees, engineers, or cars" of a company operating a railroad upon an unfenced right of way, to any cattle, etc., thereon. Jeffersonville, M. & I. R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403, holding that the injury must be by actual contact.

its roadway, erect and thereafter maintain fences on the sides of its road, of height and strength sufficient to prevent cattle, horses, sheep, and hogs from going upon its road from the adjacent lands. . . . So long as such fences are not made, or are not in good repair, the corporation, its lessee, or other person in possession of its road, shall be liable for all damages done by their

agents or engines or cars to any domestic animals thereon."

We think the question not an open one in this court. In *Knight v. New York*, L. E. & W. R. Co. 99 N. Y. 25, 28, 1 N. E. 108, 109, the action was brought for injury to a colt which escaped from a barnyard to the highway, and ran thence along the highway through a gap in the fence to defendant's

signed by sister states under statutes not materially different, for holding that an actual collision was necessary in order to warrant a recovery, were insufficient to induce the court to hold likewise.

And under a statute making a railroad company liable for injuring or killing live stock "upon or near any unfenced track" when caused "by any moving train, engine, or cars" upon such track, it has been held that actual collision between the train and the live stock is not essential in order to warrant a recovery. *Meeker v. Northern P. R. Co.* 21 Or. 513, 14 L.R.A. 841, 28 Am. St. Rep. 768, 28 Pac. 639 (horse driven by moving train into an open trestle); *Meier v. Northern P. R. Co.* 51 Or. 69, 93 Pac. 691 (frightened horse jumped on fence in effort to escape from train).

As before stated, the broader statutes have generally been construed as not intended to make actual collision an essential element of the cause of action under the statute. Thus it has been held that under a statute making a railroad company liable for animals killed or wounded "by the engine or cars on such railroad, or in any manner whatever, in operating such railroad," except where lawfully fenced, actual collision is not necessary to create liability, and liability has been extended to an injury to a horse caused by falling into an open bridge while frightened by and running ahead of an approaching train (*Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 627); to injuries to horses received while railroad employees were removing them from a bridge into which they had fallen (*Atchison, T. & S. F. R. Co. v. Edwards*, 20 Kan. 531); and to injuries to a horse which, while grazing on an unfenced right of way, was frightened by the whistle of an engine and ran into a barbed-wire fence (*Missouri P. R. Co. v. Gill*, 49 Kan. 441, 30 Pac. 414; *Missouri P. R. Co. v. Eckel*, 49 Kan. 794, 31 Pac. 693); but not to horses wandering upon and falling into railroad bridge (*Atchison, T. & S. F. R. Co. v. Edwards*, supra); nor to injuries neither the proximate cause of the failure to fence nor the wrongful operation of the road, such as the straying away of a cow to an extraordinary distance, where she mired down in a creek (*Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627, 28 Pac. 695).

And under a statute making a railway company liable in damages to the owner of any "stock injured or killed by reason of the want of" a railway fence, actual contact of the train with the animal is not necessary, where the injury is one which the

railway company had reason to apprehend. Thus, in *Young v. St. Louis, K. C. & N. R. Co.* 44 Iowa, 172, in holding a railway company liable for injuries caused by a horse becoming frightened and running upon a bridge, where there was but a single narrow passage down the fill of the road by which the horse could have avoided the bridge, between the point where the horse went upon the track and the bridge, the court, in discussing the question as to when an animal is injured by reason of the want of a fence within the meaning of the statute, said: "It is when the want of a fence in connection with the acts of the defendant is the proximate cause of the injury. The defendant in this case would not have been liable if the horse had run into the bridge and been injured simply through a freak or freak, because the defendant would have had no reason to apprehend the occurrence of an injury in that way. But when they left the track unfenced, they knew that horses would probably stray upon it from the highway, and if there was only one narrow passage for escape from the track when the train approached, they knew that horses on the track would naturally be driven upon the bridge, and if it could be crossed only upon cross-ties a foot or more apart, they would naturally fall into the bridge and be injured. All this, in the exercise of reasonable foresight, should have been foreseen. . . . If there had been ample opportunity for the horse to escape from the track, and yet it had run into the bridge, contrary to the ordinary conduct of horses, the case would have been different." And in *Kraus v. Burlington, C. R. & N. R. Co.* 55 Iowa, 338, 7 N. W. 598, the court, after holding the question of the defendant's liability for injuries to a horse resulting from its falling into a bridge to be one for the jury, intimated that the railroad company could not escape liability by setting up want of intelligence or negligence of the animal injured. And in *Liston v. Central Iowa R. Co.* 70 Iowa, 714, 29 N. W. 445, it was expressly held that the railroad company was liable where a horse, on account of the lack of a fence, got upon a railroad track, and, through want of intelligence, ran ahead of a train when it might have escaped on the other side, and so ran into a bridge and was killed. And in *Mikesell v. Wabash R. Co.* 134 Iowa, 736, 112 N. W. 201, in holding a railway company liable for injuries to horses caused by running upon a railroad bridge while frightened at a hand car or its operators, it was said that the test was not whether



... for damages which shall be done by the engines or agents of any such corporation." It was held that the bridge was not an agent, and that the defendant was not liable. Since that decision two cases have been decided in the supreme court (*Graham v. Delaware & H. Canal Co.* 46 Hun, 386; *French v. Western New York & P. R. Co.* 72 Hun, 469, 25 N. Y. Supp. 229), in which recoveries for injuries to animals escaping from fields adjacent to the track encountered in the same manner as that which occurred in the Knight Case have been upheld. In the opinion rendered in those cases the Knight decision is distinguished on the theory that it did not apply where the animals escaped from an adjacent field. In other words, that the liability for failure to maintain the fence was greater to adjacent owners than to other parties. If we assume that the Knight Case might have been decided on the theory that the plaintiff was not an adjacent landholder, it is sufficient to say that it was decided on no such ground, but solely on the ground that the liability of failing to comply with the mandates of the statute was expressly limited by it. It is also to be observed that in *Corwin v. New York & E. R. Co.* 13 N. Y. 42, this court had already held that the statute applied equally to the trespassing cattle of strangers and those of adjacent owners. But if it were an open question we think it would be difficult to avoid the conclusion reached by the court in the Knight Case. The correctness of that decision is emphasized by the subsequent act of the legislature. As the statute stood at the time of the Knight Case, the liability was for damage occasioned by their "engines or agents." In 1900, when the present railroad law (now Consol. Laws, chap. 49) was enacted, the old statute was amended by adding to "engines or agents" the word "cars." It may be, as argued by the learned judges of the supreme court, that there is little reason for making the railroad companies liable for damages to cattle run down by cars or engines, but not for injuries caused by falling through bridges, when the original source of the injury is the same in both cases,—the failure to comply with the statutory requirement. If this, however, had been the view of the legislature, it would have, in amending the statute, made the liability general, instead of which it simply added liability for injuries by cars.

The judgments of the Appellate Division and of the Special Term must be reversed, and judgment rendered for the defendant on demurrer, with costs in all courts, with leave to plaintiff to serve amended com-  
37 L.R.A.(N.S.)

plaint within twenty days on payment of costs.

Gray, Vann, Werner, Willard Bartlett, and Chase, JJ., concur. Haight, J., not voting.

#### KENTUCKY COURT OF APPEALS.

J. M. ROBINSON et al., Appts.,  
v.

BANK OF PIKEVILLE et al.

(146 Ky. 538, 142 S. W. 1065.)

**Principal — fraud of agent — ratification of satisfaction of judgment — responsibility of principal.**

1. A judgment creditor is not bound by the act of his agent for the collection of the judgment in conniving at the forgery of an indorsement on a draft of a stranger, and using it to secure a bank credit from which the judgment debtor can satisfy the judgment, so that the bank can refuse to cash a check growing out of such credit, on the ground of fraud, since such act is beyond the scope of the agent's authority.

**Bank — transfer of fraudulent deposit account — right to dishonor check.**

2. A bank which honors the check of a customer upon a deposit account based upon a draft upon which he had forged an indorsement, by placing the check to the credit of an innocent stranger, and authorizing him to check against such credit, cannot refuse, because of the original fraud, to honor his check to the injury of an innocent payee.

**Same — estoppel — authority to issue checks.**

3. When a bank by its course of dealing with a customer authorizes him to issue checks on it, it will be estopped to say, after such checks have come in good faith into the hands of innocent holders, that the customer did not in fact have any money to his credit, and for this reason decline to pay the check.

**Same — laches — effect.**

4. A bank cannot refuse to pay a check upon itself, because of delay in presenting it, if no prejudice to its rights has resulted therefrom.

(February 1, 1912.)

**Note. — Right of bank to impeach sources of deposit as against holder of check drawn against the same.**

While "in most jurisdictions the holder of an unaccepted check has no right of action against the bank for refusing to pay such check" (5 Cyc. 536), it would seem that, in jurisdictions where the holder is deemed to have such a right of action, on the ground that the check constitutes an assignment *pro tanto* of the deposit against

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Pike County dismissing an action brought to enforce payment of a check given to plaintiffs' attorney in satisfaction of a debt due to plaintiffs. Reversed.

The facts are stated in the opinion.

Messrs. John C. Strother and James Goble, for appellants:

If a bank deposits checks, drafts, or other instruments as so much cash to the credit of a customer, and authorizes him to draw on it, it is bound to honor his check against the deposit in the hands of innocent holders, even if it learns after the deposit was made and check given that the instruments were forgeries and could not be collected.

Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Tiedeman, Com. Paper, § 449; Wasson v. Lamb, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729; Dan. Neg. Inst. §§ 1655, 1656; Morse, Banks & Bkg. §§ 291, 596; Craigie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; City Nat. Bank v. Burns, 68 Ala. 276, 44 Am. Rep. 138; First Nat. Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766; St. Louis & S. F. R. Co. v. Johnston, 23 Blatchf. 489, 27 Fed. 243; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; Bolton v. Richard, 6 T. R. 139, 1 Esp. 106; Oddie

v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160.

A check is never overdue. The delay of one month and twenty-four days before presenting the check for payment is no defense to the bank.

Morse, Banks & Bkg. § 443; Smith v. Jones, 2 Bush, 105; Lester v. Given, 8 Bush, 360; Herndon v. Louisville Bkg. Co. 10 Ky. L. Rep. 584; Deatheridge v. Crumbaugh, 8 Ky. L. Rep. 592; National Bank v. Boles, 12 Ky. L. Rep. 422.

When a check is given a sheriff to satisfy an execution in his hands for collection, and the bank in which it is made payable accepts it and places the amount to the sheriff's credit, authorizing him in writing to check it out, and he accepts the deposit, gives his check to the execution plaintiff, and returns the execution satisfied, the bank is estopped to refuse to pay his check drawn on that deposit.

Bailey v. Robinson, 14 Ky. L. Rep. 670; Carter v. Richardson, 22 Ky. L. Rep. 1204, 60 S. W. 397.

Mr. J. M. York for appellees.

Carroll, J., delivered the opinion of the court:

On the 3d day of January, 1891, J. B. Jones presented to the appellee Bank of Pikeville a draft for \$1,960, drawn by the Moline Bank of Illinois, to the order of the Deer Mansur Company, and indorsed

which it was drawn (see 5 Cyc. 536-538), the bank should not be allowed, as against an innocent holder, to resist payment by impeaching the sources of the deposit, as the relationship of debtor and creditor between the bank and the depositor arose immediately upon the receipt and acceptance of the deposit by the bank, and cannot subsequently be avoided as to the part of the deposit assigned. As said in Wasson v. Lamb, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729, quoted in ROBINSON v. BANK OF PIKEVILLE: "The settled rule is, where checks, drafts, or other evidences of debt are received in good faith as deposits, if the bank credits them as so much money, the title to the checks or drafts is immediately transferred to the bank, and it becomes legally liable to the depositor as for so much money deposited."

Only one case, however, aside from ROBINSON v. BANK OF PIKEVILLE, has been found, involving this precise question. In the earlier Kentucky case of German Nat. Bank v. Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951, quite fully set out in the opinion in ROBINSON v. BANK OF PIKEVILLE, it was held that where a bank has accepted from a customer on deposit, as so much cash, and not merely for collection, a draft with an indorsed bill of lading attached, agreeing to honor checks given by the customer in payment for the goods covered by the bill of 37 L.R.A. (N.S.)

lading, innocent holders of checks drawn against the deposit can recover the amount of their checks from the bank, although the draft is subsequently dishonored.

In ROBINSON v. BANK OF PIKEVILLE, it will be noted, the bank had in effect paid the check drawn against the deposit, the source of which it sought primarily to impeach on the ground of forgery,—the innocent payee of that check, however, instead of receiving cash thereon, having been credited by the bank with the amount thereof, as a deposit, and, at its special request, having accepted the credit in lieu of the cash, with express authority to draw checks against the deposit; and it was the indirect source of this resulting deposit that the bank sought to impeach, as against the holder of a check drawn, in accordance with its authorization, against the latter deposit. Under such circumstances it would seem clear that, as held in ROBINSON v. BANK OF PIKEVILLE, the bank had no right to dishonor the check drawn against the resulting deposit, as this deposit had no more legal connection with the one against which the check constituting it was drawn, than if the payee of that check and drawer of the dishonored check had created his deposit by a payment to the bank, on deposit, of cash received by him from some other source.

A. C. W.

to the Hickman Lumber Company. It bore the date of December 11, 1890. The bank discounted the draft, paid Jones \$300 in cash, and placed the remainder of the draft to his credit on its books, giving him a pass book and check book. On the following day, Jones, with the \$300 in money and pass book and check book, went to Hindman, in Knott county, Kentucky, and there met J. M. Bailey, who was indebted to appellants J. M. Robinson & Company in the sum of \$827.50, for which amount an execution had been levied on Bailey's property. Jones gave Bailey a check for the amount of the execution, which Bailey indorsed to Kelly, the deputy sheriff who had levied the execution. At the same time, Bailey gave to Kelly Jones's check to satisfy other execution debts Kelly had against him; the total of the checks aggregating some \$1,011. In the early part of January, Kelly, who refused to accept these checks until satisfied they were good, forwarded them to the Pikeville bank for payment, and on the 8th day of January, 1891, the Pikeville bank wrote Kelly the following letter:

"Pikeville, Ky., January 8, 1891.

L. D. Kelly, Esq.,

Dear Sir:—

Mr. Jones was here last Saturday. I paid off the teachers of this county, which amounted to over \$5,000, and I told Mr. Jones at the time that I could not pay him the money on his check as I was close for cash. I have got plenty of money in my Cincinnati bank and other banks, but haven't any more than the regular reserve here. Therefore I write you and ask you if you cannot make it convenient to check this out at different times by giving to parties below and to merchants over there, so they can send them to their banks and their banks to me. In that way, I am out no currency. I send you a bank book and a check book, and if you can do this way conveniently, it will very greatly oblige.

Yours truly,

J. B. Hatton, Cashier.

After Kelly received the letter, with the check book and pass book showing that there had been placed to his credit in the bank the amount mentioned, and on January 16, 1891, he drew checks for the amount due the appellant and the other execution creditors on the bank in favor of S. J. Kilgore, attorney for appellant, and returned the executions against Bailey satisfied. On the 10th of March following, the check given by Kelly to Kilgore to satisfy the debt of appellant was presented to the bank and payment refused, for the reason that the bank had discovered that the draft pre-

sented to it by Jones on January 3, 1891, was a forgery. After the bank refused to pay the check, the appellant, conceiving that the executions against Bailey had been returned satisfied by fraud or mistake, on account of the facts before stated, brought an action against Bailey to have the return on the execution quashed and other executions issued against him. It succeeded in the circuit court in obtaining the relief sought, but Bailey appealed to the superior court of Kentucky, which reversed the judgment of the circuit court, holding that the acceptance by Kelly of the check given by Jones to Bailey was equivalent to the payment of the execution in cash, and authorized the sheriff to return it satisfied. *Bailey v. Robinson*, 14 Ky. L. Rep. 670. Thereafter the appellant brought this suit against the bank to recover the amount of the check which Kelly gave to Kilgore to satisfy its execution against Bailey. Upon hearing in the lower court, the petition was dismissed, and this appeal prosecuted.

In its answer to the suit brought against it, the bank averred, in substance, that the draft presented by Jones was a forgery, and that, at the time it placed to the credit of Jones the \$1,660 and to the credit of Kelly the \$1,011.30, it had not discovered that the draft was forged. It also set up lack of diligence in presenting to it for payment the Kelly check; and, further, that Kilgore, who was at the time the agent and attorney for appellant, was a party, together with Jones and Bailey, to the fraud and forgery perpetrated upon it in the presentation of the draft by Jones.

It is conclusively shown by the evidence that the draft presented to the bank by Jones was in fact made payable to the Hickman Lumber Company; but by some misadventure the letter inclosing the draft to the Hickman Lumber Company, which was addressed to Hickman, Kentucky, fell into the hands of Bailey, who was operating a lumber company at Hindman, in Knott county, Kentucky. When the draft in this manner came into the possession of Bailey, he and Jones conceived the idea of forging the name of the Hickman Lumber Company on the draft and obtaining the money it called for, and, in pursuance of this plan, the draft was presented, as before stated, to the Bank of Pikeville. Nor is there any issue made or dispute about the fact that the bank placed to the credit of Jones \$1,660 and gave to him a pass book showing that there was to his credit this sum. That there was placed to the credit of Kelly on the books of the bank \$1,011.30, and that he was given a pass book showing this fact, or that Kelly gave to Kilgore a check drawn on his account in the bank

sufficient to satisfy appellant's execution debt, or that the payment of this check was refused. There is really only one issue of fact made in the case, and that is whether or not Kilgore was a party to the fraud practised by Jones and Bailey. Upon this issue, Jones testified that Kilgore knew all about the transaction, while Kilgore denies any knowledge of the fraud. Aside from this issue of fact, which will be further noticed, the question for our consideration may be thus stated: Will a bank that has opened an account with a bona fide customer be permitted to dishonor a check that he in good faith has issued on this account in satisfaction of a debt, upon the ground that it was induced to open the account and give the customer credit by means of a fraud and forgery that had been practised upon it by another customer out of whose account and connection with the bank the entire transaction grew, when to sanction the dishonor would cause the loss to fall upon an innocent party?

The chief argument of counsel for the bank is rested upon the ground that Kilgore, the agent and attorney of appellant, was a party to the fraud, and that it occupies no better position than its agent, Kilgore, would if he was seeking to collect the check for himself and on his own account. Of course, if this legal conclusion of counsel was sound, and the evidence supported the contention that Kilgore was a party to the fraud, it would be an end of the case. But we do not take the same view of this issue that counsel does. If Kilgore was a party to the fraud, his conduct would not prejudice the rights of appellant, who is admittedly the owner of the debt for which the check was given, and free from any blame in the transaction. In short, the attitude of appellant is precisely the same as if Kelly had made the check payable to it in place of payable to Kilgore, its attorney. We do not know of any principle of law that, upon a state of facts such as is here presented, would charge the principle with the fraud or delinquency of his agent. Certainly Kilgore had no authority, express or implied, to assist in practising a fraud upon the bank or anyone else. If he did so assist, he was acting entirely outside of the scope of his employment, and the appellant is not bound by what he did. *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731. As the agent or attorney of appellant in the collection of this debt against Bailey, the authority of Kilgore was limited to matters that related to the collection of the debt.

37 L.R.A. (N.S.)

But, aside from this, the ground upon which the bank is liable does not rest on what Kilgore did or did not do. Its liability grows out of the fact that it opened an account with Kelly, who was entirely innocent of any wrongdoing, and placed to his credit a sum of money, and thereby authorized him to issue checks against his account for the amount placed to his credit. The initial fraud was practised by Jones; but Jones was only enabled to reap any benefit from this fraud, or to involve other people in trouble on account of it, by the conduct of the bank in receiving from him a forged draft and giving him credit he was not entitled to. By this course of dealing with Jones, it authorized him to issue checks on account it had put to his credit in the bank, and, on the faith of its assurance that the check he gave Kelly was all right, Kelly was induced to accept the check and release the execution levy. But the carelessness, or want of diligence, on the part of the bank, did not stop with this. Five days after it had placed to the credit of Jones the amount of the forged check, it accepted Jones's check to Kelly drawn on this account and placed it to the credit of Kelly, thereby authorizing Kelly to issue checks on the account, which he did, and as a consequence the only recourse the appellant has is against the bank. Between the date of the presentation of the draft by Jones, and the receipt of Kelly's check, the bank had ample time and opportunity to ascertain whether or not the Jones's check was genuine; but it did not, so far as the record shows, take any steps to inform itself concerning the validity of the draft. Both Jones and Kelly are to be treated as customers of the bank; and, when it comes to a question as to whether the bank should lose, or the appellant, that was misled by its course of dealing, we think it clear that the loss should fall on the bank. When the bank put to the credit of Kelly Jones's check, it was a settlement and satisfaction of the Bailey debt. Liability for the debt was then transferred to and assumed by Kelly, who in turn acquitted himself, as held in the case of *Bailey v. Robinson*, supra, by giving to appellant, a check that the bank said it would honor. The letter written by the bank to Kelly, and the deposit to his credit, had the further effect of creating the relation of creditor and debtor between Kelly and the bank. In short, so far as the rights of these parties are concerned, Kelly had to his credit in the bank the amount of the debt due appellant, and the bank is estopped from setting up the defense, against a bona fide holder of the check drawn in good faith by Kelly, the fact that it was induced to give credit to

Kelly on its books by reason of a fraud practised upon it by Jones.

The commercial interests of the country demand that banks should be held to a high degree of care in the conduct of their business with customers to whom they give credit they would not otherwise be able to obtain. And when a bank receives not for collection, but as so much money, a check, and places the amount to the credit of a customer, it thereby assumes liability for this amount to all persons to whom the customer may give checks.

And we think the principle of law is or should be well settled that, when a bank by its course of dealing with a customer authorizes him to issue checks on it, it will be estopped to say, after such checks have come in good faith into the hands of innocent holders, that the customer did not in fact have any money to his credit, and for this reason decline to pay the checks. Especially should this principle obtain when to permit the bank to make this defense would cause a bona fide holder of the customer's check to lose the amount of it. Our attention has been called to a number of analogous cases treating on this subject, and from them we select the following as illustrating the doctrine that, under circumstances such as are disclosed by this record, a bank will not be allowed to escape liability, although it may suffer a loss in consequence of its course of dealing.

In *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160, the facts were that the bank received a genuine check drawn on itself in favor of Oddie by Davis and Aiken, regular depositors, and credited Oddie with the amount of it on his deposit book. Afterwards and on the same day, the bank discovered that the account of Davis and Aiken was overdrawn, when Oddie was given credit by their check, and refused to pay the check. Thereupon Oddie brought suit against the bank to recover the amount of the check. In the course of the opinion, the court said: "In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiff as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiff and then deposited. When a check is presented

to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally; . . . but if it accepts such a check, and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. . . . Under these circumstances it would be inequitable and unjust to permit the defendants to throw the responsibility of their own acts upon the plaintiff, and the law has established a rule which forbids it. Every element of an estoppel *in pais* exists in this case."

In *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, it is said: "It is now perfectly well settled that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor; and that, when the bank receives the money as an ordinary deposit and gives credit to the depositor, the money becomes the funds of the bank, and may be used by it as any other funds to which it may be entitled. It is accountable for the deposits that it may receive as debtor, and in respect to ordinary deposits there is an implied agreement between the bank and the depositor that the checks of the latter will be honored to the extent of the funds standing to his credit. . . . There is no question of trust, therefore, between the parties, but their relation is purely a legal one; and if the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril, and pays out its own funds, and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the principle is universally maintained that banks and bankers are bound to know the signature of their customers, and that they pay checks purporting to be drawn by them at their peril."

In *Wasson v. Lamb*, 120 Ind. 514, 6 L.R.A. 191, 16 Am. St. Rep. 342, 22 N. E. 729, it is said: "The settled rule is, where checks, drafts, or other evidences of debt are received in good faith as deposits, if the bank credits them as so much money, the title to the checks or drafts is immediately transferred to the bank, and it becomes



legally liable to the depositor as for so much money deposited."

In *First Nat. Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766, it is said: "When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned."

In *Morse on Banks & Banking*, § 289, the author, after stating that the relation of debtor and creditor exists between the depositor and the bank, proceeds to say: "It follows that, the act of deposit having been once consummated, nothing short of payment on the part of the bank, or some act of the depositor himself, will suffice to exonerate it from the indebtedness it has assumed."

In *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674, 52 S. W. 951, the facts were that Taylor, a dealer in eggs, made an arrangement with the bank by which he was to draw drafts on his New York consignees, with a bill of lading covering the consignment of eggs attached thereto, and turn it over to the bank, and thereupon the bank would place the amount of the draft thus secured by the bill of lading, to the credit of Taylor on the books of the bank and on Taylor's pass book, as so much cash. Taylor would then draw checks on the bank against this cash credit, for the amount of the purchase price of the eggs, in favor of the persons from whom he had purchased them. One of the drafts drawn by Taylor on his New York customers was dishonored, and thereupon the bank refused to pay the checks drawn on it by Taylor and made payable to the persons from whom he purchased the eggs. In holding the bank liable for the payment of the checks Taylor had given, although the bank failed to collect the New York draft given to it by Taylor, and on the faith of which Taylor drew checks on it in favor of the purchasers, the court said: "The purpose of the arrangement was to secure Taylor as a customer and enable him to buy and ship the eggs. His account having been credited by the draft, the outstanding checks were an appropriation of this credit."

It is further insisted that the delay in 37 L.R.A. (N.S.)

presenting the check relieved the duty of paying it; but in this contention. If appellant had been present that the credit was given by the bank, or before the bank discovered it would have been paid; the bank would be no better off when it is now compelled to pay the money. By the check at any time, the bank is the loser. The delay in presenting the check in any manner that we can devise does not change its rights.

Wherefore the judgment of the court is reversed, with directions to enter judgment in favor of the plaintiff for the amount of the debt, with interest from March 10, 1891.

## NEBRASKA SUPREME COURT

MARY M. C.

v.

SUPREME LODGE ROYAL ARCH MASONS, Inc.,  
App't.,  
and

SARAH E. LIPPS, In

(90 Neb. 578, 134 N.W. 1000)

### Insurance — warranty

1. In construing a contract in a fraternal beneficiary society, the purpose of determining the purpose of determining the statements made in the warranty therefor were intended to be or warranties, the court in consideration the situation of the subject-matter, and the law and will construe a statement to be a warranty only where it appears that such was the intention of the contracting parties, and that the party consciously intended that such should be the effect of his statements.

### Same — defense — plea

2. And in order that it may be a defense

Headnotes by FAWCETT,

*Note. — Who is a "dependent" under the statute or rules defining mutual benefit societies*

The question here consists in the notes to Caldwell v. A. O. U. W. 2 L.R.A. (N.S.) 1000. *League v. Shields*, 36 L. and the present note is not contrary to these.

Where an unmarried man and without a home enter into a contract with a neighbor who which the latter undertook

such application shall constitute a defense to an action upon the certificate of membership or policy of insurance, issued to such applicant, it is incumbent upon the association to plead and prove that the answers were made as written in the application, that they were false in some particular material to the insurance risk, and that the association relied and acted upon those answers.

**Will—contract to make—validity.**

3. A contract between an adult man and woman, not related to each other, that, if the latter will enter the home of the former and act as his housekeeper, he will support her, and at his death leave her his estate, is not, where the relations between them are at all times moral and proper, forbidden by law or obnoxious to public policy.

**Insurance—beneficiary—dependent—housekeeper.**

4. Where a woman who is without means, in good faith leaves her own home and work, and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her, and at his death leave her his estate, and no evidence is offered showing any improper relations between them, held, that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member.

(January 3, 1912.)

**S**EPARATE appeals by defendant and intervener from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Mr. Arthur H. Burnett, for appellant Supreme Lodge:

The contract includes the certificate, application, and the by-laws of the society.

Farmers' Mut. Ins. Co. v. Kinney, 64 Neb. 808, 90 N. W. 928.

The law makes a distinction between bene-

former during his lifetime, in consideration that he should be named the beneficiary in a benefit certificate, it was held that the hotel keeper was not a "dependent" within the meaning of the law relating to fraternal associations. Modern Woodmen v. Comeaux, 79 Kan. 493, 25 L.R.A.(N.S.) 814, 101 Pac. 1, 17 Ann. Cas. 865.

And the brothers and sisters, and nieces and nephews, of a member of a fraternal insurance order who died leaving no other relatives, are not "legal dependents," where they are not living with him, or shown to be dependent upon him, since the words "legal dependents" mean those relying upon 37 L.R.A.(N.S.)

ficial societies and ordinary insurance companies with respect to what constitutes warranties and what representations.

Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535; Home Friendly Soc. v. Berry, 94 Ga. 606, 21 S. E. 583; Supreme Council, C. B. L. v. McGinniss, 59 Ohio St. 531, 53 N. E. 54; Grand Lodge, A. O. U. W. v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; Vivar v. Supreme Lodge, K. P. 52 N. J. L. 455, 20 Atl. 36; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; Supreme Council, A. L. H. v. Perry, 140 Mass. 580, 5 N. E. 634; Daniels v. Pratt, 143 Mass. 216, 10 N. E. 166; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Whitmore v. Supreme Lodge, K. & L. H. 100 Mo. 36, 13 S. W. 495; Hanford v. Massachusetts Ben. Asso. 122 Mo. 50, 26 S. W. 680; Krause v. Modern Woodmen, 133 Iowa, 199, 110 N. W. 452; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297; Knights of Honor v. Dickson, 102 Tenn. 255, 52 S. W. 862; Finch v. Modern Woodmen, 113 Mich. 646, 71 N. W. 1104; Baumgart v. Modern Woodmen, 85 Wis. 546, 55 N. W. 713; Gray v. Sovereign Camp, W. W. 47 Tex. Civ. App. 609, 106 S. W. 176; Beard v. Loyal Neighbors, 53 Or. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83, 17 Ann. Cas. 1190; Supreme Lodge, O. C. K. v. McLaughlin, 108 Ill. App. 85; United Brethren Mut. Aid Soc. v. White, 100 Pa. 12; Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660.

The assured having made the statement that the plaintiff was his niece and warranted it to be true, the defendant had a right to rely wholly on such statement, and his beneficiaries have to take the consequence of forfeiture on account of falsehood.

Supreme Council, A. L. H. v. Green, 71 Md. 263, 17 Am. St. Rep. 527, 17 Atl. 1048; Koerts v. Grand Lodge, O. H. S. 119 Wis.

the insured for support. Little v. Colwell, — N. C. —, — L.R.A.(N.S.) —, 74 S. E. 10.

And it is also held that creditors of the insured are not "dependents" within the meaning of a statute regulating mutual benefit societies or of the by-laws of such societies. Sargent v. Supreme Lodge, K. H. 158 Mass. 557, 33 N. E. 650; Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17; Briggs v. Earl, 139 Mass. 473, 1 N. E. 847; Fisher v. Donovan, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778. And see also cases cited in the earlier notes as to creditors.

J. T. W.

525, 97 N. W. 163; Gaines v. Fidelity & C. Co. 93 App. Div. 524, 87 N. Y. Supp. 821; Webb v. Bankers' L. Ins. Co. 19 Colo. App. 456, 76 Pac. 738; United Brethren Mut. Aid Soc. v. White, 100 Pa. 12; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A. (N.S.) 798, 99 Pac. 83, 17 Ann. Cas. 1199; Brock v. United Moderns, 36 Tex. Civ. App. 12, 81 S. W. 340; Gray v. Sovereign Camp, W. W. 47 Tex. Civ. App. 609, 106 S. W. 176.

The plaintiff cannot recover as a dependent, because she was wrongfully living with the assured.

Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; West v. Grand Lodge, A. O. U. W. 14 Tex. Civ. App. 479, 37 S. W. 966; Grand Lodge, A. O. U. W. v. Hanses, 81 Mo. App. 545; McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183.

Messrs. J. C. Kinsler and F. H. Woodland, for intervenor appellant:

Plaintiff was not a dependent, and cannot recover.

West v. Grand Lodge, A. O. U. W. 14 Tex. Civ. App. 479, 37 S. W. 966; Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543; Miller v. Prella, 122 Ill. App. 380.

The void designation does not avoid the contract as the defendant lodge claims.

Shea v. Massachusetts Ben. Asso. 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; Burns v. Grand Lodge, A. O. U. W. 153 Mass. 173, 26 N. E. 443; Rindge v. New England Mut. Aid Soc. 146 Mass. 286, 15 N. E. 628; Sargent v. Supreme Lodge, K. H. 158 Mass. 557, 33 N. E. 650; Britton v. Supreme Council, R. A. 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675.

If the contract is not void and the appellee cannot take, judgment should be rendered in favor of the intervenor.

Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 553; Ballou v. Gile, 50 Wis. 614, 7 N. W. 561; Britton v. Supreme Council, R. A. 46 N. J. Eq. 109, 19 Am. St. Rep. 376, 18 Atl. 675; Rindge v. New England Mut. Aid Soc. 146 Mass. 286, 15 N. E. 628; Sargent v. Supreme Lodge, K. H. 158 Mass. 557, 33 N. E. 650.

Messrs. Smyth, Smith, & Schall, for appellee:

The statement that plaintiff was a niece is a representation, and not a warranty, and did not avoid the policy.

Etna Ins. Co. v. Simmons, 49 Neb. 835, 69 N. W. 125; Kettenbach v. Omaha Life Asso. 49 Neb. 848, 69 N. W. 135; Royal Neighbors v. Wallace, 64 Neb. 331, 89 N. W. 758, 66 Neb. 546, 92 N. W. 897; Bank-

ers' Union v. Mixon, 74 Neb. 38, 103 N. W. 1049.

Plaintiff was a dependent.

McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; Wilber v. Supreme Lodge, N. E. O. P. 192 Mass. 477, 78 N. E. 445; Murphy v. Nowak, 223 Ill. 301, 7 L. R.A. (N.S.) 393, 79 N. E. 112; Alexander v. Parker, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; Supreme Lodge, A. O. U. W. v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Storey v. Williamsburgh Masonic Mut. Ben. Asso. 95 N. Y. 474; People v. Hayes, 70 Hun, 115, 24 N. Y. Supp. 194; Bivins v. Jarnigan, 3 Baxt. 282; Burgen v. Straughan, 7 J. J. Marsh. 583; Brown v. King, 81 N. C. 245; Massey v. Wallace, 32 S. C. 149, 10 S. E. 937; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748; Robbins v. Potter, 98 Mass. 532; Lytle v. Newell, 24 Ky. L. Rep. 188, 68 S. W. 118; James v. Supreme Council, R. A. 130 Fed. 1014.

Fawcett, J., delivered the opinion of the court:

From a judgment in favor of plaintiff upon a certificate of membership issued by defendant to Joseph A. Lipps, and payable by its terms to plaintiff, defendant and intervenor separately appeal. The petition alleges that defendant is a corporation under the laws of Nebraska; that on December 11, 1901, it issued a certificate for \$1,000 upon the life of Joseph A. Lipps, in which it agreed to pay to plaintiff, "a dependent and niece," at the death of said Lipps, \$1,000; that all assessments were duly paid from time to time and that said Lipps died January 17, 1908; that shortly after the death of Lipps defendant refused to furnish plaintiff any blanks upon which to prepare proofs of death, denied all liability to plaintiff upon such certificate, and refused to pay the same. Prayer for judgment. Intervener, Sarah E. Lipps, filed her petition, asking to be allowed to intervene, for the reason that she was the wife and widow of the deceased; that at the time of his death plaintiff did not and could not have an insurable interest in the life of said Lipps, and could not be a beneficiary in said contract, and that "under the law and the terms and provisions of the by-laws and articles of incorporation of the defendant she is entitled to the proceeds of said policy." Defendant filed its answer to the petition of plaintiff, in which it admits its incorporation; the issuance of the certificate to Lipps, in which "it agreed, among other things, to pay to Mary M. Goff a sum not exceeding one thousand (\$1,000) dollars on the death of said Joseph A. Lipps;" the correctness of the copy of the certificate attached to plain-

tiff's petition; the payment of all the assessments; the death of Lipps as alleged; the request of plaintiff for blanks on which to make proof of death; the refusal to furnish the same, and the refusal to pay the money or any part thereof to plaintiff.

The answer then alleges that the defendant is a fraternal beneficiary association, and that the certificate was issued upon a written application made by Lipps, and on the conditions named in his application, one of which was that plaintiff was his niece; that the statement made by Lipps as to the relationship of plaintiff was false; that they were not in any manner related by consanguinity, and that plaintiff was not in any manner dependent upon Lipps. It then sets out *in extenso* the statements made in the application, the conditions contained in and indorsed upon the certificate, and the agreement therein that all such statements and conditions should constitute the basis for and form a part of the certificate, and making the same warranties on the part of the applicant, and an agreement that any untrue statements or answers contained in the application or made to the examining physician, or any concealment of facts or failure to comply with the laws, rules, and usages of the order, should render the certificate void, and that all rights of any person thereunder should become forfeited. Plaintiff replied to the answers of both intervenor and defendant, said replies being substantially general denials.

The trial proceeded to the court and a jury upon the issues thus framed. When all parties had rested, each moved the court for a peremptory instruction. The court thereupon made the following order: "I will excuse the jury and take the case from the jury, a question of law solely being in the case." To this order the intervenor alone excepted. This action of the court having been invited by all of the parties, neither can now predicate error thereon.

As it appears to us, the case involves but two simple propositions: (1) Was the statement in the application that plaintiff bore the relation to the applicant of niece, a warranty the falsity of which would, regardless of its materiality to the risk, render the certificate void? (2) Was plaintiff a dependent within the meaning of the constitution and by-laws of defendant, and of the statute in relation to such societies? We will consider these two points in the order named.

The wording of the application is: "I hereby direct that the amount of the beneficiary fund, to which my beneficiaries may be entitled at my death, shall be paid to Mrs. Mary M. Goff, residing at 1110 South Eighth, related to me as niece." Authori- 37 L.R.A. (N.S.)

ties are cited by defendant, from other jurisdictions, which sustain its contention that a false answer avoids the policy, where the application provides that all of the answers of the applicant contained therein are express warranties, and that, if any of them are shown to have been false, the policy is void. It would serve no good purpose to refer to those cases here, for the reason that this court is, by repeated decisions, committed to the rule that, "in construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements." *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 842, 69 N. W. 125, 135. In the opinion in that case we said: "We reach the conclusion, therefore, that in order that the answers under consideration, made by the assured, constitute a defense to this action, it was incumbent upon the insurance company to plead and prove not only that the answers were made as written in the application, but that they were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon these answers." The rule there announced has been followed in *Kettenbach v. Omaha Life Assn.* 49 Neb. 842, 69 N. W. 135; *Ætna L. Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251; *Bankers' Union v. Mixon*, 74 Neb. 36, 103 N. W. 1049, and in a number of other cases, which we will not encumber this opinion by citing. While this rule, when originally announced in the *Simmons* Case, may have been a "blazed trail," it has now become a beaten path in which we are content to travel. That the statement in the application here, that plaintiff bore the relation to the deceased of niece, was not material to the insurance risk, seems clear. The falsity of that statement in no manner shortened the life of the deceased; and hence did not increase the hazard assumed by defendant. If plaintiff had been required to prove this relationship, in order to bring herself within the class which defendant was permitted to insure, then there could have been no recovery by her; not because of the falsity of the statement, but because of the fact that she was not one of a class, who, under the statute and the constitution and by-laws of

the defendant, could lawfully become a beneficiary. This brings us to a consideration of the second point.

2. Section 94, chap. 43, Comp. Stat. 1909, provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificate of membership to any person under the age of eighteen years, nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member." The constitution and by-laws of defendant follow this statutory requirement. Was plaintiff "dependent upon the member" within the meaning of the statute and of the laws of the order?

The evidence shows that plaintiff is the widow of one James O. Goff, who died in Kansas, leaving plaintiff and three children surviving. Shortly thereafter one of the children died. After the death of this child plaintiff lived for two years with a sister-in-law in Missouri and for four years with a brother, the latter two of such years in "Dakota," during all of which time she kept her two children with her. The brother with whom she was living having removed from Dakota, she remained there, working at day's work to support herself and children. When the older of the two boys was able, he went to work in Dakota. From Dakota she came with her other child to Nebraska, and after stopping a while at Norfolk went to Columbus. While working there, supporting herself and son, she met the deceased. Her boy was then fifteen years of age. At the time she met deceased, he was selling sewing machines. In the preparation of a lease for a machine which she had purchased from him, he asked her her name and the name of her mother, and upon being informed told plaintiff that he had a niece who married a man by the name of Goff. She told him her mother's name was Nancy Lee, and he said he had a half sister by that name. He told her that she was raised by a family by the name of Lee and that he was her uncle. It appears that she knew little of her family record. About a month or so later plaintiff became seriously ill, which illness lasted about four months. Deceased went to her house, and, with the aid of her son, took care of her. She testified that after she had recovered deceased said to her, "If I would come and keep house for him we would work together and have a home together, he would have a home and I would have a home. He said, I was not able to work and support myself, but that I could keep house for him, and we would live together, and he would support me, and at his death I should have what he

had;" that when deceased obtained the certificate of insurance in controversy, he gave it to her, and it remained in her possession until his death; that he also executed a will in her favor; that he did not stay at her house when he was in town before she went to keep house for him, but stayed at the hotel; that after she assumed the duties of housekeeper they, together with her boy, resided at different places named, when they settled in Omaha, where they lived for several years and until the death of Mr. Lipps. One year of the time, prior to settling in Omaha, was spent in Papillion. Her son always lived with her in the same house, and her other son sometimes visited them. Mr. Lipps had a wife and son residing in Omaha during at least the last three years of Mr. Lipps's life. The charge is made that Lipps had abandoned his wife and children, and that he and the plaintiff lived together illicitly for years and up to the date of his death. We have before us three abstracts, the main abstract prepared by defendant, a supplementary abstract by intervenor, and one by plaintiff. These abstracts are barren of any proof to sustain either of these charges against plaintiff. It is claimed in the briefs that the trial court found that the relations between plaintiff and Lipps were illicit. We do not think the language used by the trial judge will bear any such construction. For him to have made such a finding he would have been compelled to go outside of the evidence, and indulge in conjecture not warranted thereby. This the learned trial judge did not do.

Cases are cited in which persons, situated somewhat similarly to plaintiff, have been held not to be dependents within the meaning of statutes not materially unlike our own; but in every such case the relations between the claimant and the deceased were shown to have been meretricious. No case has been cited, nor do we think one will ever be decided, holding that a woman who, without means, in good faith, leaves her own home and work, and assumes and for years faithfully performs the duties of housekeeper for a man who agrees in consideration therefor to support her and at his death leave her his estate, does not thereby become a dependent upon him; and especially so where there is an entire absence of evidence to show any improper relations between them.

The right of a plaintiff to recover in an action like this is fully sustained in *James v. Supreme Council, R. A. (C. C.)* 130 Fed. 1014; *McCarthy v. Supreme Lodge, N. E. O. P.* 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866, which case is cited and followed fifteen years later in

Wilber v. Supreme Lodge, N. E. O. P. 192 Mass. 477, 78 N. E. 445.

Our attention has been called to the recent case of Royal League v. Shields, 251 Ill. 250, 36 L.R.A. (N.S.) 208, 96 N. E. 45. That case was decided by a divided court. The majority opinion held that plaintiff was not entitled to recover. The dissenting opinion (by three of the justices) makes out a strong case in favor of a recovery, even under the facts disclosed in that case. A single quotation from the majority opinion will show that, had the facts been as they are here, plaintiff's action would have been sustained. The opinion states: "Frieda Wassmann was not related in any way to Michael Shields. She was not his daughter by nature or adoption. *She had at no time been a member of his family or his household.* He could not legally have been compelled to assist in her support, nor was he morally bound to furnish her support or leave her this money. *Had she been at the time of his death a member of his household* a different situation might have been presented, and the case of Wilber v. Supreme Lodge, N. E. O. P. supra, cited by appellant, might then have been in point." (The italics are ours.) In the dissenting opinion it is said: "He voluntarily assumed the burden of contributing to her support in a regular and substantial manner, and did so regularly for nine years before his death. In my opinion these facts bring appellant within the definition of a dependent, and as such made her eligible as a beneficiary under the statute and the by-laws of the Royal League, and entitled her to the money paid into court by the association." It thus appears that both the opinion and dissenting opinion sustain a recovery in this case.

We think the language in Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 543, is apt: "I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support."

That it was lawful for Lipps to bind himself to support plaintiff under the circumstances shown cannot be doubted. That he did so bind himself is equally clear. That such a contract is not obnoxious to public policy is beyond question.

The reasoning of the above cited cases appeals to us as eminently sound. Without pursuing the matter further we hold: (1) That the answer of the deceased in his application, that plaintiff bore to him the relation of niece, whether it be termed a representation merely or a warranty, was not material to the risk, and hence did not 37 L.R.A. (N.S.)

avoid the policy. (2) That plaintiff was, at the time the application was signed and the certificate issued, and at the time of the death of Mr. Lipps, dependent upon him for her support, and that she is therefore competent to take as the beneficiary named in the certificate in suit.

The judgment of the District Court is therefore affirmed.

Petition for rehearing denied.

## NEBRASKA SUPREME COURT.

JENNIE E. BROWN, Appt.,

v.

ORLANDO W. WEBSTER, Admr., etc., of  
Erastus E. Brown, Deceased, et al.

(90 Neb. 591, 134 N. W. 185.)

**Will — reciprocal — husband and wife — enforcement.**

1. Where a husband and wife possessed of separate estates orally agree that upon the predecease of either the survivor shall thereupon become the owner of all of the estate, both real and personal, of such decedent, and at the same time, and in pursuance of and for the expressed purpose of providing a proper method of carrying such agreement into effect, simultaneously execute reciprocal wills, in each of which the other spouse is made sole devisee and legatee, held, that the oral agreement and the execution of the wills constitute a single transaction, that each is an integral part of one contract, and that such contract cannot be said to rest entirely in parol.

**Same — consideration.**

2. And in such a case the contract of each is a sufficient consideration for the contract of the other.

**Same — performance.**

3. And the continued reliance by plaintiff upon the contract, by permitting her will executed as a part thereof to remain in the family safe unchanged and unrevoked, during the entire lifetime of the deceased, constituted full performance by her of the terms of the contract.

**Same — revocation.**

4. And the wills executed as a part of such contract in equity are not ambulatory, and may not be revoked by either party to

Headnotes by FAWCETT, J.

**Note. — Revocability of mutual wills.**

The earlier cases on this question are collected in a note to Frazier v. Patterson, 27 L.R.A. (N.S.) 508.

As shown in the earlier note, mutual wills executed in pursuance of a compact or agreement entered into by the testators to devise their property to certain designated beneficiaries, subject to a life estate or other

such contract, so long as the other party continues to perform the contract on his or her part.

**Same — specific performance.**

5. And where either party to such a contract commits a breach of the same by subsequently executing another will, devising and bequeathing his estate contrary to the terms of such contract, and dies, the survivor, upon proof of a continued performance thereof, in good faith, on his or her part, is entitled to a specific performance of the contract, as against the heirs, devisees, legatees, and executors of the decedent.

**Pleading — sufficiency of petition.**

6. The petition set out in the opinion examined, and held sufficient.

(Root, J., dissents in part.)

(January 3, 1912.)

**A**PPEAL by plaintiff from a judgment of the District Court for Lancaster County in defendants' favor in an action brought to enforce specific performance of an alleged oral contract. Reversed.

The facts are stated in the opinion.

Messrs. Field, Ricketts, & Ricketts for appellant.

Messrs. Charles O. Whedon, and Perry, Lambe, & Butler, for appellees:

There was no consideration for either the alleged agreement or the wills which was binding upon either party.

Kansas Mfg. Co. v. Gandy, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; Wallace v. Rappleye, 103 Ill. 253; Semmes v. Worth-

ington, 38 Md. 298; Cawley's Estate, 136 Pa. 628, 10 L.R.A. 93, 20 Atl. 567; Schumaker v. Smith, 44 Ala. 454, 4 Am. Rep. 135; Buchanan v. Anderson, 10 Prob. Rep. Anno. 175, 70 S. C. 454, 50 S. E. 12; DeMoss v. Robinson, 46 Mich. 62, 41 Am. Rep. 144, 8 N. W. 712; Raub v. Smith, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; Mandlebaum v. McDonell, 29 Mich. 91, 18 Am. Rep. 61; Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 537; Edson v. Parsons, 85 Hun, 263, 32 N. Y. Supp. 1036; Hale v. Hale, 90 Va. 728, 19 S. E. 739; Rood, Wills, § 27.

In Baker v. Syfritt, supra, it was held that where a husband and wife executed a joint will in which they described their property as being held by them jointly, and devised the same to a third person subject to a life estate in the survivor, the husband, accepting the benefits upon the death of the wife, became bound by its provisions so as to preclude his surviving second wife from claiming dower in the land mentioned in the will, although the statute provided that the right of a widow to dower should not be affected by any will of the husband.

But the mere concurrent execution of mutual wills, with full knowledge of their contents by both testators, is not enough to prove a legal obligation to forbear revocation, in the absence of a valid contract. (Note in 27 L.R.A. (N.S.) 511.)

37 L.R.A. (N.S.)

ington, 38 Md. 298; Cawley's Estate, 136 Pa. 628, 10 L.R.A. 93, 20 Atl. 567; Schumaker v. Smith, 44 Ala. 454, 4 Am. Rep. 135; Buchanan v. Anderson, 10 Prob. Rep. Anno. 175, 70 S. C. 454, 50 S. E. 12; DeMoss v. Robinson, 46 Mich. 62, 41 Am. Rep. 144, 8 N. W. 712; Raub v. Smith, 61 Mich. 543, 1 Am. St. Rep. 619, 28 N. W. 676; Mandlebaum v. McDonell, 29 Mich. 91, 18 Am. Rep. 61; Hill v. Harding, 92 Ky. 76, 17 S. W. 199, 537; Edson v. Parsons, 85 Hun, 263, 32 N. Y. Supp. 1036; Hale v. Hale, 90 Va. 728, 19 S. E. 739; Rood, Wills, § 27.

The alleged contract is within the statute of frauds.

Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Somerby v. Buntin, 118 Mass. 287, 19 Am. Rep. 459; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; Shahan v. Swan, 48 Ohio St. 25, 29 Am. St. Rep. 517, 26 N. E. 222; Pond v. Sheehan, 132 Ill. 312, 8 L.R.A. 414, 23 N. E. 1018; Dicken v. McKinley, 163 Ill. 318, 54 Am. St. Rep. 471, 45 N. E. 134; Ellis v. Crary, 74 Wis. 176, 4 L.R.A. 55, 17 Am. St. Rep. 125, 42 N. W. 252; Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439; Loper v. Sheldon, 120 Wis. 26, 97 N. W. 524; Tilton v. Tilton, 9 N. H. 390; Malins v. Brown, 4 N. Y. 403.

Fawcett, J., delivered the opinion of the court:

The petition alleges, substantially, that Erastus E. Brown, late of Lancaster county,

Accordingly it has been held that a verbal agreement between a husband and wife to make similar wills by which they should devise their property to certain designated charities, subject to a life estate in the survivor, is void under the statute of frauds invalidating parol contracts for the sale or disposition of land, and that therefore, after the death of one, the surviving testator had a right to revoke the former will and make another that could operate to dispose of the property. Allen v. Bromberg, 163 Ala. 620, 50 So. 884.

A mutual will executed in pursuance of an agreement entered into by the testators to dispose of their property in a particular way may be revoked before the death of either party, without notice to the other. Stone v. Hoskins, 93 L. T. N. S. 441, [1905] P. 194, 74 L. J. Prob. N. S. 110, 54 Week. Rep. 64, 21 Times L. R. 528.

In the above case it was held that, upon the death of the testator, who had revoked his will by the execution of another, the survivor was not entitled to have the later will set aside, nor entitled to any relief against the later will by way of declaration of trust, since he was not prejudiced, as he had notice of the revocation. Ibid.

A. L. R.

died August 15, 1908, possessed of a large amount of real and personal property, which is specifically set out; that he left no heirs of his body, and that plaintiff is his widow; that at the time of her marriage to the deceased in 1866 deceased did not own property exceeding in value the sum of \$1,000; that at the time of her marriage, or shortly thereafter, plaintiff received from her mother's estate about \$20,000, all of which she turned over to deceased, who managed, controlled, and invested the same in his own name as if it were his own money; that nearly all the property purchased with such funds was taken in the name of deceased, and was by him held and transferred as his own; that from time to time, as convenience suggested, an occasional piece of property was taken in the name of plaintiff, the description of which property is set out. As to one of the pieces described, it is alleged that it was sold in 1882 at a profit of \$8,000, and the consideration paid to and used by the deceased; that another piece described was also sold and the proceeds paid to and used by deceased; that in January, 1896, plaintiff had standing in her name real property of the reasonable value of \$40,000 or \$50,000; that at the same time deceased owned property and securities of the value of \$50,000 or \$60,000; that no accounting was had at any time between plaintiff and deceased of the moneys turned over by her to deceased or of the profits and income arising from the investment thereof; that in January, 1896 (thirty years after their marriage), plaintiff and her husband had no children to whom to leave their property; that, at the suggestion of the deceased, at that time a parol contract was entered into by and between plaintiff and deceased, by the terms of which it was agreed that the survivor should, on the death of the other, become the exclusive owner of all the property, both real and personal, that should then be owned by the one who should first depart this life, "the agreement of one being the consideration for the agreement of the other;" that, at the time, the deceased suggested that "a proper method to carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all of the property of which he or she should die seised;" that, in pursuance of said agreement, the deceased caused wills to be prepared, one for himself to execute and the other to be executed by plaintiff, which wills were accordingly executed by plaintiff and deceased respectively, "each being executed in consideration of the execution of the other." A photographic copy of each of said wills is attached to the petition as a part thereof, and

37 L.R.A. (N.S.)

shows that they were both written by the same person, and, as it appears by comparison with the signature of the deceased, by the deceased himself. The will executed by deceased made plaintiff sole devisee and legatee of all of the property of which he might die seised, and that executed by plaintiff made the deceased sole devisee and legatee of all of the property of which she might die seised. The wording of the two wills is identical, except as to the change of name and sex. Both wills are signed in the presence of the same attesting witnesses.

The petition further alleges: That, after the execution of the wills, deceased caused them to be placed in an envelope, and delivered them to plaintiff for safe-keeping. That they were placed by plaintiff in the family safe, where they remained until after the death of deceased. That in good faith and in full reliance on the agreement made and entered into by and between the parties, as above set out, "and the irrevocable character of said agreement, and of the wills executed by the respective parties in pursuance thereto, the plaintiff permitted the deceased to use and deal with the property of the plaintiff, held in her right, as hereinbefore alleged, as if it were his own property. He not only collected, invested, and used in his own name the income arising from plaintiff's property, but also money received as consideration for the sale of her property, as if the same were his own money." That in April, 1902, deceased sold the farm owned by plaintiff at the time of the agreement referred to, and received on the contract price between the date of sale and the time of his death the sum of \$7,750, all of which he kept and used as his own, and had not accounted to plaintiff for any portion thereof. That he used plaintiff's residence, in which had been invested the sum of about \$40,000, for many years as the family home without rent or compensation, while the income from his other property, as well as that from plaintiff's property, was invested in his own name, thereby increasing his holdings at the expense of plaintiff's estate. That deceased at no time intimated or notified plaintiff that he wished to modify or revoke the will which he had made in plaintiff's favor in execution of said agreement. That plaintiff in all things fully kept and performed the agreement, made between herself and deceased, as alleged, in consideration for which he agreed to make plaintiff sole devisee and legatee of all property, real and personal, of which he should die seised, if he should first decease. That the will which she executed in due form in January, 1896, making deceased her sole devisee and



legatee, is still in full force and effect and unrevoked. That "as the conditions on which plaintiff was to have and receive all of the real and personal property of the said Erastus E. Brown, as her own property, have come to pass, and as the plaintiff has fully kept and performed the agreement on her part, she has become the equitable owner of all the real and personal property of which the deceased died seised. And, as the deceased before his death committed a breach of said contract, she is in equity entitled to have the same specifically performed by his estate, and those who claim under him." That in the latter part of July, 1908, it was arranged between plaintiff and deceased to visit friends in the state of New York. That deceased also desired to visit his three brothers in and near Angola, Indiana. That by reason of the illness of a servant in their household, which they felt rendered it unsafe to then leave her alone, it was arranged between them that deceased should proceed to Indiana and there visit his brothers, that plaintiff should remain at home until it was deemed safe to leave the servant, when she would proceed to northern Michigan and spend a few days with a friend, and then join the deceased at Angola, from whence they would proceed together to New York. That, in pursuance of said arrangement, deceased left home for Indiana on July 26, 1908. That plaintiff remained at home until August 2, 1908, when she proceeded to northern Michigan, where she remained until August 10th, when she proceeded to Angola, reaching there on the evening of August 11th. That, on her arrival, she found deceased dangerously ill from urinary trouble with which he had been suffering for three or four days, but of which she had no notice until her arrival. That he survived until August 15th, when he passed away. That on the afternoon of August 11, 1908, and before plaintiff reached the bedside of deceased, deceased executed another and different will from that made in pursuance of the agreement made with plaintiff, and by which latter will he gave plaintiff an interest for life in certain property, and gave all the rest and residue of his estate to the defendants Frank M. and Clinton M. Brown, sons of the deceased's brother, Ezekiel and Charles W. Brown, Homer H. Brown, and Laura E. Talmage, children of Warren Brown, another brother of deceased, except a small legacy of \$1,500 to Augusta Kreitlow, a long-time servant in the house of plaintiff and deceased. That on January 26, 1911, the will of August 11, 1908, was approved and allowed in the county court of Lancaster county, Nebraska, as the last will and 37 L.R.A. (N.S.)

testament of the deceased. That no appeal has been taken from the order probating said will. A true copy of the will is attached to the petition. That, by reason of the premises, the defendants Brown and defendant Talmage have become vested with a legal title to all the real estate belonging to the estate of the deceased and the right to receive on final distribution of said estate all of the personal property or its proceeds belonging to said estate, subject only to the rights of plaintiff as widow in the estate of the deceased. That from the time deceased arrived in Indiana the defendant Talmage became his daily companion, went with him from the residence of one brother to that of another, and continued to be his constant and daily companion from the time of his arrival until plaintiff reached his bedside on the evening of August 11th. That at some time prior to making his will deceased gave to defendant Talmage \$3,000 in gas bonds which he had taken with him from Lincoln, and also gave to his brother, William M. Brown, a note and mortgage owned by deceased of \$1,500, to be held by him for the use and benefit of the defendants Frank M., Charles W., and Homer H. Brown. That after plaintiff's arrival at the bedside of deceased he was more or less lucid mentally; yet neither he nor any other person notified or intimated to plaintiff that deceased had made and executed the will of August 11th, or that he had given to defendants the securities above referred to, until after the demise of the deceased. That plaintiff declined to act as executrix of the will of August 11th, and defendant Webster has been appointed as administrator with the will annexed. That as such administrator defendant Webster is now in possession of the real estate belonging to said estate, and is collecting the rents and income therefrom. That he is also in possession of all of the personal assets belonging to said estate. That all of the debts of said estate, except a small claim of \$25, which still is pending, have been paid, and all claims against said estate have been barred by limitations by order of the county court. That the instrument approved and allowed as the last will and testament of the deceased operated as a breach of his agreement with plaintiff. That no consideration passed from either of the defendants to the deceased for the provisions made in their behalf in said last will and testament, and that no consideration passed from defendants Talmage, Frank M., Charles W., and Homer H. Brown for the securities given to them, nor was the deceased in any way legally or morally obligated to provide for any of said defendants by will or otherwise. That the

provisions so made were entirely voluntary and without consideration. That plaintiff had duly renounced the provisions made for her in the instrument probated as the last will and testament of the deceased, and claimed such share in said estate as was given her by law. That the provision made for Augusta Kreitlow in the will of deceased met with the approval of plaintiff, and shortly after the death of deceased plaintiff paid to Augusta the sum of \$1,500 the amount of the legacy in her behalf, and took from her an assignment thereof. Plaintiff prays that defendant Webster, as administrator, be restrained from parting with the possession of the whole or any portion of the real estate belonging to said estate, and from making any distribution of the personal assets thereof, and, that defendants Brown and defendant Talmage may each be enjoined from taking or attempting to take possession of any part of the real estate of deceased and from taking any order for the distribution of the personal assets of said estate, pending the final determination of this suit. That plaintiff be decreed specific performance of the agreement entered into between herself and the deceased, whereby she was to become possessed of the legal title to all the real and personal property of which deceased should die seised. That her title to the several pieces of real estate described, and to all the personal assets of said estate, be quieted and settled in the plaintiff as against the several defendants and each of them. That defendants, and each of them, be foreclosed and barred from all right, title, interest, or demand in and to any part of portion of the real and personal property belonging to the estate of said deceased. That defendant Webster, as administrator with the will annexed, and his successors in office, may be ordered and adjudged to turn over and account to plaintiff on final settlement of said estate for all the personal property and personal assets belonging to said estate which have come into his hands as such administrator, and which have not been consumed in the settlement of said estate, and "for such other, further, and different relief as may be necessary to fully vest in the plaintiff full and complete title to all of the estate, both real and personal, of the late Erastus E. Brown, or that may be necessary to forever bar the several defendants of all right, title, interest, claim, or demand in and to any portion thereof."

To the above petition the defendants, other than defendant Webster, demurred upon two grounds: "First. That the court has no jurisdiction of the subject-matter in this action. Second. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and

against these demurring defendants." The first ground of demurrer was overruled and the second sustained, and, plaintiff electing to stand upon her petition, the suit was dismissed at her cost. From the judgment so entered, plaintiff appeals.

The objections to the petition urged by demurrants are substantially: That the contract between plaintiff and deceased, that the survivor should become the owner of all of the estate, real and personal, of the deceased spouse, rests entirely in parol, and, as it affects the title to real estate, is void under the statute of frauds; that such contract was not aided by the execution of the reciprocal wills; that the oral contract and the wills are alike without consideration; that the will of the deceased was ambulatory in its character and revocable at his pleasure; and that the execution of the wills did not constitute part performance. These points are so interwoven that we will consider them together.

The fact that a contract of the nature of the oral agreement alleged would rest in parol would not necessarily render the same void. Section 3 of the statute of frauds (Comp. Stat. 1911, chap. 32), relied upon by defendants, is qualified by the exceptions noted in §§ 4 and 6 of the statute. Section 4 provides: "The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." Section 6 provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreement in cases of part performance."

It will be seen by these two sections:

First. That § 3 cannot be construed to affect in any manner the power of the deceased in the disposition of his real estate by a last will and testament, as was done by the will of January, 1896; and hence, even if it were to be conceded that the agreement by the deceased that, if he predeceased his wife, she should become the owner of all of his real estate, and the will executed by him to that effect, were separate agreements, the execution of the will, if executed "in pursuance to said agreement," as alleged, would bring the case within the scope of § 4.

Second. Under the provisions of § 6, if there was a part performance by plaintiff of the agreement on her part, then under the well-settled rule in this state § 3 of the statute of frauds would not apply. In this case we think there was not only part performance by the plaintiff, but that the performance by her of her part of the

agreement was a complete performance. She at once executed the will provided for in her agreement with her husband, and never receded from it, but at all times during the period of more than twelve years which elapsed before the death of her husband acted upon it, and thereby continually affirmed it.

This constituted not only performance by her, but a good and sufficient consideration for the contract. The deceased himself acted upon the contract, completed by the execution of the wills, and continued performance thereof from the time of its execution in January, 1896, until the 11th day of August, 1908,—four days prior to his death. This action on his part shows that during every day of that period of more than twelve years he was in effect asserting and relying upon the contract which he had entered into with the plaintiff. This constituted a sufficient consideration, and performance during that period, of the contract on his part, and, had the condition of the parties been reversed, and plaintiff had died first, the deceased could and doubtless would have asserted his rights under the contract, as evidenced by plaintiff's will. It is unfortunate that he, in the absence of his wife, while in the hands of his collateral heirs, and in the face of a speedy demise, should have committed a breach of the contract which he himself had induced his wife to enter into with him.

We are unable to consent to the theory that the agreement between the plaintiff and deceased, as to what should become of the estate of the one who should die first, and the execution of the wills, were separate transactions. The so-called oral contract and the execution of the wills were made, entered into, and executed at the same time. The allegations of the petition are that in January, 1896, "at the suggestion of the deceased," a parol contract was entered into by and between the deceased and plaintiff in the manner above set out, and that "the deceased at the time suggested a proper method to carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all the property of which he or she should die seised. He therefore, in pursuance to said agreement, caused wills to be prepared and drawn, one for himself to execute, and one for the plaintiff to execute, which wills were accordingly executed," etc. It is a fact well known to the members of this court, and admitted in the briefs of both sides, that the deceased was an able lawyer of many years experience. He desired that this contract be made. They had been married for thirty years, and had no children. They had no debts or anyone dependent upon their

37 L.R.A.(N.S.)

bounty. The years had been passing, and he, realizing that death might at any time remove one or the other, with the care and forethought characteristic of the man, desired to provide against such contingency. He therefore suggested this plan of disposing of their property. It was agreed to by his wife. His knowledge as a lawyer was such that he realized the importance of reducing the terms of this agreement to writing. He therefore suggested the making of reciprocal wills as the "proper method to carry said agreement into effect." This also was assented to by the plaintiff, and he, with his own hand, drew the wills, and had them simultaneously executed in full compliance with the laws of this state. It would be a travesty upon justice to say that everything that was said and done on that occasion did not constitute a single transaction. It is not a question, therefore, of whether or not the execution of the wills aided an oral contract. The question is, Were the wills an integral and important part of the contract? We hold that they were, and that from the moment the wills were executed the contract no longer rested entirely in parol. We also think it would be doing violence to every rule of equity to hold that the contract of each, of which the will was a part, was not a good consideration for the contract of the other. We think the consideration of each was both a good and a valuable consideration; but, even if it were to be held that it did not constitute a valuable consideration, in the sense that no money was paid, or property delivered, or personal services performed, by the one to or for the other, the contract would still be enforceable for the reason that it was supported by a good consideration. Conceding that a contract by A to make a will in favor of B, that upon A's death he would leave all of his property to B, could not be enforced by B, as against the creditors of A, or as against those having a superior equity to B, yet, if there are no creditors and no one possessing superior equities to B, then a good consideration would be sufficient to entitle B to enforce the contract after A's death. *Parsell v. Stryker*, 41 N. Y. 480, 485; *Underhill, Wills*, § 285. That a contract to devise real estate, where there has been performance by the promisee, is good in this state, is settled in this court by *Kofka v. Rosicky*, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181, *Id.*, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; *Peterson v. Bauer*, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *Pemberton v.*

Pemberton, 76 Neb. 669, 107 N. W. 996; Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042; Cobb v. Macfarland, 87 Neb. 408, 127 N. W. 377; and Johnson v. Riseberg, 90 Neb. 217, 133 N. W. 183. That the execution of the wills satisfied the statute of frauds, see Brinker v. Brinker, 7 Pa. 53; Shroyer v. Smith, 204 Pa. 310, 54 Atl. 24; Keith v. Miller, 174 Ill. 64, 51 N. E. 151; Bruce v. Moon, 57 S. C. 60, 35 S. E. 415.

That the will of deceased was not in equity ambulatory or revocable, see Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57, where, in the seventh paragraph of the syllabus, we held: "A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract." See also Bolman v. Overall, 80 Ala. 451, 60 Am. Rep. 107, 2 So. 624; Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773; Rivers v. Rivers, 3 Desauss. Eq. 190, 4 Am. Dec. 609, where it is said: "By this agreement [to make a will of a particular tenor] he has renounced that absolute power of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him; and I cannot doubt that he could bind himself to do so. . . . A man may renounce every power, benefit, or right which the laws gave him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral. . . . It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject." See also Bruce v. Moon, 57 S. C. 60, 71, 35 S. E. 415; Parsell v. Stryker, 41 N. Y. 480, 486, 487. The contention that plaintiff parted with nothing, that the manner in which she permitted her husband to manage and control her estate and take title to property in his own name and hold the same, and the proceeds from sales thereof, after the execution of the contract, was not different from the manner in which she had permitted him to handle her property prior to its execution, does not impress us as being of any force. The fact is admitted that at all times after the execution of the contract she in good faith relied upon it by permitting her will to remain as originally executed, without any attempt at modification or revocation. If during the four days that intervened after the deceased had broken his contract, and, while plaintiff was watching by his bedside, she had been stricken with paralysis and suddenly

died, the deceased would, by the terms of the contract, have immediately become vested with the ownership of all her estate, both real and personal, and that estate would have gone, under his will of August 11th, to those of his blood who appear as defendants in this case; and, if the heirs of the blood of plaintiff had attempted to assert any claim to her estate, these heirs of the blood and devisees and legatees of the deceased would be here in the role of plaintiffs, seeking a specific performance of her contract. The record before us shows that, when the plaintiff and deceased were married, he was worth not to exceed \$1,000; that she then had, or very soon thereafter, inherited \$20,000, which she turned over to her husband, and which he subsequently used as his own in the manner set out in the petition. This was the nucleus of his fortune. Without this start in life who can say that the deceased would not have suffered the fate of many a good lawyer, and have died without leaving sufficient estate to fight over. Plaintiff not only furnished this start, but she permitted him to use it and its accumulations and the income therefrom, as if it were his own. For the last twelve years or more of their lives she did it in reliance upon this contract. The deceased proved to be a successful business man. She trusted him in business, and trusted him in the arrangement of all of the details of their contract and in the preparation of the wills in consummation thereof. She trusted him until the moment of his death, and, if the allegations in the petition are established upon the trial, she should now receive the reward of that faith and trust which extended over a period of more than forty years. This is not an attempt on the part of the court or of the plaintiff to make a will for the deceased. It is simply a case of holding him to the terms of a will which he himself voluntarily and freely made as a part of a contract which he induced his wife to enter into with him, and which she honestly and in good faith fully performed on her part.

Several minor questions discussed in the briefs are not thought to be material at this time, and will not be considered.

The judgment of the District Court in sustaining the demurrer of defendants is clearly wrong, and it is reversed, and the cause remanded for further proceedings in harmony with this opinion.

Root, J.:

I concur in the majority opinion in so far as it reverses the judgment of the district court and remands the cause for further proceedings, but I do not concur in

the further direction nor in all that is said in the opinion.

The opinion assumes that there is no defense to the petition, and the district court cannot upon a second hearing follow the opinion, and at the same time enter a decree for the defendants, notwithstanding a perfect defense may have been pleaded and proved.

I do not agree to the statement that mutual wills executed in conformity to a preceding oral contract constitute, with the contract, an integral part of one transaction, nor that the respective testators are powerless to revoke their wills. The wills may furnish written evidence to take the oral contract without the statute of frauds, and if either testator subsequently, in violation of his contract, revokes his will or devises to another the property described in the oral contract, the beneficiaries whose rights are last in point of time will hold the property as trustees for the benefit of the senior devisee.

Furthermore, a decree of specific performance within the limits of legal discretion may be granted or withheld according to the circumstances of the case. In the case at bar neither will refers to any contract, nor can it be ascertained from an inspection of them that they were executed in conformity to an antecedent agreement. If evidence competent to establish that essential link in the plaintiff's title be not produced upon a trial, she should not prevail. If that evidence be produced, still there may be proof of such fraud, mistake, unfairness, hardship, rescission, or of changed conditions as will justify a judgment for the defendants.

For these reasons, I go no further than to say that the petition states facts sufficient to constitute a cause of action in the plaintiff's favor, and the district court erred in sustaining the demurrer.

Petition for rehearing denied.

#### ALABAMA SUPREME COURT.

M. E. BELL et al., Appts.,

v.

N. J. BELL.

(— Ala. —, 56 So. 926.)

#### Subrogation — advance to pay purchase price — vendor's lien.

1. One who advances money to pay the purchase price of real estate, under an agreement that he shall be secured by mortgage, is entitled to subrogation to the vendor's lien as against the rights of the wife 37 L.R.A. (N.S.).

of the vendee, who did not comply with the statutory requirements in executing the mortgage so as to bind her interests therein, and to the extent of such lien the mortgage may be enforced.

#### Same — general accounts — tacking.

2. The inclusion in a mortgage given by a purchaser of land to one who advanced money to pay the purchase price, for which he is entitled on the principle of subrogation to enforce the vendor's lien against the rights of the purchaser's wife, who did not execute the mortgage, of indebtedness growing out of general accounts, will not enable him to have the amount of such debts included in his priority over the wife's interests.

#### Payment — application — least security.

3. If neither debtor nor creditor apply payments made by one owing more than one debt, the law makes the application upon the one least secured.

(December 19, 1911.)

#### Note. — Right of one advancing money for purchase price of property to be subrogated to vendor's lien.

- I. General rule, 1203.
- II. Where payment is by volunteer, 1204.
- III. Payment by surety,
  - a. In general, 1204.
  - b. Parties against whom right exists, 1205.
- IV. Payment by subsequent purchaser, 1206.
- V. Lender of money which was applied on purchase price, 1206.
- VI. Payment of note given for purchase price, 1207.
- VII. Loan of money expressly to pay purchase price, 1207.
- VIII. Where trust funds are used to pay for land, 1208.
- IX. Payment under express or implied contract of substitution, 1208.
- X. Where the legal title or a mortgage is taken as security, 1209.
- XI. Where purchase money paid relying upon promise of security which is not given, 1209.
- XII. Where purchase price is paid in reliance on defective security, 1210.
- XIII. Where the vendor has waived his lien, 1212.

#### I. General rule.

Wherever a vendor's lien is treated as assignable, the doctrine prevails that in equity any person paying the purchase price for land in behalf of another with reference to which the vendor has a lien is entitled to be subrogated thereto, providing the payment is made in compliance with a contract with the vendee expressly to pay the purchase price, with an express or implied understanding that the lien shall be retained as security for the money advanced, or where the payment is necessary

**A**PPEAL by defendants from a decree of the Chancery Court for Lowndes County in complainant's favor and dismissing defendant's cross bill in an action brought to foreclose a mortgage. Corrected and affirmed.

The facts are stated in the opinion.

Messrs. W. P. McGaugh, H. S. Houghton, and George E. Gordon, for appellants:

A payment should be applied by the court to the oldest debt, where there is more than one debt,—that is, the debt first becoming due.

30 Cyc. 1243; Harrison v. Johnston, 27 Ala. 447; Stickney v. Moore, 108 Ala. 597; 19 So. 76; Bobe v. Stickney, 36 Ala. 482; Moses Bros. v. Noble, 86 Ala. 412, 5 So.

dell v. Callaway, 6 Mo. 605; Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 432, 22 S. W. 613.

to the protection of the person making same.  
The doctrine of subrogation does not depend upon contractual relations between the parties to be affected by it, but it is broad enough to include every instance in which one person, not acting voluntarily, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.

Nalle v. Farish, 98 Va. 130, 34 S. E. 985.  
But the rule of subrogation to the rights of the vendor, by advancing the purchase price of land or a portion of the purchase price, has no application where the result would be to defeat the lien of the vendor for a balance yet remaining due him on the purchase price. Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975.

And does not apply where the person in whom the title to the land is vested is in no way obligated to pay the purchase money, as where a husband purchases property having the title run to his wife, whether he pays the purchase price in cash or by notes which he thereafter pays, such payment vests in him no equitable right of subrogation to the vendor's lien. Clay v. Clay, 24 Ky. L. Rep. 2016, 72 S. W. 810.

## II. Where payment is by volunteer.

A mere voluntary payment of money due for the purchase price of land, where payment is unnecessary for the protection of the person making same, and not required by any contract with the vendor or vendee, does not raise any equitable right of subrogation to the lien of the vendor. Nichol v. Dunn, 25 Ark. 129; Rodman v. Sanders, 44 Ark. 504; Martin v. Martin, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; Greishaber v. Farmer, 19 Ky. L. Rep. 1028, 42 S. W. 742; Ratcliff v. Mason. — Ky. —, 14 S. W. 960; Winder v. Diffenderffer, 2 Bland. Ch. 166.

A voluntary and unauthorized payment of money due from another for the purchase price of land does not give to the person making the payment a right of subrogation to the lien of the vendor. Trues-

181; Connor v. Armstrong, 91 Ala. 266, 9 So. 816.

The only title acquired by N. J. Bell was the two tracts, less the homestead and dower, and consequently he sold and conveyed to W. H. Bell nothing but what he had acquired.

McCurdy v. Middleton, 82 Ala. 138, 2 So. 721; Norman v. Harrington, 62 Ala. 107; Jones v. Robinson, 77 Ala. 499.

Messrs. Ray Rushton and W. M. Williams, for appellee:

The right of homestead does not prevail over a vendor's lien or a purchase-money mortgage.

Newbold v. Smart, 67 Ala. 326; Tyler v. Jewett, 82 Ala. 93, 2 So. 905; Ross v. Perry, 105 Ala. 535, 16 So. 915; Moses Bros. v.

dell v. Callaway, 6 Mo. 605; Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 432, 22 S. W. 613.

One cannot by simply paying a debt due a vendor of land who has a lien thereon for the purchase-price money be subrogated to such lien. Nichol v. Dunn, 25 Ark. 129.

As applicable to the right of subrogation to a vendor's lien, the general doctrine has been asserted and applied that a person who may be compelled to pay a debt, or the protection of whose property or interest requires that he pay it, is not a mere volunteer; neither is one who pays a debt or advances money for the purpose, at the request of the debtor. Warford v. Hankins, 150 Ind. 489, 50 N. E. 468.

So, a third person paying a balance due on the purchase price of land at the instance and request of the vendee is not a mere volunteer, and if at the time of payment he manifests an intention to keep the prior lien alive for his protection in equity, he will be deemed the purchaser of the lien and entitled to be subrogated thereto. Rodman v. Sanders, 44 Ark. 504.

## III. Payment by surety.

### a. In general.

Real estate is primarily liable for the indemnity and protection of sureties for the purchase price. Stenhouse v. Davis, 82 N. C. 432. Hence it is a general rule in nearly all jurisdictions recognizing any right of subrogation to a vendor's lien, that a surety for the payment by the vendee of the purchase price of land or a portion thereof, if compelled to pay the purchase price under his contract of suretyship, is to the amount so paid by him entitled to be subrogated to the lien of the vendor, providing, of course, this right of subrogation does not prejudice the vendor or other sureties. Beattie v. Dickinson, 39 Ark. 205; Allen v. Bank of Kentucky, 4 Ky. L. Rep. 257; Riggs v. Chapman, 20 Ky. L. Rep. 473, 46 S. W. 692; Barnes v. Barnes, 24 Ky. L. Rep. 1732, 72 S. W. 282; Kleiser v. Scott, 6 Dana, 137; Burk v. Chrisman,

Home Bldg. & L. Asso. 100 Ala. 470, 14 So. 412.

A widow has no right of dower against a purchase-money mortgage.

Eslava v. Lepretre, 21 Ala. 528, 56 Am. Dec. 266; Boynton v. Sawyer, 35 Ala. 500.

Where a debtor owes two or more separate debts to one creditor, and makes a partial payment, he may direct to which debt it shall be applied; and this right must be asserted at the time the payment is made, and if not then asserted, the right of election devolves on the creditor, as between the debts past due, and if no application is made by either party at the time the payment is made, the law applies it to the one most beneficial to the creditor.

3 B. Mon. 50; Davidson v. Carroll, 20 La. Ann. 199; Ghiselin v. Fergusson, 4 Harr. & J. 522; Magruder v. Peter, 11 Gill & J. 217; Welch v. Parran, 2 Gill, 320; Ellis v. Roscoe, 4 Baxt. 418; Galliher v. Galliher, 10 Lea, 23; Faires v. Cockerell, 88 Tex. 428, 28 L.R.A. 528, 31 S. W. 190, 639.

Bank of Fayetteville v. Lorwein, 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202, recognizes the right of a surety on or indorser of notes given for the purchase price of land to be subrogated to a vendor's lien if required to pay the notes, providing all the notes given for the purchase price are paid.

A surety on a bond given to enjoin a judgment for enforcing a vendor's lien, if required to pay the bond, is entitled to be subrogated to the rights of the vendor. Darrow v. Summerhill, 93 Tex. 92, 77 Am. St. Rep. 833, 53 S. W. 680.

The rule, however, has been asserted that payment of a note for a portion of the purchase price of real estate, by a surety of the vendee, does not confer upon the surety any right of subrogation to the lien of the vendor. McNeill v. McNeill, 36 Ala. 109, 76 Am. Dec. 320. The value of this decision is weakened by the fact that the opinion cites as authority, and apparently without discussion follows, Foster v. Athenæum, 3 Ala. 402, which, however, is only authority for the rule that a vendor, by taking a bill of exchange either in payment of or as security for the payment of land, thereby waives his implied lien, and hence an indorser of the bill of exchange, although compelled to pay it, creates thereby no right of substitution.

And it has been asserted that sureties on a purchase-price note executed for money used to pay for the land, if compelled to pay the note, do not thereby acquire a lien by substitution to the rights of the obligee, since he has none himself. Reid v. Jackson, 6 Ky. L. Rep. 743; Jones v. Talbott, 13 Ky. L. Rep. 303.

An indorser of a note given for the purchase price of land is not entitled to subrogation to the vendor's lien, where, by failure to make proper demand on the maker, 37 L.R.A. (N.S.)

McCurdy v. Middleton, 82 Ala. 131, 2 So. 721; Johnson v. Thomas, 77 Ala. 369.

Simpson, J., delivered the opinion of the court:

The bill in this case was filed by the appellee for the foreclosure of a mortgage for \$5,000, purporting to be signed by W. H. Bell and his wife, M. E. Bell, upon which there appears a general acknowledgment, but no separate acknowledgment, by the wife. Said mortgage is dated October 1, 1894, and the complainant produces a deed by him to said W. H. Bell for the same amount, dated September 29, 1894, claiming that said mortgage was given for the purchase money of said land. The deed is a quitclaim.

he is exonerated from liability on the note and under no legal obligation to take care of it. Hutchinson v. Crutcher, 98 Tenn. 421, 37 L.R.A. 89, 39 S. W. 725.

So, an indorser of a bill of exchange given in part payment for the purchase price of real estate, who is compelled to pay same, is not, by reason of such payment, entitled to subrogation to the vendor's lien on the land, since the vendor by taking the bill of exchange in payment, or as security for the payment of the land, thereby waives his implied vendor's lien, and the lien therefore did not exist either in his favor, or in favor of the surety or indorser. Foster v. Athenæum, 3 Ala. 302.

It has been held that a surety's right of subrogation is extinguished where the vendor in foreclosure of his lien sells the land, and the surety becomes the purchaser of it and takes it subject to any other liens against it. Hall v. Jones, 21 Md. 439.

On the other hand, in a different jurisdiction the rule has been asserted that where a surety upon paying the purchase money takes a deed to the land in his own name, he has all the rights of the vendor, either as against the vendee or as a subsequent purchaser of the equity of the vendee. Fulkerson v. Brownlee, 69 Mo. 371.

#### *b. Parties against whom right exists.*

The equitable title to land vests in the sureties of the vendee who are compelled to pay the purchase money, and until such payment is refunded neither the vendee, nor anyone claiming through or under him, has a right to require a conveyance from the trustee holding the legal title. Deitzler v. Mishler, 37 Pa. 82.

Sureties for the original purchase money for a tract of land have the first equity to be indemnified from the proceeds of a sale of the land in judicial proceedings, as against a subsequent purchaser of the equity of the vendee. Schoffner v. Fogleman, 60 N. C. (Winst. Eq.) 12.

A surety for the purchase money of land to secure a payment for which a lien is expressly reserved if compelled to pay a

The defense set up by the answer and cross bill is that said M. E. Bell has never released or conveyed her dower interest in said land, nor so conveyed as to include her homestead rights in said land, a part of which, she shows, was occupied as a homestead by her husband, and by herself since his death. She also produces transcripts of the proceedings in the probate court, by which said lands were allotted to her as a homestead after the death of her husband. She also claims that the indebtedness of her deceased husband to N. J. Bell has been satisfied.

The answer to the cross bill sets up the facts that on May 10, 1886, said W. H. Bell purchased the land, described as the Reid place, from commissioners appointed by the

probate court, and, "not having the money with which to comply with his said purchase, he borrowed the same from V. H. Bell, and executed to him a mortgage for the sum of \$951.35; . . . that on the 8th day of March, 1887, the said V. H. Bell transferred said mortgage and notes secured by it to Marks & Gayle as collateral security, but afterwards redeemed the same, and on the 16th day of June, 1890, for value received, transferred said mortgage and notes secured by it to N. J. Bell as collateral security for a debt owing by said V. H. Bell to said N. J. Bell;" that said notes and mortgage have never been paid; that V. H. Bell foreclosed said mortgage October 29, 1888, John W. Harris being the purchaser for \$1,045; that a deed was made by said

portion of the purchase price to the extent of such payment is entitled to be subrogated to the lien of the vendor as against a subsequent purchaser from the vendee, although such purchaser has also paid a portion of the purchase money to the original vendor. *Uzzell v. Mack*, 4 *Humph.* 319, 40 *Am. Dec.* 648.

A surety for the purchase price of land who pays a portion thereof is entitled to the extent of such payment to be subrogated to the lien of the vendor as against the vendee who asserts the lien by virtue of a subsequent sale. *Carter v. Sims*, 2 *Heisk.* 166.

A surety on a note for a portion of the purchase price of land who has been compelled to pay the note, as against the widow of the vendee, is entitled to be subrogated to the lien of the vendor. *Ballew v. Roler*, 124 *Ind.* 557, 9 *L.R.A.* 481, 24 *N. E.* 976, so also, is a surety to whom a title bond is assigned as security. *Keith v. Hudson*, 74 *Ind.* 333.

#### ***IV. Payment by subsequent purchaser.***

A purchaser of land against which there exists a vendor's lien for unpaid purchase money, who pays same either in compliance with his contract of purchase or to protect his interest in the land, is to the extent of the payment entitled to be subrogated to the lien of the vendor, although his title deed may be defective, or there may be intervening liens against the original vendee.

The rule applies where the purchaser of real estate is compelled for his own protection to pay vendor's lien notes given by his grantor (*Fulkerson v. Taylor*, 100 *Va.* 426, 41 *S. E.* 863); or where his title deed is invalid, and the purchaser has assumed and paid outstanding notes of his grantor for a portion of the purchase price of the land (*Ruse v. Bromberg*, 88 *Ala.* 619, 7 *So.* 384); or where he pays a vendor's lien bond, under a contract with the vendor that, in consideration thereof, certain real estate shall be conveyed to the payer, and the contract to convey proves to be unenforceable and is 37 *L.R.A.* (N.S.)

not carried out (*Nalle v. Farish*, 98 *Va.* 130, 34 *S. E.* 985); or where he pays a portion of the purchase money for the land, taking a deed for it, which is thereafter held to be void (*Bartley v. Knott*, 140 *Ky.* 288, 130 *S. W.* 1096).

And one paying notes given for the purchase price of land, under an agreement with the purchaser to take the land, is not a mere volunteer, and is entitled to be subrogated to the lien of the vendor. *Hart v. Davidson*, 84 *Tex.* 112, 19 *S. W.* 454.

So, a purchaser of land who pays a portion of the purchase price to the original vendor under a contract of purchase with the vendee is to the extent of the payment entitled to be subrogated to the lien of the vendor. *Dillow v. Warfel*, 71 *Iowa.* 106, 32 *N. W.* 194.

The doctrine also applies to a vendee who has paid a vendor's lien on land fraudulently conveyed to him; and such a vendee is entitled, upon the setting aside of his conveyance on the ground of fraud, to be subrogated to the lien of the vendor for the amount paid. *Kimble v. Wotring*, 48 *W. Va.* 412, 37 *S. E.* 606.

So, where the purchaser of land unpaid for releases his equity or rights therein to a third person, who pays the original vendor for the land, such third person becomes subrogated to the vendor's lien for the amount so paid, as against the right of dower of the wife of the original purchaser. *Fisher v. Johnson*, 5 *Ind.* 492.

#### ***V. Lender of money which was applied on purchase price.***

A mere lender of money which the borrower applies to the payment of land does not thereby become entitled to be subrogated to the lien of the vendor. *Rodman v. Sanders*, 44 *Ark.* 504; *Austin v. Underwood*, 37 *Ill.* 439, 87 *Am. Dec.* 254; *Griffin v. Proctor*, 14 *Bush.* 571.

And one paying a pre-existing debt created for the purchase of real estate does not thereby acquire the vendor's lien upon the property. *Martin v. Martin*, 164 *Ill.* 640, 56 *Am. St. Rep.* 219, 45 *N. E.* 1007.



V. H. Bell to said Harris, and said Harris subsequently, on December 12, 1891, conveyed the lands to said N. J. Bell.

It is also alleged that on December 15, 1883, said W. H. Bell purchased the remaining lands, known as the Dunklin place, from E. C. Dunklin, receiving a deed thereto, and "contemporaneously with the execution of said deed borrowed the sum of \$1,500 from Milthorn Woolsey," using the money to pay a part of the purchase money on said purchase, and executing a mortgage to secure the payment of the same on said land; that said Woolsey sold and transferred said notes and mortgage to said N. J. Bell; that thereafter said E. C. Dunklin filed a bill in the chancery court against W. H. and N. J. Bell for a balance of purchase money due,

and said court, holding that Dunklin's claim was superior to the Woolsey mortgage, rendered a decree in his favor for \$386, and said decree was paid by said N. J. Bell to protect his interest; that said W. H. Bell never paid said amounts, but became largely indebted to said N. J. Bell, from time to time, for goods, wares, and merchandise advanced to him; that, in order to give said W. H. Bell a chance to pay for said lands and "get the indebtedness between them in a more definite shape," etc., said W. H. Bell, by quitclaim deed, on September 27, 1894, conveyed said lands to said N. J. Bell for a recited consideration of \$5; that the only effect of said deed was to convey his equity of redemption in the Dunklin place and any equity he might have in the Reid place; that

So the holder of a note given for money borrowed to pay off a vendor's lien on land is not entitled to be subrogated to such lien. *Boughner v. Laughlin*, 23 Ky. L. Rep. 1166, 64 S. W. 856.

#### **VI. Payment of note given for purchase price.**

Although a mere lender of money to pay a note given for the purchase price of land has no right of subrogation (*Wooldridge v. Scott*, 60 Mo. 669), especially where the note is given for a much larger sum of money than that required to pay the purchase price, and independent security is given to secure same (*Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559), nevertheless the payment of vendor's lien notes at the request of the vendee is sufficient to give to the person making the payment the right of subrogation to the vendor's lien to the extent of the money paid (*Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559; *Pioneer Sav. & L. Co. v. Paschall*, 12 Tex. Civ. App. 613, 34 S. W. 1001; *Ford v. Ford*, 22 Tex. Civ. App. 453, 54 S. W. 773; *Mergerle v. Felix*, 45 Tex. Civ. App. 55, 99 S. W. 709; *Price v. Davis*, 88 Va. 939, 14 S. E. 704).

So a person paying vendor's lien notes at the request of the vendee, and with the understanding that he is to hold the notes as security, is entitled to be subrogated to the lien of the vendor. *Hulings v. Hulings Lumber Co.* 38 W. Va. 351, 18 S. E. 620.

One paying off for another, purchase-price notes for land, is entitled to be subrogated to the rights of the vendor, and this right of subrogation is not lost by taking a mortgage on the land for the amount thus advanced, unless this was the intention of the parties. *Harrod v. Johnson*, 5 Ky. L. Rep. 247.

But where the object of an advance of money to pay a vendor's lien note is plainly to extinguish the lien, and other security is taken for the money so advanced, there exists no right of subrogation to the lien of the vendor. *Norris v. Woods*, 89 Va. 873, 17 S. E. 552.

One who at the instance and request of

the vendee pays a vendor's lien note to the holder thereof, who took same from the payee, without notice of any homestead rights in the land of the vendee, is entitled to be subrogated to the vendor's lien, although he paid the money with notice of such homestead rights. *Denecamp v. Townsend*, — Tex. Civ. App. —, 33 S. W. 254.

#### **VII. Loan of money expressly to pay purchase price.**

The courts are not in harmony on the question whether a loan of money to pay off a vendor's lien on real estate creates, in favor of the lender, a right of substitution to the lien thus paid. It has been held that a stranger or a third person advancing or loaning money for the express purpose of paying the purchase price of land sold another is entitled to be subrogated to the right of the vendor to an equitable lien on the land for the purchase money. *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47.

However, a person loaning money to be used to pay a vendor's lien is not entitled to be subrogated to such lien as against the vendee's claim for a balance due him on a subsequent sale, where the loan was made at the instance and request of the purchaser from the vendee, under an agreement to pay and discharge the original vendor's lien. *Austin v. Pulschen*, — Cal. —, 42 Pac. 306.

But it has been held that the lender of money to enable another to complete the purchase of real estate has no right of subrogation to the lien of the vendor as against the widow of the vendee, although the vendor as security for the money thus loaned executes a judgment bond reciting that it was given for the balance of the purchase money due on the land in question. The theory is that the lender under such circumstances does not belong to the favored class of vendors, but to the unprotected class of general creditors. It is reasoned that others were the vendors of the land, therefore the lender cannot claim that character, and it is said that manifestly he is a loan creditor, and nothing more.

the deed of N. J. Bell to said W. H. Bell, of September 29, 1894, was contemporaneous with said last-named deed, and the \$5,000 mentioned as the consideration in said deed of N. J. to W. H. Bell represented "part of the money owing by the said W. H. Bell to said N. J. Bell," and that "for the said \$5,000 purchase money agreed upon the said W. H. Bell did, contemporaneously with the execution of said deed, execute and deliver" the mortgage in question for the consideration of \$5,000, "which was the agreed purchase money of the lands owing by said W. H. Bell;" that at that time said W. H. Bell owed on account of the purchase money of the Reid place, with interest, \$1,540.73,

and on account of the purchase money of the Dunklin place, and interest, \$2,813.49, and on account of advances, etc., \$6,170.43. Said answer mentions the proceeds of an insurance policy and other items that have been credited on the general account of said W. H. Bell.

These same facts were set up in an amendment to the original bill, and the answer denies that the said M. E. Bell ever acknowledged the mortgage in question, and claims her dower and homestead in the lands. She testifies, also, that she never appeared before the justice of the peace who purports to have taken the acknowledgment.

From this summary of the facts, which

Said the court: "No lien was taken for purchase money, for the vendors were paid in full; paid, it is true, with . . . [the money borrowed], but they assigned and transferred nothing to . . . [the lender]. There was no privity between them and him, and if he could claim subrogation to their rights they had no rights to a lien for purchase money after receipt of it in full, and a conveyance of the legal title to . . . [the vendee]." *Nottes's Appeal*, 45 Pa. 362.

So it has been asserted that merely lending money to another to pay on the purchase price of land raises in behalf of the lender no right of subrogation to the lien of the vendor. *Hitt v. Applewhite*, — Miss. —, 20 So. 161. And that one loaning money to pay off a vendor's lien does not thereby acquire a right to the lien. *Reid v. Jackson*, 6 Ky. L. Rep. 743.

#### *VIII. Where trust funds are used to pay for land.*

Where a trust fund in the hands of a vendee of land is used to discharge the vendor's lien thereon, under such circumstances as to amount to a fraud on the beneficiaries unless the lien is retained for their benefit, they are entitled to be subrogated to such lien. *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030.

So where trust funds in the hands of a vendee of real estate are used to pay notes given for the purchase price of land in which a lien on the land is reserved, the beneficiaries of the trust fund are entitled to be subrogated to such lien. *Aiken v. Taylor*, — Tenn. —, 62 S. W. 200.

As against a subsequent purchaser of the land, partners of a former purchaser have no right to be subrogated to the vendor's lien to the amount of money wrongfully taken by their copartner from the firm account and applied on the purchase price of the land. *Grover v. Wilson*, 18 Ky. L. Rep. 467, 37 S. W. 60.

#### *IX. Payment under express or implied contract of substitution.*

It is sufficient to entitle a third person to be subrogated to the vendor's lien on land, if he pays the purchase price or a

portion thereof, at the instance and request of the vendee, and upon the express agreement with the vendee for the preservation of the vendor's lien as security, or if the circumstances are such as to raise an implied agreement to this effect. *Brown v. Dennis*, — Tex. Civ. App. —, 30 S. W. 272.

A third person paying a balance due on the purchase price of land at the instance and request of the vendee is not a mere volunteer, and if at the time of payment he manifests an intention to keep the prior lien alive for his protection in equity, he will be deemed the purchaser of the lien and entitled to be subrogated thereto. *Rodman v. Sanders*, 44 Ark. 504.

Payment of a note for the purchase price of land at the instance and request of the vendee under an agreement, express or implied, that the lender shall be subrogated to the rights of the vendor, gives the right to such subrogation. *Greishaber v. Farmer*, 19 Ky. L. Rep. 1028, 42 S. W. 742.

And where one advances money to pay for a discharge of the vendor's lien upon a homestead, and the money is so applied, the lender becomes subrogated to the vendor's lien as against any homestead rights of the vendee in privity with him. *Hicks v. Morris*, 57 Tex. 658; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559; *Western Mortg. & Invest. Co. v. Ganer*, 11 C. C. A. 371, 23 U. S. App. 608, 63 Fed. 647.

A person paying a balance due on the purchase price of land, at the instance and request of the vendee, sufficiently evidences his intention to keep the vendor's lien alive as security, to be entitled to be subrogated thereto, where he takes up and keeps the purchase-price notes he pays, together with the deed of the property, and looks to the land for his reimbursement, under agreement with the purchaser to keep possession of these papers until his money is refunded. *Rodman v. Sanders*, *supra*.

One loaning money at the request of the widow of the vendee to pay the purchase notes given for land, and taking and keeping the conveyance thereof as additional security, is entitled as against creditors of the vendee to be subrogated to the lien of the vendor, although he also took a

seem to be without conflict, if said W. H. Bell was paid for the lands in question, his said widow, not having released her dower and homestead rights according to law, her rights are superior to the mortgage, provided she sustains her claim that she did not acknowledge the mortgage in question. The purchase money was paid, so as to vest the legal title in the vendee, but subject to the equitable rights of the complainant. So the question of prime importance is: Did the transactions detailed constitute a payment of the purchase money by W. H. Bell, or were the several mortgages for money borrowed to pay purchase money such as to

preserve the purchase-money lien in favor of the mortgagees?

This court has held that one who advances money to a vendee to pay the deferred payments on land, or pays the amount to the vendor, at the vendee's request has no vendor's lien or resulting trust. *Chapman v. Abrahams*, 61 Ala. 108.

In a subsequent case, in which it was alleged that Mrs. B., "while negotiating said loan, told complainant that she wanted the money to pay off a former mortgage on her house and lot, and when she got the money did use the same for that purpose, and thereby discharged said prior mortgage," this court, while recognizing the principle

mortgage on the land. *Ogden v. Totten*, 17 Ky. L. Rep. 1390, 34 S. W. 1081.

So a person has a vendor's lien as against execution creditors of the vendee, by paying the balance of the purchase price of land, under an agreement with the vendee that he should have a lien on the land for the amount so advanced, and should take a deed running to the vendee and hold it as security. *Fuller v. Hollis*, 57 Ala. 435.

One advancing money to pay for land held by a vendor until the purchase price is paid, is entitled to a vendor's lien where the advancement is made under an agreement with the vendee that the land shall be security for the money thus paid. *Mitchell v. Butt*, 45 Ga. 162.

A surety for the payment of the balance due on the purchase price of land, to whom a title bond is assigned as security, who thereafter pays the purchase price, is entitled to be subrogated to the rights of the vendor as against the claims of the widow of the vendee. *Keith v. Hudson*, 74 Ind. 333.

One furnishing money to purchase real estate for another, under an agreement that he is to have the equitable title thereto, and is to have a special lien thereon as security for the money thus advanced, is entitled as against a subsequent purchaser with notice to an equitable vendor's lien for the amount advanced by him. *Dwenger v. Branigan*, 95 Ind. 221.

One paying notes given for the purchase price of land, under an agreement that he is to be secured by the lien on the land, is entitled to be subrogated to such lien. *Gunn v. Orndorff*, 23 Ky. L. Rep. 2369, 67 S. W. 372, 68 S. W. 461.

Money of one person used to purchase land creates a resulting trust although title is taken in the name of another, or by express agreement of the parties they may create a vendor's lien in favor of the person advancing the money. *Ford v. Ford*, 22 Tex. Civ. App. 453, 54 S. W. 773.

#### **X. Where the legal title or a mortgage is taken as security.**

One loaning a vendee of land money to pay the purchase price, taking as security

the title to the land, stands in the position of the vendor as against any rights, homestead or otherwise, of the vendee. *Heyderstadt v. Whalen*, 54 Minn. 199, 55 N. W. 958.

So, one advancing money upon the purchase price of real estate, and taking a deed of the premises from the vendor, is entitled to be subrogated to the vendor's lien for the money paid, as against judgment creditors of the vendee. *Kline v. Triplett*, 2 Va. Dec. 429, 25 S. E. 886.

One paying the purchase price of land, under an agreement with the vendee to execute to him a deed of the land, stands in the position of the vendor, and holds the land by virtue of the deed executed to him under this agreement, free from any homestead rights of the wife of the vendee. *Roy v. Clarke*, 75 Tex. 28, 12 S. W. 845.

The doctrine of conventional subrogation applies in favor of a stranger paying off the vendor's lien at the instance of the buyer of land, and upon his agreement that the lender should have a lien on the land for reimbursement, and in this respect the latter stands in the shoes of the vendor. *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 So. 512.

So a lender of money to discharge a vendor's lien on land, who takes a mortgage thereon, is entitled to be subrogated to the rights of the vendor, as against any homestead claims by the vendee. *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12.

#### **XI. Where purchase money paid relying upon promise of security which is not given.**

Although the contrary is asserted in *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468, most of the cases considering the question hold that one paying off or loaning money to pay off a vendor's lien on land is not entitled to be subrogated thereto, where such payment was induced by the promise of the vendee to secure the repayment of the money thus advanced, and which promise the vendee refuses to fulfill.

Thus a lender of money to pay a debt due for the purchase of real estate, taking

just stated, says: "But the rule is settled that, where the money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender of obtaining a valid security, or where its payment is secured by a mortgage which, for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior encumbrancer, whose claim he has satisfied; there being no intervening equity to prevent." And it was held in that case that the money was obtained by false representations as to owning a fee-simple estate, and complainant was entitled to recover. *Bolman v. Lohman*, 74 Ala. 507, 508-511, 512. This case states the general principle, but decides the case on the fraud-

ulent representation, which does not exist in the present case.

In the case of *Tyler v. Jewett*, 82 Ala. 93, 101, 2 So. 905, the bill was filed to cancel a mortgage on a homestead, to which there was no separate acknowledgment by the wife, said mortgage having been given for money advanced to enable the borrower to pay purchase money, and thereby convert his equitable title into a legal title; and this court, while recognizing the principle of the *Chapman-Abrahams Case*, supra, said: "It would be inequitable to deprive defendant of the advantage of the legal title, without requiring repayment of the purchase money paid by him, only by reason of which payment complainant would be entitled to demand it of his vendor."

a note of the buyer upon her promise to execute as security a deed of trust covering the land, is not by reason of these facts entitled to be subrogated to the rights of the vendor, although the vendee is a married woman, and takes the title to the land in her own name, and refuses to execute the deed of trust as she agreed. *Durant v. Davis*, 10 Heisk. 527.

So, a loan of money to purchase land, on the promise of the purchaser to give the lender security on the land, does not entitle the latter to a vendor's lien for the money advanced, although the purchaser thereafter refuses to give the security. *Campan v. Molle*, 124 Cal. 415, 57 Pac. 208.

But a person holding title to land as security for the payment of money advanced on the purchase price, who is induced to deed the land to a subsequent purchaser on the joint promise of the original vendee and such subsequent purchaser to pay him out of the proceeds, is entitled to an equitable assignment of the vendor's lien for the amount due him, upon the violation of this promise by the parties. *Armstrong v. Farr*, 11 Ont. App. Rep. 186.

In view of the conflict on this question the cases in the next subdivision are of interest. As affecting the right of substitution, it would seem that the same principle would ordinarily be applicable whether based on a broken promise by the vendee, or a promise not fulfilled because the security proves unenforceable, although a bona fide attempt has been made to fulfil the promise.

### ***XII. Where purchase price is paid in reliance on defective security.***

Although the decisions are not in harmony on the question, the weight of authority supports the view that a person paying the purchase price of land or a portion thereof is entitled to be subrogated to the lien of the vendor, where the payment was induced by the promise of security on the land, which either is not carried out, or if carried out is not effective, because of some defect in the instrument.

37 L.R.A. (N.S.)

Thus the rule has been asserted that "when a third party at the request of a debtor loans the money to him to pay a debt secured by mortgage or other lien, under an agreement that he shall have a mortgage on the same real estate to secure him in such loan, and after the same is paid the debtor refuses to give the mortgage, or, if given, it proves invalid or ineffectual for any reason, or if there are intervening liens of which the person making the loan or payment had no notice or knowledge, such person is entitled to be subrogated to the mortgage or other lien securing the debt paid." *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468.

And that a mortgagee of land who releases his mortgage on the land to enable the owner to sell it and invest the proceeds in other lands upon which it is agreed that the mortgagee shall have a like mortgage, in a proceeding in equity to cancel his mortgage as invalid, is entitled to subrogation to the vendor's lien upon the lands so purchased, for the amount of the mortgage released where the mortgage executed to him is invalid for failure of the husband of the mortgagor to join in its execution. *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.

And it has been held that payment of the vendor's lien on land gives a right of subrogation to the lien, where induced by the execution of a trust deed or mortgage by the vendee to the lender which, however, is invalid or not enforceable. *Flynt v. Taylor*, 100 Tex. 60, 93 S. W. 423; *Dixon v. National Loan Invest. Co.* — *Tex. Civ. App.* —, 40 S. W. 541.

On the other hand, in another jurisdiction it has been held that the fact that a portion of the proceeds of an invalid mortgage was applied upon the purchase price of the land covered by the mortgage does not give to the mortgagee or lender any equitable right of subrogation to the vendor's lien as against the homestead right of the wife of the purchaser, there being no express agreement that the lender should be substituted to the rights of the vendor. *Griffin v. Proctor*, 14 Bush, 571.

In Illinois, a vendor's lien is a right per-

The case of *Faulk v. Calloway*, 123 Ala. 325, 26 So. 504, is not analogous to this case, as in that the purchaser assumed to pay off the mortgage, as a part of the purchase money, under a contract of sale which afterward failed.

The principle announced in *Bolman v. Lohman*, supra, was applied to a case where the party loaned money for the purpose of paying off a purchase-money encumbrance, and took a mortgage on the land to secure the same, which mortgage failed because of a defective acknowledgment. *Scott v. Land, Mortg. Invest. & Agency Co.* 127 Ala. 161, 28 So. 709. This principle was declared operative, also, in favor of one who paid off an existing mortgage, and took a mortgage on the land, which was inoperative by

reason of *lis pendens*. *Bigelow v. Scott*, 135 Ala. 236-239, 33 So. 546.

Pomeroy says: "The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party, and for his benefit; such a person is in no true sense a mere stranger and volunteer." 3 Pom. Eq. Jur. 3d ed. §1212, pp. 2423, 2424. It is applied also to one who makes a loan to discharge a first mortgage, under an agreement that he shall have a first mortgage, as against a second mortgagee. *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Amick v. Woodworth*, 58 Ohio St. 80, 50 N. E. 437.

sonal to the vendor, and is not assignable; hence a third person loaning money to discharge same at the request of the purchaser has no right of subrogation to the lien, although relying upon the promise of the purchaser to secure the repayment of the money advanced by a trust deed, which, although executed, is not effective as to some of the land, as the purchaser had previously conveyed same away. *Small v. Stagg*, 95 Ill. 39; and see *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007, for restatement of the doctrine that vendor's lien is personal to the vendor and hence is not assignable, and no right of subrogation exists with reference thereto.

The rule obtaining in Alabama on the right of subrogation to a vendor's lien is not at all clear. Thus in *Chapman v. Abrahams*, 61 Ala. 108, the general rule is asserted that a person paying a portion of the purchase price of land for and at the request of the vendee thereby extinguishes the debt of the vendee to the vendor, and creates a new debt or liability; it does not transfer the original debt or the vendor's lien; neither does it create a resulting trust in favor of the lender. And the doctrine is there applied to a payment of the purchase price of land under an agreement by the vendee, a married woman, to execute to the person making the payment a mortgage on the land. This mortgage was not at that time executed, and in the meantime the vendor conveyed the property to the vendee. Thereafter the mortgage was executed by the vendee and her husband, but was later held to be void because the land was the statutory separate estate of the vendee. This case is referred to and distinguished in *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 So. 512, which case, however, applied the doctrine of conventional subrogation in favor of a stranger paying off a vendor's lien at the instance of the buyer of land, and upon his agreement that the lender should have a lien upon the land for reimbursement, and that in this respect he should stand in the shoes of the vendor. Referring to the *Chapman Case*, the court said that the agreement constituting that 37 L.R.A. (N.S.)

case being to execute a mortgage for the reimbursement of the lender, which was done, the invalidity of the mortgage by reason of the marital incapacity of the vendee to make it was no cause for broadening the agreement in support of the right of subrogation, even if an agreement by a married woman in respect of her separate estate was not itself likewise void by reason of marital incapacity.

In *Scott v. Land, Mortg. Invest. & Agency Co.* 127 Ala. 161, 28 So. 709, however, the right of subrogation was sustained in favor of a person advancing money expressly to pay the purchase price of land, under an agreement that the repayment of the money thus advanced should be secured by a mortgage on the land to be executed by the vendee, the mortgage actually executed being invalid because defectively acknowledged and because the land was a homestead. The *Chapman Case* is referred to and distinguished, the court saying that in that case "it was held that one who advances money to the vendee to pay the deferred payments on a purchase of lands, or pays the amount, at the vendee's request [to the vendor], who conveys to the purchaser, has no vendor's lien on the lands,—the principle on which the doctrine rests being that the payment of the purchase money by another at the request of the vendee of the land did not operate to transfer the original demand to him, but extinguished it, and created a new liability, the advancer of the money becoming a new and original creditor. . . . In such case, said the court, "the lender is treated as a mere volunteer in the transaction." Continuing the court quotes with approval from *Bolman v. Lohman*, 74 Ala. 507: "But the rule is settled that where money is expressly advanced in order to extinguish a prior encumbrance, and is used for this purpose, with the just expectation on the part of the lender, of obtaining a valid security, or where its payment is secured by a mortgage which for any reason is adjudged to be defective, the lender or mortgagee may be subrogated to the rights of the prior encumbrancer, whose claim he has satisfied, there being

It is said that "the better opinion now is that one who loans his money upon real-estate security, for the express purpose of taking up and discharging liens or encumbrances on the same property, has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted in fact in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler; nor is the debt, lien, or encumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor." *Emmert v. Thompson*, 40 Minn. 386, 392, 32 Am. St. Rep. 566, 52 N. W. 31, 32; *Hughes v. Thomas*, 131 Wis. 315, 111 N. W. 474, 11 L.R.A. (N.S.) 744, 11 Ann. Cas. 673 and note 677 et seq.

"Where defendant loaned money to plaintiff on an agreement that it was to be used to pay off existing valid mortgages on exempt personal property, and that a new mortgage should be executed to defendant therefor, and the mortgage subsequently executed was void, because the signature of the mortgagor's wife was not witnessed as required by Rev. Stat. 1898, § 2313, the lien of the mortgages paid by the funds advanced, was not destroyed, but would be enforced in equity for defendant's benefit, who would be subrogated to the rights of the holders, as against the mortgagor and his

no intervening equity to prevent." It is obvious that, in asserting this doctrine, the court overlooked the fact that in the *Chapman Case* the purchase money was paid at the request of the vendee and upon her promise to execute a mortgage on the land as security therefor, which promise was carried out, but the mortgage was invalid because of the disability or incapacity of the vendee to execute same.

### *XIII. Where the vendor has waived his lien.*

A vendor's lien is not necessarily first in point of preference as against other liens, where the right of subrogation thereto is claimed, since the parties may contract with reference thereto, and thereby utterly destroy the lien, or they may provide for the preference over it and may replace it in the scale of liens; and hence holding it by the equity of subrogation the lien is always subject to any paramount equity thus set above it. *Blake v. Pine Mountain Iron & Coal Co.* 22 C. C. A. 430, 43 U. S. App. 490, 76 Fed. 824.

Where by taking independent security the vendor's lien is waived by the vendor, sureties of the vendee who thereafter are required to pay the purchase price have no right of subrogation. *Carrico v. Farmers' & M. Nat. Bank*, 33 Md. 235. 37 L.R.A. (N.S.)

wife." *Lashua v. Myhre*, 117 Wis. 18, 93 N. W. 811.

We hold that in the present case, the money having in each instance been advanced for the express purpose of paying the purchase money, or a part of it, with an agreement for a mortgage on the premises, which was not so executed as to be effective, and it being shown that without said payment the legal title to the land could not have been secured by the vendee, under the equitable principles, above cited, the original lien for the purchase money is preserved for the benefit of the complainant. This right is by subrogation to the rights of the original vendor, and not a right to enforce the mortgage sought to be foreclosed, for the amounts therein named; for, while W. H. Bell could, in so far as he was concerned, agree that the \$5,000 represented the purchase money still due on the land, yet that agreement could not affect the right or interest of his wife.

By subrogation, the complainant is entitled to subject the lands, as against the respondents, to the payment of whatever amount is found to be due of the original purchase money advanced, but not for the amounts due on other accounts by said W. H. Bell. While there is no special prayer for subrogation, yet probably it may be covered by the prayer for general relief.

In so far as there was a lien in favor of N. J. Bell against the lands, it was compe-

If notes are given for the purchase price of land and no lien is reserved therein, a subsequent payment of the note by a third person gives to him no right of subrogation, since the vendor himself, under such circumstances, had no lien. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176.

Where a note is given for money paid for land, the purchase price of which is paid before delivery of the deed no vendor's lien is created, and hence a person advancing the money on the note has no right of subrogation. *Walsh v. McBride*, 72 Md. 45, 19 Atl. 4.

So, where the vendor retains title to the land until full payment is made, there is no vendor's lien to which a person furnishing the money for such payment may be entitled to be subrogated, although the money is furnished under an agreement with the vendee to secure the repayment of the sum by giving security on the land, and which he afterwards refuses to do. *Campan v. Molle*, 124 Cal. 415, 57 Pac. 208.

A vendor of land, by taking a bill of exchange in payment thereof or as security for the payment, thereby waives his vendor's implied lien, and hence an indorser of the bill of exchange, although compelled to pay it acquires thereby no right of subrogation. *Foster v. Athenæum*, 3 Ala. 302.

A. G. S.

tent for said N. J. and W. H. Bell to put the indebtedness in the shape of a mortgage, thereby expressing only what the law required; but, as against the rights of the respondents, they could not by said agreement fix a lien upon the lands for any other indebtedness, so that the amount for which said mortgage may be foreclosed is not necessarily the amount named therein, but the amount actually due for the money advanced to pay purchase money.

The decree will be corrected so as to provide that the register, in taking and stating the account, shall ascertain what amounts were advanced to pay the purchase money for the lands described, what payments have been made thereon, and what amount is now due, calculating at simple legal interest only. To this extent, the second prayer of the cross bill is granted, but the cross complainant is not entitled to have the mortgage declared null and void; nor is she entitled to dower and homestead, until the lien in favor of the complainant is satisfied.

As there seems to be some confusion in regard to the application of payments, it seems necessary to state that the rule applicable to this case is that "a debtor, owing to the same creditor more debts than one, and making partial payments, has the right to elect and dictate on which debt the payment shall be credited;" but if neither the debtor nor creditor expresses an election "the presumption of the law is that the credit is applied most beneficially to the creditor; that is, to the most precarious debt, or the one least secured." *McCurdy v. Middleton*, 82 Ala. 131-137, 2 So. 721, 724.

As corrected, the decree of the court is affirmed.

All the Justices concur, save Dowdell, Ch. J., not sitting.

#### DISTRICT OF COLUMBIA COURT OF APPEALS.

RODGER O'HANLON, Appt.,

v.

HARRY J. GRUBB.

(38 App. D. C. 251.)

#### Evidence — lease — adding to written agreement.

1. Evidence is admissible in an action by a tenant of an apartment to hold the landlord liable for injury to his property by a defect in the heating apparatus, that at the time of the leasing, the landlord's agent told him that the apartment was heated by steam, where the lease is silent upon the subject and the heating apparatus attached

to the central plant was in place when the conversation took place.

#### Landlord and tenant — apartment — heating apparatus — duty to repair.

2. The owner of an apartment building who heats the separate apartments with steam supplied from a central plant is bound to keep the heating apparatus in repair.

#### Same — contributory negligence — failure to make repairs.

3. A tenant of an apartment is not guilty of contributory negligence which will prevent his holding the owner of the building liable for injury to his furniture through a defect in the steam-heating apparatus, in failing to have a small leak repaired upon discovering it, or to turn off the steam when temporarily leaving the apartment, where it was the duty of the owner to have the repairs made, and there was nothing to charge him with notice that the defective place was likely to give way and flood the apartment with water and steam.

#### Damages — defective heating apparatus — injury to tenant's property.

4. The value of the property destroyed, and not the cost of making the repairs, or the difference in value of the premises with a perfect and defective radiator in, is the measure of damages for injury to property of a tenant of an apartment through the bursting of a defective steam radiator which the landlord was bound to keep in repair.

(February 5, 1912.)

**A**PPEAL by defendant from a judgment of the Supreme Court in plaintiff's favor in an action brought to recover damages for injury to property alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel W. Baker, Joseph C. Sheehy, and Frank J. Hogan, for appellant:

There was no obligation or duty on defendant's part to provide for steam heating for said apartment.

#### Note. — Duty and liability of landlord of apartments as to heating.

It may safely be said that a landlord renting an apartment in a building heated by a central heating plant, control over which is retained by him, is bound to heat such apartment even when the lease is silent on the question of heat. This rule is supported by practically all the authorities.

Thus, in *Berlinger v. Macdonald*, 133 N. Y. Supp. 522, where there was no provision in the lease of an apartment with reference to heat, it was held that the lessor impliedly covenanted to keep the apartment sufficiently heated to make it habitable, where the entire heating plant remained exclusively under his control.

And in *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842, it was held that an adequate

McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; Whitehead v. Comstock, 25 R. I. 423, 56 Atl. 446; Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 60; Cooper v. Lawson, 139 Mich. 628, 103 N. W. 168; Coats v. Meriwether, 144 Mo. App. 89, 129 S. W. 468; 1 Tiffany, Land. & T. § 92, p. 644.

Plaintiff was guilty of contributory negligence as matter of law, in not taking the proper precaution to prevent this radiator from leaking during his absence from his apartment.

Martin v. Surman, 116 Ill. App. 282; Margolius v. Muldberg, 88 N. Y. Supp. 1048; Tiffany, Land. & T. § 94, p. 648.

The measure of damages is not a consequential injury arising therefrom, but is either the cost of the repair where the cost

would be slight, or the difference between the value of the premises leased properly repaired and their condition when the landlord fails to repair.

Thompson v. Clements, 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919; 2 McAdam, Land. & T. § 386, p. 1247; Warren v. Stoddart, 105 U. S. 224, 229, 26 L. ed. 1117, 1120; Lillard v. Kentucky Distilleries & Warehouse Co. 67 C. C. A. 74, 134 Fed. 178; Graff v. Lemp Brewing Co. 130 Mo. App. 624, 109 S. W. 1044; Schick v. Fleischhauer, 26 App. Div. 210, 49 N. Y. Supp. 962; Nagle v. Davies, 60 Misc. 479, 113 N. Y. Supp. 834; Reams v. Taylor, 31 Utah, 288, 8 L.R.A. (N.S.) 436, 120 Am. St. Rep. 930, 87 Pac. 1089, 11 Ann. Cas. 61.

supply of heat by the landlord was an integral part of the covenant for quiet enjoyment of the use of an apartment, where the apparatus for heating was in the exclusive control of the landlord, although the lease did not in terms bind him to supply any heat whatever. And in Jackson v. Paterno, 58 Misc. 201, 108 N. Y. Supp. 1073, affirmed in 128 App. Div. 474, 112 N. Y. Supp. 924, it was held that, in the absence of an express agreement by the lessor to supply heat to an apartment, his duty to supply adequate heat may be implied from the covenant of quiet enjoyment, where the means of supplying heat are exclusively under his control.

In Siebold v. Heyman, 120 N. Y. Supp. 105, it was held that a covenant in a renewal lease of an apartment, that the radiators should be "increased and enlarged to give sufficient heat,—i. e., a temperature of at least 65 degrees in cold weather,"—will be construed, where the landlord has retained complete control over the heating plant, as binding him to supply the radiators as increased and enlarged, with steam of a sufficient quantity and quality to effect that result. And in Iowa Apartment House Co. v. Herschel, 36 App. D. C. 457, cited in O'HANLON v. GRUBB, it was held that under a lease of an apartment "including steam heat," and giving the lessor the right to enter and make necessary repairs, the obligation to furnish heat carries with it the duty of keeping in repair heating apparatus, and the obligation to make repairs carries with it an obligation of inspection and examination in order to ascertain whether any repairs have to be made, so as to render the lessor liable as for negligence, for damages resulting from steam escaping from the radiators which had been adjusted according to the instructions of the landlord's agent, while the tenant was, to the knowledge of the landlord, away from the apartment for a considerable length of time.

But in Slaughter v. Johnson, 28 Ill. App. 417, it was held that where no inference could be drawn from the lease or from any other evidence in the case, that the land-

lord was obligated to furnish heat to the tenant of a flat, no such obligation arose. In arriving at this conclusion the court said that if counsel had wished to raise the question of whether there was an implied covenant to furnish heat with the premises, he should have proved that the only heating apparatus available remained under the control of the landlord.

In Howe v. Frith, 43 Colo. 75, 17 L.R.A. (N.S.) 672, 127 Am. St. Rep. 79, 95 Pac. 603, 15 Ann. Cas. 1069, it was held that a landlord is not liable for injuries to his tenant by shutting off the heat from the tenement after the tenant is in arrears for rent, where the lease provides for forfeiture in case of nonpayment of rent, and for re-entry by the use of such force as is necessary, in which event no action shall be brought by the tenant.

And a landlord is not prevented from shutting off the heat of a leased apartment because of breach of covenant to pay rent, by an injunction against the prosecution of proceedings in forcible entry and detainer, nor is the tenant released from his covenant not to sue for injuries caused by re-entry in case of such a breach. *Idem*.

Aside from O'HANLON v. GRUBB, but one case seems to have treated the question of damages recoverable in the class of cases under discussion, and in that case (Ireland v. Gauley, 95 N. Y. Supp. 521) it was held that a loss to a tenant from idleness because he could not or would not work in a leased apartment, because the proper temperature was not maintained by the landlord, who had covenanted to furnish heat, was not the natural or probable result of the breach of the covenant, especially where the difficulty could have been avoided at an inconsiderable outlay by the tenant himself, and therefore a claim for such damages could not be set up in a summary proceeding to dispossess the tenant.

As to liability of landlord for injuries to tenants from defects in premises, see note to Walsh v. Schmidt, 34 L.R.A. (N.S.) 798.

As to eviction of tenant by failure to furnish heat, see note to Russell v. Olson, post, — G. J. C.



Mr. E. Beverly Slater, for appellee:

The court properly allowed the appellee to show by parol testimony that the terms upon which he leased his apartment included the heating thereof by the appellant with steam heat.

Donaldson v. Uhlfelder, 21 App. D. C. 489; Raub v. Barbour, 6 Mackey, 245; Tuley v. Barton, 79 Va. 387.

The duty of the appellant to furnish the appellee's apartment with steam heat carried with it the necessity on the part of the appellant of keeping the heating plant in proper repair.

Iowa Apartment House Co. v. Herschel, 36 App. D. C. 457; George, Apartments, § 169; Sciolaro v. Asch, 198 N. Y. 77, 32 L.R.A.(N.S.) 945, 91 N. E. 263; Priest v. Nichols, 116 Mass. 407; 18 Am. & Eng. Enc. Law, 2d ed. 220; Railton v. Taylor, 20 R. I. 283, 39 L.R.A. 246, 38 Atl. 980.

The measure of damages is the value of the property destroyed.

15 Cyc. 254, notes, 21, 22; Iowa Apartment House Co. v. Herschel, 36 App. D. C. 457; Railton v. Taylor, 20 R. I. 283, 39 L.R.A. 246, 38 Atl. 980; 12 Am. & Eng. Enc. Law, 687.

Robb, J., delivered the opinion of the court:

This is an appeal from a judgment for the plaintiff, appellee, here, in the supreme court of the District in an action for the recovery of damages to furniture and household articles alleged to have been occasioned by defendant's negligence in failing to repair a steam radiator in one of the several apartments in the defendant's apartment house. "The Newry," which apartment plaintiff was occupying under a written lease.

On November 29, 1909, plaintiff, accompanied by defendant's agent, Mr. Walshe, examined apartment No. 43 in question with the object of renting it. Seeing radiators in the apartment, he inquired of Mr. Walshe if "it would be steam heat or hot water." Mr. Walshe said "steam heat," whereupon plaintiff signed the lease. An exception was noted by the defendant to the admission of this conversation, on the ground that it tended to contradict, alter, or change the terms of the lease.

The lease by its terms covered "Apartment No. 43, The Newry," without further description. Under one of the covenants plaintiff agreed to pay the water rent and gas bills. The instrument was entirely silent on the subject of heating.

It further appeared that the apartment had been heated by the defendant's agent in pursuance of said understanding, and that no other way was provided by which it could have been heated. The plaintiff testified

that on the day he moved into the apartment "he noticed a little leakage in the radiator; that the leakage was just a little dripping which would amount to about a gill in twenty-four hours; that he put a saucepan under it to catch it, and that as soon as he noticed the leak he asked the janitor to come up and look at it; stating to him that possibly the joints needed tightening;" that the janitor looked at the radiator and promised to notify Mr. Walshe; that the defect continued, a little more water leaking out every day; that the janitor was repeatedly notified, and the agent Mr. Walshe, was also notified; that on Friday night of the last of the year plaintiff and his wife closed the apartment for the purpose of spending New Year's Day with relatives in Virginia; that, before leaving, plaintiff "went around and turned off every radiator, but not entirely off, because he did not wish the apartment to get chilled before they returned; that he left the saucepan under the leak; that when they returned to their apartment New Year's (Sunday) night, about 8 o'clock, it was much dilapidated" by reason of the bursting or cracking of one of the cast-iron sections of the radiator and the consequent escape of steam into the apartment; in other words, the leak which had theretofore existed had suddenly developed into a crack about 4 inches long. The plaintiff did not know the nature of the trouble until it was pointed out to him by the steamfitter when the radiator was repaired. Plaintiff, under cross-examination, stated that he did not try to get anyone else to repair the defect in the radiator, because he had been instructed by the defendant's agents to notify them of such defects.

The janitor of the building, testifying for the plaintiff, stated "that the apartment house was heated by a steam-heating plant constructed in the building; that he was employed by Mr. Walshe, and had full charge and management of the heating plant; that it was his duty to look after the whole building and to report any complaints to Mr. Walshe; that he went around to all the apartments every day and gave the tenants instructions about working the radiators; that Mr. Grubb notified him of the trouble with the radiator in his apartment several times, and that he always notified Mr. Walshe, and that Walshe said he would have it fixed." The witness said he had no key to plaintiff's apartment.

The steamfitter who examined the radiator after it was removed, testifying for the defendant, said that the crack in the radiator, while about 4 inches long, was scarcely wide enough to admit the entry of a razor blade. Mr. Walshe, in his testimony in behalf of the defendant, said nothing about

not having a pass-key to the various apartments of the house.

The defendant, at the close of all the evidence, moved for a directed verdict, on the ground: First, that there was no express or implied agreement as to repairs to the radiator; second, that no negligence had been shown on the part of the defendant; and, third, that contributory negligence, as matter of law, had been shown on the part of the plaintiff. The motion was overruled and exception noted.

The defendant further excepted to the granting of one of plaintiff's prayers on the question of damages, through which the jury was permitted to consider the amount shown by the evidence to have been expended by the plaintiff in repairing the household articles injured by the bursting of the radiator, the defendant contending that the measure of damages was either the cost of repair of the radiator, or the value of the premises with the defective radiator therein.

The pivotal question in this case is whether there existed any liability on the part of the landlord to repair the defective radiator. As was said in *Iowa Apartment House Co. v. Herschel*, 36 App. D. C. 457, we "are not dealing with an ordinary tenancy. The tenancy here relates to an apartment house,—a class of tenancy of comparatively recent origin, and one which, in some respects at least, is to be distinguished from other classes."

It is a matter of common knowledge and observation that to quite an extent this class of tenancy in the larger cities has displaced the old. Instead of a tenement complete in itself and having its own heating facilities, the modern apartment house may contain anywhere from a dozen to a hundred or more so-called apartments, all heated from a main plant operated and exclusively controlled by the landlord. In all the larger houses the landlord also operates and maintains an elevator system for the general accommodation of the occupants of the house. He controls and keeps in repair common hallways and entrances. In short, the tenant has possession of nothing more than the rooms of his apartment, the landlord controlling everything else. Leases are of course entered into in the light of this common practice and understanding, and while their positive stipulations are absolutely controlling, parol testimony may be introduced when it is apparent that the written instrument does not express the whole agreement of the parties. *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011; *Lillard v. Kentucky Distilleries & Warehouse Co.* 67 C. C. A. 74, 134 Fed. 168.

In the light of the foregoing observations, 37 L.R.A. (N.S.)

was to error to admit the testimony as to the conversation preceding the signing of the lease? The lease, as we have seen, is entirely silent on the subject of heating. It is equally silent as to what constituted "Apartment No. 43." The evidence showed that this apartment was provided with steam radiators and with no other heating means; that these radiators were part of the steam-heating plant constructed in the building, and over which the defendant retained exclusive control. That the radiators were in the apartment for practical, and not ornamental, purposes is apparent, for the evidence shows that heat was supplied through that means. Supposing nothing whatever had been said concerning heat, could it have been successfully contended, in view of the circumstances just detailed, that the plaintiff would have been without redress had the defendant neglected or refused, after the commencement of the tenancy, to heat the apartment? We think not. There is nothing in the lease concerning elevator service, nor is there anything therein concerning the duty of the defendant in respect to the halls and entrances to the building, and yet, under the decisions, all these things were implied incidents of the tenancy. Thus in *Sawyer v. McGillicuddy*, 81 Me. 318, 3 L.R.A. 458, 10 Am. St. Rep. 260, 17 Atl. 124, the defendant was the owner of a building on the second floor of which were several tenements occupied by different tenants and having a common stairway. It was held that the defendant, in the absence of an express agreement to the contrary, was charged with the duty of caring for and maintaining this stairway. In *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346, a tenement building was leased to different tenants under leases requiring them to make repairs. It was held that inasmuch as the possession of the roof was in the owners, they were under obligation to repair it. So, in *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, it was held that a landlord who lets rooms in a building to different tenants, with a right of way in common over a staircase, is bound to use unreasonable care in keeping such staircase in repair. The court, after stating the general rule that a tenant takes the premises as they are, said: "But this rule applies only to premises which, by the terms of the lease, have passed out of the control of the landlord into the exclusive possession of the tenant."

Had this suit grown out of a failure on the part of the defendant in respect to an implied covenant regarding hallways or elevators, parol evidence would have been admissible not to vary the terms of the lease, but to annex an incident. We think such evidence clearly admissible for the purpose

of proving what was really covered by the terms of the lease.

Under the authority of the Iowa Apartment House case, *supra*, the obligation to furnish steam heat carried with it the duty of providing and maintaining means for the proper fulfilment of that obligation. The implied covenant to keep this heating system in repair carries with it the right on the part of the landlord to enter the premises at reasonable times for the purpose of fulfilling that obligation. Such a control of the premises on the part of the landlord is not inconsistent with the possession of the tenant as the owner of the particular estate during the tenancy. *Miles v. Janvrin*, 200 Mass. 514, 86 N. E. 928.

It is next contended that the plaintiff was guilty of contributory negligence as matter of law. In the first place, the plaintiff was not a steamfitter, and, in the second place, there is no evidence in the record that anyone not possessing some knowledge of such matters would have had reason to anticipate the sudden enlargement of the defect in the radiator. The plaintiff himself testified that he saw no crack until after the radiator was taken out, and did not, until that time, know the nature of the defect. He repeatedly directed the attention of the defendant's agent to the leaky condition of the radiator, and they promised to have it repaired. Defendant's janitor, who was in charge of the entire heating system, and presumably much more familiar with radiators and their defects than the plaintiff, did not even suggest the imminence of a greater break, or the necessity completely to turn off the steam. For a whole month the precautionary measures taken by the plaintiff had been sufficient. He was to be away for two days only. While the evidence shows the janitor had no key to the apartment, it does not show that the agent did not have one. It does not even appear that the plaintiff knew that the janitor was without a pass-key, but, aside from that, we do not think the conduct of the plaintiff, in the circumstances, was such that reasonable men would be bound to say he was negligent. The question was carefully submitted to the jury under a prayer prepared by the defendant. This was all the defendant could ask.

The next and last question relates to the measure of damages. There was ample evidence before the jury from which it might have found that the defendant, through his agents, had reason to believe that the defect in the radiator, if not repaired, would be likely to produce the results of which the plaintiff complains. Having exclusive control of the heating system, it was incumbent upon the defendant to exercise due care in maintaining that system and keeping it in

repair. What would constitute negligence on the part of the agent charged with the immediate control and supervision of this system might not, for the reasons previously suggested, constitute contributory negligence on the part of a tenant. The failure of the defendant, after knowledge of the defect, to repair it, coupled with knowledge of the consequences reasonably likely to ensue, constituted negligence, and rendered the defendant liable for the damages immediately resulting from such negligence.

The case relied upon by the defendant, *Thompson v. Clemens*, 96 Md. 196, 60 L.R.A. 580, 53 Atl. 919, is not in point. That was an action for personal injuries growing out of an alleged failure on the part of a landlord to make certain general repairs of premises under the exclusive control of the tenant. The damages in such a case are much more remote and consequential. The court, however, ruled that a landlord "may, under some circumstances, be liable for damages for personal injuries by reason of a negligent failure to make repairs." In Massachusetts it has been held that there can be no recovery for personal injuries against a landlord, even for negligent failure to make repairs, unless the landlord has assumed the duty of looking after the condition of the premises and providing for their safety for the protection of the tenant. *Miles v. Janvrin*, 196 Mass. 431, 13 L.R.A. (N.S.) 378, 124 Am. St. Rep. 575, 82 N. E. 708.

The plaintiff in the case under consideration is not seeking damages for personal injuries growing out of the failure of the landlord to make general repairs, but is asking to be reimbursed for the actual damages suffered as the immediate consequence of defendant's negligence in failing to repair an instrumentality under the exclusive control of the landlord.

Judgment affirmed, with costs.

#### NORTH DAKOTA SUPREME COURT.

T. F. RUSSELL, Resp't.,

v.

OLAF A. OLSON, Appt.

(— N. D. —, 133 N. W. 1030.)

Appeal — review of facts — motion for new trial.

1. Questions of fact cannot be reviewed on appeal from a judgment in any action

Headnotes by POLLOCK, Sp. J.

*Note. — Eviction of tenant by failure to furnish heat.*

It may be stated as the broad general rule that the failure of a landlord to furnish



time they made the contract, as the probable result of the breach of it. While profits may be considered in proper cases in estimating damages, proof of them must be of a high character, and not such that the jury are left to speculate or guess what, in fact, they are or would be.

**Same — special — right to consider.**

7. The jury awarded \$593.75 special damages. Special damages must be alleged and proven. No testimony in this action appeared warranting such a finding; hence it was error for the court to submit that question to the jury.

(June 22, 1911.)

**A** PPEAL by defendant from a judgment of the District Court for Ward County in plaintiff's favor in an action brought to recover damages alleged to have been caused

nished, although so inadequate as to have warranted abandonment, as abandonment or surrender of possession in an essential element of constructive eviction. *Jackson v. Paterno*, 58 Misc. 201, 108 N. Y. Supp. 1073, affirmed in 128 App. Div. 474, 112 N. Y. Supp. 924; *Siebold v. Heyman*, 120 N. Y. Supp. 105. And to constitute constructive eviction the abandonment must be complete. *Merida Realty Co. v. Coffin*, 123 N. Y. Supp. 120.

And the deprivation of heat must be continued at the time of the abandonment in order to work a constructive eviction. Thus, in *Ryan v. Jones*, 2 Misc. 65, 20 N. Y. Supp. 842, the court accepted the rule that a failure of the landlord to furnish an adequate supply of heat, as he had impliedly covenanted to do, substantially deprived the tenant of the beneficial enjoyment of the premises, sufficient to warrant abandonment and interposition of a defense of constructive eviction in an action to recover rent, but held that the defense was not established, as the wrongful deprivation of heat had ceased at the time of the actual abandonment. And in *Siebold v. Heyman*, 120 N. Y. Supp. 105, it was held that the surrender must be made within a reasonable time after the accrual of the right to surrender the premises for failure to supply heat, unless there has been a waiver by the landlord of his right to take advantage of the tenant's failure to surrender the premises within a reasonable time. See also *Jackson v. Paterno*, as set out *supra*.

In case of a prompt compliance with the notification of inadequacy of heat, temporary inconvenience must be borne by the tenant, but he is not bound to attempt to keep the apartment warm by the use of lamps and gas stoves during a protracted discontinuance of steam heat called for by his lease. See *O'Gorman v. Harby*, 18 Misc. 228, 41 N. Y. Supp. 522, as quoted in *RUSSELL v. OLSON*. And in *Merida Realty Co. v. Coffin*, 123 N. Y. Supp. 120, it was held that the landlord has a right to a reason-  
37 L.R.A.(N.S.)

by defendant's failure to building in accordance w lease. Reversed.

The facts are stated in  
Messrs. Palda, Aaker,  
so, for appellant:

Loss of profits is not  
of damage in this case.

3 Sutherland, Damages  
870.

Loss on furniture is not a plaintiff, because not a reasonably be expected to of defendant's contract.

13 Cyc. 3, ¶ 3.

The fact that plaintiff to recover damages does defendant from recovering way of counterclaim, any may have sustained throu

able opportunity to rectify  
ing apparatus when notified  
in the heat, and that in  
compliance no eviction can  
the temporary inconvenience.  
And that the tenant would  
in vacating premises because  
particular occasion he was  
beneficial enjoyment by re  
of heat resulting from an  
or commission on the part  
see *Berlinger v. Macdonald*  
522. And when the landl  
of inadequacy of heat, pr  
take steps to obviate the  
putting in larger radiators  
prevents, in the absence of  
larger radiators would be  
tenant is not relieved from  
of his contract. *Merida R*  
fin, 123 N. Y. Supp. 120. S  
tender by payment of rent  
continuance of inadequacy  
his right to abandonment.

In a few instances the evidence held insufficient to show an implied warranty in *Martens v. Sloane*, 132 N. Y. Supp. 512, where the tenant was no proof that the rooms were arranged so as to be heated by the landlord, but that the radiators of imperfect construction in the apartment rooms were cold in winter. The tenant complained thereof, but the effect only of showing an unexplained reason for the tenant's complaint was not to maintain the tenancy comfortable, and not constructive eviction. *And Proby*, 130 Ill. App. 571, where the sickness of two of the tenants with colds, the cause of which was shown although it was as a result of lack of heat during the winter, is insufficient to constitute a breach of the lease under a lease wherein the landlord is to provide heat.

wrong, provided it grows out of the same contract or transaction.

*Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133.

Mr. F. B. Lambert, for respondent:

Loss of profits may be recovered.

3 *Sutherland, Damages*, 3d ed. § 868, p. 2595; *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858, 32 N. W. 38; 3 *Sutherland, Damages*, 3d ed. pp. 2597, 2612; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 64.

The loss on the furniture was a direct and natural consequence of defendant's breach of contract, which was recoverable by plaintiff.

3 *Sutherland, Damages*, 3d ed. § 865; *Pratt v. Paine*, 119 Mass. 439; *Hall v. Horton*, 79 Iowa, 352, 44 N. W. 560.

Plaintiff having been wrongfully evicted, this of itself terminated the lease and gave him the right of action alleged in the complaint.

*Filkins v. Steele*, 124 Iowa, 742, 100 N. W. 851; *Piper v. Fletcher*, 115 Iowa, 263, 88 N. W. 380; 24 Cyc. 1153; *Rea v. Algren*, 104 Minn. 316, 124 Am. St. Rep. 627, 116 N. W. 580; *Viehman v. Boelter*, 105 Minn. 60, 116 N. W. 1023.

The cause of action must exist and be one upon which a right of action had accrued at the commencement of the action.

nanted to furnish heat, which will justify a removal several months later, under the rule that "actions of the landlord which will sustain a constructive eviction must be of a grave and permanent character, and done with the intention of depriving the tenant of the full enjoyment of the premises in an important, and not a trivial, matter. It must consist of an invasion of a material character, tending to make further occupation attendant with serious consequences or continuing discomfort."

And the question has been held to be one for the jury. Thus, in *Butler v. Newhouse*, 85 N. Y. Supp. 373, in holding that constructive eviction from an apartment, caused by an insufficient supply of heat which rendered the premises uninhabitable, is a good defense to an action for rent, the court said that the issue of constructive eviction, which was supported by evidence that during the month of October the apartment was insufficiently heated, or not heated at all, that defendant had repeatedly complained but without effect, and that as a result he was obliged to remove from the premises on October 29th, should have been left to the jury, and the court could not say as matter of law that constructive eviction had not been established, although there was evidence which in a measure injured the tenant's case, which was said "not to have been particularly strong." In connection with this case, see also *Graham v. Grape Capsule Co.* 61 Misc. 87, 113 N. Y. Supp. 103. 37 L.R.A. (N.S.)

*Orton v. Noonan*, 29 Wis. 541; *Oswald v. Moran*, 8 N. D. 113, 77 N. W. 281; *McGuire v. Edsall*, 14 Mont. 359, 36 Pac. 453; *Taylor, Land & T.* 8th ed. § 677; *Walker v. McKay*, 2 Met. (Ky.) 294; *Scott v. Jones*, 1 Brock, 244, Fed. Cas. No. 12,536; *Howze v. Davis*, 76 Ala. 381; *Meyer v. Temme*, 72 Ill. 574; *Martin v. Kunzmueller*, 37 N. Y. 396; *Gannon v. Dougherty*, 41 Cal. 661; *Paige v. Carter*, 64 Cal. 489, 2 Pac. 260; *Fergus Printing & Pub. Co. v. Otter Tail County*, 60 Minn. 212, 62 N. W. 272; *Pate v. Gray*, *Hempst.* 155, Fed. Cas. No. 10,794a; *Trafford v. Hall*, 7 R. I. 104, 82 Am. Dec. 589; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 117; *Barnstable Sav. Bank v. Snow*, 128 Mass. 513; *Cragin v. Lovell*, 88 N. Y. 258; *Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599.

*Pollock*, Special Judge, delivered the opinion of the court:

The defendant rented to plaintiff a certain hotel in the city of Minot. One of the clauses in the contract reads as follows: "The party of the first part (Olson) agrees, during the continuance of this lease, to furnish the heat for the proper heating of the same, from the 1st day of October to the succeeding 1st day of May during each year,

In the following cases the question of heating was involved but in connection with other elements which were treated jointly with it: Thus, in *Trenkmann v. Schneider*, 26 Misc. 695, 56 N. Y. Supp. 770, it was held that proof of a failure to furnish "so much heat as shall at all times be required" in a certain business, together with a failure to supply a uniform power, although sometimes more than the full amount of power called for by the lease was furnished, the business requiring a uniform power, established eviction upon surrender of the premises. And in *November v. Wilson*, 49 Misc. 533, 97 N. Y. Supp. 989, allegations that an apartment was rendered untenable, unsafe, and unfit for occupation by reason of dampness, leakage of water, cold, lack of protection, and negligence and insufficient management of the boilers, were held to set up the defense of constructive eviction; and it was said that if any of the acts charged which were within the control of the landlord were proven to have been done or permitted by him with the result alleged, it would show constructive eviction, the tenant having vacated the premises because thereof.

A number of cases have passed upon the right of a tenant to vacate or abandon the leased premises, and where the tenant has been held justified, the decisions amount to a holding that the tenant was constructively evicted, since constructive eviction, according to the general rule, is a deprivation by

from the date hereof." The action is for damages for violation of this condition of the lease. Plaintiff alleges that under the lease he entered upon said premises October 1, 1905, and remained there until October 30, 1906, when he was evicted by reason of the failure of the defendant to furnish heat for said premises. The written lease made by the parties was for and during the term of five years from October 1, 1905. The damages claimed were: First, for \$100 per month from October 1, 1905, to May 1, 1906, \$700 in all; second, \$1,000 per year from October 30, 1906, for the remaining four years' term of the lease, total \$4,000; third, because he had bought certain furniture especially fitted for the building, and paid therefor \$2,000, and which, when moved from the said building, had no value in excess of \$500, and on that cause of action claims \$1,000 damages. Defendant entered a general denial, except that he admitted making the lease as alleged by plaintiff, and then set forth a counterclaim for damages: First, for putting in partitions and injuring the floors, \$100; second, abandoning the place without cause, damage \$4,800, being the rental of said premises for the unexpired term; third, taking away the keys of the building, \$50; fourth, leaving the premises in a dirty and filthy condition, \$75,—making a

total of \$5,025. A general counterclaim was set for. The cause was tried before a jury, and during the trial the plaintiff was permitted to amend his complaint by adding thereto "That said furniture and fixtures were especially adapted to said building and especially useful to the plaintiff's eviction from the premises above alleged there was no other rooms in which to place the same and the same were of no value in excess of the sum of \$500, and the defendant sustained loss on said furniture by reason of the foregoing \$1,000." At the close of the trial the plaintiff moved for a directed verdict, only leveled at plaintiff's dict, but also asked for a verdict in favor of the defendant. The motion was overruled, properly excepted to. The jury returned a verdict in favor of the plaintiff for \$865.75, and the verdict was affirmed. The same was arrived at as to plaintiff on hotel claim, and as to plaintiff on furniture claim. As against which the defendant moved for a directed verdict. For loss of keys, condition of the premises, and for the cost of the premises. Thereafter, certain exce

the acts of the landlord, either in whole or in part, of the beneficial use and enjoyment of the demised premises, accompanied by removal of the tenant because of such deprivation. For this reason the following cases, which do not treat the question expressly as one of eviction, have been included: Thus, in *O'Gorman v. Harby*, 18 Misc. 228, 41 N. Y. Supp. 522 (quoted in *RUSSELL v. OLSON*), it was held that where, owing either to faulty construction, accident, or mismanagement, an apartment was so cold during the month of December and in January until after the tenant moved out, as to interrupt the beneficial use and render the apartment untenable, such removal was justified. And in *Filkins v. Steele*, 124 Iowa, 742, 100 N. W. 851, failure to furnish heat in breach of a covenant to do so, after demand for compliance, was held to warrant vacation of the premises by the tenant without formal notice to the landlord. And in *Harmony Co. v. Rauch*, 64 Ill. App. 386, where the lessor had expressly covenanted to furnish heat, it was held that failure to do so, even if because of accident or inability, justified abandonment.

But, although failure to furnish heat may, under certain circumstances, constitute constructive eviction, it has been held that the failure of a landlord to fulfill his duty implied from a covenant of quiet enjoyment to supply heat to an apartment, the means of supplying which are exclusively under his

control, does not constitute an eviction, as it cannot be held that the tenant was not furnished with heat, as his landlord was under no obligation to furnish heat, and the tenant has been physically injured by the premises which he occupies. *Jackson v. Paterno*, 58 Misc. 228, 41 N. Y. Supp. 1073, affirmed in 121 N. Y. Supp. 924.

Aside from *RUSSELL v. OLSON*, the case seems to have passed on the question of the amount or kind of damage resulting from failure to furnish heat, and that is *O'Gorman v. Harby*, 18 Misc. 228, 41 N. Y. Supp. 522. It was held that a tenant for a term of years could maintain a counterclaim against the landlord for the value of the premises at which he lost through the failure to furnish heat.

As to eviction of tenant or interference with enjoyment, see *McCall v. New York L.R.A. (N.S.)* 38.

For a discussion of the question of the duty and liability of a landlord to heat apartments as to heating, see *Olson v. Grubb*, ante, 1213.

As to the landlord's breach of duty to repair or make improvement for abandonment of the premises, see *Partridge v. D. (N.S.)* 984.

to the charge, in the following language only: "Comes now the defendant in the above-entitled action and excepts to the following provisions of the charge of the court, given to the jury in the above-entitled action, covering pages 7 to 16, inclusive, and reading as follows, to wit: . . ." Then follows the paragraphs of the charge excepted to. No grounds for the exception were mentioned. Judgment was thereafter entered in favor of the plaintiff for the sum of \$865.75. From the judgment defendant appeals. In the statement of the case are found sixty-seven specifications of error, mostly with reference to the admission of testimony, and directly attacking its character as a proper mode of proving the damages claimed. No motion for a new trial was made, so that the matter comes before this court only to review the errors of law occurring at the trial.

1. Questions of fact cannot be reviewed by this court on appeal from a judgment in any action tried by a jury, unless a motion for a new trial was made in the court below. Rev. Codes, 1905, § 7226; *McNab v. Northern P. R. Co.* 12 N. D. 568, 98 N. W. 353.

In justice to the learned judge who tried this case, it is only fair to suggest that if counsel had made a motion for a new trial, and thus given the court below a chance to review the entire record, it is safe to say that the expense of an appeal would have been saved. The writer hereof, through long experience as a trial court, well knows the difficulties attendant upon a trial where, as shown by the record herein, more care should have been given to the preparation of the pleadings, and the elimination of all those items, on both sides, which serious reflection would have shown could not have been allowed. While constant demand upon a busy practitioner's time will often excuse lack of the most careful preparation for the actual trial of a case, it will not justify the trouble and expense incident to an appeal, without first calling upon the court below to correct any errors which occurred at the trial.

2. The exceptions taken to the charge in this case cannot be considered. They should have pointed out some definite or specific defect in the character of the instructions given. Counsel should, by his objection, lay his finger on the precise point, or upon the precise request refused, or alleged error of the court. *St. Croix Lumber Co. v. Pennington* (1882) 2 Dak. 467, 11 N. W. 497.

3. There was competent evidence given both pro and con upon the question of whether the defendant had violated his contract with reference to the heat, and we 37 L.R.A.(N.S.)

cannot, in the absence of a motion for a new trial, pass upon the sufficiency of this evidence to warrant the finding that the defendant had failed to comply with the full terms of the contract in relation thereto, and must proceed, therefore, in the further examination of the case, assuming that the defendant had violated his contract.

4. Certain questions were asked, during the time of the trial, by counsel for the plaintiff, by which he sought to establish the amount of damages alleged to have been sustained during the time that he remained in the hotel; likewise questions attempting to prove the damages to the furniture as alleged in the amended paragraph of the complaint. To most all of these questions the defendant interposed the objection that the same were incompetent, irrelevant, and immaterial, not constituting a proper measure of damages, and, in many cases, that the plaintiff was not competent to answer the question asked. Defendant further claims that an error was committed in refusing to grant the motion of defendant for a verdict. These alleged errors of law occurring at the trial are properly before us in the statement of the case, and must receive consideration at our hands.

5. Did the failure of defendant to furnish the heat according to his contract constitute in law a constructive eviction of plaintiff from the premises? Assuming, as we must in this case, that defendant was at fault in failing to furnish the heat contemplated in the contract, plaintiff was clearly within his rights, under subparagraph 1, § 5523, Rev. Codes, 1905, in terminating the same. "The hirer of a thing may terminate the hiring before the end of the term agreed upon: 1. When the latter does not, within a reasonable time after request, fulfil his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it in a good condition, or repairing." There was competent evidence that the plaintiff requested the defendant to furnish a proper amount of heat; that the same was not so furnished within a reasonable time. The jury having passed upon the sufficiency of such evidence, that question is settled against the defendant.

In view of the fact that the selling of heat has become an important industry under modern methods, the rights of parties growing out of contracts to furnish heat take an unusual importance. The plaintiff in this instance had no more control over the source of supply than as though the heat was to come from a central plant, blocks away, and not, as it did, from the cellar beneath the rented building. We are not dealing with a question of repairs.



There is no intimation that there were neither proper pipes nor a lack of radiation. It was simply a failure on the part of defendant, who was in sole control of the heating plant, to use fuel and keep present a sufficient amount of steam to warm the rooms.

An apartment-house contract was under discussion in the case of *O'Gorman v. Harby*, 18 Misc. 228, 41 N. Y. Supp. 521, where the landlord failed to supply a sufficient amount of heat. The court says: "The facts of the case do warrant us, however, in saying that in matters of repairing and remedying defects, as between the landlord and the lessee of rooms in an apartment house, a reasonable rule prevails. If, after notice, the landlord proceeds with proper diligence to do what is necessary, he is allowed a reasonable time to remedy the defect. If the tenant waits a reasonable time for him to do the work, and it is not done, he may remove from the premises if he has been and is deprived of the beneficial use and enjoyment of them. . . . The tenant attempted to keep warm by the use of lamps and gas logs in his apartment; but it cannot be held that he was bound to do this during a protracted discontinuance of the steam heat which his lease calls for. In the case of a prompt compliance with notification of defect in the heating apparatus, temporary inconvenience must be suffered by the tenant, under a reasonable construction of the relations between the parties. But in this case the facts established that an unreasonable infliction was imposed upon him, and his abandonment of the premises was justified."

Again, the supreme court of New York, in *Siebold v. Heyman*, 120 N. Y. Supp. 105, says: "There can be no doubt that the failure of a landlord to supply sufficient heat to an apartment used as a dwelling and fitted with apparatus for that purpose, over which the landlord has control, constitutes a constructive eviction if the tenant so elects and moves out. *Butler v. Newhouse*, 85 N. Y. Supp. 373. It is only by removal that the tenant can make his election."

Our sister state, South Dakota, in *Edmison v. Lowry*, 3 S. D. at page 85, 17 L.R.A. 275, 44 Am. St. Rep. 774, 52 N. W. 585, uses the following language: "In a case like the present, the technical rule which requires the element either of absolute expulsion from the property by the landlord, or abandonment by the tenant, to be included in the act of eviction, does not and ought not to be applied. A party should be held evicted when the act of the landlord is of such a character as to deprive the tenant, or has the effect of depriving

him, of the beneficial use of the whole or any part of the property to the extent he is entitled to."

In *Hoeveler v. Fleming*, the supreme court of Pennsylvania modern doctrine as to constructive eviction is that actual eviction is not necessary, but any interference with the tenants beneficial enjoyment of the premises will amount to a constructive eviction in law."

An exhaustive note collected from different states, in the case of *Wade v. Hill*, in volume 7, Ann. Cas. 511, 1509 ed. cited.

Based upon our authorities, which clearly appear that the plaintiff worked a constructive eviction by breaking his contract, and being entitled to any damages for the interference with the enjoyment of the premises. The ages as asked by defendant would appear to indicate that the plaintiff drew his claim for \$400 on the reason of plaintiff having been evicted from the premises; but, because the plaintiff failed to show this point clearly, we cannot say that the plaintiff is entitled to express our view which must obtain in a similar kind. Nor was there any basis upon which the court could have granted a motion in favor of the plaintiff for the \$135 claimed, an inquiry, therefore, must be made as to the part of the motion which was rejected by the verdict because the plaintiff wholly failed to establish his case.

6. To determine this case, we are led to inquire: What is the measure of plaintiff's damages, and what evidence offered upon the trial for the plaintiff could be considered in the examination of the contract? The parties shows it to be a question of the measure of damages to this action might be determined by a contract a rule, if they had provided it was lawful; They are therefore relegated to the measure of damages prescribed by the law in this case upon this subject. *Hayes v. Cooley*, 13 N. D. 250. This was an action claiming that the court below had applied the wrong rule for the measure of damages. At page 207 of the opinion, Young, speaking for the court, says: "The entire subject of damages for breach of contract or breach of contract."

rule (§ 6563, Rev. Codes, 1905) neither restricts nor enlarges the actual rule which has been recognized and applied both in England and this country, and in substance quoting from the opinion: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

*Adair v. Bogle*, 20 Iowa, 238, is a leading case upon the subject. Judge Dillon, at page 243, discussing the subject, says: "It is also settled that, in such an action against the landlord for damages, the general rule for the measure thereof is the difference between the rent reserved and the value of the premises for the term. If the value of the premises for the term is no greater than the rent which the tenant has agreed to pay, then the latter is not substantially injured, and can, in general, recover only nominal damages, though the landlord, without just cause, refuses to give possession. But if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts.

. . . It often happens that courts and juries are often perplexed in determining questions relating to the measure of damages, and, notwithstanding general rules may and should be laid down to the jury, must still be left to their sound judgment and sense of justice and right. Two principles should, in cases like the present, be impressed upon juries: First, the plaintiff should recover only such damages as have directly and necessarily been occasioned by the defendant's wrongful act or default; and, second, that if the plaintiff, by reasonable exertions or care on his part, could have prevented such damages, he is bound to do so, and, so far as he could have thus prevented them, he cannot recover therefor.

. . . The injured party is entitled to recover only such sum as will make him whole. This he is entitled to recover, so far as his injury has been the direct or natural result of the wrongful act of the other party. . . . We have said above that in general, or ordinarily, the plaintiff, in such an action as the present, recovers the difference between the value of the use of the premises and the rent reserved. But he is not in all cases confined to this, as where, in addition, he has sustained a particular

loss. If other damages have resulted as the direct and necessary or natural consequence of the defendant's breach of the contract, these are recoverable, certainly where, as in this case, they are specially set forth."

We find the general rule stated in 3 Sutherland, *Damages*, 3d ed. p. 2578, as follows: "On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages."

Upon the first cause of action the jury awarded to the plaintiff the sum of \$350. The defendant says, by virtue of his motion, as a matter of law, there was no competent proof in the record which would sustain any such findings. The following, taken from the record, is believed to contain all the testimony in the case upon that question: "I have been in the hotel business in different towns for about twelve years, and know what the profits are in the hotel business. Minot is a good hotel town. I have been in the hotel business in Minot since I left this building. Took possession of Morrill's Hotel May 1, 1907. I was able to keep filled, from October 1, 1905, to May 1, 1906, under the conditions expressed as to heat, on the average, twenty-five rooms, which would leave seven empty during the winter. Have been a hotel man both before and after the making of this lease, since I have left the place. I know something about the hotel business so far as seasons are concerned, and know Minot particularly. I think a rooming proposition, when a building is heated by steam, is better in winter than in summer, if it is properly heated. When not properly heated during the winter season, the effect is that it naturally makes it harder to get people back once they leave a house, and will interfere to quite an extent with summer business. I used the building in the summer of 1906, kept the rooms full in the summer time, and I might add a little to that: perhaps would not be the condition of affairs later on, because when you drive people away you can't get them back, and the consequences are, if I stay there long enough, I wouldn't have any roomers. I rented these rooms at \$3.50 to \$5 a week. I took possession of the building October 1, 1905, and remained there one year and one month, leaving the building on the 31st day of October, 1906. I left it because it was too cold. In the month of October, 1906, a number of roomers moved out on account of its being too cold. When I left I had about half the rooms in the house occupied. I tried in good faith to keep it occupied and keep people there. During the summer time the profits per month in my business, over



Assignment of judgment as affecting attorneys' lien thereon	220	Refunding bonds as indebtedness within meaning of debt limit provisions	1099
<b>Automobiles.</b>		<b>Bonus.</b>	
Validity of excise or license tax on	440	Trustee's right to retain bonus received from third person	923
Power to prescribe qualifications of chauffeurs	303	<b>Buildings.</b>	
Liability of manufacturer or dealer for personal injuries caused by defects in automobile	560	Who may enforce restrictive covenant or agreement as to	12
Liability of owner for injuries caused by automobile while being used by a servant or a third person for his own business or pleasure	834	Right of life tenant to timber for	765
<b>Bail.</b>		<b>Candidates.</b>	
Right to release on bail pending appeal under a general statute	693	Validity of agreement made in consideration of withdrawal of candidacy for office	289
<b>Ballots.</b>		<b>Carriers.</b>	
See ELECTIONS.		Duty of carrier as to route	222
<b>Banks.</b>		Liability of carrier for injury resulting from negligent or meddlesome act of fellow passenger	724
Right of bank to impeach sources of deposit as against holder of check drawn against the same	1186	Duty upon running train past station to notify passengers of intention to return	264
Applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character is appended to his name	409	Liability of railroad company for injury to person wrongfully on train by collusion with a train employee	419
<b>Barriers.</b>		Validity of stipulation in pass limiting carrier's liability	235
In highway, see HIGHWAYS.		Right of owner of baggage to testify as to its value in action for its loss	583
<b>Beneficiaries.</b>		Contributory negligence of passenger where train is run past station	266
Of insurance policy, see INSURANCE.		Passing from one car to another of a moving train as contributory negligence	518
<b>Benefit societies.</b>		<b>Cemeteries.</b>	
Matters as to insurance, see INSURANCE.		Public character of charitable bequest for	997
<b>Bequests.</b>		<b>Certainty.</b>	
See WILLS.		Of purpose of general bequest for charity or religion	1001
<b>Bills and notes.</b>		<b>Character.</b>	
Right of one advancing money to pay purchase money note to be subrogated to vendor's lien	1207	Right of jurors to act on their own knowledge as to character of accused	797
Right of accommodation party who is obliged to pay bill or note, to recover from the accommodated party	783	<b>Charities.</b>	
Conclusiveness of judgment as between plaintiff and one not a party nor privy who voluntarily conducted defense in action upon note	965	Creation of charitable trusts by precatory words in will	646
Necessity of demand and protest to enable accommodation indorser who has been obliged to pay bill or note to recover from accommodated maker	785	Enforcement of general bequest for charity or religion	993
<b>Blank.</b>		<b>Chattel mortgage.</b>	
Effect of deed executed with name of grantee blank where grantee's name is filled in and deed delivered contrary to grantor's authorization	326	Mortgage of receipts or property as indebtedness within meaning of debt limit provision	1065
<b>Bond.</b>		Right of seller of chattel retaining title thereto or a lien thereon as against existing mortgagees of the realty to which it is affixed by the owner	119
Of executor, see EXECUTORS AND ADMINISTRATORS.		Right of seller of chattel who takes a chattel mortgage as against existing mortgagees of the realty to which it is affixed by the owner	123
Liability of bondsmen of peace officer for acts of latter in respect of property taken from prisoner	873	<b>Chauffeur.</b>	
37 L.R.A. (N.S.)		Power to prescribe qualifications of	303

**Costs.**

- Right of accommodation party who is obliged to pay bill or note to recover costs from accommodated party 788

**Cotenancy.**

- Right of former cotenant to acquire title in his own right through or under a purchaser at a sale under a title or interest paramount to the common title 831

**Counterclaim.**

- See SET-OFF AND COUNTERCLAIM.

**Counties.**

- Creation of indebtedness within meaning of debt limit provision 1058

**Courts.**

- Removal of cause from state to Federal court 392  
 Notice of distribution in probate proceedings as jurisdictional 368  
 Right of representative of decedent's estate to interplead claimants as affected by exclusiveness of surrogate's jurisdiction 986  
 The effect of a counterclaim in an amount in excess of jurisdiction 606

**Covenants and conditions.**

- Who may enforce restrictive covenant or agreement as to use of property 12  
 Right of grantee to enforce restrictive covenants in prior conveyances by his grantor of other parcels 623

**Criminal law.**

- Good faith as affecting criminal responsibility for illegal registration or voting 1177  
 Liability of bondsman of peace officer for acts of latter as to property taken from prisoner 873  
 Prohibitions to prevent numerous unfounded prosecutions for alleged violation of statute or ordinance 448  
 Right of jurors to act on their own knowledge as to matters not in evidence 796  
 Statute reducing number of presiding judges at criminal trial as *ex post facto* law 567  
 Repeal of statute excluding evidence discovered or obtained by judicial proceedings 96

**Crops.**

- Measure of damages for injury to, or destruction of growing crops 976

**Crowd.**

- Assault with intent to murder or kill by shooting into crowd 173

**Current receipts.**

- When obligations payable out, as indebtedness within debt limit provision 1070

37 L.R.A. (N.S.)

**Custody.**

- Of holographic will 842

**Custom.**

- Custom of estate as to life tenant's cutting timber for sale 768

**Cy pres.**

- Application of *cy pres* doctrine to charitable gift 1005, 1007

**Damages.**

- Punitive damages for infringing trademark, tradename, or copyright, where amount of actual damages not established 533  
 Measure of damages for breach of warranty on sale of seeds 85  
 May purchaser recover damages for breach of warranty or fraud as to both articles, where one article is substituted for another at his request and both are defective 298  
 Amount of recovery by accommodation party who has been obliged to pay bill on note against accommodated party 788  
 Measure of damages for personal injury by dog 865  
 Measure of damages for injury to, or destruction of, growing crops 976  
 Measure of damages for injury to or destruction of trees or shrubbery not valuable for timber or firewood 1115  
 Damages on condemnation of the fee of land over which there is an existing highway 231  
 Liability for apprehension, fright, etc., through personal injury by dog 866  
 Personal wrong as aggravation of damages for trespass on realty 912

**Dealer.**

- Liability for personal injuries caused by defects in automobile 560

**Death.**

- Effect of death of accommodation party on right to recover from accommodated party 786  
 Effect of declarant's death on admissibility in behalf of accused of extrajudicial confessions by stranger 349

**Debts.**

- Debt limit of municipality, see MUNICIPAL CORPORATIONS.  
 Right of insurer to deduct indebtedness of insured extrinsic to insurance contract 556  
 Applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character is appended to his name 409  
 Real estate acquired in payment of debts as partnership property 963

**Decaying timber.**

- Life tenant's rights as to 767

<b>Entry.</b>		<b>Exemplary damages.</b>	
Writ of, see WRIT OF ENTRY.		See DAMAGES.	
<b>Equitable conversion.</b>		<b>Exemption.</b>	
Of partnership realty	900	Judgment on antecedent debt as lien on property to which exemption law has attached in meantime	156
<b>Equitable mortgage.</b>		<b>Experience.</b>	
Necessity and character of one's previous interest in land essential to his claim as an equitable mortgagor	321	Right of jurors to waive evidence by application of general experience	803
<b>Equity.</b>		<b>Ex post facto law.</b>	
Nature of chancery jurisdiction over charities	994	See CONSTITUTIONAL LAW.	
Remedy of pretermitted heirs by proceedings in equity	1146	<b>Fallen timber.</b>	
<b>Estoppel.</b>		Life tenant's rights as to	761
Of surety to complain of creditor's management and collection of collateral	715	<b>Fences.</b>	
<b>Estovers.</b>		Right of life tenant to timber for	765
Customary estovers of life tenant	764	<b>Fiduciary relations.</b>	
<b>Eviction.</b>		Applicability of deposits to individual indebtedness of depositor where word suggestive of fiduciary character is appended to his name	409
Of tenant, see LANDLORD AND TENANT.		<b>Fire arms.</b>	
<b>Evidence.</b>		Carrier's liability for injury resulting from accidental discharge of fire-arms by fellow passenger	724
Right of jurors to act on their own knowledge	790	<b>Fires.</b>	
Admissibility of insurance agent's memoranda or letters as to policies and risks	1169	Carrier's liability for injury by fire resulting from negligent or meddlesome act of fellow passenger	725
Repeal of statute excluding evidence discovered or obtained by judicial proceedings	96	<b>Fixtures.</b>	
Parol evidence as to whether real estate is partnership property	898	Right of seller of chattel retaining title thereto or a lien thereon as against existing mortgagees of the realty to which it is affixed by the owner	119
Right of owner of baggage to testify as to its value in action for its loss	588	<b>Forcible entry and detainer.</b>	
Opinion evidence by nonexpert as to the contractual or testamentary capacity of another	591	Mere display of invalid process without actual force or threats as ground of action of forcible entry and detainer	600
Admissibility in behalf of accused of extra-judicial confession of stranger	345	<b>Foreign charities.</b>	
Admissibility in behalf of accused of dying declarations of stranger	350	Validity of bequest for	999
Admissibility of contradictory statements by declarant to impeach dying declarations	252	<b>Forfeiture.</b>	
Effect of party's changing testimony on second trial, to supply defects in the case made on the first trial	429	Of license by aiding infringement of, or attempt to defeat patent	821
<b>Excise.</b>		<b>Fraud.</b>	
Validity of excise tax on automobiles	440	Of creditor towards surety in management and collection of collateral	716
<b>Executors and administrators.</b>		May purchaser recover damages for fraud as to both articles where one article is substituted for another at his request and both are defective	298
Jurisdiction and power of consuls to administer on estates	549	Effect of fraud on right of accommodation party who has been obliged to pay bill or note to recover from accommodated party	784
Bequest to executor to divide as he thinks best	403	<b>Frauds, statute of.</b>	
Remedy of pretermitted heirs by intervening in administration	1147	See CONTRACTS.	
Remedy of pretermitted heirs by action on executor's bond	1147		
Right of representative of decedent's estate to interplead claimants	986		
Notice of distribution in probate proceedings as jurisdictional	368		
Liability of wife's separate estate for her funeral expenses	754		

- Occupying claimants acts; right to allowance for improvements made before acquiring color of title 918
- Income.**  
Of separate property, see HUSBAND AND WIFE.
- Incompetent person.**  
Opinion evidence by nonexpert as to contractual or testamentary capacity of another 591
- Indebtedness.**  
See DEBTS.
- Indemnity.**  
Indemnity insurance, see INSURANCE.
- Industrial insurance.**  
Constitutionality of compulsory industrial insurance 466
- Infringement.**  
Of copyright, see COPYRIGHT.  
Of patent, see PATENTS.  
Of trademark, see TRADEMARK.  
Of tradename, see TRADENAME.
- Injunction.**  
Against publication or sale of letters 944  
Right to protection against use by rival of similar design, shell or pattern not protected by patent 259  
Decree in taxpayer's suit restraining district from performing contract as binding on contractor. 383
- Insolvency.**  
Effect of insolvency of accommodated party on right of accommodation party who has been obliged to pay bill or note to recover the amount thereof 786
- Instalments.**  
When municipal indebtedness payable in instalments arises 1063
- Insurance.**  
Admissibility of insurance agent's memoranda or letters as to policies and risks 1169  
Constitutionality of compulsory industrial insurance 466  
Power of legislature to regulate life insurance rates 773  
Who is a "dependent" within statute or rules defining beneficiaries of mutual benefit societies 1191  
Scope and construction of provision for indemnity in case of injury while riding in or on a public conveyance 618  
Life insurance policy in favor of married woman or its proceeds as her separate estate 582  
Right to deduct indebtedness of insured extrinsic to insurance contract 556
- Intent.**  
Effect of, on question whether real estate is partnership property 891
- 37 L.R.A. (N.S.)
- Grantee's right to enforce restrictive covenants prior conveyance by his grantor of other parcels as affected by grantor's intent 624  
Assault with intent to murder or kill by unlawful act aimed at another than the one injured 172
- Interest.**  
Purchaser's right to interest on breach of warranty on sale of seeds 88  
Right of accommodation party who is obliged to pay bill or note to recover interest from accommodated party 785  
Municipal liability for interest as creating indebtedness within meaning of debt limit provisions 1106
- Interpleader.**  
Right of representative of decedent's estate to interplead claimants 966
- Intervention.**  
Remedy of pretermitted heirs by intervening in administration 1147
- Intoxicating liquor.**  
Privilege or license to sell as subject of taxation 453
- Irrigation.**  
See WATERS.
- Joinder.**  
Of parties, see PARTIES.
- Joy ride.**  
Liability of owner for injuries caused by automobile while being used by servant or third person for his own business or pleasure 834
- Judges.**  
Statute reducing number of presiding judges at criminal trial as *ex post facto* law 567
- Judgment.**  
Municipal liability on judgment as creating indebtedness within meaning of debt limit provisions 1107  
Conclusiveness of as between the plaintiff and one not a party nor privy, who voluntarily conducted the defense 957  
Judgment between principal and a third person as *res judicata* in an action between the latter and an agent 37  
Decree in taxpayers' suit restraining district from performing contract, as binding upon contractor 353  
Conclusiveness of surrogate's decree on right of personal representative to interplead claimants. 966  
Judgment on antecedent debt as lien on property to which exemption law has attached in the meantime 156  
Assignment of judgment as affecting attorneys' lien thereon 226  
Service of notice in proceedings to revive a judgment 1162

Liability of master for medical attendance engaged by employee who, by the contract of employment, was entitled to such attendance	757	<b>Municipal corporations.</b>	
Validity of stipulation in employee's pass limiting carrier's liability	250	License by, see LICENSE.	
Liability of railroad company for injury to person wrongfully on train by collusion with a train employee	419	Validity of bequest to	1009
Liability of owner for injuries caused by automobile while being used by servant or third person for his own business or pleasure	834	Power to take property already devoted to public by municipality	101
		Prohibitions to prevent unfounded prosecutions for alleged violation of ordinance	448
<b>Materialmen.</b>		Creation of indebtedness within the meaning of debt limit provisions	1058
Rights in fund retained pursuant to contract for public work to insure payment of their claims	575	Municipal liability for defective plan of street construction as distinguished from other defects	1150
<b>Medical attendance.</b>		<b>Mutual benefit society.</b>	
See PHYSICIANS AND SURGEONS.		See BENEFIT SOCIETIES.	
<b>Medical treatment.</b>		<b>Mutual covenants.</b>	
As element of damages for injury by dog	868	Who may enforce mutual covenants containing restrictions as to use of property	23
<b>Memoranda.</b>		<b>Mutual wills.</b>	
Admissibility of, in evidence, see EVIDENCE.		Revocability of	1196
<b>Merger.</b>		<b>Name.</b>	
Sale of collateral merging security in debt	714	Warranty that seed sold is true to name	80
<b>Ministers.</b>		Measure of damages where seed sold is not true to name	86
Validity of general bequest for education and support of ministry	1004	<b>Nationality.</b>	
<b>Misnomer.</b>		Competency to testify as to one's nationality	760
Of trustee or beneficiary in bequest for charity or religion	1010	<b>Navigation.</b>	
<b>Missions.</b>		Right of government to divert water from nontidal stream for navigation purposes without compensation to riparian owner	308
Validity of bequest for	1005	<b>Negligence.</b>	
<b>Mistake.</b>		Of carrier or passenger, see CARRIERS.	
Assault with intent to murder or kill by unlawful act under mistake as to identity of person assaulted	172	As to highways, see HIGHWAYS.	
<b>Mortgage.</b>		At railroad crossing, see RAILROADS.	
Purchase of equity of redemption by municipality as creating indebtedness within debt limit provisions	1105	Creditor's duty to surety with respect to management and collection of collateral	699
Right of one advancing money for purchase price of property to be subrogated to vendor's lien where mortgage is taken as security	1209	Of manufacturer or dealer for personal injuries caused by defects in automobile	560
Necessity of giving mortgagee notice of public improvement	558	Care required of one in sudden emergency	43
Necessity and character of one's previous interest in land essential to his claim as an equitable mortgagor	521	Liability of vendor of seeds	79
Rights of seller of chattel retaining title thereto or a lien thereon as against purchaser on foreclosure of an existing mortgage on the realty to which the chattel was affixed by the owner	123	<b>New trial.</b>	
37 L.R.A. (N.S.)		Effect of repeal of civil statute on pending motion for	854
		<b>Nonresident.</b>	
		Service of notice in proceedings to revive judgment on nonresident of state	1163
		<b>Notes.</b>	
		See BILLS AND NOTES.	
		<b>Notice.</b>	
		Of attorney's lien	226
		Of distribution in probate proceedings as jurisdictional	368



- Judgment between principal and third person as res judicata in action between latter and agent 37
- Conclusiveness of judgment as between plaintiff and agent of defendants who voluntarily conducted defense 963
- Principal and surety.**
- Payment or promise by principal as extending limitation period as to surety 272
- Duty of creditor to surety with respect to management and collection of collateral 600
- Right of surety advancing money for purchase price of property to be subrogated to vendor's lien 1204
- Printed signature.**
- Sufficiency of, within statute of frauds 352
- Priority.**
- Effect of priority of purchase on right to enforce restrictive covenant or agreement as to use of property 84
- Prisoner.**
- Liability of bondsmen of peace officer for acts of latter as to property taken from prisoner 873
- Private cemeteries.**
- Public character of charitable bequest for 997
- Prize contest.**
- Changing terms of offer of prize after efforts to secure it have begun 183
- Probate.**
- See WILLS.
- Process.**
- See WRIT AND PROCESS.
- Prohibition.**
- Prohibition to prevent numerous unfounded prosecutions for alleged violation of statute or ordinance 448
- Promissory notes.**
- See BILLS AND NOTES.
- Proximate cause.**
- Of injury to passenger whose train has run past station 266
- Publication.**
- Of letters, injunction against 944
- Public contracts.**
- See CONTRACTS.
- Public conveyance.**
- Scope and construction of provisions for indemnity in case of injury while riding in or on a public conveyance 618
- Public improvements.**
- Cost of, as indebtedness within debt limit provision 1072
- 37 L.R.A. (N.S.)
- Rights of laborers or materialmen in fund retained pursuant to contract for public work to insure payment of their claims 575
- Necessity of giving mortgagee or other lienor notice 558
- Public lands.**
- Prohibition of grant as including lease 606
- Public policy.**
- Necessity of accordance with, in enforcement of general bequest for charity or religion 996
- Public utilities.**
- Heating service as 510
- Punitive damages.**
- See DAMAGES.
- Pupils.**
- See SCHOOLS.
- Purchase money.**
- Lien for, see VENDOR AND PURCHASER.
- Transfer of purchase money obligation as affecting reservation of title on conditional sale 71
- Railroads.**
- As carriers, see CARRIERS.
- Right of railroad to divert water from nontidal stream without compensation to riparian owner 311
- Liability for injury to stock other than by trains, because of breach of statutory duty to fence 1181
- Duty of traveler approaching railway crossing as to place and direction of observation 135
- Rates.**
- Power of legislature to regulate insurance rates 778
- Real property.**
- Measure of damages for trespass on, see DAMAGES.
- Of partnership, see PARTNERSHIP.
- Records and recording laws.**
- Release of surety upon creditor's failure to record papers 710
- Registration.**
- See ELECTIONS.
- Relative.**
- Contracts procured by threats of prosecution of relative 539
- Religion.**
- Bequest for, see CHARITIES.
- Remainder.**
- See WILLS.
- Removal of causes.**
- Mandamus to compel removal of case to Federal court or remanding of case to state court 592

**Subordinate.**

Change of salary of subordinate as violation of constitutional provision against change of salary of public officer during term of office 388

**Subrogation.**

Right of one advancing money for purchase price of property to be subrogated to vendor's lien 1203

**Sudden emergency.**

See EMERGENCY.

**Sunday schools.**

Validity of bequest for 1004

**Surrogate.**

Conclusiveness of surrogate's decree on right of personal representative to interplead claimants 986  
Right of representative of decedent's estate to interplead claimants as affected by exclusiveness of surrogate's jurisdiction 986

**Taxes.**

License tax, see LICENSE.  
Life tenant's right to timber for payment of 767  
Privilege or license to sell intoxicating liquors as subject of taxation 455  
To whom are improvements removable by tenant at expiration of term taxable 1166

**Taxpayers.**

Decree in taxpayer's suits restraining district from performing contract as binding on contractor 383

**Telegraphs.**

Liability of telegraph company for handling libelous message 861

**Threats.**

Contracts procured by threats of prosecution of relative 539

**Timber.**

Timber rights of life tenant 763

**Tort.**

Waiver of, see ELECTION OF REMEDIES.  
Municipal liability for tort as indebtedness within debt limit provisions 1097

**Trademark.**

Punitive damages for infringement of, where amount of actual damages is not established 533  
Conclusiveness of judgment as between plaintiff and one not a party nor privy who voluntarily conducted the defense in trademark case 986

**Tradename.**

Punitive damages for infringement of, where amount of actual damages is not established 533

37 L.R.A. (N.S.)

**Treasury.**

Effect of money in, on creation of indebtedness in excess of debt limit 1085

**Trees.**

See also TIMBER.

Measure of damages for injury to, or destruction of trees not valuable for timber or firewood 1115

**Trespass.**

Measure of damages for, see DAMAGES.

**Trial.**

Right of jurors to act on their own knowledge 790  
Effect of verdict of jurors acting on their own knowledge 794

**Trustees.**

See also TRUSTS.

Certainty as to trustees in general bequest for religion or charity 1010

**Trusts.**

Charitable trusts, see CHARITIES.  
In partnership real estate 890  
Right to subrogation to vendor's lien where trust funds are used to pay for land 1205  
Creation of trust by precatory words in a will 646  
Right of trustee to retain bonus or gratuity received from third person 923

**Unaccepted offer.**

Of compromise as tolling statute of limitations 885

**Unfair competition.**

Right to protection against use of rival design, shell or pattern not protected by patent 259

**Usury.**

Effect of usury on right of accommodation party who has been obliged to pay bill or note to recover from accommodated party 784

**Value.**

Right of owner of baggage to testify as to its value in action for its loss 568

**Vendor and purchaser.**

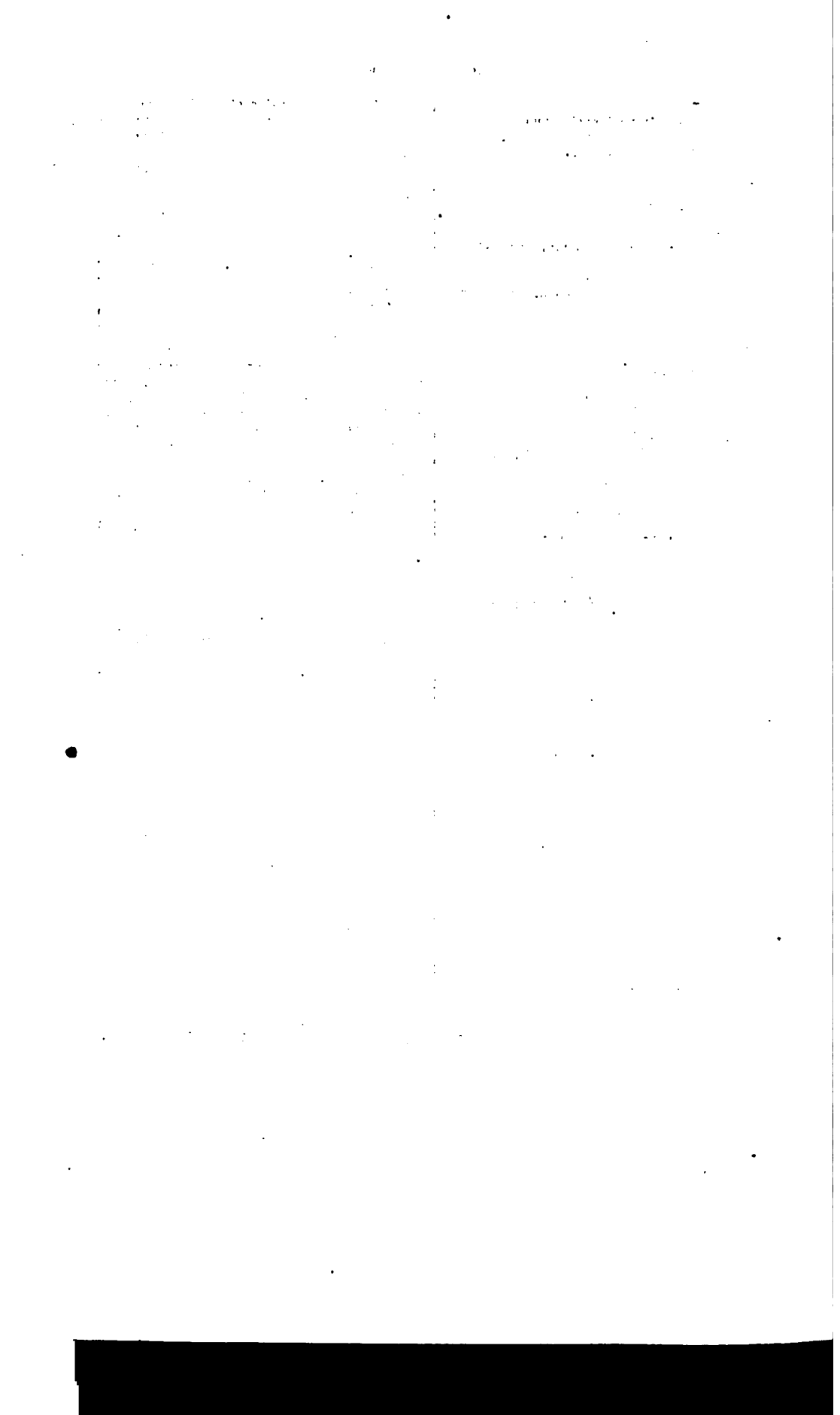
Covenants by vendor, see COVENANTS AND CONDITIONS.  
Right of one advancing money for purchase price of property to be subrogated to vendor's lien 1203  
May purchaser of property be required to accept deed of third person 1123  
Implied power of agent to assent to rescission of land contract 92

**Vendor's lien.**

See VENDOR AND PURCHASER.

**Village.**

Creation of indebtedness within meaning of debt limit provision 1053



**AGREEMENTS.**

Contracts generally, see Contracts.

**ALIENS.**

Inheritance from alien cousin, see Descendant and Distribution, 5.

Foreign consul's right to administer estate of, see Executors and Administrators.

**AMENDMENT.**

Of record on appeal, see Appeal and Error, 1, 2.

Amendment of pleading as affecting limitation of action, see Limitation of Actions, 6.

Amendment of city Charter, see Elections, 1, 2; Municipal Corporations, 1, 2.

Of statute, see Statutes, 4.

**AMUSEMENTS.**

Negligence in maintaining step at exit of darkened room where moving pictures are shown, see Negligence, 5, 6.

**ANIMALS.**

Transportation of, see Carriers, 13-15.

Measure of damages for injuries by bite of dog, see Damages, 11.

Sufficiency of evidence of notice of vicious character of dog, see Evidence, 33.

Injury to, on railroad track, see Railroads, 1.

**ANTENUPTIAL AGREEMENT.**

See Husband and Wife, 10.

**APARTMENTS.**

Landlord's duty to keep heating apparatus in repair, see Landlord and Tenant, 3, 4.

**APPEAL AND ERROR.**

Who may appeal in administration proceedings, see Judgment, 11.

Right of insolvent bank to appeal from order appointing receiver after repeal of statute authorizing, see Statutes, 5.

**Record on appeal.**

1. A respondent in the appellate court who serves an additional abstract for the purpose of bringing matters to the attention of the court, from which he intentionally omits certain matters which might have been included, will not, after argument, be permitted to file an amendment to such additional abstract, for the purpose of raising new questions which he then thinks necessary to his success. *Grigsby v. Wopschall*, 37: 206, 127 N. W. 605, 25 S. D. 564.

2. The appellate court will not permit a party to alter the record which he made in the lower court, for the purpose of making contentions before it which are opposed to the record as made. *Grigsby v. Wopschall*, 37: 206, 127 N. W. 605, 25 S. D. 564. 37 L.R.A. (N.S.)

**Sufficiency of exceptions.**

3. Exceptions to a charge of the court must point out some definite or specific defect. *Russell v. Olson*, 37: 1217, 133 N. W. 1030, — N. D. —.

**Dismissal.**

4. Parties to an appeal may stipulate for its dismissal without the aid or intervention of their counsel. *Humtulsips Driving Co. v. Burrows*, 37: 226, 118 Pac. 827, 65 Wash. 636.

**Who may complain.**

5. One of several property owners in whose name property is placed by his co-owners for sale, who is sought to be held liable to his co-owners for the broker's commission, because the contract between the parties was illegal, has a right to be heard on appeal from a decree in his favor, although a trustee in bankruptcy was appointed for him before the decree was entered, where he is made a party to the appeal, and his trustee did not become a party to the proceedings or seek a hearing. *Heckscher v. Blanton*, 37: 923, 69 S. E. 1045, 111 Va. 648.

**What reviewable generally.**

6. In an appeal from a judgment quieting title to lands, where there was sufficient evidence to sustain a judgment in favor of the plaintiff, finding that when the action was brought he was in the peaceable, quiet possession of the real estate, claiming title, the first inquiry must necessarily be as to what title the defendant has; for, if he have no title, he cannot question that of the plaintiff. *Cramer v. McCann*, 37: 108, 112 Pac. 832, 83 Kan. 719.

**Necessity for motion for new trial below.**

7. Although by statute a new trial is necessary to preserve matters of fact for consideration of the appellate court, errors of law occurring at the trial by way of admitting testimony properly objected to, or otherwise with exceptions saved, and which are brought up to the record through a statement of the case, will be considered by the court without a motion for a new trial. *Russell v. Olson*, 37: 1217, 133 N. W. 1030, — N. D. —.

**Grounds for reversal.**

8. The erroneous admission of evidence is not reversible error if it is withdrawn by the court from the consideration of the jury. *American Sales Book Co. v. Whitaker*, 37: 91, 140 S. W. 132, — Ark. —.

9. It is not error to refuse to permit a witness who has identified accused as one who committed a homicide to be asked on cross-examination if he was not present at the inquest, and if it was not true that no testimony about who did the shooting could be secured there, where it does not appear that the question called for more than cumulative evidence that he had made no disclosure at the inquest as to who did the deed. *Brown v. State*, 37: 345, 55 So. 961, — Miss. —.

10. Permitting a person injured by another's negligence to state his earning capacity so indefinitely as to leave it uncer-

Kyle v. Chester, 37: 230, 113 Pac. 749, 42 Mont. 522.

### ATTORNEYS.

Stipulation for dismissing appeal without aid of counsel, see Appeal and Error, 4.

1. An attorney in whose name his client has placed property for the purpose of defrauding the creditors of the client cannot refuse to comply with his agreement to return it, on the theory that the parties being *in pari delicto*, equity will leave them where it finds them. *Lindaley v. Caldwell*, 37: 161, 137 S. W. 983, 234 Mo. 498. Compensation; *lien*.

As to attorneys' fees generally, see Attorneys' Fees.

Injunction against enforcement of lien against judgment, see Injunction, 3.

Interpleader to determine respective rights of judgment creditor and attorney claiming lien on judgment, see Interpleader.

2. An attorney in whose name stock is placed under the express agreement that he would indorse and turn it over to his client cannot hold it to compel a settlement of his claim against the client; at least when, to his knowledge, the stock belongs to a stranger. *Lindaley v. Caldwell*, 37: 161, 137 S. W. 983, 234 Mo. 498.

3. Under a statute giving an attorney a lien on the judgment from the time of filing notice thereof, an assignment of the judgment in good faith and without collusion, before the lien is filed, frees the judgment from liability to the lien. *Hump-tulips Driving Co. v. Burrows*, 37: 226, 118 Pac. 827, 65 Wash. 636.

### ATTORNEYS' FEES.

Rights to solicitor's fees as costs in partition suit, see Costs and Fees, 1.

### AUTHORITY.

Of agent, see Principal and Agent.

### AUTOMOBILES.

Admissibility of chauffeur's statements at time of accident, see Evidence, 23.

Double indemnity under policy to person injured in taxicab, see Insurance 11.

Validity of excise tax on, see License, 1, 3.

Owner's liability for injury to third person by chauffeur, see Master and Servant, 14.

Power of Municipality to forbid children to operate, see Municipal Corporations, 5.

Liability of manufacturer of, for injury due to defects in, see Negligence, 1-4.

Contributory negligence of driver of, at railroad crossing, see Railroads, 3.

37 L.R.A. (N.S.)

### AWARD.

Court's power to set aside award of board, see Courts, 1.

### BAD FAITH.

Presumption and burden of proof as to bad faith of purchaser of note, see Evidence, 4, 5.

### BAIL AND RECOGNIZANCE.

1. A convict is not within the operation of a constitutional provision that all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. *Re Schriber*, 37: 693, 114 Pac. 29, 19 Idaho, 531.

2. Where a defendant who has been convicted and sentenced to serve a term of imprisonment appeals from such judgment, and applies to the trial judge for admission to bail, such application is addressed to the sound legal discretion of such judge or court, and, unless it clearly appears that such discretion has been abused, the action of the trial judge or court will not be disturbed or interfered with by the supreme court on application for a writ of habeas corpus. *Re Schriber*, 37: 693, 114 Pac. 29, 19 Idaho, 531.

### BALLOTS.

See Elections, 1-3.

### BANKRUPTCY.

Who may appeal in bankruptcy proceeding, see Appeal and Error, 5.

Lien of judgment against bankrupt, see Judgment, 14, 15.

A discharge of a bankrupt after the entry and docketing of a judgment which is valid, against exempt property, does not annul or extinguish it, except so far as it imposes a personal liability on the bankrupt. *Gregory Co. v. Cale*, 37: 156, 133 N. W. 75, 115 Minn. 508.

### BANKS.

Bank's liability to payee for amount of check charged to drawer's account, see Checks.

Police power to regulate business of, see Constitutional Law, 17.

Right of bank undertaking to deliver money to carrier to benefit of judgment in favor of principal against carrier, see Judgment, 2.

Agent's authority to connive at forging of indorsement on draft to be used for satisfying judgment, see Principal and Agent, 3.

Effect of repealing statute authorizing liquidation of insolvent bank, see Statutes, 5, 6.

### CHARTERS.

1. The state may refuse a bank charter if, upon examination, no public necessity is found for its existence in the community in which it is sought to be established. *Schanke v. Dolley*, 37: 877, 118 Pac. 80, 85 Kan. 598.

**BILLS OF EXCHANGE.**

See Bills and Notes.

**BILLS OF LADING.**

Effect of paying draft with bill of lading attached on forged indorsement, see Bills and Notes, 3.

**BLANK.**

Right of innocent purchaser as against one executing deed in blank, see Records and Recording Laws.

**BLANKET BALLOT.**

Discrimination in, see Elections, 3.

**BONA FIDE PURCHASER.**

Right of maker to recover from payee amount paid bona fide purchaser, see Assumpsit.

Bank's right to dishonor check in hands of, see Banks, 5.

Of negotiable paper, see Bills and Notes, 4.

Bank's estoppel to claim right to refuse to pay check, see Estoppel, 3.

Rights of innocent purchaser of land on faith of record as against one intrusting to third person deed executed with blank for grantee's name, see Records and Recording Laws.

Instructing jury as to right to find against bona fides of purchaser of note, see Trial, 14.

**BONDHOLDERS.**

Right to bid at foreclosure sale, see Mortgage, 1.

**BONDS.**

Interruption of limitation of action on, see Limitation of Actions, 7, 8.

What must be pleaded in action on official bond of sheriff, see Pleading, 3.

Release of surety on, see Principal and Surety.

The bond of a sheriff conditioned that he shall faithfully perform and execute the duties of his office is not liable for an injury inflicted upon a bystander by the discharge of a revolver negligently dropped by his deputy after it had been taken from a prisoner, if the prisoner was not lawfully arrested or it was not necessary to relieve him of the revolver, so as to make it part of the official duty of the deputy to have possession of the weapon. People use of Tamplin v. Beach, 37: 873, 113 Pac. 513, 49 Colo. 516.

**BONUS.**

Compelling one joint owner to account to co-owners for bonus paid him, see Trusts, 5.

**BOUNDARIES.**

A boundary in a state patent of land said to lie on the bank of a river, beginning 37 L.R.A. (N.S.)

at a tree on the east shore of the river, thence around the land to the river, and then "up and along the same" to the place of beginning, does not prevent the title from extending to the thread of the stream. Fulton Light, Heat, & Power Co. v. State, 37: 307, 94 N. E. 199, 200 N. Y. 400.

**BRAKE.**

Carrier's liability for injury due to fellow passenger releasing set brake, see Carriers, 5.

**BRIDGES.**

Time when county becomes indebted for, see Counties, 3.

Validity of adoption of charter amendment authorizing building of, see Municipal Corporations, 1.

Injury to animal by falling through railroad bridge, see Railroads, 1.

As obstruction of navigation, see Waters, 5, 6.

**BROKERS.**

Estoppel to sue brokers for commission retained, see Election of Remedies, 2.

Compelling one joint owner to account to co-owners for bonus paid him by brokers effecting sale, see Trusts, 5.

**BUILDING CONTRACTORS.**

Assignability of balance due under contract for public work, see Assignment.

Materiality of architect's good or bad faith in failing to pass on plans and drawings for changes in work, see Contracts, 21.

Liquidated damages for delay in completing, see Damages, 7-9.

**BUILDINGS.**

Restrictive covenants as to, see Covenants and Conditions.

To whom listed for taxation, see Taxes, 7.

**BURDEN OF PROOF.**

See Evidence, 1-8.

**BURIAL LOT.**

Effect of including cost of maintaining in gift for establishing hospital, see Charities, 3.

**BYSTANDER.**

Sheriff's liability for injury to bystander by discharge of revolver dropped by deputy, see Bonds.

Homicide in killing, while shooting at another, see Homicide.

**CANCELATION.**

Of order for goods, see Contracts, 7.

Of license to patent, see Patents.

## II. Carriers of freight.

Conductor's implied authority to carry person in consideration of service in handling freight, see Master and Servant, 2.

12. An ocean carrier is not liable for injury to freight due to the steamer to which the property is delivered for transportation following its usual route to the port of destination, although there is a short route, by following which the injury might have been prevented. *H. S. Emerson Co. v. Reunis*, 37: 222, 118 Pac. 631, 65 Wash. 513.

## Carriers of live stock.

13. A carrier which accepts stock for transportation, knowing that its facilities are so overloaded that loss will result to the shipper, is liable for the loss. *St. Louis S. W. R. Co. v. Mitchell*, 37: 546, 142 S. W. 168, — Ark. —.

14. A carrier of live stock is not absolved from liability for loss due to its refusal to unload when necessary, by the fact that the owner, when informed of that fact, consented that the stock might be immediately forwarded from the point where unloading became necessary. *St. Louis S. W. R. Co. v. Mitchell*, 37: 546, 142 S. W. 168, — Ark. —.

15. Where a carrier has established the custom to unload stock at a particular place for their proper care and necessary preservation, a shipper, in delivering stock to the carrier without notice of change of custom, may rely on its being observed, and the carrier will be liable for loss resulting from its breach. *St. Louis S. W. R. Co. v. Mitchell*, 37: 546, 142 S. W. 168, — Ark. —.

## CERTAINTY.

Of charitable bequest, see Charities, 5, 6.

## CERTIFICATE OF DEPOSIT.

Bank's notice of ward's rights in, see Banks, 3.

## CHANNEL

Diverting water from river to artificial channel for improvement of navigation, see Waters, 4.

## CHARITIES.

1. A court will not refuse to sustain a charitable trust because the beneficiaries are not confined to residents of the state. *Re Robinson*, 37: 1023, 96 N. E. 925, 203 N. Y. 380.

## What are charities.

Construction of will attempting to create charity, see Wills, 6.

2. Providing a fund for the specific education of the poor does not destroy the charitable nature of the gift. *Re Robinson*, 37: 1023, 96 N. E. 925, 203 N. Y. 380.

3. The validity of a bequest for the establishment and maintenance of a hospital is not affected by the fact that the fund is

charged with the cost of maintaining the burial lot of the donor, and with a small monthly payment to his relatives for life. *Buchanan v. Kennard*, 37: 993, 136 S. W. 415, 234 Mo. 117.

4. A devise to trustees and their successors forever of property to establish and maintain a hospital for sick and injured persons without distinction of creed, under the auspices of a particular religious denomination or its successors, creates a valid public charity under the statute of Elizabeth, although the benefit is not limited to poor persons. *Buchanan v. Kennard*, 37: 993, 136 S. W. 415, 234 Mo. 117.

## Definiteness; certainty.

5. The words, "and such other financial aid" to persons in need as may seem fitting and proper, in a will establishing a trust to provide shelter, necessities of life, education, and such other financial aid, etc., with preference for elderly and disabled Christian persons of good moral character, members of Evangelical churches, will be construed as requiring aid of the same general character as the purposes specified, so as to come within the statute providing that no gift for religious, educational, charitable, or beneficent purposes shall be invalid by reason of the indefiniteness and uncertainty of the beneficiaries. *Re Robinson*, 37: 1023, 96 N. E. 925, 203 N. Y. 380.

6. Provision for the selection of the objects of a public charity is sufficiently definite where the charity is the construction and maintenance of a hospital for sick and injured persons, without distinction of creed, under the auspices of a particular religious denomination, and "under such rules and regulations as the trustees and their successors" shall, from time to time, establish and maintain. *Buchanan v. Kennard*, 37: 993, 136 S. W. 415, 234 Mo. 117.

## Cy près doctrine.

7. In case, after a devise of a fund to an academy in trust to pay the tuition of worthy poor boys of a certain town, the academy is by law made a free high school for such town, the fund may be applied in establishing scholarships for such boys, rather than in relieving the tax payers of the town of the burden of maintaining such school, or in aiding the academy in paying its general expenses. *Pembroke Academy v. Epsom School Dist.* 37: 646, 75 Atl. 100, 75 N. H. 408.

## CHARTER.

Of bank, see Banks, 1, 2.

Of municipality, see Elections, 1, 2; Municipal Corporations, 1, 2.

## CHATELS.

Sale of, see Sale.

## CHAUFFEUR.

Admissibility of statements by, at time of accident, see Evidence, 23.

Liability of owner of automobile for injury to third person by chauffeur, see Master and Servant, 14.

**COMPETENCY.**

- As juror of officer in charge of other jury, see Jury, 2.
- Of witness, see Witnesses.

**COMPOUNDING CRIME.**

- Validity of deed by parents to avoid prosecution of child, see Contracts, 20.

**COMPROMISE AND SETTLEMENT.**

- Attorney's power to hold stock to compel settlement of claim against client, see Attorneys, 2.
- Settlement of action against one tort joint feisor as bar to action against other, see Joint Creditors and Debtors.
- As affecting limitation of actions, see Limitation of Actions, 9.

**CONCEALMENT.**

- By manufacturer of defects in automobile, see Negligence, 3.

**CONCLUSIONS.**

- Opinion evidence as to, see Evidence, 17-20.
- Sufficiency of allegation of, see Pleading, 3.

**CONCURRENT REMEDIES.**

- See Election of Remedies.

**CONDEMNATION.**

- Of property, see Eminent Domain.

**CONDITIONAL PAYMENT.**

- By giving check, see Payment, 1.

**CONDITIONAL SALES.**

- See Sale, 3.

**CONDUCTORS.**

- Custom of, see Carriers, 1.

**CONFESSION.**

- Admissibility of, in evidence, see Evidence, 21.
- Admissibility of extra judicial confession by stranger, see Evidence, 25.

**CONSENT.**

- By shipper to forwarding of livestock without unloading, see Carriers, 14.
- Constitutionality of statute authorizing action without notice by administrative board acting by consent, see Constitutional Law, 13.
- Husband's consent to wife's execution of will, see Contracts, 2, 19.

**CONSIDERATION.**

- For note, see Bills and Notes, 2.
- Of contract, see Contracts, 2-4.

**CONSTITUTIONAL LAW.**

- Punishment of insurance agent giving special rates, see Criminal Law.

37 L.R.A. (N.S.)

- As to voters and elections generally, see Elections.

- Taking of property for public use, see Eminent Domain.

- Construction of constitutional provision against private ownership of tide lands, see Waters, 2, 3.

- Presumption as to construction of constitutional provision adopted from other state, see Evidence, 1.

- Interference with constitutional right to jury trial, see Jury, 1.

- Who may question validity of statute, see Statutes, 1.

- Title of statutes, see Statutes, 2.

- Matters as to amending or repealing statute, see Statutes, 4-6.

- Matters as to taxes generally, see Taxes.

**Ex post facto laws.**

1. A statute passed after the commission of a crime, reducing the number of judges who shall preside at the trial, is not invalid as an *ex post facto* law. *Com. v. Phelps*, 37: 567, 96 N. E. 349, 210 Mass. 78.

2. The repeal, after the commission of an alleged forgery, of a statute which prevents the use against accused of any discovery or evidence obtained from him by means of any judicial proceeding, so as to permit the use against him of the paper alleged to have been forged, which was originally exhibited by him in an equity suit, and of his testimony in that suit, is *ex post facto* and invalid, where the crime could not have been established without the aid of the record in the other suit. *Frisby v. United States*, 37: 96, — App. D. C. —.

**Delegation of power.**

- Power of courts to pass on validity of statutes, see Courts, 2-4.

- See also *infra*, 6, 21.

3. An employees' compensation act is not invalid because it gives the employers the right to determine whether or not minors rightfully employed by them shall have the benefit of the act, in the same way that they determine the matter for adult employees. *Borgnis v. Falk Co.* 37: 489, 133 N. W. 209, 147 Wis. 327.

**Separation of powers.**

- Judicial power to decide as to legislative acts, see Courts, 2-4.

4. Providing for the submission to an administrative board of the questions of fact in case of a dispute as to the amount to be awarded an injured employee under a workmen's compensation act, which has power to award the amount due as provided by the statute which award, under certain circumstances, may be reviewed by the courts, does not, where the jurisdiction of the commission depends on the consent of parties, and the question of consent is subject to review by the courts, render the commission a court, and the statute void on the theory that the legislature has no constitutional power to create courts. *Borgnis v. Falk Co.* 37: 489, 133 N. W. 209, 147 Wis. 327.



## CONSTITUTIONAL LAW.

**Local self-government; initiative and referendum.**

5. The legislature may enact general laws governing municipal corporations under constitutional provisions that corporations may be formed under general laws, and that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. *Kiernan v. Portland*, 37: 332, 112 Pac. 402, 57 Or. 454.

6. The people may confer upon the voters of a municipal corporation the right to enact local laws which cannot be affected by special acts of the legislature, so long as the legislature is not prevented from controlling them by general enactments. Kiernan v. Portland, 37: 332, 112 Pac. 402, 57 Or. 454.

**Equal protection and privileges.**

Discrimination in ballot, see Elections,  
3.

**Uniformity and equality as to license,  
see License, 1, 2.**

**Special legislation, see Statutes, 3.**

Equality and uniformity of taxation,  
see Taxes, 1, 2.

7. A statute is not invalid for unconstitutional discrimination, which abolishes the doctrines of fellow service and assumption of risk in actions to hold employers liable for negligent injuries to their employees, except in cases of persons employing less than four servants. *Borgnis v. Falk Co.* 37: 489, 133 N. W. 209, 147 Wis. 327.

8. A statute is not invalid as conferring unequal privileges and immunities, which abolishes the doctrines of assumption of risk and fellow service in actions to hold employers liable for personal injuries to their servants, in cases where employers refuse to take advantage of the act, but preserves them intact to those who come under the law. *Borgnia v. Falk Co.* 37: 489, 133 N. W. 209, 147 Wis. 327.

9. An employees' indemnity act is not invalid as class legislation because the fund collected by assessments upon certain hazardous business is to be expended in the relief of employees of such business, instead of being applied to the relief of workmen generally, or to the use of the state at large. *State ex rel. Davis-Smith Co. v. Clausen*, 37: 466, 117 Pac. 1101, 65 Wash. 158.

10. That an employees' indemnity act made applicable only to hazardous occupations entitled to its benefit workmen injured when outside the line of their duties, or in a branch of the business not peculiarly hazardous, does not render the entire act invalid as class legislation, if provision is made for an elimination from the act of parts which may be found to be invalid, without affecting the remainder. State ex rel. Davis-Smith Co. v. Clausen, 37: 466, 117 Pac. 1107. 65 Wash. 158.

11. A statute making it unlawful to keep open, or run or permit to be run, any theaters, show, moving picture show, or

theatrical performance un-  
invalid as special legisla-  
Temple v. Barnes, 37: 11  
— N. D. —,

**Due process of law.**

Power of legislature  
 constructive service  
 vive lien of jud  
 ment, 16.

**See also Taxes, 1, 5.**

12. A statute creating demnity fund by assessers in hazardous callings, police power, is not in process of law clauses of as interfering with free creating liability without the property of one em obligations of another. *S. Smith Co. v. Clausen*, 1101, 65 Wash. 156.

13. Permitting an adversary to cross-examine a witness which acts only by consequence to the interested, to take testimony from either party, and to give weight to it does not deprive the party of a fair trial. *Borgnis v. Falk*

N. W. 209, 147 Wis. 327.  
14. Failure to provide mortgagee of the amount assessed on the mortgage the time for hearing objection to the statute is as depriving him of property without due process of law, although the assessment may impair the value of the property. *Patrick v. Botheras*, 377 P.2d 163, 150 Iowa, 376.

15. The legislature may establish reasonable bounds, where probable cause is required, on the manner in which *in rem* proceedings may be initiated, to determine what notice is sufficient notice of the proceedings for the settlement of the property to give the court jurisdiction. The legislature may require that those interested in the property be notified, so that the court will administer the property and distribute the property among those interested, without infringing on the constitutional requirements of due process. *Barrette v. Whitney*, 37 P.3d 1038, 1044, 36 U'tah, 574.

16. A section of the pension act, abolishing the presumption of risk and actions to hold employers liable for injuries to servants, in case provisions of the act are not complied with, may not be said to make the act of an employer or employee, a question of the constitution. Abolition, on the theory that the employer will be compelled to accept the consequences of such escape such defenses, and will be compelled to do so to continue from service. *Borgnis v. White*, 133 N. W. 209, 147 Wis. 1912.

See also *supra*, 12.

17. The business of [redacted] is primarily related to the [redacted] and it properly falls within [redacted]

police power of the state, exercisable by the legislature. *Schaafe v. Dolley*, 37: 877, 118 Pac. 80, 85 Kan. 598.

18. The police power extends to compelling life insurance companies to maintain uniform rates among the same classes of applicants, although the effect is to stifle competition between different companies for business. *People v. Hartford L. Ins. Co.* 37: 778, 96 N. E. 1049, 252 Ill. 398. Freedom of worship.

19. Prohibition of labor on Sunday does not violate the constitutional right to religious freedom, where the Constitution provides that liberty of conscience shall not be construed to justify practices inconsistent with the peace and safety of the state. *State ex rel. Temple v. Barnes*, 37: 114, 132 N. W. 215, — N. D. —.

#### Impairing obligation of contracts.

Effect of repeal of statute that rents, profits and proceeds of separate property during marriage shall be common property, see *Husband and Wife*, 4.

20. No contract right is impaired by making applicable to existing contracts which are to terminate in the future, an employees' indemnity act which gives the employees an option to take advantage of it, or to stand on their common-law right, under the contract, to maintain an action to redress an injury received in the employment. *Borgnis v. Falk Co.* 37: 489, 133 N. W. 209, 147 Wis. 327.

#### Guaranty of republican form of government.

21. A republican form of government is not destroyed by taking from the legislature and committing directly to the people the power over the enactment of certain kinds of legislation. *Kiernan v. Portland*, 37: 332, 112 Pac. 402, 57 Or. 454.

#### CONSTRUCTION.

Of contract, see *Contracts*, 15.  
Of will, see *Wills*.

#### CONSTRUCTIVE NOTICE.

On application to revive lien of judgment, see *Judgment*, 16.

#### CONSUL.

Right to administer estate, see *Evidence*, 3.

#### CONTINGENCY.

Power to dispose of, by will, see *Wills*, 8.

#### CONTINUANCE AND ADJOURNMENT.

A continuance to secure the presence of witnesses to testify to their nationality should not be granted because their child is offered as a witness to prove that fact, where there is nothing to show that their testimony would differ from that of the child, or that diligence has been used in attempting to secure their testimony sooner. *State v. Rackich*, 37: 760, 119 Pac. 843, 66 Wash. 390.  
37 L.R.A. (N.S.)

#### CONTRACTS.

Assignability of right to balance due under contract for public work, see *Assignment*.

Impairing obligation of, see *Constitutional Law*, 20.

Time when county becomes indebted under, see *Counties*, 3.

As to covenants, see *Covenants and Conditions*.

Measure of damages for breach of, see *Damages*, 6.

Injunction to protect rights in, see *Injunction*, 5-7.

As to mortgages, see *Mortgages*.

Of sale of chattels, see *Sale*.

Specific performance of, see *Specific Performance*.

#### Implied agreements.

Implied contract to pay for animals negligently driven in front of railroad train, see *Attachment*.

Implied contract that land in name of one partner shall be partnership property, see *Partnership*, 1.

1. The law implies a contract by the maker of a note to reimburse the accommodation indorser the amount which he is compelled to pay thereon, and therefore, if the note is barred in favor of the maker when its amount is collected from the indorser's estate, the time having been extended as to it by the administration proceedings, the estate has a right of action against the maker upon the implied contract for reimbursement. *Blanchard v. Blanchard*, 37: 783, 94 N. E. 630, 201 N. Y. 134.

#### Consideration.

For promissory note, see *Bills and Notes*, 2.

2. A written consent by the husband, to the devise by the wife of her real property, does not require a consideration to support it. *Erickson v. Robertson*, 37: 1133, 133 N. W. 164, 116 Minn. 90.

3. A merely moral obligation, though not illegal, is not a consideration for a promise to make that promise enforceable. *Gooch v. Allen*, 37: 930, 73 S. E. 58, — W. Va. —.

4. When there is by law no enforceable obligation to pay, a promise made afterwards to pay wants legal consideration, and is not enforceable. *Gooch v. Allen*, 37: 930, 73 S. E. 58, — W. Va. —.

Offers and their acceptance or withdrawal.

Right to change terms of accepted offer of specified compensation based on paid subscriptions to newspaper, see *Prize Contest*.

5. An offer of specified compensation to the person obtaining the highest vote based on paid subscriptions to a newspaper, after acceptance and part performance of the terms of the offer, becomes an executory contract between the person making and the person so accepting the terms of the offer. *Mooney v. Daily News Co.* 37: 183, 133 N. W. 573, 116 Minn. 212.

## CONTRACTS.

6. Until there has been an acceptance of a written order for machinery to be shipped to the purchaser at a future date, the latter is at liberty to countermand such order, as the same, until acceptance, does not constitute a contract, but merely an offer or proposal to purchase. *J. L. Owens Co. v. Bemis*, 37: 232, 133 N. W. 59, — N. D. —.

7. A letter to one to whom an order had been sent, requesting cancellation of the order, giving its date, which is received before the order is accepted, is a sufficient cancellation. *J. L. Owens Co. v. Bemis*, 37: 232, 133 N. W. 59, — N. D. —.

### Statute of frauds.

Right to recover value of services under parol agreement to convey land in action for damages for breach of contract, see Election of Remedies, 3.

Oral agreement as to insurance rates of premiums, see Insurance, 6-8.

8. The party to be charged, who must sign a contract to make it binding under the statute of frauds, is the one against whom it is sought to be enforced. *Lee v. Vaughan Seed Store*, 37: 352, 141 S. W. 496, — Ark. —.

9. Letters passing between an alleged vendor and vendee cannot be read together to constitute a contract for the sale of real estate, if they do not identify the land which is intended to be the subject-matter of the contract, as to which there is a dispute, so that parol evidence would be required to substantiate the truth of the matter. *Jackson v. Stearns*, 37: 639, 113 Pac. 30, 58 Or. 57.

10. The printing of the name of the vendor at the beginning, in the body, and on the back of the merchant's order blanks, to be filled up by a soliciting agent, is not a sufficient signature to satisfy the statute of frauds. *Lee v. Vaughan Seed Store*, 37: 352, 141 S. W. 496, — Ark. —.

11. A contract between husband and wife that the survivor shall take the property of the other is taken out of the statute of frauds by the execution of reciprocal wills. *Brown v. Webster*, 37: 1196, 134 N. W. 185, 90 Neb. 591.

12. That one to whom another promises orally, upon receiving title to real estate, to convey it upon payment of a specified sum of money, acted for the promisor in negotiating the purchase, and had a possible broker's opportunity to find another purchaser for the land, does not show such a change in situation as to constitute part performance sufficient to take the promise out of the statute of frauds. *Re Bennett*, 37: 521, 132 N. W. 309, 115 Minn. 342.

13. A "part performance," to take an oral agreement to convey real estate out of the statute of frauds, must be substantial, and of such a nature that the refusal to enforce the agreement would result not merely in the denial of the right which the agreement was intended to confer, but in an "unjust and unconscientious injury." 57 L.R.A. (N.S.)

*Re Bennett*, 37: 521, 132 Minn. 342.

14. A written notification that he has received of a customer, but cannot a recognition of the contract out of the statute of *Vaughan Seed Store*, 37: 496, — Ark. —.

### Construction.

Widow's right to year antenuptial agreement band and Wife, 1

Insufficiency of warranty person tendered Vendor and Pur

Construction of will,

15. Where a contract the sale of real property, ance by warranty deed, t narily has a right to ins shall be executed by the he contracted. *George H.* 37: 1123, 119 Pac. 546, 86 Validity; public policy.

Attorney's duty to tract to reconvey erty transferred tors, see Attorne

Validity of agreement rier's liability, s

What constitutes d contract, see Dur

16. The appointment deputy of one who withdr for the nomination in co promise of a deputyship is a statute forbidding the farm or deputation of an rel. *Lyman v. Sheeran*, 37: 668, 145 Ky. 361.

17. An employer and c ulate to arbitrate the e disability caused by a p the employee in the pe duties, if the question as rights of the parties as open to the courts. *Bo* 37: 489, 133 N. W. 209, 1

18. A contract between and woman, not related t if the latter will enter former and act as his h support her, and at his estate, is not, where the them are at all times forbidden by law or of policy. *Goff v. Supre* Achates, 37: 1191, 134 N. 578.

19. A written consent devise by his wife of h valid and effectual, thou erance of a void written husband and wife, by w released all interest in property; the wife having part of the agreement. *son*, 37: 1133, 133 N. W.

20. A deed by paren cution of their child up

is in fact unfounded, but which the accuser honestly believes that the child has subjected itself to, will be set aside. *Ball v. Ball* (N. J. Err. & App.) 37: 539, 81 Atl. 724, — N. J. —.

#### **Performance; breach.**

Part performance of oral contract, see *supra*, 11-14.

Liquidated damages for delay in completing contract, see *Damages*, 7-9.

Right to recover value of services under parol agreement to convey land in action for damages for breach of contract, see *Election of Remedies*, 3.

Bar to action to recover on quantum meruit, see *Judgment*, 4.

Judgment as bar against carrying out of contract with school district, see *Judgment*, 6, 7.

See also *supra*, 19.

21. The question of the good or bad faith of the architect to whose satisfaction and under whose direction work upon a building is to be done, in failing to pass upon plans and drawing for changes in the work so that its completion is delayed, is immaterial in determining the responsibility of the owner for such delays, so as to prevent his taking advantage of provisions in the contract for stipulated damages for failure to complete the work within a specified time. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.* 37: 353, 93 N. E. 81, 199 N. Y. 479.

22. One contracting to drive entries in a mine waives his contract right to have the other contracting party furnish pumps, piping, and tools to keep water out of the mine, which might be secured at small cost, by working for several months without procuring them or insisting that they be furnished, but informing the other party that he will bail the water out. *Stonega Coke & Coal Co. v. Addington*, 37: 959, 73 S. E. 257, 112 Va. 807.

#### **CONTRIBUTION.**

Codebtor's right to enforce for debt paid by him though deed of trust securing same is barred by laches, see *Limitation of Actions*, 1.

Codebtor's right to contribution on payment of entire debt, see *Subrogation*, 1.

A deed of trust binding land of several debtors for a debt paid by one not principal debtor, and released by the creditor, is kept alive in equity to give contribution to the debtor paying against a codebtor, notwithstanding such release, and though action at law for contribution is barred by the statute of limitations. *Gooch v. Allen*, 37: 930, 73 S. E. 56, — W. Va. —.

#### **CONTRIBUTORY NEGLIGENCE.**

See *Negligence*, 8, 9.

Criminal liability of discharged convict for registering as voter, see *Elections*, 4.

#### **COPY.**

Selling stove copied from design of another as unfair competition, see *Unfair Competition*.

#### **CORPORATIONS.**

Attorney's power to hold stock to compel settlement of claim against client, see *Attorneys*, 2.

As to banks, see *Banks*.

Insurance companies, see *Insurance*.

Municipal corporations, see *Municipal Corporations*.

Railroad corporations, see *Railroads*.

#### **COSTS AND FEES.**

1. The mere fact that the construction of a will is necessary to determine whether or not the relief sought shall be granted in a proceeding to partition real estate is not sufficient to entitle defendant to an allowance of a solicitor's fee as costs, although the relief is denied. *Kendall v. Taylor*, 37: 154, 92 N. E. 562, 245 Ill. 617.

2. Where a party failed to appear at the time and place designated in a notice for taking deposition and cross-examine the witness, and thereafter duly and regularly served notice of the taking of the deposition of the same witness, and in pursuance thereof took the deposition of such witness which consisted of a cross-examination of the witness on the deposition previously given, the costs and expense of taking such subsequent deposition should not be allowed as a part of the costs of the case. *Vaughn v. Johnson*, 37: 816, 119 Pac. 879, 20 Idaho, 689.

#### **COTENANCY.**

One of the tenants in common of mortgaged property may secure a title adverse to his cotenant by purchasing the property from one who bids it in at a foreclosure sale. *McLawhorn v. Harris*, 37: 831, 72 S. E. 211, 156 N. C. 107.

#### **COTTAGE.**

To whom listed for taxation, see *Taxes* 7.

#### **COUNCIL.**

Legislative functions of, see *Municipal Corporations*, 3-6.

#### **COUNTIES.**

Municipal authority to condemn land of county used for poor farm, see *Eminent Domain*, 3.

1. The allowance by the county court of a claim for services rendered to the county

tive covenant in a grant of the entire tract before its subdivision, as to the character of buildings to be placed on the property, although the original grantor parted with his entire interest in all property in the neighborhood, where deeds and mortgages were given by a subsequent grantee in subdividing the tract, and foreclosure sales made on the various subdivisions, without any reference to such covenant. *Korn v. Campbell*, 37: 1, 85 N. E. 687, 192 N. Y. 490.

3. A finding that covenants in a deed of a parcel of a tract of city property, requiring the erection of a building of a certain character placed in a certain way upon the property, were for the benefit of the entire tract, does not require its enforcement at the suit of an adjoining owner, where it is also found that there was no intention to create an easement in favor of any land whatever. *Berryman v. Hotel Savoy Co.* 37: 5, 117 Pac. 677, 160 Cal. 559.

4. A covenant in a deed of a parcel of a tract being divided into city lots, which is stated to run with the land, and requires the covenantor to construct a specified building on the property which shall be a certain distance from street and side lines, cannot be enforced by a purchaser of an adjoining lot, whose deed forbids the placing of a building on the lot within the same distance from the street specified in the former deed, on the theory that the obligations are reciprocal. *Berryman v. Hotel Savoy Co.* 37: 5, 117 Pac. 677, 160 Cal. 559.

**Covenants running with land.**

See also *supra*, 4.

5. A covenant imposing a burden on real estate for the benefit of the grantor personally does not follow the land into the possession of an assignee. *Berryman v. Hotel Savoy Co.* 37: 5, 117 Pac. 677, 160 Cal. 559.

6. A covenant in a deed of a parcel of a tract of city property, that the grantee shall place a certain described building on the property, having certain relations to the side lines of the lot is personal to the grantor, and does not run with the remainder of the tract, although the deed states that the covenant runs with the land "herein conveyed." *Berryman v. Hotel Savoy Co.* 37: 5, 117 Pac. 677, 160 Cal. 559.

## CRIMINAL LAW.

Bail and recognizance, see *Bail and Recognizance*.

*Ex post facto* laws, see *Constitutional Law*, 1, 2.

Criminal liability of discharged convict for registering as voter, see *Elections*, 4.

Evidence in criminal cases generally, see *Evidence*.

Habeas Corpus, see *Habeas Corpus*.

Enforcing excise tax by criminal prosecution, see *License*, 4.

Prohibition against criminal prosecution, see *Prohibition*.

27 L.R.A. (N.S.)

Failure of petitioner for release of convicts for refusal to accept tender of find, see *Tender*.

Competency of witnesses, see *Witnesses*.

## Extent of punishment.

A statute depriving a life insurance agent of the right to prosecute that business if he gives special rates to applicants is not invalid as imposing too severe a penalty. *People v. Hartford L. Ins. Co.* 37: 778, 96 N. E. 1049, 252 Ill. 398.

## CROPS.

Measure of damages for injury to, see *Damages*, 15-19.

Admissibility of evidence as to kind of crop land will yield, see *Evidence*, 27.

Replevin for, see *Replevin*.

Liability for loss of, due to selling unfit seed, see *Sale*, 1.

## CROSS-EXAMINATION.

Reversible error in, see *Appeal and Error*, 9.

## CURTESY.

A man who joins in a mortgage of his wife's property is entitled to compute his curtesy interest only on the surplus after satisfying the mortgage and tax liens, not on the entire value of the property, under a statute giving him one third of all the real estate of which she was seized in fee simple during coverture, unless the right shall have been barred or relinquished. *Ketterer v. Nelson*, 37: 754, 141 S. W. 409, 146 Ky. 7.

## CUSTOM.

Of carrier, see *Carriers*, 1, 15.

Estoppel of bank to deny right to refuse to pay check to bona fide purchaser, see *Estoppel*, 3.

Evidence as to custom of passengers, see *Evidence*, 28.

## CY PRES.

Doctrine of, see *Charities*, 7.

## DAMAGES.

Remittitur curing error in instructions as to measure of damages, see *Appeal and Error*, 13.

Sufficiency of evidence of loss of profits from breach of contract, see *Evidence*, 36.

Extent of recovery on insurance policy, see *Insurance*, 11, 12.

Sufficiency of evidence of special damages to go to jury, see *Trial*, 4.

## Nominal.

Judgment on appeal where damages are nominal only, see *Appeal and Error*, 17.

See also *infra*, 3.

1. A railroad company is liable in nominal damages for carrying a passenger beyond his station, into its yards, without giving him an opportunity to alight at the

ed States Smelting Co. v. Sisam, 37: 976, 191 Fed. 293, — C. C. A. —.

**Injuries to Crop.**

Admissibility of evidence as to, see Evidence, 27.

15. The measure of damages to a growing crop by a wrongful act which destroys it is its value at the time and place of its destruction. United States Smelting Co. v. Sisam, 37: 976, 191 Fed. 293, — C. C. A. —.

16. The measure of the damage to a growing crop injured, but not rendered worthless, is the difference between the value of that crop before and after the injury, at the time and place thereof. United States Smelting Co. v. Sisam, 37: 976, 191 Fed. 293, — C. C. A. —.

17. Where a crop is injured from time to time throughout its growing season until its maturity, by sulphurous fumes and their products, but is not destroyed, so that it is cultivated throughout the season, harvested and marketed, the damage to it is the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at that time, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury. United States Smelting Co. v. Sisam, 37: 976, 191 Fed. 293, — C. C. A. —.

18. To ascertain the damages for loss of a crop because of defective seed, the cost of production which has actually been incurred should not be deducted from the market value of the crop which should have been produced. Fuhrman v. Interior Warehouse Co. 37: 89, 116 Pac. 666, 64 Wash. 159.

19. The contract price of seed purchased for use on land, if not paid, should be deducted from the market value of the crop, in awarding damages for loss of the crop because of defective character of the seed. Fuhrman v. Interior Warehouse Co. 37: 89, 116 Pac. 666, 64 Wash. 159.

#### **DANGEROUS PREMISES.**

Liability for injury on, see Negligence, 5, 6.

#### **DEADLY WEAPON.**

Commission of homicide while using, see Homicide.

#### **DEATH.**

Burden of proof in action by parent for death of minor employee, see Evidence, 8.

Interruption of statute of limitations of action for, see Limitation of Actions, 6.

Employer's liability for death of minor servant, see Master and Servant, 6.

#### **DEBTOR AND CREDITOR.**

Joint creditors and debtors, see Joint Creditors and Debtors.  
37 L.R.A. (N.S.)

Right of judgment creditor of life tenant to income from life estate, see Life Tenants, 1.

#### **DEBTS.**

Parol evidence as to, see Evidence, 13.  
Deduction of debts due insurer in paying insurance, see Insurance, 12.

Debt limit of county, see Taxes, 6.

Debt limit of municipality, see Municipal Corporations, 7-11.

Debt limit of school district, see Schools, 2.

Injunction against levying tax to pay for improvement whose cost exceeds debt limit, see Injunction, 8.

#### **DECEDENTS.**

Administration of estates of, see Executors and Administrators.

Rights of heirs and distributees generally, see Descent and Distribution.

#### **DECLARATIONS.**

Evidence of, see Evidence, 22-25.

#### **DEDICATION.**

By map or plat.

1. The sale of lots with reference to a plat does not dedicate to public use lands shown on the plat as a park, if the lots sold are not contiguous or adjacent to the park. Stover v. Steffey, 37: 856, 81 Atl. 33, 115 Md. 524.

2. A dedication to the public of a piece of land marked on a plat as a park is not shown by the mere planting of a few trees upon it, where it is never used as a park, and nothing is ever done to fit it for that purpose. Stover v. Steffey, 37: 856, 81 Atl. 33, 115 Md. 524.

3. The purchaser of lots according to a plat is entitled to have the streets shown on the plat maintained only so far as their existence is material to the enjoyment of the lots purchased. Douglass v. Belknap Springs Land Co. 37: 953, 81 Atl. 1086, 76 N. H. 254.

4. One who upon purchasing lots with reference to a plat is informed that a portion of the platted tract belongs to a stranger, and that he will do what he wishes with respect to the streets on that portion, cannot prevent the closing of such streets. Douglass v. Belknap Springs Land Co. 37: 953, 81 Atl. 1086, 76 N. H. 254.

5. One selling lots with reference to a plat made and recorded by another is bound to maintain the streets shown on the plat, so far as his grantee is interested in them. Douglass v. Belknap Springs Land Co. 37: 953, 81 Atl. 1086, 76 N. H. 254.

6. The existence of a street shown on a plat upon the shore of a lake cannot be defeated as against claims of persons who buy lots with reference to the plat, by the fact that when the requisite number of lots is laid out according to course and distance no space will be left for the street. Douglass v. Belknap Springs Land Co. 37: 953, 81 Atl. 1086, 76 N. H. 254.



**ELEEMOSYNARY INSTITUTIONS.**

See Charities.

**EMBANKMENT.**

Duty to furnish lateral support for, see Lateral Support.

**EMBLEMENTS.**

See Crops.

**EMERGENCY.**

Contributory negligence while acting on, see Negligence, 8; Railroads, 2.

**EMINENT DOMAIN.**

Participation by appellate court in division of fund where damages are nominal only, see Appeal and Error, 17.

Nominal damages for taking fee of street which had been platted by owner, see Damages, 2.

**What may be taken.**

1. Charter authority to widen streets does not empower a municipal corporation to condemn for such purpose property already devoted to public use, such as a public library. *Moline v. Greene*, 37: 104, 96 N. E. 911, 252 Ill. 475.

2. A citizen and taxpayer of a city for the benefit of the citizens of which property is held in trust for library purposes may file objections against the taking of a portion of the library property for the purpose of widening a street. *Moline v. Greene*, 37: 104, 96 N. E. 911, 252 Ill. 475.

3. Authority conferred upon a municipality to exercise the power of eminent domain to take private property for the purpose of laying out streets does not by implication include authority to condemn land owned by the county and used for a poor farm. *Edwardsville v. Madison*, 37: 101, 96 N. E. 238, 251 Ill. 265.

**EMPLOYEES.**

Rights, duties, and liabilities of generally, see Master and Servant.

**EMPLOYEES' INDEMNITY ACT.**

Constitutionality of, see Constitutional Law, 3, 4, 7-10, 12, 16, 20; Jury, 1; Taxes, 2, 5.

When court will set aside as invalid, see Courts, 4.

Injunction against employer's accepting benefits of, see Injunction, 1.

**ENTITLING.****EQUALITY.**

Of protection and privileges, see Constitutional Law, 7-11.

Of license tax, see License, 1, 2.

In taxation generally, see Taxes, 1, 2.

**EQUAL PROTECTION AND PRIVILEGES.**

See Constitutional Law, 7-11.

**EQUITABLE ESTOPPEL.**

See Estoppel, 2, 3.

**EQUITABLE MORTGAGE.**

See Mortgage, 2, 3.

**EQUITY.**

Jurisdiction and practice in particular cases, see Injunction; Specific Performance.

**ERROR.**

As to appellate review generally, see Appeal and Error.

**ESTATES.**

Estates in common, see Cotenancy.

Life estates, see Life Tenants.

Nature of estate created by will, see Wills, 8-12.

**ESTOPPEL.**

Conclusiveness of judgment, see Judgment, 1-13.

**By deed.**

1. One alleged to have conveyed real estate while ill is not estopped by the deed to testify that he gave no paper or any kind of deed, as bearing on the question of his mental capacity at the time; nor is the evidence immaterial upon that issue. *Atwood v. Atwood*, 37: 591, 79 Atl. 59, 84 Conn. 169.

**Equitable estoppel.**

By electing remedy, see Election of Remedies, 2.

Laches barring right to enjoin material departure from restrictive covenants, see Injunction, 6.

Laches as bar to action, see Limitation of Actions, 1.

2. Estoppel may, in equity, be relied on to work a transfer of title to real estate from a member of a partnership in whose name it stands, to grantees of the firm. *Johnson v. Hogan*, 37: 889, 123 N. W. 891, 158 Mich. 635.

3. When a bank by its course of dealing with a customer authorizes him to issue checks on it, it will be estopped to say, af-



rette v. Whitney, 37: 368, 108 Pac. 522, 36 Utah, 574.

#### **Collateral attack on appointment.**

Collateral attack on judgment in administration proceedings, see Judgment, 11-13.

2. Lack of jurisdiction does not appear on the face of an order appointing an administrator, by a court of general jurisdiction over the appointment, so as to render it subject to collateral attack, by a recital that the court "was opened and held" on a certain day, whereas the statute required the regular term to begin on the preceding day, the court to sit from day to day so long as business should require, since it will be assumed that the court regularly convened on the day required by statute, and that the recital in the order referred merely to the opening of the court for the transaction of business on the day when it was entered. *Dayton Coal & Iron Co. v. Dodd*, 37: 456, 188 Fed. 597, 110 C. C. A. 395.

#### **Who may be appointed.**

3. The foreign consul is not entitled to administer upon the estate of a citizen of his country dying within one of the United States, in preference to the public administrator of such state, under a treaty provision that if any citizen of either country shall die in the territory of the other, the consul of the nation to which he belonged shall have the right to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs. *Re Ghio*, 37: 549, 108 Pac. 516, 157 Cal. 552.

#### **EXEMPLARY DAMAGES.**

See Damages, 3-5.

#### **EXEMPTIONS.**

Effect of discharge of bankrupt on judgment against exempt property, see Bankruptcy.

Creditor's election of remedies where exempt property is subject to payment of particular debt, see Election of Remedies, 1.

Homestead exemptions, see Homestead.

Lien of judgment against bankrupt on exempt property, see Judgment, 14, 15.

#### **EXPECTANCIES.**

Rights of heirs and distributees in decedent's estate generally, see Decedent and Distribution.

#### **EX POST FACTO LAW.**

See Constitutional Law, 1, 2.

#### **EXPRESS COMPANIES.**

State taxation of gross earnings of interstate express company, see Commerce, 3.

Taxation of generally, see Taxes, 1, 3, 8, 10.

37 L.R.A. (N.S.)

#### **EXPULSION.**

Of passenger, see Carriers, 9.

#### **EXTRINSIC EVIDENCE.**

See Evidence, 13-16.

#### **FARMING.**

Of office, see Contracts, 16.

#### **FEES.**

In general, see Costs and Fees.

#### **FELLOW SERVANTS.**

Master's liability for acts of, see Master and Servant, 12, 13.

#### **FINES.**

Failure of petition for release of convicts for refusal to accept tender of fine, see tender.

#### **FIRE ARMS.**

Sheriff's liability for injury to bystander by discharge of revolver dropped by deputy, see Bonds.

#### **FIRE INSURANCE.**

See Insurance.

#### **FIRES.**

Insurance against loss by, see Insurance.

#### **FIXTURES.**

To whom cottages placed on posts should be listed for taxation, see Taxation, 7.

1. The agreement between a seller and purchaser of machinery to be affixed to the realty, that the title shall remain in the seller until the price is paid, is binding on the existing mortgagee of the realty, although the contract is not recorded so as to be effective against subsequent purchasers without notice. *Blanchard v. Eureka Planning Mill Co.* 37: 133, 113 Pac. 55, 58 Or. 37.

2. Persons undertaking to erect a standpipe as part of a waterworks system, which is to be attached to the foundation by bolts embedded in it, cannot, by contract to which the mortgagee is not a party, reserve a right to remove it in case of failure to pay the purchase price, as against rights under a mortgage covering after-acquired property of the water company, and which embraces its entire working plant, including franchises. *Tippett & Wood v. Barham*, 37: 119, 180 Fed. 76, 103 C. C. A. 430.

#### **FORCE.**

What constitutes force in detaining property, see Forcible Entry and Detainer.

#### **FORCIBLE ENTRY AND DETAINER.**

1. One is not guilty of forcible entry upon real property, who, under color of a warrant which is not valid against the one in possession, enters the premises without force, or the display or threat of force, of any kind, and is left in possession by the



**INSURABLE INTEREST.**

In life, see Insurance, 3.

**INSURANCE.**

Admissibility of memorandum on policy register of deceased agent, see Evidence, 11, 12.

Admissibility of evidence in action for penalty for rebating, see Evidence, 30.

Insurance money collected by widow as her separate estate on remarriage, see Husband and Wife, 9.

**Regulation of companies.**

Constitutionality of statute requiring companies to maintain uniform rates, see Constitutional Law, 18.

Punishment of agent giving special rates, see Criminal Law.

Admissibility of evidence in action for penalty for rebating, see Evidence, 30.

Right to share in penalty for rebating, see Penalties.

1. A claim against an insurance company for penalty for making a discrimination between applicants in rates need not allege that it was unjust, if all the facts are stated, and the statute fixes the character of discrimination prohibited and characterizes such discrimination as unjust. *People v. Hartford L. Ins. Co.* 37: 778, 96 N. E. 1049, 252 Ill. 398.

2. A rule of an insurance company forbidding rebating of premiums cannot effect a reduction of statutory penalty for granting rebates, if the rule was violated by a manager having charge of an agency. *People v. Hartford L. Ins. Co.* 37: 778, 96 N. E. 1049, 252 Ill. 398.

**Insurable interest.**

3. Where a woman, who is without means, in good faith leaves her own home and work, and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her, and at his death leave her his estate, and no evidence is offered showing any improper relations between them, she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member. *Goff v. Supreme Lodge Royal Achates*, 37: 1191, 134 N. W. 239, 90 Neb. 578.

**Warranties and representations in life policies.**

Burden of pleading and proving falsity of answers in application, see Evidence, 3.

4. A misrepresentation as to relationship of the beneficiary in an application for a mutual benefit certificate will not avoid the contract if the beneficiary was eligible in his true relationship. *Goff v. Supreme Lodge Royal Achates*, 37: 1191, 134 N. W. 239, 90 Neb. 578.

5. In construing a contract of insurance 37 L.R.A. (N.S.)

ance in a fraternal beneficiary association, for the purpose of determining whether the statements made in the written application therefor were intended to be representations or warranties, the court will take into consideration the situation of the parties, the subject-matter, and the language employed, and will construe a statement made therein to be a warranty only when it clearly appears that such was the intention of the contracting parties, and that the mind of each party consciously intended and consented that such should be the interpretation of his statements. *Goff v. Supreme Lodge Royal Achates*, 37: 1191, 134 N. W. 239, 90 Neb. 578.

**Premiums and assessments; rates.**

Rendition of judgment on appeal in action to recover premium, see Appeal and Error, 15.

Constitutionality of statute requiring companies to maintain uniform rates, see Constitutional Law, 18.

Punishment of agent giving special rates, see Criminal Law.

Admissibility of evidence in action for penalty for rebating, see Evidence, 30.

Right to share in penalty for rebating, see Penalties.

See also *supra*, 1, 2.

6. A parol agreement as to rates different from those named in the policy, made by an insurance agent to secure business which had been carried by a rival company, is not binding on the insurer, where the policy provides that no provision or condition of the policy shall be varied or altered by anyone unless by written consent of the president or secretary of the company. *Fidelity & Casualty Co. v. Fresno Flume & Irrig. Co.* 37: 322, 119 Pac. 646. — Cal. —

7. That an applicant for insurance does not sign the policy does not absolve him from its provisions as to rates of premium and limitation of agent's authority, so as to enable him to enforce an oral agreement that the rates shall be different from those named in the policy. *Fidelity & Casualty Co. v. Fresno Flume & Irrig. Co.* 37: 322, 119 Pac. 646, — Cal. —

8. An insurance company does not, by attempting to enforce by action the payment of premiums on a policy of insurance written by an agent, ratify his unauthorized oral agreement as to rates, made to secure the business. *Fidelity & Casualty Co. v. Fresno Flume & Irrig. Co.* 37: 322, 119 Pac. 646, — Cal. —

**Risks and causes of loss.**

Sufficiency of evidence as to attachment of lightning clause to policy, see Trial, 6.

9. Insurance against direct loss or damage by lightning includes injuries to the property by being precipitated into water and debris by the throwing down of the walls of the building by a lightning stroke. *Cummings v. Pennsylvania F. Ins. Co.* 37: 1169, 134 N. W. 79, — Iowa, —

10. Liability for injuries to insured



**Eviction.**

Sufficiency of evidence of lost profits from eviction of tenant, see Evidence, 36.

1. A lease of property permitting its use for saloon business in accordance with law is not nullified by the adoption of a statute forbidding further sales of liquor in the locality. *Hayton v. Seattle Brewing & M. Co.* 37: 432, 119 Pac. 739, — Wash. —.

2. A landlord who agrees in his contract with his tenant, during the continuance of the lease, to furnish heat for the proper heating of the building leased, and fails to keep his contract, after having been given notice of the defect and allowed a reasonable time in which to remedy the same, commits acts which in law will be regarded a constructive eviction of the tenant from the premises. *Russell v. Olson*, 37: 1217, 133 N. W. 1030, — N. D. —.

**Liability of landlord.**

Measure of damages for injury to tenant's property through bursting of defective steam radiator, see Damages, 13.

Joining landlord with municipality in action for injury to person on sidewalk, see Parties, 3.

3. The owner of an apartment building who heats the separate apartments with steam supplied from a central plant is bound to keep the heating apparatus in repair. *O'Hanlon v. Grubb*, 37: 1213, 38 App. D. C. 251.

4. A tenant in an apartment is not guilty of contributory negligence which will prevent his holding the owner of the building liable for injuries to his furniture through a defect in the steam heating apparatus, in failing to have a small leak repaired upon discovering it, or to turn off the steam when temporarily leaving the apartment, where it was the duty of the owner to have the repairs made, and there was nothing to charge him with notice that the defective place was likely to give way and flood the apartment with water and steam. *O'Hanlon v. Grubb*, 37: 1213, 38 App. D. C. 251.

**Recovery of possession.**

5. The assignee of a lease who has been recognized by the landlord as rightfully in possession cannot be dispossessed under a warranty in an action for recovery of possession to which he is not made a party. *Fults v. Monroe*, 37: 600, 95 N. E. 23, 202 N. Y. 34.

**LARCENY.**

A statute rendering it larceny for one having property in his control, as a public officer, to appropriate it to his own use, applies to an officer having public money in his possession, although no law authorized him to receive it. *State v. Snow*, 37: 395, 118 Pac. 209, 65 Wash. 353.

**LAST CLEAR CHANCE.**

Instruction as to, see Trial, 15.  
37 L.R.A. (N.S.)

**LATERAL SUPPORT.**

That different parcels of land owe to each other the duty of lateral support when in their natural condition does not require the owner of one to furnish such support for the other, when its owner attempts to construct upon it an embankment of earth far beyond its capacity to withstand. *Giacconi v. Astoria*, 37: 1192, 113 Pac. 855, — Or. —.

**LAWS.**

Necessity for pleading and proving foreign laws, see Pleading, 2.

**LEGACY.**

See Wills.

**LEGAL REPRESENTATIVES.**

See Executors and Administrators.

**LEGISLATURE.**

Validity of legislation by, generally, see Constitutional Law.

Legislative functions of city, see Municipal Corporations, 2-6.

**LESSEE.**

See Landlord and Tenant.

**LESSOR.**

See Landlord and Tenant.

**LETTERS.**

Sufficiency of, to constitute contract for sale of land, see Contracts, 9.

Injunction against publication or multiplication of, see Injunction, 2.

Property right in, see Literary Property.

**LEVY AND SEIZURE.**

On exempt property subject to payment of particular debt, see Election of Remedies, 2.

Exemption of homestead, see Homestead.

Extending lien secured by levy by injunction restraining sale, see Limitation of Actions, 5.

**LIBEL AND SLANDER.**

Presumption of knowledge rendering transmission of telegram libelous, see Evidence, 7.

Under a statute imposing a penalty for refusal to transmit a telegram, neither a telegraph company nor its operator is guilty of libel in transmitting a message stating that "board here sold out," without anything to charge the operator with notice of the meaning intended to be conveyed, although it in fact purports to state that a committee to select text-books for the schools had been bribed. *Grisham v. Western U. Tele. Co.* 37: 861, 142 S. W. 271, 238 Mo. 480.

**LIBRARY.**

Condemnation of property used for, see Eminent Domain, 1, 2.

the complaint is insufficient without it, state a new cause of action so as to be ineffectual if the limitation period had elapsed before the amendment. *Neubeck v. Lynch*, 37: 813, 37 App. D. C. 576.

7. Payments on account by one who has given bond with sureties to secure money lent him by a school district, before the limitation period has expired, will toll the statute as against the sureties. *Clinton County v. Smith*, 37: 272, 141 S. W. 1091, — Mo. —.

8. That payments by one who has borrowed money belonging to a school district, giving as security a bond secured by mortgage, were credited to him individually on the books of the district, and not indorsed on the bond, does not render the indebtedness one merely on open account against him, with the bond as collateral, so that the payments will not affect the running of the statute of limitations against the sureties on the bond. *Clinton County v. Smith*, 37: 272, 141 S. W. 1091, — Mo. —.

9. An unaccepted offer to turn over a tax receipt against the property of claimant in full satisfaction of a debt is not a sufficient promise to toll the running of the statute of limitations. *Marcum v. Terry*, 37: 885, 142 S. W. 209, 146 Ky. 145.

#### LIMITATION OF INDEBTEDNESS.

Of county, see Counties, 2-5; Taxes, 6.

Of municipality, see Municipal Corporations, 7-11.

Of school district, see Schools, 2.

Injunction against levying tax to pay for improvement whose cost exceeds debt limit, see Injunction, 8.

#### LIMITATION OF LIABILITY.

Of carrier's liability, see Carriers, 11.

#### LIQUIDATED DAMAGES.

See Damages, 7-9.

#### LIQUIDATION.

Effect of repeal of statute authorizing liquidation of insolvent bank, see Statutes, 5, 6.

#### LIQUOR.

See Intoxicating Liquors.

#### LIVE STOCK.

See Animals.

#### LITERARY PROPERTY.

The property right in the words of private letters is in the writer, and not in the receiver, except letters written by agents, and those where the conditions indicate that the property in the form or expression is in another than the writer; but the property right in the material on which the letter is written, with the right to transfer it, is in the receiver, in the absence of some special limitations imposed either by the subject-matter, or the circumstances under which it is sent. *Baker v. Libbie*, 37: 944, 97 N. E. 109, 210 Mass. 599.  
37 L.R.A. (N.S.)

#### LOAN.

When right to recover money loaned is barred, see Limitation of Actions, 3.

#### LOCAL LAWS.

See Statutes, 3.

#### LOCAL SELF-GOVERNMENT.

Constitutional right of, see Constitutional Law, 5, 6.

#### LOSS.

Of insured property, cause of, see Insurance, 9, 10.

#### MAGISTRATE.

See Justice of the Peace.

#### MALICE.

What constitutes legal malice justifying punitive damages, see Damages, 4.

#### MANDAMUS.

Officers' right to question constitutionality of statute in mandamus proceeding, see Statutes, 1.

The refusal of a Federal circuit court to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states cannot be reviewed by mandamus, which may not be used to perform the office of an appeal or writ of error. *Re Harding*, 37: 392, 55 L. ed. 252, 31 Sup. Ct. Rep. 324, 219 U. S. 363.

#### MANUFACTURERS.

Liability for injury due to defects in articles manufactured, see Negligence, 1-4.

Notice to purchaser of defect in automobile sold, see Notice.

#### MARKETABLE TITLE.

See Vendor and Purchaser.

#### MARRIED WOMEN.

In general, see Husband and Wife.

#### MASTER AND SERVANT.

Constitutionality of workmen's compensation act, see Constitutional Law, 3, 4, 7-10, 12, 16, 20; Jury, 1; Taxes, 2, 5.

When court will set aside employees' indemnity act as invalid, see Courts, 4.

Injunction against employer's accepting benefits of employees' indemnity act, see Injunction, 1.

Combination of employees, see Labor Organizations.

Question for jury as to reasonableness of rule for guidance of servant, see Trial, 9.

#### Rights and relation generally.

Mine employee riding on train as a passenger, see Carriers, 3.

1. A rule that employees in a factory

ficers of the plant have failed to instruct employees as to the use of the device, and to exercise proper supervision over them with respect to such use. *Dayton Coal & Iron Co. v. Dodd*, 37: 456, 188 Fed. 597, 110 C. C. A. 395.

**Master's liability for acts of servant or independent contractor.**

Admissibility of chauffeur's statements at time of accident, see Evidence, 23.

14. The owner of an automobile who, upon leaving home, instructs his chauffeur not to take the machine out without orders from himself or wife, is not liable for injury done by the machine while it is being used by the chauffeur contrary to the express orders so given him. *Riley v. Roach*, 37: 834, 134 N. W. 14, — Mich. —.

15. A municipality cannot, by letting the execution of the work to an independent contractor, escape liability for injury to private property by soft earth forced thereon, by attempting to bring a street to grade by dumping earth onto the unstable, sloping bottom of a gulch which crossed the street. *Giaconi v. Astoria*, 37: 1150, 113 Pac. 855, — Or. —.

16. Where, by statute, municipal corporations are liable for injury to private property through their acts or omissions as public corporations, a city if found negligent is liable for injury to private property by the sliding thereon of soft earth because of an attempt by it to bring a highway to grade, by dumping earth upon the unstable foundation at the sloping bottom of a gulch crossing it, although it committed the preparation of the plans which were adopted and followed to a competent engineer, if he made no inspection to ascertain the actual conditions before preparing his plans; and it is immaterial that the property injured is not adjacent to the street. *Giaconi v. Astoria*, 37: 1150, 113 Pac. 855, — Or. —.

#### MATERIALITY.

Of evidence, see Evidence, 27-31.

#### MAXIMS.

1. *Allegans contraria non est audiendus*. *Smith v. Boston Elevated R. Co.* 37: 429, 184 Fed. 387, 106 C. C. A. 497.

2. A man cannot derogate from his own grant. *New York Continental Jewell Filtration Co. v. Jones*, 37: 193, 37 App. D. C. 511.

3. A man is presumed to intend the natural consequences of his acts. *May v. Western U. Teleg. Co.* 37: 912, 72 S. E. 1059, 157 N. C. 416.

#### MECHANICS' LIENS.

Assignability of balance due under contract for public work prior to filing of notice of liens, see Assignment.

Conclusiveness of judgment against mechanic's lien claimant, see Judgment, 9.

#### MEDICAL ATTENTION.

Servant's right to, see Master and Servant, 3, 4.

37 L.R.A. (N.S.)

#### MEMORANDUM.

On policy register of deceased insurance agent, admissibility, see Evidence, 11, 12.

#### MINES.

Mine employee riding on private railroad as a passenger, see Carriers, 3.

Employer's duty and liability as to derailling switch on private railroad to mine, see Master and Servant, 8, 13.

Waiver of rights by one contracting to drive entries in mine, see Contracts, 22.

Extent of damages recoverable for breach of agreement to furnish appliances to one contracting to drive entries in mine, see Damages, 6.

Mining claims as separate or community property, see Husband and Wife, 8.

Injunction against casting mine water into stream to injury of lower riparian land, see Injunction, 4.

Owner's liability for injury by mineral matter in water from, see Waters, 7.

Necessity of notice to purchaser of mine to render him liable for nuisance. see Nuisances, 1.

#### MINORS.

See Infants. \*

#### MISREPRESENTATIONS.

By insured, see Insurance, 4, 5.

#### MORAL OBLIGATION.

As consideration for promise, see Contracts, 3.

#### MORTGAGE.

Necessity for notice to mortgagee of special assessment on mortgaged property, see Constitutional Law, 14.

Keeping released mortgage alive to give contribution to debtor paying against codebtor, see Contributions.

Right of one cotenant to purchase property from one bidding in at foreclosure sale, see Cotenancy.

Curtesy rights of man joining in mortgage of wife's property. see Curtesy.

Joinder of husband and wife in as evidence of community character of land, see Evidence, 35.

Mortgagee's right to machinery subsequently purchased as against seller. see Fixtures.

Codebtor's right to enforce for debt paid by him through deed of trust securing same is barred by laches, see Limitation of Actions, 1.

Subrogation to rights of mortgagee. see Subrogation, 1-3.

1. The holder of a bond secured by mortgage of real estate has a right to bid

a stipulated price per year, payable quarterly, violates a constitutional limit of indebtedness, depends upon whether or not the required payments for one year exceed the permitted indebtedness, and not the aggregate amount for the full term of the contract. *Allison v. Chester*, 37: 1042, 72 S. E. 472, 60 W. Va. 533.

10. That a sewer is necessary to receive and dispose of the storm water in a municipality, and thereby prevent actions against it for damages, does not justify its incurring indebtedness for the sewer in violation of the constitutional limitation of its indebtedness. *Logansport v. Jordan*, 37: 1036, 85 N. E. 959, 171 Ind. 121.

11. In determining whether or not a municipal corporation has reached its constitutional debt limit, the indebtedness of an independent school district which is coincident with its territorial limits, and which has been created by the legislature a distinct municipality, with power to create indebtedness to a certain amount, is not to be considered. *Ex parte Newport*, 37: 1034, 132 S. W. 580, 141 Ky. 329.

## MURDER.

See Homicide.

## MUTUAL WILLS.

Oral agreement for execution of, see Contracts, 11.

Specific performance of agreement to execute, see Specific Performance, 2.

## NATIONALITY.

Continuance to secure witness to testify as to, see Continuance and Adjournment.

Best evidence as to, see Evidence, 9.

Competency of Indian to testify to parents' nationality, see Witnesses.

## NAVIGABLE WATERS.

See Waters.

## NAVIGATION.

Improvement of, see Waters, 4.

Obstruction of, see Waters, 5, 6.

## NEGATIVE TESTIMONY.

Duty to instruct as to weight of, see Trial, 16.

## NEGLECTANCE.

In execution of negotiable paper, see Bills and Notes, 1.

Measure of damages for negligence causing personal injury, see Damages, 11, 12.

Removal of lateral support, see Lateral Support.

Release of surety through creditor's negligence in collecting collateral, see Principal and Surety, 2.

Of carriers, see Carriers.

Of master, see Master and Servant.

Of railroads, see Railroads.

Question for jury as to, see Trial, 11, 12.

Instruction as to last clear chance, see Trial, 15.

## Liability of manufacturer.

Notice to purchaser of defect, see Notice.

Liability of seller of unfit seed, see Sale, 1, 2.

1. A manufacturer of an automobile will be charged with notice of the unsafe condition of a rumble seat attached to the car, if the faulty construction was so patent that no person engaged in its construction could have failed to observe it. *Olds Motor Works v. Shaffer*, 37: 560, 140 S. W. 1047, 145 Ky. 616.

2. The manufacturer of an automobile who attaches to it a rumble seat so insecurely that it is likely to break off when occupied by a passenger is liable to a stranger for injuries caused by its so doing, if he knew or was charged with notice that the seat was imminently dangerous, and concealed that fact from the purchaser. *Olds Motor Works v. Shaffer*, 37: 560, 140 S. W. 1047, 145 Ky. 616.

3. Representing a machine to be well built is a sufficient concealment from the purchaser of a defect in it, with notice of which the maker is charged, to bring him within the rule that a manufacturer who sells an article for general use knowing it to be imminently dangerous and unsafe, and conceals that fact from the purchaser, may be liable for injury caused by use of the machine. *Old Motor Works v. Shaffer*, 37: 560, 140 S. W. 1047, 145 Ky. 616.

4. A rumble seat placed upon an automobile, so insecurely as to be liable to break off if a passenger attempts to ride in it is imminently dangerous, within the rule that a manufacturer who sells an imminently dangerous article, concealing the defect from the purchaser, may be liable to strangers attempting to use it, for injuries caused by its defective condition. *Olds Motor Works v. Shaffer*, 37: 560, 140 S. W. 1047, 145 Ky. 616.

## Dangerous premises.

5. The proprietor of a moving-picture show is not negligent in maintaining a step at the exit of the darkened room where the pictures are shown, into the corridor, so as to render him liable to a patron who, in attempting to use the exit, falls down the step, to his injury, although a light is maintained over it which tends to dazzle the eyes of persons who emerge from the darkness. *Hollenbaek v. Clemmer*, 37: 698, 119 Pac. 1114, — Wash. —.

6. The proprietor of a moving-picture show is not negligent in directing patrons to use exits with which they are not familiar, if they are reasonably safe, so as to render him liable to a patron who falls down a step, to his injury, in attempting to use the exit to which he was directed. *Hollenbaek v. Clemmer*, 37: 698, 119 Pac. 1114, — Wash. —.

## On highway.

7. The owner of a team is not, in the absence of negligence on the part of himself



Distinguished from liquidated damages, see Damages, 7-9.

Admissibility of evidence in action for penalty for rebating, see Evidence, 30.

Against insurance company for discrimination in rates, see Insurance, 1, 2.

Right of jury to fix amount of, see Trial, 8.

One does not lose the right to share in a penalty imposed for the rebating of life insurance premiums, by the fact that he furnished the money to pay the premium and directed an applicant to secure a rebate if possible. *People v. Hartford L. Ins. Co.* 37: 778, 96 N. E. 1049, 252 Ill. 398.

## PEOPLE.

Constitutionality of statute empowering people to make laws, see Constitutional Law, 21.

## PERFORMANCE.

Of Contract, see Contracts, 11-14, 19, 21, 22.

Specific performance, see Specific Performance.

## PERSONAL INJURIES.

To passenger, see Carriers.

Measure of damages for, see Damages, 11, 12.

To employees generally, see Master and Servant.

On railroad track, see Railroads.

## PERSONAL PROPERTY.

Measure of damages for injury to tenant's property through bursting of defective steam radiator, see Damages, 13.

Sale of, see Sale.

## PERSONAL REPRESENTATIVES.

See Executors and Administrators.

## PETITION.

To take land to widen street, see Highways, 1.

## PHYSICIANS AND SURGEONS.

Husband's right to reimbursement from wife's estate for amount paid to, see Husband and Wife, 1.

Servant's right to medical attention, see Master and Servant, 3, 4.

## PLAINTIFFS.

Parties plaintiff, see Parties, 1, 2.

## PLAT.

Dedication by, see Dedication.

## PLEADING.

Variance between pleading and proof, see Evidence, 37.

Amendment of pleading as affecting limitation of action, see Limitation of Actions, 6.

37 L.R.A.(N.S.)

## Relief under pleadings.

1. Under a declaration seeking to hold a carrier liable for injuries because of careless, negligent, and reckless operation of its car in approaching and rounding a curve, a recovery cannot be allowed for defect in the car, or failure to inspect. *Lemay v. Springfield Street R. Co.* 37: 43, 96 N. E. 79, 210 Mass. 63.

What must be pleaded.

As to answers in application of insurance, see Evidence, 3.

2. Foreign laws differing from those of the state in which an action is pending, and which are relied on to support the cause of action or defense, must be pleaded and proved. *United States Banking Co. v. Veale*, 37: 540, 114 Pac. 229, 84 Kan. 385.

3. One attempting to hold the official bond of a sheriff liable for an injury caused by his deputy must allege facts showing that the act was within the scope of his official duty, and it is not sufficient merely to allege that conclusion. *People use of Tamplin v. Beach*, 37: 873, 113 Pac. 513, 49 Colo. 516.

Reply.

4. In an action by the vendor for the specific performance of a contract for the sale of real property, an allegation in an answer that the plaintiff has never tendered a deed executed by himself is met by allegations in the reply that no previous objection had been made upon that ground to the deed which he had tendered, and that he had at all times been, and was still, able and willing to furnish such a deed. *George H. Paul Co. v. Shaw*, 37: 1123, 119 Pac. 546, 86 Kan. 136.

## PLEDGE AND COLLATERAL SECURITY.

Liability of bank for surrendering collateral security given by guardian to make up defalcation, see Banks, 3.

Release of surety through creditor's negligence in collecting collateral, see Principal and Surety, 2.

Effect of indorsing purchase money note as collateral on conditional sale contract, see Sale, 3.

## POLICE POWER.

In general, see Constitutional Law, 12, 17, 18.

## POOR AND POOR LAWS.

Charitable gift for poor, see Charities, 2, 5, 7.

Authority to condemn land used for poor farm, see Eminent Domain, 3.

## POOR FARM.

Municipal authority to condemn for purpose of laying out street, see Eminent Domain, 3.

## PORTS.

Obstruction of navigable water by construction of bridge, see waters, 5, 6.